

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
The Honorable Mikell R. Scarborough, Master in Equity

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**RECEIVED**

DEC 10 2015

Case No. 2010-CP-10-5825  
Unpublished Opinion No. No. 2015-UP-353  
Appellate Case 2015-001945

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**S.C. SUPREME COURT**

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Trustee of the  
American Mortgage Investment Partners Fund I Trust.....Respondent,

v.

Melissa Furmanchik; Masonborough at Park West Association, Inc.  
and Wells Fargo Bank, N.A.,.....Defendants,

Of whom Melissa Furmanchik is the.....Petitioner.

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REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Mary Leigh Arnold  
MARY LEIGH ARNOLD, P.A.  
749 Johnnie Dodds Blvd. Suite B  
Mt. Pleasant, SC 29464  
Telephone: 843-971-6053  
[sammie@maryarnoldlaw.com](mailto:sammie@maryarnoldlaw.com)  
*Attorney for Appellant*

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The Petitioner respectfully submits the following Reply Brief in support of her Petition for Certiorari. The Respondent, the Master in Equity and the Court of Appeals all misunderstand the importance of the divergent path taken by the note and mortgage. Confoundedly they misunderstand standing. They do not recognize the distinctions in an action on a note (an action in law) and an action in foreclosure (an action in equity). The simple act of saying here is the note is not an entitlement to foreclose.

**I. IMPORTANT REASONS EXIST FOR THE COURT TO ISSUE A WRIT OF CERTIORARI.**

Incredulously, Respondent contends that the “assignments of mortgages is irrelevant to the issue of standing in judicial foreclosure proceedings.” (Return., p. 18, n. 8). This position along with other misguided practices illustrates Respondent’s and other lender institutions determination to redirect the Courts from the systemic failures in foreclosure proceedings. Here Respondent, who is not the original mortgagee, failed to present sufficient evidence to establish the chain of title. Indeed, Respondent and the Court of Appeals failed to address the divergent path of the mortgage from the note in this instance. By so doing they fail to address and follow long established precedent set forth in *Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (1930) and *South Carolina Nat. Bank v. Halter*, 293 S.C. 121, 359 S.E.2d 74 (S.C. App. 1987). This is grounds for review under Rule 242(b) (5), SCACR.

Additionally, the Court of Appeals failed to address the lack of jurisdiction of the lower court to grant *sua sponte* relief under Rule 59(d), SCRCP, to a lender that had made no such request for relief. This clearly is contrary to established jurisprudence. See, *Eaddy v. Eaddy*, 283 S.C. 582, 324 S.E.2d 70 (1984); and *Lake v. Reeder Const. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998). Moreover, the issue is

arguably novel as unlike the analogous situations contemplated by Rule 59, SCRPC, in this instance 21 days after trial but prior to a judgment being issued the Master *sua sponte* determined that the trial would be “reopen for the express purpose of taking additional testimony with regard to the note and subsequent modification agreement.” (App. p. 18). Rather than try and save the lower court from its obvious error, the Court of Appeals had a duty to take notice and determine if the lower court had proper jurisdiction to act in the manner that it did. *Badeaux v. Davis*, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). These issues and others are important reasons for this Court to grant Certiorari.

**II. RESPONDENT’S ARGUMENT THAT ALL ISSUES RAISED IN THE PETITION FOR WRIT OF CERTIORARI WERE NOT PRESERVED IS A RED HERRING.**

**A. The lack of subject matter jurisdiction can be raised at any time and the Court of Appeals had a duty to determine if the lower court acted within its jurisdictional limits.**

Courts do have limitations and are not cloaked with the unfettered authority to act *sua sponte* at their whimsy. Several cases have held that a court lacks subject matter jurisdiction to *sua sponte* act after the expiration of a certain amount of time after judgment. See *Heins v. Heins* 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001) (holding a judge lacked subject matter jurisdiction to *sua sponte* alter a judgment more than 10 days after the judgment was entered); *Ness v. Eckard Corp.*, 350 S.C. 399, 566 S.E.2d 193 (CT. App. 2002) (quoting *Heins* to assert that same proposition); *Leviner v. Sunoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000) (a trial judge may alter or amend a judgment *sua sponte* but must do so within 10 days of the judgment); *Doran v. Doran*, 288 S.C. 477, 343 S.E.2d 618 (1986) (in a case predating the promulgation of Rule 59(e), SCRPC, this Court ruled “A trial judge loses jurisdiction to modify an order

after the term at which it is issued”); *Southern Railway Co. v. Coltex, Inc.*, 285 S.C. 213, 214, 329 S.E.2d 736, 736 (1985) (“The sole issue is whether a trial judge *ex mero motu* can grant a new trial on a ground not raised by a party. We hold he cannot”). “Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. . . it is the duty of this [C]ourt to take notice and determine if the [lower] court had proper jurisdiction for its actions. *Badeaux*, 337 S.C. at 205, 522 S.E.2d 835.

In this case the Court of Appeals simply did not address the issue electing to save the lower court by merely asserting the issue was not preserved. Subject matter jurisdiction is always properly before a court. In fact, the Court of Appeals had a duty to review the issue to determine whether the Master had jurisdiction for his actions. The issue was properly before the lower courts and should be addressed by this Court.

**B. Petitioner objected to Master re-opening the trial preserving the issue for review.**

Contrary to the Respondent’s position and the fact the issue of subject matter can be raised at any time, the issue was preserved. After both parties had rested and the trial had concluded but while the parties to the hearing were still on the record Petitioner objected to the Master’s suggestion that additional evidence may be admitted by stating:

I object to the Court considering this –they chose to try their case. The case is closed. If this is going to be considered a reconsideration that law is you don’t get new evidence in on a motion to reconsider. This is critical in this case. And that is standard black letter law, there are no new issues coming in on reconsideration. So I would object to the Court addressing this at this point in time. (App. pp. 226-27).

This is the grounds for my objection, so the record is clear. The case is closed. This is new evidence. Under the rules it can’t be. We don’t have testimony with regard to what you are now looking at. It hasn’t been properly established with testimony.” (App. p. 249).

The issue was preserved and should have been addressed by the Court of Appeals rather than finding a way to avoid the merits of the issue.

**C. Petitioner preserved the issue of whether the Master showed bias by *sua sponte* reopening the case to admit additional evidence.**

Petitioner is not holding an ace card up her sleeve. Petitioner's brief to the Court of Appeals clearly addressed whether the Master lacked the authority *to sua sponte* reopen the trial and hold a second hearing. Within that topic is contained a subsection titled "*The lower court not only exceeded its authority but strayed from its role as a neutral.*" (App. 384). The issue of *sua sponte* relief is one of four issues addressed by the Court of Appeals in its opinion (App.p. 429). In the Petition for Rehearing the Petitioner addressed whether the Master had acted improperly by *sua sponte* reopening the trial to admit additional evidence for the benefit of Respondent. (App. pp. 435-37). Additionally the Petition for Rehearing states "the principal purpose of this Petition is to preserve [Petitioner's] ability to request further review of the arguments that she offered to [the Court of Appeals] on the merits. To that end, [Petitioner] wishes to incorporate by reference *all* the arguments made before the Court and contained in her brief." (App. p. 434). Thereafter Petitioner calling particular attention to the standing issue went on to say "[The Court of Appeals] failed to properly address this issue along with the other issues raised on appeal. [The Court of Appeals] should have properly evaluated the circumstances and reversed the lower court's rulings." (App. p. 435).

The issue of bias on the part of the Master by *sua sponte* reopening the trial to admit additional evidence for the benefit of the Respondent, was briefed and argued by the Petitioner before the Court of Appeals, referenced as an issue in the opinion of said

court, and subsequently raised as an issue in the Petition for Rehearing. Again, the issue was preserved.

**D. The issue of whether the Master erred in awarding interest on the debt was preserved.**

The Petitioner briefed the interest issue in detail and the Court of the Appeals ruled on the issue in its Opinion. Thereafter in the Petition for rehearing, the Petitioner incorporated by reference to her final brief her argument on the interest issue and asked the Court of Appeals to review the issue as well every other issue she had specifically briefed the Court upon. The issue was preserved for review.

**III THE MASTER LACKED THE AUTHORITY TO SUA SPONTE RE-OPEN THE TRIAL.**

The Master's Order filed July 11, 2013, states: "*After trial* and review of the [Petitioner's] Rule 59(e), this court finds that the matter should be reopened for the express purpose of taking additional testimony with regard to the note and subsequent modification agreement. This is done pursuant to Rule 50(d), SCRCP." (App. p. 18). This Court has determined that a trial judge *ex mero motu* cannot grant a new trial on a ground not raised by a party. Southern Railway Co. v. Coltex, Inc., 285 S.C. 213, 329 S.E.2d 736 (1985). Thus, Rule 50(d) has no application here.

Respondent contends the Master's ruling was based upon Rule 59(d) rather than Rule 50(d), SCRCP, as stated in the Order. (Return, p. 15). Rule 59(d), SCRCP provides: "Not later than 10 days after entry of judgment, the court of its own initiate may order a new trial for any reason for which it might have granted a new trial on motion of a party." Essential to the application of Rule 59(d), SCRCP is the issuance of a judgment. This condition precedent was not meet. No judgment had been entered as required. Rule 59(d)

Therefore it does not appear Rule 59(d) is applicable. Notwithstanding, clearly the Master acted more than ten days after the close of evidence and after the parties had rested. If the Rule 50(d) is applicable the Court acted in an untimely manner.

Interestingly, Respondent raises a unique and novel issue for the first time claiming the Court properly acted *sua sponte* because it did so before judgment was entered although 10 days after the close of trial. Petitioner does not concede this issue is properly before the Court, however, it does recognize that there is no case addressing the specific circumstances here. Irrespective, Petitioner contends it was error and abuse of discretion to grant a new trial sua sponte on an issue not raised by a party.

Respondent cites two cases in support of its assertion that the Master possessed the authority to reopen the trial to admit additional evidence for the benefit of Respondent. *Brenco v. S.Carolina Dep't. of Transportation*, 377 S.C. 124, 127, 659 S.E.2d 167, 169 (2008) and *Spinx Oil Co., Inc. v. Federated Mut. Ins. Co.*, 310 S.C. 477, 482, 427 S.E.2d 649, 651 (1993). However both cases are distinguishable from the facts in this case. In both *Brenco* and *Spinx Oil Co., Inc.* a party moved to have the trial re-opened by filing a motion pursuant to Rule 59, SCRPC. That is not the case in this instance, neither party moved for the Master to reopen the trial in this instance. The Master lacked the authority to re-open the trial sua sponte in this matter and abused his discretion in doing so.

#### **IV. RESPONDENT LACKED STANDING TO ENFORCE THE MORTGAGE THROUGH FORECLOSURE.**

Respectfully the Court of Appeals in its opinion in this case as well as in its opinion in *Draper* have obliterated important distinctions within the realm of foreclosure actions, and disregard long held case law and controlling statutes within this state. The

result has been a fast track system wherein lenders and mortgage servicers are able to bypass general foundational requirements to proving the right to foreclosure and have birthed an unwarranted perception of an entitled to foreclose even absent the necessary evidentiary established of the right. The Court of Appeals in *Bank of America N.A. vs. Draper*, 405 S.C. 214, 746 S.E. 2d 478 (Ct. App. 2013) based its ruling on misconceived decisions of the South Carolina Bankruptcy Court, such as *Woodberry*, 383 B. R. 373 (Bankr. D.S.C. 2008). Respectfully, Petitioner would assert that the *Woodberry* case does not follow South Carolina law to the great determinant of the consumers of this state. If this Court were to take the time to lay out the distinctions, the rights, the necessary actions and instruments required to establish the right to foreclose upon a mortgage and to clearly define the obligations and duties of a party seeking to enforce such a right, this Court would be doing a great service to the consumers of this state. “To disregard contradicting [documentation and instruments] without proper authentication of the current documentation and explanation of the discrepancies, would be unjust and would ask this Court to ignore the action of the financial institutions who have an obligation to conform with acceptable business practice and establish an unbroken chain of assignments prior to instituting a foreclosure action.” *U.S. Bank Nat. Assoc., as Trustee v. George*, 2015 Ohio – 4957, 2015 Ohio App. Lexis 4794 (Ct. App. Ohio December 1, 2015)

“A mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action.” *Lever v. Lighting Galleries, Inc.*, 374 S.C. 30, 33, 647 S.E.2d 214 (2007). “Moreover, because foreclosure is equitable relief the simple assertion of the elements of foreclosure does not require, as

a matter of law the remedy of foreclosure.” *U.S. Bank Nat. Assoc., as Trustee v. George*, 2015 Ohio – 4957, 2015 Ohio App. Lexis 4794 (Ct. App. Ohio December 1, 2015). “The assignment of a mortgage as distinct from the debt it secures is nugatory and confers not rights upon the transferee, absent some indication that the parties also intended to transfer the debt.” *S.C. National Bank v. Halter*, 293 S.C. 121, 359 S.E. 2d 74 (Ct. App. 1987). Additionally “[t]he right to enforce an instrument and ownership of the instrument are two different concepts. . . Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3. . . a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument.” *Official Comment 1 to S.C. Code Ann. §36-3-203*. “Some rights of the transferor are not vested in the transferee unless the transfer is a negotiation” *Id.* “If an instrument not in the possession of the original holder is not properly indorsed, then the person in possession of it does not have the status of a holder. *Martin v. New Century Mortg. Co.*, 377 S.W. 3d 79, 84 (Tex. App. 2012).

**A. The mortgage diverges from the path of the note.**

In this case the, as Petitioner explained in detail in her Petition to this Court why the Court of Appeals failed to appreciate the importance of the fact that the Note and Mortgage took divergent paths, which resulted in the Mortgage never being properly assigned and/or transferred to the Respondent and therefore depriving Respondent of the ability to foreclose the mortgage. The Court of Appeals appears to simply cite *Draper* and *In Re Woodberry* for the proposition that simple possession of a Note deems one a holder with the right to foreclose regardless of the facts. However, as the Petitioner pointed out to the trial court and the Court of Appeals, there is strong evidence within the

record to question whether the Respondent is in fact a holder as will be explained below. The importance of distinguishing the possible right to enforce a note with the attendant burden thereto and the right to enforce a mortgage is emphasized by the Respondent's misconception that the issue is of no importance. The Respondent states in its Return:

“By possessing the Original Note and Allonge containing a blank endorsement at the first foreclosure hearing, Selene proved that it was the holder of the Original Note. The interest in the Mortgage automatically followed the Original Note as a matter of law when it was negotiated to Selene . . . Furmanchik's complaint that the chain of mortgage assignments does not perfectly mirror the chain of the note endorsements is a red herring because no written assignment of the mortgage is required under state law.. *If timely assignments of mortgage were relevant to a noteholder's right to foreclose, then surely state law would require them. But it does not.*”

Respondent then goes on in a footnote to that statement to state: “*the practice of executing and recording assignments of mortgages is irrelevant to the issue of standing in judicial foreclosure proceeding. . .*” The Respondent's contention emphasizes a common perspective of mortgage lenders and servicers in prosecuting foreclosure actions in this state. Respondent believes that because it is possession of the Note it automatically has a legal interest in the Mortgage, which fails to acknowledge that the Note and Mortgage are distinct documents and an alleged legal or ownership interest in one does not automatically equate to the right to enforce the other.

**B. Respondent failed to provide evidence that it was a holder despite strong evidence presented to the court refuting that assertion.**

Because lenders and servicers automatically presume they can foreclose upon a mortgage regardless of the facts, by simply waving the original note around, it is of the utmost importance that our lower courts do not automatically presume a lender to be a holder simply because they are in possession of a note when there is clear evidence within the record to suggest otherwise. When there are discrepancies within the record

before a court, that court must require a lender or servicer to provide some further support for the assertion that they are a holder who received a note by negotiation rather than have acquired possession through transfer alone. “[I]t is the movant’s burden to establish the chain of transfers and assignments, if it is not the original mortgagee and this is well-established law.” *George*, 2015 Ohio – 4957, 2015 Ohio App. Lexis 4794. “Without duly attested documents or other competent evidence, we cannot infer the transfers of the note and the assignment of the mortgage as matters of fact and therefore cannot affirm . . . judgment of foreclosure.” *Id.* “[Respondent] did not meet its burden to demonstrate an absence of a dispute regarding its status as a holder of the note and mortgage, and therefore its standing to bring the action on the note and the foreclosure action on the mortgage.”

In this case the Note contained a number of cancelled and voided endorsement upon the note itself, which Respondent contends were not relevant. Rather Respondent to prove its right to enforce the Note relied upon an allonge which contained a blank endorsement but which bore no evidence that the allonge had ever been properly affixed to the Note. (App. p. 286-87) Furthermore, when Respondent’s witness was questioned about the chain of title of the Note and whether she had any knowledge as to the canceled/voided endorsements and the allonge she stated that she did not have any knowledge of those transactions save for the evidence of the mortgage assignments. (App. 213-15). The Petitioner raised evidence that the alleged allonge did not automatically provide Respondent with holder status, and requested that Respondent provide further support for that assertion. If the allonge was not affix then the Note would be specially endorsed to someone other than Respondent. Respondent should have

been required to provide some evidence to support its assertion that it was holder, given the discrepancies regarding the Note. However, Respondent failed to provide any such evidence, and the Master nonetheless held that Respondent was a holder given possession of the Note and an unaffixed allonge. The Court of Appeals erred in glossing over this issue and simply holding that the Respondent was a holder entitled to enforce the mortgage.

**V. RESPONDENT DID NOT MEET ITS EVIDENTIARY BURDEN OF PROOF.**

**A. The Master abused his discretion in admitting Respondent's exhibits into evidence particularly with regard to Exhibit 2b.**

Respondent did not lay a proper foundation for the admission of certain of its exhibits into evidence. This is particularly true with regard to Exhibit 2B which Respondent refers to as a Modification Agreement. Respondent claims that it properly authenticated Exhibit 2B; that the document is admissible under Rule 901(b) (4), SCRE; and that the document is self-authenticating. (Return, pp. 19-21)

Respondent quotes *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, stating: "the burden to authenticate . . . is not high and requires only that the proponent offer a satisfactory foundation from which the jury could reasonably find that the evidence was authentic." 413 S.C. 58, 69, 773S.E.2d 607, 613 (Ct. App 2015). In this case during the trial Respondent's witness did not proffer any testimony as to Exhibit 2B and as such Respondent did not meet the authentication requirements referenced in *Deep Keel, LLC*.

Next Respondent asserts that the documents are self-authenticating asserting "in an action with respect to an instrument, the authenticity of, and authority to make, each

signature on the instrument is admitted unless specifically denied in the pleadings.” S.C. Code Ann. § 36-3-308(a). However, this is not applicable with regard to Exhibit 2B which Respondent alleges is a modification agreement, because respondent did not plead the existence of the document; no reference is made to Exhibit 2B in the Complaint; and no testimony was offered by the Respondent’s witness with regard to Exhibit 2B prior to the Exhibit being admitted into evidence by the Master. Additionally this self-authenticating argument as to the Note, Mortgage, and Exhibit 2B was not raised before the lower court nor the Court of Appeals and is now being raised for the first time by Respondent in its return to the Petition for Writ of Certiorari. “Respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.” *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

Finally, Respondent asserts in the alternative that the Note, Mortgage, and Exhibit 2B could have been admitted into evidence pursuant to Rule 901(b) (4), SCRE. This line of argument was also not raised before the lower court or before the Court of Appeals.

**B. Testimony as to the interest rate was hearsay.**

“Rule 803(6) does not apply to admit live testimony offered to prove the contents of a record containing hearsay when that record is not offered in evidence” *Deep Keel*, 413 S.C. 58, 773S.E.2d 607.

In this case during the trial Respondent failed to provide any evidence supporting the witness’ statement that the Note provided an interest rate of 6.375%. (App. 226-228). In fact, Respondent’s witness testified that the Note contained an interest rate of 0% (App. 218-220). The Note admitted into evidence through testimony proffered by

Respondent's witness did not support the witness's hearsay statement that the interest rate was 6.375%. Additionally, Exhibit 2B was never proffered by the testimony of Respondent's witness during the June 20, 2013, trial and therefore does not meet the business records exception to hearsay. Finally, Respondent contends that Exhibit 2B was properly admitted into evidence because it is a public record. However, Respondent did not raise this assertion before the lower court. The Respondent failed to establish the interest rate it claimed to be owed on the note.

### CONCLUSION

For the reasons given within the Petitioner's Petition and this Reply to the Return of Respondent, this Court should grant the Petitioner's Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

MARY LEIGH ARNOLD, PA



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Mary Leigh Arnold  
749 Johnnie Dodds Blvd. Suite B  
Mt. Pleasant, SC 29464  
Telephone: 843-971-6053  
[sammie@maryarnoldlaw.com](mailto:sammie@maryarnoldlaw.com)  
*Attorney for Petitioner*

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Of whom Melissa Furmanchik is the.....Petitioner.


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CERTIFICATE OF SERVICE

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I certify that I have served a copy of the Reply to Return to Petition for Writ of Certiorari,  
upon counsel for Respondent named below by depositing a copy of the same in the United States  
Mail, postage prepaid on December 9, 2015, addressed as follows:

Sean M. Foster  
ROGERS TOWNSEND & THOMAS, PC  
P.O. Box 100200  
Columbia, SC 29202  
*Attorney for Respondent*



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