THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

Clyde N. Davis, Jr., Special Referee

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Case No. 2009-CP-46-03996
Appellate Case No. 2013-001930

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JPMorgan Chase Bank, National Association, ..... Respondent,

v.

Leah B. Sample and JP Morgan Chase Bank, National Association s/b/m to Providian National Bank, ..... Defendants

Of Whom Leah B. Sample is ..... Petitioner.

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**Return to the Petition for a Writ of Certiorari**

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## Introduction

This appeal involves the denial of Petitioner Leah B. Sample's motion to set aside a foreclosure sale. Sample claimed that Chase failed to properly serve Sample's counsel with notice of the foreclosure sale. The trial court rejected that claim. The Court of Appeals affirmed in the unanimous, unpublished opinion of *JPMorgan Chase Bank, National Association v. Leah B. Sample*, Op. No. 2015-UP-361 (S.C. Ct. App. filed July 15, 2015) (Shearouse Adv. Sh. No. 27 at 10) ("the Opinion"). The Court of Appeals denied Sample's petition for rehearing. {Order denying Sample's Petition for Rehearing}.[1] Sample now petitions this Court for certiorari.

As shown herein, Sample has failed to offer this Court any grounds that warrant certiorari as provide by Rule 242 of the South Carolina Appellate Court Rules. In fact, Sample does not cite ***any*** case law or authority to support her certiorari position. Instead, Sample asks this Court to address an argument that (1) she failed to preserve for review by the Court of Appeals and (2) was not included in her petition for rehearing. Moreover, the Court of Appeals properly analyzed the issues properly before it and correctly affirmed the denial of Sample's motion to set aside the foreclosure sale. The petition for certiorari should be denied for all these reasons.

[1] Sample included the briefing to the Court of Appeals, the unpublished opinion, the petition for rehearing, and the order denying the petition for rehearing in the Appendix. However, such documents are not numbered. As a result, Chase will cite by name only.

## Facts/Procedural History

Chase initiated this foreclosure action against Sample in September 2009. {Special Referee's Order and Judgment of Foreclosure and Sale p. 2; R. 4; App. p. 4}. Sample was represented at all times in the litigation by her husband. At the outset of the action, Sample's counsel provided an address of Post Office Box 12340, Rock Hill, South Carolina, as counsel's address for service.[2] {Transcript p. 3-4; R. 21-22; App. p. 21-22}. Sample's counsel provided no other address to Chase's counsel thereafter. As a result, Chase served the foreclosure notices and the Notice of Sale at that last known address of Sample's counsel. {Transcript of Hearing dated May 23, 2013, p. 8; R. 26; App. p. 26}.

The special referee entered a foreclosure judgment in favor of Chase and directed sale of the property in December 2009.[3] {Special Referee's Order and Judgment of Foreclosure and Sale; R. 3-12; App. p. 3-12}. Thereafter, the special referee noticed the sale of the property for February 2013. {Notice of Sale; R. 18; App. p. 18}. Chase served the Notice of Sale on Sample's counsel at his last known address **and** served the notice of sale at Sample's home address. {Transcript p. 8; R. 26; App. p. 26}. Sample's counsel admitted to the special referee that Sample still

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[2] Counsel for Sample admitted that this Rock Hill Post Office Box address was the address provided to Chase "when I made my first appearance or notified counsel that I was involved in the case." {Transcript p. 3-4; R. 21-22; App. p. 21-22}.

[3] Prior to the sale, the action was stayed to allow the parties to participate in foreclosure intervention per Chief Justice Toal's Administrative Order 2011-05-02-11. Chase served the Notice of Mortgagor's Right to Foreclosure Intervention on counsel for Sample at his last known address. {Notice of Mortgagor's Right to Foreclosure Intervention, Certificate of Service; R. 17; App. p. 17}. Notably, Sample received this notice, which was sent to the same address of her counsel as the Notice of Sale.

lived in the home where Notice of Sale was mailed. {Transcript p. 3; R. 21; App. p. 21}.[4] Neither Sample nor her counsel appeared at the sale. {Transcript p. 9; R. 27; App. p. 27}.

After the sale, Sample filed a motion to set aside the foreclosure sale. {Motion to Set Aside; R. 13; App. p. 13}. Sample argued she did not receive the Notice of Sale because her counsel changed offices after the inception of the action, and Chase failed to serve the Notice of Sale on the current address as required by the Attorney Information System ("AIS"). {Motion to Set Aside p. 1; R. 13; App. p. 13}. The record belied Sample's argument.

The trial record established that Sample's counsel moved offices several times during the pendency of the foreclosure action. The record showed that Sample's counsel never informed Chase of the relocation of his office. In fact, Sample's counsel acknowledged at the hearing that he had moved offices several times since the inception of this action.

From the inception of the action to the sale, Sample's counsel used, at a minimum, three different addresses. At the inception of the foreclosure, Sample's counsel used the post office box address for service.[5] {Transcript p. 3-4; R. 21-22; App. p. 21-22}. Sample's counsel then moved to an address in Fort Mill, South Carolina, in April 2010. {Transcript p. 4; R. 22; App. p. 22}. Counsel did not inform Chase of this move or any new address associated with that move. Sample's counsel

[4] Counsel further admitted that Sample and counsel received the notice of the hearing on the motion to set aside at the home address addressed to Sample. {Transcript p. 17; R. 35; App. p. 35}.

[5] Chase served Sample at that address with all notices, including the Notice of Sale.

moved again sometime in 2011 to another address in Rock Hill, South Carolina. {Transcript p. 5-6; R. 23-24; App. p. 23-24}. Counsel again did not inform Chase of this move or any new address associated with that move.[6]

The trial court denied the motion to set aside the foreclosure sale. The trial court found (1) that Chase properly served counsel for Sample at his last known address pursuant to Rule 5(b)(1), SCRCP, and (2) that counsel for Sample failed to provide any other address to Chase for service. {Order Denying Motion to Set Aside p. 1-2; R. 1-2; App. p. 1-2}. The Court of Appeals affirmed in an unpublished opinion. {Opinion}.

Sample filed a petition for rehearing and raised a single issue. {Petition for Rehearing}. The ***entirety*** of the petition states:

> As stated in the Appellant's Final Brief, it is undisputed that the Appellant's attorney's address was at all times listed correctly in the Attorney Information System. By order of the South Carolina Supreme Court, "Each attorney and foreign legal consultant must, at a minimum, have a mailing address, an e-mail address and a phone number listed on the AIS. The mailing and e-mail address shown in the AIS shall be used for all purposes of notifying and serving the attorney or foreign legal consultant." South Carolina Supreme Court Order 2011-10-17-01.

{Petition for Rehearing p. 3}. As is evident from the above, Sample failed to raise any due process argument in the petition for rehearing. {*Id.*}. In the petition for certiorari,

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[6] Sample's counsel shifting addresses has continued through this appeal. Counsel provided a Rock Hill address on the Notice of Appeal. {*See* Notice of Appeal filed in Court of Appeals but not included in Appendix}. After dismissal of the appeal, counsel sought reinstatement and provided a new address in Rock Hill for his office. {*See* Motion to Reinstate filed by Sample with the Court of Appeals}.

Sample raises the argument that due process required the trial court and Court of Appeals to vacate the foreclosure sale. {Petition for Certiorari p. 3-4}.

## Argument

This Court should deny the petition for certiorari for any of three primary reasons:

1. Sample seeks certiorari on the basis that "the trial court failed to properly apply the law of due process" in denying the motion to set aside the foreclosure sale. {Petition for Certiorari p. 4}. This argument is not preserved for appellate review.

When the trial court fails to rule on that specific argument, then it is incumbent on the party to seek a ruling via a motion to reconsider. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) (holding that (1) "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court" and (2) when the trial court does not rule on an issue, the party must file a Rule 59(e), SCRCP, motion in order to preserve the issue for appellate review). Sample failed to adhere to these preservation requirements.

The trial court did not rule on any such due process argument in the order denying Sample's motion to set aside the foreclosure sale. {Order Denying Motion to Set Aside p. 1-2; R. 1-2; App. p. 1-2}. Sample did not file any Rule 59, SCRCP, motion requesting a ruling on her due process argument. Thus, Sample failed to preserve the issue for appellate review. This Court should deny the petition.

2. Even if the due process argument were preserved for appellate review, the argument is not properly before this Court. Our appellate court rules unequivocally

mandate that "[o]nly those questions raised in the Court of Appeals ***and in the petition for rehearing*** shall be included in the petition for a writ of certiorari as a question presented for review by the Supreme Court." Rule 242(d), SCACR (emphasis added). As noted above, Sample limited her petition for rehearing to one specific ground and did not include any due process argument. Therefore, Sample improperly raises such an argument in her petition. This Court cannot consider this improper argument and should deny the petition.

3. Moreover, the Court of Appeals correctly rejected Sample's motion to set aside the foreclosure sale. Sample's reliance on the Attorney Information System is misplaced for several reasons and does not provide a sufficient basis to grant certiorari.

First, Sample provides no authority for the proposition that the Attorney Information System supplanted the normal rules of service[7] or relieved her counsel of his obligation to inform counsel for Chase of his change in address. Thus, Sample has abandoned this argument because she does not cite any authority to support her claim. *See, e.g., State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"); *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (finding an issue abandoned where the party's brief cited minimal authority and presented no argument as to how the ruling was an abuse of discretion or constituted prejudice pursuant to applicable authority).

[7] As the Court of Appeals properly held, Chase served Sample via Rule 5(b)(1), SCRCP, at her counsel's last address known to Chase.

Second, the AIS order affords no relief to Sample. Sample fails to understand that the AIS was not fully operational at the time of service of the Notice of Sale in this matter. The AIS order, relied upon by Sample in the petition, set forth an effective date of November 18, 2011. *See* Supreme Court Administrative Order 2011-10-17-01. The AIS order plainly and unambiguously allowed South Carolina attorneys until "November 18, 2011" to "log-on, verify, and update their contact information on the AIS." Id. Attorneys had until that date to alter, change, or update their information. Thus, any information contained on the AIS could not be considered accurate or reliable until the effective date of November 18, 2011.

Chase effectuated service of the Notice of Sale on Sample, through her attorney husband, on June 7, 2011, via Rule 5(b)(1), SCRCP. ***That was 164 days prior to the effective date of AIS***. Chase could not be expected to rely on information in a system that was subject to change for another 164 days. Therefore, Sample's argument that the AIS provides the proper address for serving an attorney lacks merit. Chase was correct to serve Sample's counsel at the last address known to Chase via Rule 5(b)(1), SCRCP.

The trial court correctly found that it was incumbent on Sample's attorney to notify counsel for Chase of any change in address and that the AIS did not obviate that requirement. The Court of Appeals properly rejected Sample's unsupported argument to the contrary. The petition for certiorari should be denied.

Third, even if Sample could argue that AIS supplanted the normal rules of service under Rule 5(b)(1), SCRCP, Sample's argument still fails to provide a basis for rehearing. South Carolina law contains no requirement that a party to a foreclosure

action be given personal notice of a judicial sale. *See Cumbie v. Newberry*, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968); *Peoples Fed. Sav. & Loan Assn. v. Graham*, 291 S.C. 178, 182, 352 S.E.2d 511, 514 (Ct. App. 1987).

In *Graham*, this Court addressed Sample's argument in the same context as this case—a motion to set aside a foreclosure sale based on failure to serve the notice of sale on the borrower. In that case, after the plaintiff purchased the property at a foreclosure sale, Graham and two lien holders moved to have the foreclosure sale set aside based on the fact that they were not served with the notice of sale. *Id.* at 180, 352 S.E.2d at 512. The trial court denied the motion, reasoning the lack of service "is not the sort of unfairness which will void the sale . . . the lack of personal service [is] insufficient grounds upon which to vacate the judicial sale." *Id.* at 181, 352 S.E.2d at 513. This Court affirmed, holding "there is no requirement of law that parties to a suit for foreclosure be given personal notice of a judicial sale." *Id.* at 182, 352 S.E.2d at 514. Thus, Chase had no obligation to serve the Notice of Sale on Sample's counsel either by Rule 5(b)(1), SCRCP, or by the address in the AIS.

Moreover, this Court should note that Chase sent Sample the Notice of Sale to her home address as well as her counsel's address. In addition to serving Sample's counsel, Chase sent the Notice of Sale to Sample (and to her attorney, who is her husband) at her home address. Chase presented evidence that the notice was mailed to Sample at her residence. {Transcript p. 8; R. 26; App. p. 26}. Thus, the burden of proof shifted to Sample to rebut the presumption of receipt. Once evidence of mailing is shown, the burden of proof shifts to the party claiming that he did not receive a mailing to offer evidence to rebut a presumption of receipt. *See Bakala v. Bakala*, 352

S.C. 612, 625, 576 S.E.2d 156, 163 (2003) ("Evidence of mailing establishes a rebuttable presumption of receipt."); *Foster v. Ford Motor Credit Co.*, 302 S.C. 450, 452, 395 S.E.2d 440, 441 (1990) ("Evidence that a letter is properly addressed and mailed raises a presumption it was received by the addressee . . . ."). Simply stating she did not receive the notice failed to overcome this presumption. Notably, Sample's counsel admitted to the special referee that (1) Sample still lived in the home where notice was mailed {Transcript p. 3; R. 21; App. p. 21}, and (2) Sample and counsel received other notices in the case ***at the home address***. {Transcript p. 17; R. 35; App. p 35}. Therefore, Sample received the Notice of Sale at her home address.

Lastly, even if Sample could establish that she failed to receive the Notice of Sale through service on her counsel or at her home address, Sample's argument remains unavailing and fails to provide a basis for rehearing because Sample failed to demonstrate any resulting prejudice from the purportedly deficient service.

Our rules require a party claiming inadequate notice to demonstrate prejudice resulting from the insufficient notice. *Gardner v. S.C. Dept. of Revenue*, 353 S.C. 1, 15, 577 S.E.2d 190 (2003); *Ballenger v. S.C. Dept. of Health & Envtl. Control*, 331 S.C. 247, 500 S.E.2d 183 (Ct. App. 1998). "To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her case." *Chastain v. Hiltabidle*, 381 S.C. 508, 518, 673 S.E.2d 826, 831 (Ct. App. 2009) (citing *Gardner*, 353 S.C. at 14, 577 S.E.2d at 197). "Even where a party receives no notice, he must

establish that, had he received notice, he would have taken pertinent action and could have reduced his liability." *Gardner*, 353 S.C. at 15, 577 S.E.2d at 197.

In this matter, Sample failed to argue or otherwise introduce any evidence of prejudice to the trial court. Sample offered no evidence or argument that she would have attended the sale, bid on the property, or otherwise done anything different than that which occurred in this matter had she received notice. In fact, Sample never even mentioned the prejudice requirement in her motion to set aside the foreclosure sale or in argument to the special referee. Thus, the trial court properly denied the motion to set aside the foreclosure sale, and the Court of Appeals correctly affirmed. The petition for a writ of certiorari should be denied.

## Conclusion

Based on the foregoing, Sample's petition for a writ of certiorari lacks merit. Sample's claimed basis for certiorari review is not properly before this Court. Even if such an argument were before this Court, any purported lack of service of the Notice of Sale cannot provide a basis to set aside the foreclosure sale. As a result, this Court should deny the petition for a writ of certiorari.

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Of Whom Leah B. Sample is ..... Appellant.

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PROOF OF SERVICE

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I, the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for JP Morgan Chase Bank, National Association, do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

**Return to the Petition for a Writ of Certiorari**

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October 21, 2015