

78436

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

The Honorable J.C. Nicholson, Jr., Circuit Court Judge JAN 15 2018

SC Court of Appeals

Appellate Case No. 2015-001508
Case No. 2013-CP-10-06439

Wells Fargo Bank, N.A., Successor by Merger to Wachovia Bank, National
Association,.....Respondent,

v.

Robert L. Freeman,Appellant.

RESPONDENT'S MOTION FOR LEAVE TO FILE SURREPLY BRIEF

Wells Fargo Bank, N.A., Successor by Merger to Wachovia Bank, National
Association ("Respondent"), hereby moves the Court, pursuant to Rule 240, SCACR, for
leave to file a Surreply Brief in response to the Initial Reply Brief ("Reply") filed by the
Appellant on January 4, 2016. In support of this Motion, the Respondent would
respectfully show unto this Court as follows:

I. APPELLANT ERRONEOUSLY CITES RECENT LYONS DECISION

In his Reply, Appellant erroneously cited the recent decision of this Court in
Lyons v. Fidelity Nat. Title Ins. Co., --- S.C. --- (Ct.App. December 2, 2015), as holding
that the sealed instrument discussion in Treadaway v. Smith, 325 S.C. 367 (Ct. App.

1996) has been “abrogated” and no longer constitutes valid precedent. (Appellant’s Initial Reply Br. p. 4.) Appellant’s misstatement requires correction.

In Treadaway, the Court of Appeals addressed two distinct issues: (1) whether the circuit court had subject matter jurisdiction over a separation agreement between husband and wife; and (2) whether the separation agreement was a sealed instrument. The Treadaway Court held that the circuit court had subject matter jurisdiction and also held that the separation agreement was a sealed instrument. Only the first holding, relating to subject matter jurisdiction, has been changed.

In Carolina Marine Handling v. Lasch, 363 S.C. 169 (Ct. App. 2005), this Court approvingly discussed the Treadaway holding as it related to sealed instruments, but explained in a footnote that the jurisdictional portion of the Treadaway decision had been abrogated by the decision in Moseley v. Mosier, 279 S.C. 348 (1983).¹ Appellant erroneously argues in his Reply that Lasch rejected the Treadaway holding as it relates to sealed instruments, using a bolded font to highlight the Court’s use of the phrase “abrogated by” in its citation to the Treadaway case in the recent Lyons decision.

Neither Lasch nor Lyons criticized the Treadaway holding on sealed instruments nor suggested in any way that Treadaway is no longer valid precedent on the law of sealed instruments in South Carolina. Appellant’s reliance on the “abrogated by” language extracted from the Lyons opinion is misleading, because the Lyons decision, when properly read, demonstrates that the only “abrogation” of Treadaway relates to the jurisdiction of the circuit court.

¹ In Moseley, the state Supreme Court, held that jurisdiction for all domestic matters is vested in the family court, not the circuit court. However, because the separation agreement in Treadaway was prepared prior to the decision in Moseley, the change in law did not affect the Treadaway separation agreement.

II. APPELLANT RAISES A NEW, INCONSISTENT ARGUMENT

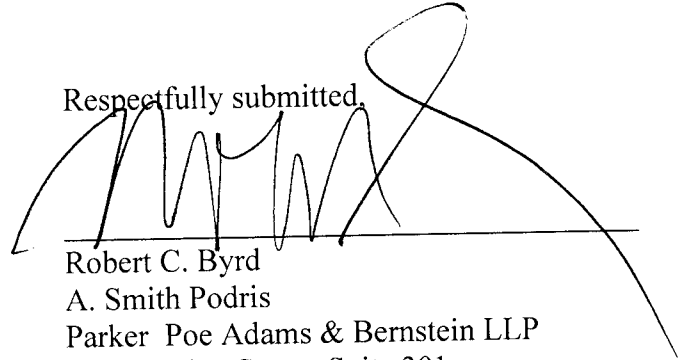
Appellant also impermissibly asserts a new argument in his Reply that is inconsistent with the position taken before the circuit court below. Specifically, Appellant now argues that the loans he personally guaranteed are not “installment contracts”. (Appellant’s Initial Reply Br. p. 21.) Appellant never argued this position to the circuit court and, in fact, referred to the payment structure multiple times as consisting of “installment payments.” (Mot. for Summ. J. Hr’g Tr. pp. 7-8, May 5, 2015).

Because the Appellant is now taking an inconsistent position regarding the installment nature of the loans, the issue has not been properly preserved for this appeal. White v. Livingston, 231 S.C. 301 (1957) (“One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with or different than that taken by him at the trial, and that the parties are restricted to the theory on which the cause was prosecuted or defended in the court below.”). See also, Continental Ins. Co. v. Shives, 328 S.C. 470, 474 (Ct. App. 1997) (“An appellant may not use the reply brief to argue issues not raised in the initial brief.”).

CONCLUSION

For the reasons stated hereinabove, Respondent respectfully requests it be permitted to file a Surreply Brief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Robert C. Byrd', is written over a horizontal line. The signature is stylized with several loops and a large flourish at the end.

Robert C. Byrd
A. Smith Podris
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Ph: (843) 727-2650
Fax: (843) 727-2680
Attorneys for the Respondent

January 13, 2016

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2015-001508
Case No. 2013-CP-10-06439

RECEIVED

JAN 15 2016

SC Court of Appeals

Wells Fargo Bank, N.A., Successor by Merger to Wachovia Bank, National
Association,.....Respondent,

v.

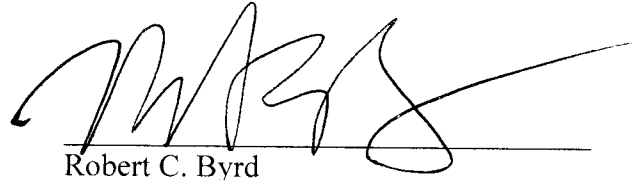
Robert L. Freeman,Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on January 13, 2016, s/he has caused a copy of the Respondent's Motion for Leave to File Surreply to be served upon Appellant by depositing a copy of it in the United States Mail, postage prepaid, addressed to the Appellant's attorneys of record at the following address:

G. Trenholm Walker, Esq.
Katie F. Monoc, Esq.
Pratt-Thomas Walker, P.A.
16 Charlotte Street
Charleston, SC 29403

Dated: January 13, 2016

A handwritten signature in black ink, appearing to read 'R. Byrd', written over a horizontal line.

Robert C. Byrd

A. Smith Podris

PARKER POE ADAMS &

BERNSTEIN LLP

200 Meeting Street, Suite 301

Charleston, SC 29401

Phone: (843) 727-2650

Fax: (843) 727-2680

Attorneys for the Respondent



Robert C. Byrd
Partner
Telephone: 843.727.2665
Direct Fax: 843.727.2680
bobbybyrd@parkerpoe.com

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

RECEIVED

JAN 15 2016

SC Court of Appeals

January 13, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: *Wells Fargo Bank, N.A., Successor by Merger to Wachovia Bank, National Association v. Robert L. Freeman*
Appellate Case No. 2015-001508

Dear Ms. Kitchings:

Enclosed for filing please find an original and six copies of *Respondent Wells Fargo Bank's Motion for Leave to File Surreply Brief and Proof of Service* in the above-referenced case. Please file the originals and return the extra copies to me in the enclosed postage-prepaid envelope.

By copy of this letter, we are serving the Appellant with a copy of *Respondent Wells Fargo Bank's Motion for Leave to File Surreply Brief*. Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. C. Byrd', written over the typed name.

Robert C. Byrd

Enclosures

cc: G. Trenholm Walker, Esq.
Katie F. Monoc, Esq.

PPAB 3055868v1



Parker Poe

200 Meeting Street, Suite 301
Charleston, SC 29401
Post Office Box 160
Charleston, SC 29402

RECEIVED
JUN 17 2016
SC Court of Appeals

To: **The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211**

