STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

George C, James, Jr., Circuit Judge, Fifteenth Judicial Circuit

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Appellate Case No.: 2016-000915

National Security Fire & Casualty Company, ...Plaintiff,

v

Rosemary Jenrette, AKA Rosemary Long Jenrette, and
Horry County State Bank, ...Defendants,

of whom

Rosemary Jenrette, AKA Rosemary Long Jenrette, ...Appellant,

v.

Horry County State Bank, ...Respondent.

APPENDIX
BOOK 2 OF 2

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better security of Respondent; that argument fails based upon the language contained in the Mortgage document itself.

Next, Appellant attempts to distinguish the factual scenario in Blackwell from the instant case by arguing that Blackwell involved a chattel mortgage and not a real estate mortgage. This too is illogical. A chattel mortgage, as no doubt this Court is aware, is no different than a real estate mortgage aside from the object to which it attaches. Furthermore, the Blackwell Court based its ruling upon the previous decisions from Swearingen and Farmers' & Merchants', which incidentally involved real estate mortgages.

Appellant also attempts to distinguish the general equitable principles established by Swearingen, Wheeler, Farmers' & Merchants', Blackwell, Freshwater, Lewis, and Jones by differentiating Appellant as a non-debtor, as opposed to the other cases, which admittedly, concern debtor-mortgagors. While, Appellant is correct that she was not the debtor named in the Promissory Note, this argument is likewise unpersuasive. The hallmark of this line of cases is that there is an agreement between the mortgagor and the mortgagee that the property be insured for the benefit and better security of the mortgagee. The principle from these cases is clear, as stated in Blackwell: "*this equitable lien arises solely from the unperformed contract to protect*, the theory being that since equity regards as done that which ought to have been done, if the mortgagor, having so covenanted, fails to make the insurance payable to the mortgagee, or to assign the same, the fund arising therefrom is within the operation of the maxim." Blackwell at 654. (Emphasis Added). In the instant case, it is absolutely clear that Appellant agreed in the Mortgage to insure the property for the benefit of Respondent during the life of the Mortgage. This is the obligation that Appellant failed to perform. What's more is that Appellant, by virtue of Paragraph 17 (I) of the Mortgage, acknowledged that "the Note was made in consideration of

the transaction" and Appellant agreed to be bound by the terms and conditions of not only the Mortgage, but the Note as well. This in and of itself shows that Appellant's involvement was more than simply pledging property as collateral. It makes no difference under these facts that Appellant was not the named debtor in the Note, because in the Mortgage itself, she acknowledged that the transaction was made in consideration of the Note and Mortgage and agreed to be bound by those terms. Pursuant to the case law of this State, the resulting equitable lien plainly follows.

Appellant in her brief attempts to argue for the first time on appeal, that Respondent failed to object to the issuance of the check to both Appellant and Respondent. Appellant attempts to point to this as evidence against the Trial Court's finding of an equitable lien, presumptively, to draw analogy to the Carrington case. However, this argument is not only meritless, but factually inaccurate. In fact, the reason this case went to trial is based upon the manner in which the proceeds were issued. Neither Respondent, nor Appellant were in possession of the funds, nor has either party released their claim to the insurance proceeds. Additionally, Appellant refused to endorse the proceeds check and negotiate it to Respondent, which led to the interpleader action being filed. (R., p. 121 lines 3-4; p. 246, line 25- p. 247, line 23). Nevertheless, based upon case law, specifically, Blackwell, Respondent's equitable lien rights would have been unaffected had the proceeds been paid directly to Appellant. The Blackwell Court, referencing Gibbes Machinery Co. v. Niagara Falls Insurance Co., 119 S.C. 1, 111 S.E. 805 (1922), stated: "if [insurance company], with knowledge of the covenant to insure for the benefit of the Bank, had without its consent, paid the amount of this loss to Blackwell, the right of the Bank to enforce its equitable lien would not have been affected and the Bank could have recovered against [insurance company] the amount of the loss." Blackwell at 654. The South Carolina Supreme

Court found the covenant contained in the chattel mortgage, requiring the mortgagor to insure "for the benefit of the bank" was sufficient to support a finding of an equitable lien on the insurance proceeds. Id.

Again, Appellant has failed to show that the Trial Court's findings are erroneous in light of the established case law of this State, the facts of this case and the operation of the documents themselves. As such, Respondent submits that the Trial Court's finding that Appellant was obligated to insure the real property for the further security of Respondent was correct and should be affirmed by this Court.

III. THE PRIOR ASSIGNMENT OF INSURANCE PROCEEDS IS BINDING ON THE APPELLANT MORTGAGOR AFTER THE CANCELLATION OF THE MORTGAGE INCIDENT TO FORECLOSURE

Appellant argues that the assignment clause contained in Paragraph 3 (B) of the subject Mortgage did not survive the filing of a cancellation of lien, and thus terminated at the conclusion of the prior foreclosure action. Appellant contends that the authority referenced by the Trial Court is inapposite because none of the authority cited references the situation where a "mortgagor was not liable for the indebtedness secured by the mortgage." (Appellant's Final Brief, p. 26). Respondent submits that the Trial Court's finding that the assignment survived the cancellation of the Mortgage complies with the equitable principles observed by our Appellate Courts and is in accord with the case law of this State.

Appellant argues that the cases of Certain Underwriters of Lloyds v. U.S. Industrial Services, LLC, 825 F.Supp.2d 882 (E.D. Mich. 2011) and Jones v. Equicredit Corp. of South Carolina, 347S.C. 535, 556 S.E.2d 713 (Ct. App. 2001) are factually distinguishable from the case at bar. Appellant states that Jones is inapplicable because the dispute involved a debtor-mortgagor. Appellant takes issue with Certain Underwriters of Lloyds because the dispute over the insurance

proceeds was between the holder of tax liens and a mortgagee named in the insurance policy. While Appellant is correct that neither of these cases deal directly with the unique factual scenario this case presents; the principles espoused in the cases utilized by the Trial Court are not compromised. Furthermore, the Trial Court listed the cases of Whitestone S & L Ass'n v. Allstate, 28 N.Y.2d 332, 270 N.E.2d 694 (1971); Smith v. Gen. Mortgage Corp., 402 Mich. 125, 261 N.W.2d 710 (1978); Nationwide v. Wilborn, 291 Ala. 193, 279 So.2d 460 (1973); Allstate v. James, 779 F.2d 1536 (11th Cir. 1986); and Helmer v. Texas Farmers Insurance Co., 632 S.W.2d 194 (Tex. App. 1982) as all applying the rule, known as the "Full Credit Bid Rule", espoused in the Emmons v. Lake States Insurance Company, 193 Mich. App. 460, 484 N.W.2d 712 (1992) and Certain Underwriters of Lloyds cases referenced in the Final Order. (R., pp. 17-18, ¶ 9).

Appellant is correct in her assessment that none of the cases relied upon by the Trial Court involve a non-debtor mortgagor dispute involving insurance proceeds. This is a case of first impression. However, while Appellant has repeatedly pointed to this difference, she has failed to produce any authority supporting her argument that the outcome would be affected in the scenario involving a non-debtor mortgagor. Aside from referencing Steinmeyer, in which no contractual privity requiring insurance existed, the Appellant has failed to provide any authority which disputes the Trial Court's findings. The Trial Court's ruling is based upon the equitable maxims which lie at the heart of the cases to which it cited. First, if an individual obligates themselves to insure property for the benefit of another, yet fails to do so, then based upon the equitable maxim "equity regards as done that which ought to be done", the Court should place the parties in the position they would have been had the obligation been performed. This is further reinforced by the contractual obligation and duty to protect.

Appellant has only asserted that the conclusion reached by the Trial Court was erroneous because the authority cited in support of the ruling did not involve non-debtor mortgagors; she has not disputed the principles espoused by those cases. Appellant has not disputed the legal conclusions drawn from or represented by the cases; she simply asserts that the cases are discernible in that they derived from relationships involving debtor-mortgagors.

In Emmons, a case utilized by the Trial Court, the Michigan Court of Appeals held that the assignment clause contained in a mortgage will survive a foreclosure so long as the debt is not extinguished. In that case, the Michigan Court of Appeals stated that the insurance clause contained in the mortgage: "created an equitable assignment of a future right. In equity, a present assignment of money having a potential existence but not yet due will operate on the fund as soon as it is acquired. Here, the bank's interest in the insurance proceeds vested at the time of the fire but expired upon satisfaction of the debt at the foreclosure sale. The assignment was collateral security for the mortgage debt." Emmons, 193 Mich. App. at 464. (Internal citations omitted). The Emmons Court further opined that while the assignment survived the foreclosure, the debt in that instance did not, as the bank bid the full amount of the indebtedness at the foreclosure sale. Id. "When property is purchased at a foreclosure sale for an amount equal to the amount due on the mortgage, the debt is satisfied." Id. at 463 *citing to* Bank of Three Oaks v. Lakefront Properties, 178 Mich. App. 551, 555, 44 N.W.2d 217 (1989).

In the instant case, however, it is uncontroverted that Respondent did not bid the entire amount of the indebtedness due at the foreclosure sale. In fact, a deficiency of One Hundred Seventeen Thousand Five Hundred Forty Six and 89/100ths Dollars ($117,546.89) remains after the public auction pursuant to the Order of Foreclosure and Sale. The Trial Court's ruling is in agreement with the principles upon which the Emmons holding is predicated.

In Certain Underwriters of Lloyds, the United States District Court for the Eastern District of Michigan held that the rule from Emmons did not apply in the instance where the debt was not satisfied through the foreclosure sale. Certain Underwriters of Lloyds, 825 F.Supp.2d 882, 890 (E.D. Mich. 2011). In its discussion, the District Court stated:

> **the point of distinction with the present case is that here, a portion of the debt, one that exceeds the amount of available insurance proceeds, remains after the foreclosure sale. The concern animating the holding in Emmons that the bank was not entitled to assigned insurance proceeds appears to be that allowing both assignment of insurance proceeds and a full-debt bid at the foreclosure sale would bestow on a mortgagee a double recovery. However, that concern is absent here...**

Id. In the instant case, there are similarities to the Certain Underwriters of Lloyds case, insofar as the winning bid at the foreclosure sale was less than the indebtedness, and the mortgage required Appellant to obtain insurance for the benefit of Respondent. However, in Certain Underwriters of Lloyds, the bank was named as a loss payee on the policy and the loss occurred after the foreclosure.

It is important to point out that at the trial of the instant case, as is reflected in the Final Order filed February 11, 2014, Respondent confirmed that if it were to prevail, the insurance proceeds would be applied to the deficiency judgment obtained against Quickel and Cajun Carolina, LLC, thus reducing the deficiency award accordingly. (R., p. 19, ¶ 14). As in Certain Underwriters of Lloyds, this would prevent the double recovery of concern to the Emmons Court, which clearly influenced their opinion.

In Jones, the South Carolina Court of Appeals followed the reasoning contained in Singletary v. Aetna Cas. & Sur. Co., 316 S.C. 199, 447 S.E.2d 869 (Ct. App. 1994) stating: "Ordinarily, the rights of a mortgagee to insurance proceeds are determined at the time of a fire loss. However, a mortgagee's rights under an insurance policy are terminated if, after fire loss, the underlying debt

is satisfied by a purchaser at a foreclosure." 347 S.C. 535 at 543. The Jones Court further reasoned that a waiver of deficiency would not have impaired the bank's pursuit of the insurance proceeds. "A mortgagee who waives deficiency 'simply elects to rely solely on the mortgage security for satisfaction of his debt.' By waiving deficiency, a mortgagee relinquishes only the right to pursue assets of the mortgagor over and above those covered by the mortgage." Jones, 347 S.C. 535 at 544 *citing to* Sellars v. First Colonial Corp., 276 S.C. 548, 551, 280 S.E.2d 805, 806 (1981). In light of the approach taken in Jones, the debt owed to Respondent has not been satisfied, thus Respondent's claim to the insurance proceeds is viable.

Appellant takes the position that Respondent's Mortgage was cancelled and satisfied by operation of the filing of the Release of Lien Mortgage Satisfaction on September 8, 2011 in Mortgage Book 5345 at Page 1825, in the Horry County Records. Appellant's argument is that once the cancellation of the lien occurred, Appellant had no further obligations to Respondent; that upon the filing of the cancellation of lien and securing a deficiency judgment against Quickel and Cajun Carolina, LLC, Respondent was made whole. In support of her argument, Appellant relies upon §29-3-660, S.C. Code Ann. (2007). Section 29-3-660, commonly referred to as the "Deficiency Judgment" statute states:

> **In actions to foreclosure mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.**

Respondent obviously disagrees with this assessment.

In opposing Appellant's argument regarding the cancellation of lien, Respondent relies upon §29-3-780, S.C. Code Ann. (2007) which states:

> **upon confirmation of the circuit court of the report of the master or the other officer making a sale of lands pursuant to decree of foreclosure, the officer of the court making the sale *shall cause to be recorded in the office where the foreclosed mortgage is recorded a release, cancellation, and satisfaction of the lien in the form prescribed in Section 29-3-790. However, nothing in this section may be construed to satisfy any unpaid portion of the debt secured by the mortgage.***

(Emphasis added). Section 29-3-790 provides:

> **the release, cancellation, and satisfaction of lien *required under Section 29-3-780* must be made in writing and signed by the officer *and must be in the following form:* 'Lien of mortgage recorded in (Mortgage Book and Page), (Office) is released, canceled, and satisfied by sale under foreclosure the ____ day of (Month), (Year). See Judgment Roll No. _____'.**

(Emphasis added).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) *citing to* Charleston County Sch. Dist. V. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Id. *citing to* In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. (*citing to* Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id. *citing to* Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992). "We are not at liberty, under the guise of construction, to alter the plain language of the statute by adding words which

the Legislature saw fit not to include." Shelley Construction Company v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985). "Our duty is to apply the statute according to its own terms." Id. *citing to* Multiplex Building Corp., Inc. v. Lyles, 268 S.C. 577, 235 S.E.2d 133 (1977).

Respondent argued at trial, and again here, that the filing of the Release of Lien Mortgage Satisfaction was a mandatory directive pursuant to §§29-3-780 and 29-3-790 that the Master in Equity for Horry County file the Release of Lien Mortgage Satisfaction form. Based upon the word choice, the Legislature did not grant discretion to the Master in Equity concerning whether the document could be filed incidental to the foreclosure being completed, it demanded that the action be taken regardless. Next, the form of the cancellation is contained in §29-3-790, which again uses mandatory directive language, *i.e.* "must". Lastly, §29-3-780 indicates that "nothing in this section may be construed to satisfy any unpaid portion of the debt secured by the mortgage." This language contained in the release of mortgage statute directly contradicts Appellant's argument. The statute specifically states that the cancellation of the mortgage does nothing to extinguish the debt secured by the mortgage as Appellant has suggested. The mandatory filing of the Release of Lien Mortgage Satisfaction by the Master in Equity is a ministerial act, required by statute. If this Court were to accept Appellant's argument, then the ministerial act required by State law, would negatively and fundamentally impair the rights of lending institutions without any recourse to prevent the harm to them.

Appellant contends that the "Deficiency Judgment" statute renders the debt fully satisfied, arguing that when a mortgagee obtains a deficiency judgment against a debtor, where the sale of the security fails to bring the full amount due under the mortgage, the judgment obtained makes the mortgagee whole. However, nothing in the "Deficiency Judgment" statute indicates that is

the case. Additionally, the Trial Court, in rejecting Appellant's argument in reliance on the "Deficiency Judgment" statute, stated: "reliance upon that statute is misplaced, as the Bank is not seeking a deficiency judgment against Mrs. Jenrette. It claims an equitable lien on insurance proceeds to which Mrs. Jenrette would otherwise be entitled." (R., p. 19, ¶ 13). The logic of the Trial Court is sound.

Furthermore, the language contained in the Mortgage executed on behalf of Appellant contradicts the argument she urges this Court to accept. Paragraph 3 of the subject Mortgage specifically addresses this scenario. In pertinent part, the Mortgage states:

> **3(A)** ... ***In the event of the foreclosure of this Mortgage or any other transfer of title to the Property in extinguishment of the indebtedness and other sums secured hereby, all right, title, and interest of Borrower in and to all insurance policies and renewals thereof then in force shall pass to the grantee.*** **Upon the failure of Borrower to obtain and maintain insurance satisfactory to Lender, Lender may at its own discretion procure and substitute for any and all of the insurance so held as aforesaid, such other policies of insurance, in such amounts as Lender, acting in its sole discretion, may determine;** ***all without prejudice to its right to foreclosure hereunder, should Borrower fail or refuse to keep said premises so insured...*** **3(B)...** ***Borrower hereby assigns to Lender all proceeds from any insurance policies, and Lender is hereby authorized and empowered in its reasonable discretion, to adjust or compromise any loss under any insurance policies on the Property, and to collect and receive the proceeds from any such policy or policies. Each insurance company is hereby authorized and directed to make payment for all such losses directly to Lender alone, and not to Borrower and Lender jointly. After deducting such insurance proceeds any expenses incurred by Lender in the collection or handling of such funds, Lender acting in its sole discretion, may; apply the net proceeds (I) to the payment of any sum secured by this Mortgage in such order as Lender may determine... all without affecting the lien of this Mortgage for the full amount secured hereby before such payment took place.***

(Emphasis added). Paragraph 3 specifically addresses the issues pertaining to the impact of the foreclosure of the mortgage and its impact upon the assignment of the insurance proceeds. Therefore, construing the language contained in the Mortgage in light of the rules espoused by Emmons, Certain Underwriters of Lloyds, Jones, and the other cases cited by the Trial Court

which adopted the "Full Credit Bid Rule", as well as §§29-3-780 and 29-3-790, it is clear that Appellant's argument must fail.

The Trial Court's ruling, taking into account the bevy of case law with respect to the "Full Credit Bid Rule"; the equitable considerations relating to the covenant by a mortgagor to insure the property for the benefit of the mortgagee; the instructive equitable maxims; the relevant statutes; and the provisions of the documents themselves correctly determined that Respondent was entitled to the insurance proceeds at issue in this case. Appellant has attempted to distinguish the applicable case law based upon Appellant's position as a non-debtor mortgagor; yet she has failed to provide any authority which assaults the well reasoned findings of the Trial Court. As such, Appellant has failed to carry her burden and the Trial Court's ruling must be affirmed by this Court.

IV. THE TRIAL COURT CORRECTLY FOUND THE EXISTENCE OF AN EQUITABLE LIEN ON THE INSURANCE PROCEEDS BASED UPON THE ADDITONAL SUSTAINING GROUNDS

In addition to the foregoing, the Trial Court's ruling should be affirmed based upon additional sustaining grounds found in the record. Specifically, Respondent would point to the admission by Appellant that the insurance was obtained for the benefit of Respondent and that the Agreement to Provide Insurance executed by Mr. Quickel identifies the exact policy at issue here, on which Respondent reasonably believed it was named as a loss payee. Both of these grounds provide support to the Trial Court's ruling that Respondent was entitled to the insurance proceeds resulting from the fire loss on the property which was encumbered by the subject Mortgage.

Appellant, on direct examination, during Respondent's case in chief, testified that she did not obtain the insurance for the benefit of Respondent. (R., p. 222, line 25 – p. 223, line 2). This testimony was inconsistent with her deposition testimony, and as a result, Appellant was impeached by Respondent's counsel. Appellant, upon impeachment, agreed that the insurance at issue in this case was obtained for the protection of Respondent. (R., p. 223, line18- p. 224, line 7). While Appellant has attempted to persuade both the Trial Court and this Court that she purchased the insurance coverage from Carrier for her personal benefit; when the documents used in this transaction are viewed in conjunction, it is easy to see how Respondent reasonably believed that the property was insured for its benefit and thus relied upon Appellant's promise and covenant to insure the property.

Appellant has argued that the Loan Commitment is irrelevant to the transaction because it was issued April 24, 2009, Three (3) days prior to Appellant executing the Specific Power of Attorney. However, the Loan Commitment, which was sent to Mr. Quickel at the subject property's address, 104 Country Club Drive, Conway, South Carolina. (R. p. 383). It identified this specific piece of property, along with the other Six (6) unimproved lots, as the collateral for the Three Hundred Fifty Thousand and 00/100ths Dollars ($350,000.00) loan extended to Mr. Quickel and Cajun Carolina, LLC. (R., p. 383). Furthermore, section 10 of the Loan Commitment Letter specifically requires insurance coverage in the amount of the replacement cost for the property listing Respondent as mortgagee/ loss payee on the policy. (R., p. 384). There is no question that this requirement was a material term of the loan commitment. It is important to note that Mr. Quickel held no legal or equitable ownership interest in the property, either at the time of, or after, the Loan Commitment Letter's issuance. Mr. Quickel was a tenant residing at the property, which was owned, since September 11, 2007, by Appellant. While Mr.

Quickel may have had an insurable interest in the contents of the residence, he would not have been able to obtain an insurance policy covering the structure himself, having no ownership interest in the subject property. It is also of import, that the Loan Commitment Letter specifically provides that the loan documents take precedence over provisions of the Loan Commitment, should any conflict between them exist. (R., p. 384).

On April 27, 2009, Appellant appointed Mr. Quickel as her attorney in fact for the purposes of this transaction. (R., pp. 386-387). In doing so, Appellant specifically references the amount of the loan, $350,000.00 and the institution from which Mr. Quickel was to obtain the loan, Respondent, Horry County State Bank. (R., p. 386). This is intriguing, especially in light of Appellant's testimony on direct examination in Respondent's case in chief. Appellant was asked whether she was aware that Mr. Quickel was applying for a loan from Respondent, to which Appellant replied: "sometime during the process I did hear about that, yes." (R., p. 217, lines 13-15). Appellant was asked whether she was aware that the subject property was going to be pledged as collateral for the loan, to which her response was: "before he got the loan, that discussion was held." (R., p. 217, lines 16-18). Appellant was further asked whether Mr. Quickel had been granted the authority to negotiate a loan using her property as collateral, to which she replied: "I did pledge the property." (R., p. 217, line 23- p.218, line 1). After being further pressed, Appellant admitted that Mr. Quickel possessed the authority from her to negotiate and obtain a loan from Respondent using her property as collateral, and that she knew he was in fact, attempting to do so. (R., p. 218, lines 2-23). Appellant's answers to these questions were intentionally evasive and were an attempt to obfuscate the truth, although Appellant eventually answered affirmatively. Appellant had to have known the terms of the transaction, because several of the material terms were notably mentioned in the Specific Power of Attorney.

Additionally, the Specific Power of Attorney authorizes Mr. Quickel to procure a $350,000.00 loan from Respondent and execute a note evidencing that debt; which was unnecessary. Mr. Quickel did not need the authority from Appellant to do those things, if she was only pledging property to be used as collateral as she has claimed. Yet she granted to Mr. Quickel unlimited authority with regard to this transaction. Appellant has argued that the Specific Power of Attorney does not expressly authorize Mr. Quickel to obtain insurance coverage, nor does it mention insurance coverage, and thus this act was not contemplated nor intended. However, this argument is unpersuasive as the document itself indicates that the enumerated powers are not a limitation, but exemplify the general powers he was intended to possess.

At the closing, Mr. Quickel executed an Agreement to Provide Insurance covering the subject property. It is significant that this document references insurance policy number 36223-205638 issued by National Security Fire and Casualty Company, the "Carrier", and obtained from Bradham Insurance Agency. (R., p. 424). Incidentally, this is the identical insurance policy at issue in this case. This document however, erroneously identifies Cajun Carolina, LLC as the owner of the property and was signed by Mr. Quickel as Member of Cajun Carolina, LLC. There is no question, that this document was signed after the Specific Power of Attorney, which granted to Mr. Quickel the authority to execute this document. While admittedly, Mr. Quickel purports to have signed it in his individual capacity; this error certainly appears to be based upon Cajun Carolina, LLC mistakenly being identified as the owner of the subject property. There is no question, however, that Mr. Quickel, had the document been executed in his capacity as attorney in fact for Appellant, possessed the authority to bind Appellant to the obligation contained therein, just as he did in executing the Mortgage itself. Furthermore, as was stated above, Mr. Quickel did not, independently of his status as attorney in fact for Appellant, possess

an insurable interest in the subject property. The question remains then, where was the insurance information contained on the Agreement to Provide Insurance obtained from, had Appellant not provided the information, or known about the insurance requirement?

It is unquestionable that the subject Mortgage provided for an assignment of insurance proceeds to Respondent, as well as required Appellant to obtain insurance naming Respondent as a mortgagee/ loss payee on the policy. It is also unquestioned that Mr. Quickel had the authority to bind her to that promise by execution of the subject Mortgage, pursuant to the Specific Power of Attorney. Furthermore, Appellant testified considerably concerning her knowledge that the property was being used as collateral for the loan extended to Cajun Carolina, LLC and Mr. Quickel. (R., p. 217, line 13- p.218, line 16). In fact, this transaction was not the first time that Appellant had pledged collateral for loans obtained by her son. Appellant testified that she had previously pledged collateral, specifically bank stock, for loans obtained by Mr. Quickel from Respondent. (R., p. 217, lines 4-12). This was not a unique scenario for Appellant and Mr. Quickel.

Moreover, Appellant's actions with respect to the insurance policy support Respondent's theory. Appellant has claimed that she purchased the insurance policy for her own benefit because "I had trees that had fallen on a fence. I had the Department of Transportation telling me that trees had to be cut because if people had a wreck I could be sued. The trees were in the way. I had- my son moved into the house in December of 2008 so that was the first time it was occupied since my mother moved out and they had animals. They had horses. They had dogs, cats, lots of vehicles, four-wheelers and all I saw were children playing and other adults in the yard, and so yes, I thought I need insurance for my protection if someone has an accident on that property." (R., p. 236, line 22- p. 237, line 6). However, Appellant did not obtain the insurance

policy until March 9, 2009, at least Three (3) months after her son moved into the subject residence, according to her testimony. Yet she obtained the policy a little more than a month before she agreed to allow her son to pledge the property as collateral for the loan from Respondent. While the original insurance policy was issued prior to the loan closing, the policy was renewed subsequently for the policy period of March 9, 2010 until March 9, 2011. Interestingly, Appellant claimed to have knowledge that the subject property had been pledged to Respondent as collateral for the loan. (R., p. 217, line 13- p. 218, line 16). She knew that a mortgage had been executed on her behalf by her son, Mr. Quickel, incidental to obtaining the loan from Respondent. The subject Mortgage was duly recorded on May 4, 2009 and re-recorded on May 5, 2009. (R., p. 390). Appellant has never denied that she was aware that the Mortgage had been filed. However, Appellant failed, even after knowing that Respondent possessed a lien on the real property and that a mortgage had been filed encumbering that improved real property, to indicate Respondent as a mortgagee or loss payee on the insurance policy which is the subject of this action. Surely, she had absolute, actual knowledge that a lien existed on her property, which she had authorized to be placed there. Also, just as assuredly, when she applied for a renewal of the insurance policy, she was aware that she could have named Respondent as a mortgagee on the insurance policy. It is difficult to believe Appellant's claim that the insurance was obtained solely for her benefit based on the timeline of events. Even if Appellant is given the benefit of the doubt with respect to obtaining the original insurance policy, it becomes increasingly more difficult when considering the renewal policy, because at that time, she had actual knowledge of the existence of the lien. Her failure to name Respondent on the policy at that time, with the knowledge she possessed, was at best negligent and at worst intentional.

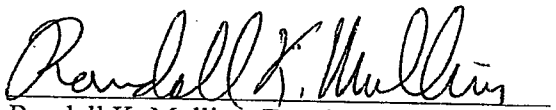
Clearly, Appellant's actions indicate that the Trial Court's findings and subsequent ruling was correct. As such, the Trial Court's determination should be affirmed.

CONCLUSION

In summary, Appellant contracted and covenanted in the Mortgage to provide insurance coverage to Respondent concerning the subject property which was pledged as collateral for a loan obtained by Appellant's son. Appellant failed to perform this covenant, instead insuring the property for her own benefit. Although the scenario presented in this case is unique, the Trial Court properly applied the equitable principles espoused by the case law of this State in finding that Respondent had an equitable lien upon the insurance proceeds, and that the assignment provision contained in the subject Mortgage survived the foreclosure and subsequent cancellation of the Mortgage in the public record. Therefore, the Trial Court's Order granting Respondent possession of the escrowed insurance proceeds should be affirmed.

Respectfully submitted,

MULLINS LAW FIRM, P.A.



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Dated: December 12, 2014
North Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate Case No. 2014-001285

National Security Fire and Casualty Company, Plaintiff

-vs-

Rosemary Jenrette, a/k/a Rosemary Long Jenrette and Horry County State Bank, Defendants,

Of whom

Rosemary Jenrette a/k/a Rosemary Long Jenrette is the Appellant

And

Horry County State Bank is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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Dated: December 12, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate Case No. 2014-001285

National Security Fire and Casualty Company, Plaintiff,

v.

Rosemary Jenrette, AKA Rosemary Long Jenrette and Horry County State Bank, Defendants,

Of whom

Rosemary Jenrette, AKA Rosemary Long Jenrette is the Appellant,

and

Horry County State Bank is the Respondent.

FINAL REPLY BRIEF OF APPELLANT

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I. THE PROMISSORY NOTE IS NOT SUFFICIENT EVIDENCE TO ESTABLISH AN EQUITABLE LIEN.

A. The Promissory Note and Paragraph 17(I) of the Mortgage do not establish a Debt owed by Appellant to Respondent.

Respondent claims that it sufficiently satisfied each element of an equitable lien, and that the Trial Court correctly ruled in favor of Respondent. In support of its claim that there was a debt, Respondent claims that Appellant was obligated and bound by the Promissory Note, as well as the Mortgage, even though Appellant was not the debtor named in the Promissory Note. However, the parties do not dispute that Appellant was not a party to the Promissory Note.

A promissory note remains subject to Article 3 of the UCC when it is secured by a real estate mortgage. *Swindler v. Swindler*, 355 S.C. 245, 251, 548 S.E.2d 438, 441 (Ct. App. 2003). Pursuant to S.C. Code Ann. § 36-3-401(a) (2013), a person is not liable on an instrument unless the particular person signed the instrument. A maker of a promissory note means a person who signs or is identified in a note as a person undertaking to pay. S.C. Code Ann. § 36-3-103(a)(7) (2013). "In South Carolina, a mortgage is a mere security for a debt." *Blackwell v. Blackwell*, 289 S.C. 470, 472, 346 S.E.2d 731, 732 (Ct. App. 1986). "Care must be taken to remember that a security instrument is not a debt; at most it is evidence of a debt." *Id.* In *Chase Home Finance, LLC v. Risher*, 405 S.C. 202, 208-209, 746 S.E.2d 471, 475 (Ct. App. 2013), the South Carolina Court of Appeals held that the Master correctly determined that a mortgagee failed to establish an equitable lien when the Master found that the mortgagee was required to show a specific debt owed from the property owner, that such a showing of a

debt from the property owner was necessary for an equitable lien to attach, and that the mortgagee was required to show an expressed affirmative action from the property owner to make the debtor's debt her own debt.

On May 1, 2009, Michael Brooks Quickel ("Quickel"), in his capacity as member of Cajun Carolina, LLC ("Cajun"), executed and delivered the Promissory Note, wherein Cajun, as maker, promised to pay the principal sum of $350,000.00, together with interest as set forth therein (R. p. 314) (R. p. 388) (R. p. 139, line 21–p. 140, line 2). Appellant never executed a promissory note or a personal guaranty agreement as the Respondent informed her that she did not have to make any payments or pay any money (R. p. 228, line 25-p. 229, line 3). No monies were delivered or paid to Appellant under the Promissory Note as she did not receive any money from the Respondent (R. p. 246, lines 4-6). The Respondent did not create any special document for the closing of the loan to Cajun, and the Mortgage securing the Promissory Note was a standard mortgage used by the Respondent (R. p. 147, lines 7-22). The Respondent filed a complaint in the case bearing the designation of Civil Action Number 2010-CP-26-04456 ("Prior Foreclosure") on May 19, 2010 (R. p. 313), and commenced foreclosure proceedings seeking judgment of foreclosure and sale of the parcels of real property securing the Promissory Note, including the Subject Real Property owned by Appellant (R. p. 11). Appellant was joined as a defendant in the Prior Foreclosure as the record owner of the Subject Real Property and as a mortgagor (R. p. 4). Respondent did not sue Appellant for any money in the Prior Foreclosure (R. p. 242, lines 2-4). The Master's Order of Foreclosure and Sale did not render any findings as to Appellant since she was not an obligor or guarantor of the debt evidenced by the Promissory Note (R. p. 12), but found that Cajun and Quickel were

liable for the debt (R. p. 318). Respondent, for the first time on appeal, references paragraph 17(I) of the Mortgage to support its contention that Appellant was obligated and bound by the Promissory Note. Pursuant to Respondent's Brief, it appears that Respondent is attempting to create an obligation on the part of Appellant under the Promissory Note through paragraph 17(I) of the Mortgage to establish a debt between Respondent and Appellant, and to show that Appellant's involvement in the loan transaction was more than simply pledging property as collateral. Contrary to Respondent's reasoning, paragraph 17(I) of the Mortgage is not sufficient to obligate Appellant under the Promissory Note so as to create a debt owed by Appellant to Respondent. If Respondent's assertion was in accord with South Carolina law, Respondent could have asserted a cause of action against Appellant in the Prior Foreclosure Action for the indebtedness owed by Cajun under the Promissory Note. The Mortgage executed by Quickel as Appellant's attorney-in-fact is not a debt, but is a mere security for the debt owed under the Promissory Note. Appellant did not sign the Promissory Note and is not identified therein as a person undertaking to pay. Therefore, Respondent has failed to show any evidence of a debt owed to Respondent by Appellant.

B. Appellant was not Obligated and Bound by the Promissory Note.

Respondent contends that Appellant agreed to provide insurance for the better security of the Respondent, and that her purported agreement was evidenced by the Promissory Note and paragraph 17(I) of the Mortgage. In support of its argument, Respondent asserts that Appellant agreed to be bound by the terms and conditions of the Promissory Note pursuant to paragraph 17(I) of the Mortgage, and that her purported agreement shows that her involvement was more than simply pledging property as

collateral. However, the Respondent does not dispute that Appellant was not the debtor named in the Promissory Note.

"Where a mortgage seeks to incorporate by reference a note, both instruments are ordinarily construed together." *Harmon v. Bank of Danville*, 287 S.C. 449, 453, 339 S.E.2d 150, 153 (Ct. App. 1985). The terms of a note will control when there is an irreconcilable conflict with the terms of a mortgage. *Id.* at 454, 339 S.E.2d at 153. "To give effect to the parties' intentions, the court will endeavor to determine the situation of the parties and their purposes at the time the contract was entered." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 205 (Ct. App. 2009). "In respect to the terms of the debt or interest, or the time for its payment, if the note and mortgage contain conflicting provisions, the note will govern as being the principal obligation." *Rhodus v. Goins*, 129 S.C. 40, 41-42, 123 S.E. 645, 646 (1924). The term borrower is defined as "a person or entity to whom money or something else is lent." *Black's Law Dictionary* (7th ed. 1999). In the instant action, the standard language contained in the Mortgage listed Appellant as "Mortgagor," but also referenced her as "Borrower" even though she was not obligated to pay the debt secured by the Mortgage (R. p. 390). The Promissory Note provides that: "I will be in default if any one or more of the following occur: (2) I fail to keep the property insured, if required" (R. p. 389). The terms "I", "me," or "my" is defined in the Promissory Note to mean "each Borrower who signs this note" (R. p. 389). The loan transaction involving the Promissory Note was based upon the April 24, 2009 Loan Commitment which listed Cajun as "Borrower" (R. p. 128, line 13-p. 129, line 21). Jenrette executed the April 27, 2009 POA to pledge part of her real property as collateral prior to Quickel's execution of the Promissory Note on May 1, 2009 (R. p. 217, line 11-p.

219, line 13) (R. p. 388). The Respondent interprets the Mortgage, including paragraph 17(I), to require Appellant, as "Borrower" under the Promissory Note and Mortgage, to obtain insurance for the benefit of the Respondent. Such an interpretation of the terms of the Mortgage would reflect that Appellant, as "Borrower," was personally obligated to pay the indebtedness when due. This could not have been the intention of the parties as Appellant was not included as a "Borrower" in the Promissory Note nor the April 24, 2009 Loan Commitment. The Promissory Note identified Cajun as "Borrower," and Appellant was not an obligor or guarantor of the debt evidenced by the Promissory Note. There is no evidence in the record that shows that Appellant was obligated and bound by the terms and conditions of the Promissory Note. Therefore, the Promissory Note and paragraph 17(I) of the Mortgage do not give rise to an obligation on the part of Appellant to insure the Subject Real Property as better security for the Respondent.

II. ANY PURPORTED ASSIGNMENT OR COVENANT IN THE MORTGAGE IS NOT MATERIAL AS APPELLANT IS NOT PERSONALLY LIABLE UNDER THE MORTGAGE.

Respondent claims that Appellant's argument that she was not the debtor named in the Promissory Note is unpersuasive. In support of its argument, Respondent asserts that its alleged "equitable lien arises solely from the unperformed contract to protect, the theory being that since equity regards as done that which ought to have been done, if the mortgagor, having so covenanted, fails to make the insurance payable to the mortgagee, or to assign the same, the fund arising therefrom is within the operation of the maxim." *Blackwell v. State Farm Mut. Auto. Ins. Co.*, 237 S.C. 649, 654, 118 S.E.2d 701, 704 (1961).

A. Appellant has Produced Authority Supporting Her Argument that the Outcome would be affected in the Scenario Involving a Non-debtor Mortgagor.

Respondent contends that the decisive fact is that there is an agreement between the mortgagor and the mortgagee that the property be insured for the benefit and better security of the mortgagee. However, Respondent's Brief does not provide any response to Appellant's argument that the purported assignment or covenant pertaining to insurance proceeds is of no materiality because Appellant was not obligated to pay the indebtedness and had no personal liability under the Mortgage.

In *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 186 U.S. 434 (1902), the issue was whether an equitable lien should be imposed upon insurance monies to pay the residue of the balance remaining unsatisfied after application of the proceeds realized from the sale of the mortgaged property. *Id.* at 444. The insurance policy was obtained by purchasers who took title to the mortgaged property subject to a mortgage lien. *Id.* at 444, 450. Although the facts are not identical to the instant action, the United States Supreme Court first determined whether there was an obligation imposed by the mortgage on the mortgagor to obtain insurance. *Id.* at 449. The Court assumed that a covenant to insure on the part of the mortgagor existed under the terms of the mortgage. *Id.* at 453. The Court found that the mortgagor had no liability to pay the debt secured by the mortgage, and that the covenant to insure was of no materiality because the mortgagor was under no personal liability. *Id.* at 454, 457.

In the instant action, the Respondent could not bring an action seeking judgment against Appellant for the indebtedness owed under the Promissory Note regardless of whether it elected to bring an action solely on the Promissory Note, solely on the

Mortgage, or on both. The Mortgage does not represent the full payment of the indebtedness owed under the Promissory Note because the indebtedness is the sum owed by Cajun, and the Mortgage is the security instrument for the indebtedness. In the event Appellant breached any covenant in the Mortgage, the Respondent could exercise is remedy of foreclosure and sale as it did in the Prior Foreclosure. However, the Respondent could not impose any personal obligation or seek a monetary judgment against Appellant upon any breach of a covenant in the Mortgage. Therefore, any purported assignment or covenant in the Mortgage pertaining to insurance proceeds is of no materiality because Appellant, like the mortgagor in *Farmers' Loan & Trust Co.*, was not obligated to pay the indebtedness owed under the Promissory Note and had no personal liability under the Mortgage.

B. An Equitable Lien does not arise from the Maxim that Equity regards as done that which ought to have been done.

South Carolina courts have the inherent power to do all things reasonably necessary to ensure just results are reached. *Buckley v. Shealy*, 370 S.C. 317, 323-24, 635 S.E.2d 76, 79 (2006) (citing *Ex Parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983)). "Courts should also balance other equitable concerns when deciding whether a party is entitled to an equitable lien." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 253, 715 S.E.2d 348, 354 (Ct. App. 2011). "The principle 'equity regards as done that which ought to be done' applies in cases where the party seeking equitable relief establishes 'a clear obligation based upon a valuable consideration that another do some act which he has failed to perform.'" *Id.* (quoting *Wilkie v. Phila. Life Ins. Co.*, 187 S.C. 382, 393-94, 197 S.E. 375, 380 (1938)). "A court of equity should scrutinize the conduct

of the plaintiff with the utmost care, to ascertain he has done everything which ought to have been done to secure the action requested." *Id.* at 254, 715 S.E.2d at 355. "'The rule that equity considers as done that which should be done cannot be invoked to create a right contrary to the agreement of the parties.'" *Id.* (quoting *Good v. Jarrard*, 93 S.C. 229, 239, 76 S.E. 698, 702 (1912).

At trial, the Respondent contended that an equitable lien arose as a result of the April 24, 2009 Loan Commitment and the Cajun Agreement to Provide Insurance. However, Quickel did not sign the Cajun Agreement to Provide Insurance as Appellant's attorney-in-fact (*See* R. p. 424). Although the Trial Court ultimately ruled in favor of the Respondent, it found that the Respondent's pre-loan dealings with Quickel were less than thorough with regard to setting forth any insurance requirements (*See* R. p. 13). At the May 1, 2009 closing on the loan to Cajun, Quickel, as a member of Cajun, executed the Promissory Note and the Cajun Agreement to Provide Insurance (R. p. 388) (R. p. 424). The Cajun Agreement to Provide Insurance identifies Cajun as the owner of the properties listed thereon, sets forth the telephone numbers and addresses of Bradham Insurance Agency and the Insurer, and lists the policy number and policy period pertaining to the Insurance Policy (R. p. 424). However, the Respondent failed to require an insurance policy listing it as a loss payee in its pre-loan procedures (*See* R. p. 14). From March of 2009 to the time of the January 15, 2011 fire casualty, Bradham Insurance Agency did not receive any correspondence from the Respondent requesting that the Respondent be named as a loss payee under the Insurance Policy (R. p. 123, line 20-p. 124, line 1). The Respondent did not require Appellant to obtain casualty or liability insurance for its benefit (R. p. 267, lines 2-6), nor did the Respondent contact

Appellant with regard to the Insurance Policy between the time she obtained the Insurance Policy and the time of the January 15, 2011 fire casualty (R. p. 267, lines 11-15). Although the Mortgage was signed by Quickel as Appellant's attorney-in-fact at the May 1, 2009 closing on the loan to Cajun, there is no evidence that Quickel was asked by the Respondent to sign any other document as Appellant's attorney-in-fact. Respondent's reference to the significance of the policy number set forth on the Cajun Agreement to Provide Insurance and the evidence in the record shows that Respondent was or should have been aware that Appellant was the mortgagor, owner of the Subject Property, and named-insured under the Insurance Policy she obtained in March of 2009. Therefore, the Respondent had sufficient information to secure its claim and avoid any loss it claimed to have sustained.

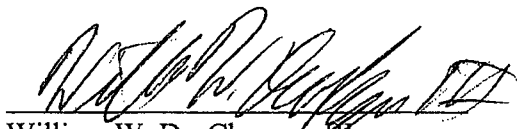
CONCLUSION

The Respondent did not present any evidence that Appellant owed a debt to the Respondent. Appellant was not obligated and bound by the terms of the Promissory Note, and paragraph 17(I) of the Mortgage is not sufficient to establish a debt owed by Appellant to the Respondent. The Respondent has failed to establish a clear obligation on the part of Appellant based upon valuable consideration that she was obligated to obtain insurance for the better security of the Respondent. The Mortgage is the only document relating to the loan transaction that was signed on the Appellant's behalf under the Power of Attorney, dated April 27, 2009. Any purported assignment or covenant of the Mortgage pertaining to insurance proceeds is of no materiality because Appellant was not personally liable under the Mortgage. Equity does not permit the Respondent to attach insurance money due to a non-debtor under an equitable lien theory to satisfy a

deficiency judgment previously awarded against its debtors, Cajun and Quickel. Therefore, the decision of the Trial Court must be reversed because its finding of an equitable lien in favor of the Respondent is against the preponderance of the evidence.

November 19, 2014

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Appellate Case No. 2014-001285

National Security Fire and Casualty Company, Plaintiff,

v.

Rosemary Jenrette, AKA Rosemary Long Jenrette and Horry County State Bank, Defendants,

Of whom

Rosemary Jenrette, AKA Rosemary Long Jenrette is the Appellant,

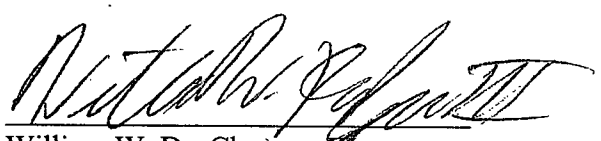
and

Horry County State Bank is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

November 19, 2014



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

National Security Fire & Casualty Company, Plaintiff,

v.

Rosemary Jenrette, AKA Rosemary Long Jenrette, and Horry County State Bank, Defendants,

Of whom

Rosemary Jenrette, AKA Rosemary Long Jenrette, is the Appellant,

and

Horry County State Bank is the Respondent.

Appellate Case No. 2014-001285

Appeal From Horry County
George C. James, Jr., Circuit Court Judge

Unpublished Opinion No. 2016-UP-067
Heard January 14, 2016 – Filed February 17, 2016

AFFIRMED

William W. DesChamps, Jr. and William W.

DesChamps, III, both of DesChamps Law Firm, of Myrtle Beach, for Appellant.

Randall K. Mullins and Jarrod E. Ownbey, both of Mullins Law Firm, PA, of North Myrtle Beach, for Respondent.

PER CURIAM: In this interpleader action, Rosemary Jenrette appeals the trial court's order awarding insurance proceeds to Horry County State Bank (the Bank). Jenrette argues the trial court erred in finding (1) the existence of an equitable lien in favor of the Bank on the insurance proceeds; (2) she was bound by a covenant in the mortgage to insure the subject property; and (3) the assignment provision in the subject mortgage survived the cancellation of the mortgage. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Fibkins v. Fibkins*, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct. App. 1990) ("An action to establish an equitable lien is an action in equity."); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) (holding in an appeal of an action in equity, tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence); *Blackwell v. State Farm Mut. Auto. Ins. Co.*, 237 S.C. 649, 653, 118 S.E.2d 701, 704 (1961) ("It is well settled that if the mortgagor is bound by covenant in the mortgage or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property damaged or destroyed."); *Jones v. Equicredit Corp. of S.C.*, 347 S.C. 535, 543-44, 556 S.E.2d 713, 717-18 (Ct. App. 2001) (stating when a foreclosure sale does not satisfy the mortgage debt, the mortgagee is entitled to collect insurance proceeds if the unpaid amount of the mortgage is in excess of the insurance proceeds).

AFFIRMED.

FEW, C.J., and KONDUROS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable George C. James, Jr., Circuit Court Judge

Civil Action No. 2011-CP-26-09199
Appellate Case No. 2014-001285
Opinion No. 2016-UP-067

National Security Fire and Casualty Company.....Plaintiff,

v.

Rosemary Jenrette, a/k/a Rosemary Long Jenrette,
and Horry County State Bank.....Defendants,

of whom

Rosemary Jenrette, a/k/a Rosemary Long Jenrette, ...Appellant,

v.

Horry County State Bank.....Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Rosemary Jenrette a/k/a Rosemary Long Jenrette ("Jenrette") hereby petitions for rehearing of this Court's February 17, 2016 Opinion No. 2016-UP-067 ("the Opinion") in the above-captioned appeal. *See National Security Fire and Casualty Company v. Rosemary Jenrette a/k/a Rosemary Long Jenrette, et. al.*, Op. No. 2016-UP-067 (S.C. Ct. App. filed February 17, 2016). The Court should grant rehearing and issue a revised

opinion in favor of Jenrette reversing the trial court's order finding an equitable lien in favor of the Respondent on the subject insurance proceeds on the grounds set forth below.

Introduction

This Court affirmed the trial court's finding (1) of the existence of an equitable lien in favor of the Respondent on the subject insurance proceeds; (2) that Jenrette was bound by a covenant in the subject mortgage to insure the subject property; and (3) that the assignment provision in the subject mortgage survived cancellation of the mortgage. The Court's holding overlooks the prior decisions of our appellate courts pertaining to equitable liens and mortgages which establish that no equitable lien exists unless the debt claimed is between the parties.

First, the Court erred in utilizing *Blackwell v. State Farm Mut. Auto. Ins. Co.*, 237 S.C. 649, 118 S.E.2d 701 (1961), to affirm the trial court's order awarding the subject insurance proceeds to the Respondent mortgagee even though the debt due to Respondent was not a debt or obligation of the insured mortgagor, Jenrette. The $117,546.89 deficiency judgment sum owed by Cajun Carolina, LLC ("Cajun Carolina") and Michael Brooks Quickel ("Quickel") represents the residue of the debt in favor of the Respondent remaining unsatisfied after the foreclosure sale of the mortgaged real property, including the subject property insured and owned by Jenrette. This unpaid amount of the debt owed to the Respondent by Cajun Carolina and Quickel is the debt on which the trial court relied in imposing an equitable lien upon the subject insurance proceeds. As demonstrated by the applicable cases determining the existence of an equitable lien, the debt claimed must exist between the parties for an equitable lien to be imposed upon Jenrette's property, which in this case are the subject insurance proceeds payable to Jenrette under an insurance policy she purchased to insure her real property. The Court did not determine

whether the Respondent was required to show a debt between it and Jenrette to establish an equitable lien. This oversight necessitates rehearing.

Second, the Court erred in utilizing *Jones v. Equicredit Corp. of S.C.*, 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001), to affirm the trial court's order awarding the subject insurance proceeds to the Respondent. The trial court analyzed the elements required for the imposition of an equitable lien, but did not find the existence of a debt between Jenrette and the Respondent. The trial court concluded that an equitable lien arose under a covenant in the subject mortgage, and erroneously found that the $117,546.89 deficiency judgment sum owed by Cajun Carolina and Quickel attached to the subject insurance proceeds. As demonstrated by the applicable foreclosure statutes and the cases pertaining to foreclosures of mortgages secured by real property, a mortgagee cannot attach a deficiency judgment owed by a third party to property belonging to a mortgagor who is not obligated to pay the debt secured by the mortgage. The Court overlooked this in its Opinion and fashioned a remedy not authorized by statute or South Carolina case law.

Third, the Court failed to properly address the ruling of the trial court that Jenrette's reliance upon S.C. Code Ann. § 29-3-660 ("the Deficiency Statute") was misplaced. The statutory mechanism through which a mortgagee can obtain payment for the money due under a mortgage contract is by foreclosure and sale and deficiency judgment. A deficiency judgment is incident to a foreclosure as it ensures full payment of the mortgage debt. The Respondent was unable to obtain a deficiency judgment against Jenrette following the foreclosure and sale of the subject property since she was neither the maker of the promissory note nor the guarantor of the payment of the promissory note secured by the subject mortgage. The trial court concluded that an equitable lien arose under a covenant in the subject mortgage, and erroneously found that the

$117,546.89 deficiency judgment sum owed by Cajun Carolina and Quickel attached to the subject insurance proceeds. The trial court's conclusion that an equitable lien in favor of the Respondent arose under a covenant in the subject mortgage was erroneously based on a contractual obligation.

This Court's Opinion, if not altered, would mean that a mortgagee may recover monies otherwise payable to an insured mortgagor who is not obligated for a debt secured by a mortgage in every foreclosure action in South Carolina wherein a deficiency judgment is sought against parties other than the insured mortgagor who are obligated for the payment of the mortgage debt. The statutory remedy of foreclosure and sale does not permit a mortgagee to obtain payment for money due under a mortgage contract through the imposition of an equitable lien upon the insurance proceeds of a mortgagor who is not personally liable for the mortgage debt. This oversight and the potential unintended consequences in supplemental proceedings and post-judgment executions necessitate rehearing.

Law/Analysis

I. For an equitable lien to arise there must be a debt between the parties.

The Court erred in affirming the trial court's finding of the existence of an equitable lien in favor of the Respondent on the subject insurance proceeds. In reaching its conclusion, the Court relied upon *Blackwell*, 237 S.C. at 653, 118 S.E.2d at 704 ("It is well settled that if the mortgagor is bound by covenant in the mortgage or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property damaged or destroyed."). The Court relied upon *Blackwell* in error as the facts of that case involved an insured who was obligated on a promissory note that was secured by a chattel

mortgage. In *Blackwell*, the insured purchased an automobile and borrowed money to pay the unpaid portion of the purchase price and the insurance premium. *Id.* at 650, 118 S.E.2d at 702. The loan was evidenced by a note that was secured by a chattel mortgage on an automobile. *Id.* at 651, 118 S.E.2d at 702. The bank immediately applied to the insurer for automobile coverage and paid the premium at the time the loan was made. *Id.* at 651, 118 S.E.2d at 703. An equitable lien in favor of the bank was imposed upon the insurance proceeds to the extent of the chattel mortgage debt. *Id.* at 653, 118 S.E.2d at 704. However, the South Carolina Supreme Court did not discuss or analyze the elements required to impose an equitable lien in rendering its decision.

"'For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for the payment of the debt.'" *Chase Home Fin., L.L.C. v. Risher*, 405 S.C. 202, 209, 746 S.E.2d 471, 475 (Ct. App. 2013) (quoting *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 250, 715 S.E.2d 348, 353 (Ct. App. 2011)). The debt required to give rise to an equitable lien must be between the parties. *First Union Commer. Corp. v. Nelson, Mullins, Riley, & Scarborough (In re Varat Enters.)*, 81 F.3d 1310, 1315 (4th Cir. 1996). On appeal, the issue in *Chase Home Fin., LLC v. Risher* was whether any deficiency remaining after foreclosure of the mortgage encumbering the defendant's husband's one-half interest in their real property would attach to the defendant's one-half interest. *Chase Home Fin.*, 405 S.C. at 210, 746 S.E.2d at 475. The Master-in-Equity required the plaintiff to show a specific debt owed from the defendant, and found that a showing of a debt from the defendant was necessary for the claimed equitable lien to attach. *Id.* at 208-09, 746 S.E.2d at 475. This Court held that the Master-in-Equity was correct in determining that the plaintiff failed to establish an equitable lien. *Id.*

In the instant action, the Court affirmed the trial court's finding of the existence of an equitable lien in favor of the Respondent even though the debt which the trial court relied upon in imposing an equitable lien was the $117,546.89 deficiency judgment sum owed by Cajun Carolina and Quickel. (R. pp. 18-20.) However, the trial court found that Jenrette obtained insurance coverage for her own benefit, (R. p. 9.), and that she was neither an obligor under the promissory note nor a guarantor thereof. (R. p. 12.) In affirming the trial court, however, this Court did not cite or analyze *Chase Home Fin., LLC* and *First Union Comm. Corp.*, nor did it determine whether the Respondent was required to show a debt between it and Jenrette to establish an equitable lien.

Accordingly, rehearing is necessary in this matter because the Opinion does not comport with South Carolina law. The Court should issue a revised opinion reversing the trial court's order that found the existence of an equitable lien in favor of the Respondent.

II. The debt owed by Cajun Carolina and Quickel cannot attach to the subject insurance proceeds belonging to the insured Jenrette.

The Court affirmed the trial court's erroneous conclusion that the deficiency judgment owed by Cajun Carolina and Quickel attached to the subject insurance proceeds. In reaching its conclusion, the Court incorrectly applied *Jones*, 347 S.C. at 543-44, 556 S.E.2d at 717-18 (stating that when a foreclosure sale does not satisfy the mortgage debt, the mortgagee is entitled to collect insurance proceeds if the unpaid amount of the mortgage is in excess of the insurance proceeds). The Court relied upon *Jones* in error as the facts of that case involved a dispute between a mortgagor who was obligated for the payment of a debt secured by a mortgage and a loan servicer of a mortgagee as to whether the loan servicer held an insurable interest. The loan servicer was listed as the named insured on endorsements to the insurance policy, and the declarations provided that a loss shall be payable to the loan servicer. *Id.* at 541-42, 556 S.E.2d

at 716. The insurable interest of the loan servicer arose from its obligation under a servicing agreement with the mortgagee to maintain insurance, and the loan servicer's contractual liability could be triggered upon its failure to obtain the disputed insurance proceeds. *Id.* at 542-43, 556 S.E.2d at 717. This Court found that the loan servicer had an insurable interest in the mortgaged property because it was exposed to liability to the mortgagee for any losses incurred on the mortgage, and that, unlike a mortgagee's interest, the loan servicer's insurable interest "would not be extinguished even if the mortgage indebtedness is satisfied." *Id.*

The rule espoused in *Jones* which the Court relied upon in affirming the decision of the trial court has no application to an action wherein a mortgagee who is not named as an insured or loss payee seeks the imposition of an equitable lien upon insurance proceeds paid under an insurance policy obtained by a mortgagor who is not obligated to pay a debt secured by a mortgage. Unlike *Jones*, the instant action does not involve the issue as to whether the Respondent has an insurable interest under Jenrette's policy following foreclosure and sale. Rather, the Respondent claims an equitable lien on the subject insurance proceeds otherwise payable to Jenrette. (R. p. 19.) Jenrette insured the subject property and obtained coverage for her own benefit. (R. pp. 8-9.) The endorsements to Jenrette's policy did not name the Respondent as a loss payee, and her policy's declarations did not provide that a loss shall be payable to the Respondent. (R. p. 13.) Jenrette was joined as a defendant in the prior foreclosure action as the record owner of the subject real property and as a mortgagor. (R. p. 4.) The $117,546.89 deficiency judgment in favor of the Respondent was not entered against Jenrette because she was neither an obligor under the note nor a guarantor thereof. (R. p. 12.) However, the trial court concluded that the Respondent was entitled to entire sum of the subject insurance proceeds since the difference between the foreclosure bid and the debt was greater than the

proceeds. (R. p. 18.) The trial court also concluded that the deficiency judgment owed by Cajun Carolina and Quickel attached to the subject insurance proceeds under paragraph 3B of the subject mortgage, (R. p. 19), and that paragraphs 3A and 3B of the subject mortgage stood on their own regardless of whether Jenrette was obligated under the note and no deficiency judgment was obtained against her. (R. p. 18.)

In South Carolina, "a mortgagee's rights under a fire insurance policy are dependent upon the existence of a secured debt owed [to] the mortgagee by the mortgagor-insured." *Ft. Hill Fed. Sav. & Loan Asso. v. S.C. Farm Bureau Ins. Co., 28*1 S.C. 532, 537, 316 S.E.2d 684, 687 (Ct. App. 1984). However, the rule espoused in *Jones*, 347 S.C. at 543-44, 556 S.E.2d at 717-18, which this Court relied upon was applied to the instant action even though Jenrette did not owe a debt to the Respondent, and the Respondent was not a named insured or loss payee under her policy. Hence, there is no need for application of the rule espoused in *Jones* to determine whether the Respondent held an equitable lien on the subject insurance proceeds. Accordingly, rehearing is necessary in this matter because the Opinion does not comport with South Carolina law as a result of its application of the rule espoused in *Jones* to the instant action.

III. The Court did not address the trial court's ruling that Appellant's reliance upon the Deficiency Statute was misplaced. It should reverse the trial court's ruling on this issue.

The trial court determined that Jenrette's reliance upon the Deficiency Statute was misplaced since the Respondent was not seeking a deficiency judgment against her. (R. p. 19.) However, the trial found that an equitable lien arose under a covenant in the subject mortgage and directed payment of the subject insurance proceeds to the Respondent even though the proceeds were payable to Jenrette under an insurance policy she obtained for her own benefit. The imposition of an equitable lien in favor of the Respondent on the subject insurance proceeds

directly conflicts with the Deficiency Statute as Jenrette was not personally liable for the mortgage debt. The Deficiency Statute does not permit a court to adjudge and direct payment by Jenrette of the residue of the mortgage debt remaining unsatisfied after the foreclosure sale because she was not personally liable for the debt.

The Court relied upon *Jones v. Equicredit Corp. of S.C.* in error to affirm the trial court's erroneous conclusion that the Respondent's "recovery of insurance proceeds is the amount of the mortgage debt less the amount . . . bid at the foreclosure sale." (R. p. 18.) This rule, relied upon by this Court and the trial court, is "that when the foreclosure sale does not satisfy the mortgage indebtedness, the mortgagee is entitled to collect insurance proceeds if the unpaid amount of the mortgage is in excess of the insurance proceeds." (R. p. 15.) The Court also relied upon *Blackwell v. State Farm Mut. Auto. Ins., Co.* in error to affirm the trial court's conclusion that an equitable lien in favor of the Respondent arose out of a covenant in the subject mortgage. This rule, relied upon by this Court and the trial court, is "that if the mortgagor is bound by a covenant in the mortgage or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property is damaged or destroyed." *Blackwell*, 237 S.C. at 650-51, 118 S.E.2d at 702. The trial court's conclusion that an equitable lien in favor of the Respondent arose under a covenant in the mortgage is based on a contractual obligation. This conclusion defies the long-standing statutory provisions governing foreclosure proceedings.

The rule relied upon by this Court and espoused in *Blackwell* was applied in that case to an action wherein the insured automobile owner was obligated on a promissory note that was secured by a chattel mortgage. *Id. Blackwell* did not involve a real estate mortgage, an analysis

of the elements required to impose an equitable lien, or the statutory mechanism through which a mortgagee can obtain payment for money lent or due under a real estate mortgage. However, the trial court relied upon *Blackwell* to find an equitable lien arising from a covenant in the subject mortgage. (R. p. 19.) The rule relied upon by this Court and espoused in *Jones v. Equicredit Corp. of S.C.* was applied in that case to an action which involved a determination of whether the insurable interest of a loan servicer of a mortgagee arising from its obligation under a servicing agreement with a mortgagee survived foreclosure. *Jones*, 347 S.C. at 542-43, 556 S.E.2d at 717. This Court and the trial court relied upon *Jones* to find that the Respondent was entitled to the subject insurance proceeds since the bid submitted at the foreclosure sale was less than the balance due on the debt secured by the mortgage. (R. p. 18.) However, *Jones* did not involve a claim for an equitable lien, or the application of the statutory mechanism through which a mortgagee can obtain payment for money lent or due under a real estate mortgage.

South Carolina courts have found "that if the mortgaged premises are sold under a foreclosure decree and fail to bring a sufficient amount to satisfy the debt, the mortgagee is entitled, absent any statutory limitation or waiver on his part, to a personal judgment for the remaining deficiency." *Perpetual Bldg. & Loan Asso. v. Braun,* 270 S.C. 338, 340, 242 S.E.2d 407, 408 (1978). Prior to 1791, South Carolina adhered to the common law principle of mortgages whereby an action to foreclose a mortgage was regarding strictly *in rem. Perpetual Bldg. & Loan Asso.,* 270 S.C. at 341-42, 242 S.E.2d at 409, a real estate mortgage foreclosure proceeding was a proceeding *in personam* as well as *in rem*, meaning that a deficiency judgment could be awarded in a foreclosure action. *See, e.g., Anderson v. Pilgram*, 30 S.C. 499, 9 S.E. 587 (1889) (holding that an action for foreclosure was a proceeding in personam as well as in rem). "The right to a deficiency judgment is provided by statute," *Am. Gen. Fin. Servs. v. Brown*, 376

S.C. 580, 583, 658 S.E.2d 99, 100 (2008), and permits a court in a mortgage foreclosure action to issue a deficiency judgment for the residue of the mortgage debt remaining unsatisfied after judicial sale in cases in which a mortgagor or other person is personally liable for the mortgage debt. S.C. Code Ann. § 29-3-660. This structure exists under the current version of the South Carolina Code and provides that a mortgagee:

> shall be deemed the . . . owner of the money lent or due and the mortgagee shall be entitled to recover satisfaction for such money out of the land by ***foreclosure and sale according to law.***

S.C. Code Ann. § 29-3-10 (emphasis added). In codifying these rights, the General Assembly then established the mechanism—"according to law"—through which a mortgagee can obtain payment for the money lent or due under a mortgage contract—foreclosure sale and deficiency judgment. The General Assembly empowered the court with the duty to determine whether payment for any remaining indebtedness is owed by a mortgagor or guarantor. The Code states:

> In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises ***in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage*** and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

S.C. Code Ann. § 29-3-660 (emphasis added).

Respectfully, this Court overlooked the above statutes in its Opinion. This Court instead affirmed the trial court's decision attaching the deficiency judgment owed by Cajun Carolina and Quickel to the subject insurance proceeds under a covenant in paragraph 3 of the subject mortgage. The South Carolina Supreme Court has "explained that a mortgage represents security for an obligation, [but] not full payment thereof." *Am. Am. Gen. Fin. Servs.*, 376 S.C. at

583, 658 S.E.2d at 100. As a result, the deficiency judgment becomes an incident to the foreclosure to ensure full payment of the debt obligation. *Perpetual Bldg. & Loan Asso., 270* S.C. at 340, 242 S.E.2d at 408. In the instant action, the Respondent was unable to obtain a deficiency judgment against Jenrette following the foreclosure and sale of the subject property since she was neither the maker of the promissory note nor the guarantor of the payment of the promissory note secured by the subject mortgage. (R. p. 12.) However, the trial court found that the Respondent held an equitable lien on the insurance proceeds because the successful bid submitted by the Respondent at the foreclosure sale was less than the balance of the debt secured by the subject mortgage. (R. p. 18.)

As shown above, the foreclosure and sale of the subject property and subsequent deficiency judgment against Cajun Carolina and Quickel was awarded to the Respondent under the statutory mechanism through which the Respondent, as mortgagee, could obtain payment for the money lent or due under the subject mortgage. The Deficiency Statute does not permit a court to adjudge and direct the payment by Jenrette of the residue of the mortgage debt remaining unsatisfied after the foreclosure sale since she is not personally liable for the debt secured by the subject mortgage. Thus, the statutory remedy available to the Respondent was by foreclosure of the subject mortgage and judicial sale of the subject property. By finding the existence of an equitable lien in favor of the Respondent, the trial court applied the deficiency judgment against Cajun Carolina and Quickel to direct payment of insurance proceeds that were payable to Jenrette under an insurance policy she obtained for her sole benefit. This ruling essentially transforms Jenrette into a deficiency judgment debtor even though a deficiency judgment cannot be rendered against her under South Carolina law in an action to enforce the subject mortgage. Therefore, Jenrette's reliance upon the Deficiency Statute is not misplaced.

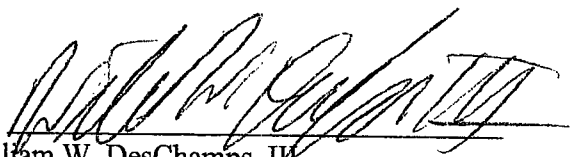
Accordingly, the imposition of an equitable lien in favor of the Respondent on the subject insurance proceeds directly conflicts with the Deficiency Statute as Jenrette was not personally liable for the mortgage debt.

Conclusion

Rehearing is necessary in this matter. Based on the above, the Court should issue a revised opinion reversing the order of the trial court imposing an equitable lien on the subject insurance proceeds in favor of Respondent.

Respectfully submitted,

DESCHAMPS LAW FIRM

By: 

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Myrtle Beach, South Carolina
March 9, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable George C. James, Jr., Circuit Court Judge

Civil Action No. 2011-CP-26-09199
Appellate Case No. 2014-001285
Opinion No. 2016-UP-667

National Security Fire and Casualty Company.....Plaintiff,

v.

Rosemary Jenrette, a/k/a Rosemary Long Jenrette,
and Horry County State Bank.....Defendants,

of whom

Rosemary Jenrette, a/k/a Rosemary Long Jenrette, ...Appellant,

v.

Horry County State Bank.....Respondent.

PROOF OF SERVICE

I certify that I have served one (1) copy of the Appellant's Petition for Rehearing upon counsel for Respondent Horry County State Bank depositing a copy of the same in the United States Mail, postage prepaid, on March 09, 2016, to the following address:

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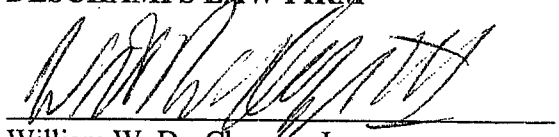
[SIGNATURE ON THE FOLLOWING PAGE]

Dated: March 09, 2016

DESCHAMPS LAW FIRM



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The South Carolina Court of Appeals

National Security Fire & Casualty Company, Plaintiff,

v.

Rosemary Jenrette, AKA Rosemary Long Jenrette, and Horry County State Bank, Defendants,

Of whom

Rosemary Jenrette, AKA Rosemary Long Jenrette, is the Appellant,

and

Horry County State Bank is the Respondent.

Appellate Case No. 2014-001285

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

FILED

Columbia, South Carolina

cc:
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The Honorable George C. James, Jr.