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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Appellate Case No. 2015-000799
Circuit Court Case No. 2010-CP-10-10122

US Bank National Association, as Trustee for the holders of Bear Stearns ARM Trust, Mortgage Pass-Through Certificates, Series 2005-4, ... Respondent,

v.

Anne B. Glassburn; Donivon D. Glassburn; The Bank of New York Mellons f/k/a The Bank of New York Indenture Trustee on behalf of the Note Holders, CWHEQ Revolving Home Equity Loan Trust Series 2007-A Trust; Tidelands Bank; Atlantic Bank and Trust, ... Defendants

of whom

Anne B. Glassburn and Donivon D. Glassburn are .... Appellants.

RESPONDENT'S MOTION TO STRIKE REFERENCES TO FACTUAL MATERIALS NOT CONTAINED IN THE RECORD

A fundamental defect in Appellants' arguments to this Court is their failure to preserve for appellate review virtually every issue discussed in their briefs. (*See* Br. of Respondent at 6–10 (detailing myriad issues that Appellants did not preserve for appellate review).) In their filings with this Court, Appellants have compounded the problem by relying on ***new*** evidence and factual arguments that were never presented to the circuit court.

This appellate posturing, which is detailed below, is expressly prohibited by the Appellate Court Rules. *See* Rule 210(h), SCACR (providing that "the appellate court will

not consider any fact which does not appear in the Record on Appeal"); *id.* 210(c) ("The Record shall not, however, include matter which was not presented to the lower court or tribunal.").

Appellants' Opening Brief: In seven different places in their opening brief, Appellants cite (and mischaracterize) a consent judgment from the United States District Court for the District of Columbia that they dub the "National Mortgage Settlement." They also cite statements regarding that consent judgment contained on a website. These passages in Appellants' opening brief are as follows:

- Page 8 in the text
- Page 8 in Footnote 2
- Page 13 in Footnote 4
- Page 21 in the text
- Page 21 in Footnote 8
- Page 22 in the text
- Page 23 in the text[1]

Neither the consent judgment nor the website were introduced into evidence in the trial court proceedings, nor did Appellants request that Judge Scarborough take judicial notice of either.

Appellants' Reply Brief: In their reply brief, Appellants again cite the "National Mortgage Settlement" for their newfound factual arguments. These passages are on Page 7 in the text and in Footnote 6. Likewise, they rely on factual assertions contained in an online news article that was never introduced into evidence and would be inadmissible hearsay in any event. Appellants cite this online article on Page 6 in both the text and in Footnote 5 of their reply brief.

[1] Wells Fargo previewed this motion and identified these improper references to never-introduced factual material in Footnote 3 of Respondent's Brief.

Because these new factual arguments and evidence were never presented below, they should be stricken, and the Court should disregard Appellants' reliance on this new evidence in their appellate arguments. *See, e.g.*, *Jenkins v. Jenkins*, 401 S.C. 191, 204, 736 S.E.2d 292, 299–300 (Ct. App. 2012) (noting that a party's appellate argument based on a court order that was not included in the Record on Appeal violated Rule 210(h), SCACR); *Spreeuw v. Barker*, 385 S.C. 45, 68, 682 S.E.2d 843, 854 (Ct. App. 2009) ("[A]fter reviewing the record, we have been unable to find where Father listed this amount as income on his tax return. Accordingly, we conclude this evidence does not appear in the record and cannot be considered on appeal.").[2]

CONCLUSION

Appellants had the chance to present their best case at trial, and they lost. The Appellate Court Rules prohibit them from now attempting to introduce new evidence on appeal, especially when they distort and misconstrue that new evidence to suit their goal of avoiding enforcement of a note that they cannot afford. Accordingly, Wells Fargo moves for an order striking from Appellants' filings all references to facts and purported evidence that was never presented to the trial court, and for the Court to disregard those improper materials and references in its review of this case.

[2] The introduction of new factual matter on appeal is especially inappropriate here, as this Court's review—in the event that Appellants have preserved any of their issues for review, which they have not—includes weighing evidence. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

Respectfully submitted,

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Attorneys for Respondent

November 30, 2015
Columbia, South Carolina

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PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Respondent, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

Pleading: Respondent's Motion to Strike References to Factual Materials Not Contained in the Record

Parties Served: David Haller
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115 River Landing Drive, Suite 102
Charleston, SC 29492

Amanda Reece
Reece Law Firm, LLC
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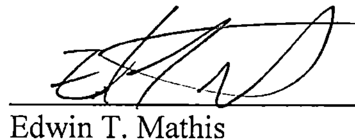
Attorneys for Appellants



Edwin T. Mathis

November 30, 2015

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The South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: US Bank National Association v. Anne B. Glassburn
Appellate Case No. 2015-000799

Dear Ms. Kitchings:

Enclosed for filing please find a Motion to Strike and our check in the amount of $25. Please file the original and return a clocked copy to us.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

Enclosure
cc: David K. Haller
Amanda Reece