THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

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S.C. SUPREME COURT

Appellate Case No.: 2016-000915

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 ................................ Petitioner,

Horry County State Bank........................................................... Respondent.

# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. The Court of Appeals properly found an equitable lien in favor of Respondent upon the proceeds of an insurance policy where the mortgage required Petitioner to obtain insurance for the benefit of Respondent during the life of the mortgage and Petitioner failed to do so.

II. The Court of Appeals did not find that the deficiency judgment attached to the proceeds of the insurance policy at issue in imposing an equitable lien in favor of Respondent, but instead attached to the proceeds pursuant to a covenant contained in the mortgage between Petitioner and Respondent.

III. Even if the Court of Appeals erred in affirming the Trial Court, any error was harmless and would not have affected the outcome of this action.

## COUNTER-STATEMENT OF THE CASE

The South Carolina Court of Appeals, in an unpublished opinion filed on February 17, 2016, properly affirmed the Trial Court's findings that Respondent was entitled to an equitable lien upon the insurance proceeds; Petitioner was bound by a covenant in the mortgage to insure the subject real property; and that the assignment provision contained in the mortgage concerning the insurance proceeds survived the cancellation of the mortgage. (Appendix, pp.524-525). Petitioner filed a Petition for Rehearing on March 10, 2016, arguing, that the Court of Appeals misapplied the standards set forth in *Blackwell v. State Farm Mut. Auto. Ins. Co.,* 237 S.C. 649, 118 S.E.2d 701 (1961); *Jones v. Equicredit Corp. of S.C.*, 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001); and failed to find that the deficiency judgment statute, §29-3-660, S.C. Code Ann. (Rev. 2007), precluded Respondent from recovering the insurance proceeds at issue in this matter. (App., pp.527-529). The Court of Appeals, on April 22, 2016 denied the Petition for Rehearing. (App., p. 541). The salient background facts and procedural history are as follows. It is important to note at this point, that as a general matter, the facts are undisputed and the issues presented to this Court are issues relating to the application of the law to those undisputed facts.

On September 11, 2007, Petitioner acquired real property located at 104 Country Club Drive, Conway, South Carolina from her mother. (App., p. 236, lines 4-9; pp. 280-81). The property remained vacant from the time that Petitioner obtained the title to the subject real property until Petitioner's son, Michael Brooks Quickel, moved into the residence at the end of December 2008. (App., p. 236, line 25- p. 237, line 2; p. 246, lines 11-16). Prior to Petitioner obtaining title, the property had been insured through Bradham Insurance Agency; however, the property was not insured by Petitioner again until March 9, 2009, after Petitioner's son moved into the residence. (App., p. 237, lines 14-22). On April 24, 2009, Respondent issued a loan commitment letter to Petitioner's son, Mr. Quickel offering to Petitioner's son and his company a loan in the amount of Three Hundred Fifty Thousand and 00/100ths Dollars ($350,000.00) to be secured by Six (6) unimproved lots and the improved lot which is the subject of this action. (App., pp. 383-85). Petitioner's son pledged, as security for the loan, Two (2) unimproved lots and the Petitioner pledged the remaining security including the lot and residence giving rise to this matter. (App., p. 9, ¶3; p. 176, line 15- p. 177, line 4). In the loan commitment, Respondent required mortgages encumbering all of the pledged security, and required that casualty insurance be obtained by Petitioner's son naming Respondent as a loss payee/ mortgagee on the policies of insurance. (App., p. 9, ¶3; p. 383, ¶ 6; p. 384, ¶10).

On April 27, 2009, Petitioner executed a Specific Power of Attorney granting her son, Mr. Quickel, the authority to execute all documents required by Respondent to effectuate the loan closing, referenced the collateral Petitioner ultimately pledged to Respondent as security for the loan, acknowledged that any act taken pursuant to the Specific Power of Attorney was binding on Petitioner and her heirs, and ratified those acts. (App., p. 9, ¶4;

pp. 386-87). The Specific Power of Attorney was recorded with the Horry County Register of Deeds contemporaneously with the Mortgages and other security documents on May 4, 2009. A loan closing was conducted on May 1, 2009 whereby Petitioner's son executed a Promissory Note, both individually and on behalf of his company, as well as a Mortgage encumbering Petitioner's lots pursuant to the Specific Power of Attorney and a Mortgage covering his pledged lots individually. (App., p. 10, ¶6). The mortgages were recorded in the Office of the Register of Deeds for Horry County on May 4, 2009; however, due to a scrivener's error, the mortgage relating to the Petitioner's real property was re-recorded on May 5, 2009. (App., p. 390).

The mortgages executed by Petitioner's son were the standard form mortgage documents utilized by Respondent and, aside from the legal description of the collateral and the Mortgagor's name, were identical. (App., p. 147, lines 14-22). Both mortgage documents executed in this transaction contained the following language concerning insurance:

> **3. Insurance. (A) Borrower shall at its sole expense obtain for, deliver to, and maintain for the benefit of Lender, during the life of the Mortgage, insurance policies in such amounts as Lender may require, in no event less than the full insurable value, insuring the Property against fire, extended coverage and such other insurable hazards, casualties and contingencies as Lender may require including flood damage, and shall pay promptly, when due, any premiums on such insurance policies and on any renewals thereof. The form of such policies, the companies issuing them, and the coverage provided shall be acceptable to Lender and shall contain a non-contributory mortgage endorsement making losses payable to Lender. At least thirty (30) days prior to the expiration date of all such policies, renewals thereof satisfactory to Lender shall be delivered to Lender. Borrower shall deliver to Lender receipts evidencing the payment of all premiums on such insurance policies and renewals. In the event of loss, Borrower will give written notice to Lender, and Lender may make proof of loss if not made promptly by Borrower. 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. (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 or (II) to the replacement, repair or restoration of the portion of the Property damaged or destroyed in a manner determined by Lender; or may release said net proceeds to the Borrower upon such conditions as Lender shall determine; or may apply said net proceeds for any combination of the foregoing; all without affecting the lien of this Mortgage for the full amount secured hereby before such payment took place. If Lender elects to restore the improvements, any balance of such monies after restoration shall either be applied toward the reduction of indebtedness and any other sums secured hereby or shall be paid to Borrower. Lender shall not be responsible for any failure to collect any insurance proceeds due under the terms or any policy regardless of the cause of such failure.**

(App., p. 10, ¶7; p. 11, ¶¶ 9-10; p. 391; p. 395). The mortgage document specifically indicates that the term "borrower" refers to the mortgagor, in this instance, Petitioner. (App. p. 390). Additionally, Petitioner's son executed an Agreement to Provide Insurance at closing which referenced the insurance policy Petitioner had obtained on March 9, 2009; however, admittedly, Petitioner's son executed this document in his capacity as member of Cajun Carolina, LLC and not as Attorney in fact for Petitioner. (App., p. 8; p. 150, line 1-p. 154, line10; p. 185, line 24-187, line 25; p. 424). However, it is clear that Mr. Quickel, with authority from Petitioner, obligated Petitioner in the mortgage, to provide insurance

insuring the real property against fire loss for the benefit and better security of Respondent, regardless of whether the Agreement to Provide Insurance was executed as Petitioner's Attorney in fact, or whether the Agreement to Provide Insurance existed at all.

Subsequently, Petitioner's son became delinquent on the loan payments and Respondent instituted a foreclosure action against Petitioner, Petitioner's son and the limited liability company owned by Petitioner's son; however, Petitioner's son was able to cure the delinquency. (App., p. 190, lines 2-7; lines 11-14). Nonetheless, Petitioner's son, again, fell into arrears and Respondent instituted a second foreclosure action against the parties, including Petitioner on May 19, 2010. (App., p. 11, ¶12; p. 190, lines 15-21; p. 221, line 8- p. 222, line 3). On January 15, 2011, during the pendency of the foreclosure action, but prior to the Master in Equity's Sale, the insured residence located on the subject real property was destroyed by a fire and was adjusted as a total loss. (App., p. 11, ¶13; p. 154, line 13- p. 155, line 3). At the time of the fire loss, Respondent Bank sent a copy of its mortgage encumbering the subject property to Bradham Insurance Agency. (App., p. 120, lines 7-13). Subsequently, Respondent learned that Petitioner had not listed Respondent as a loss payee or mortgagee on the insurance policy, in contravention of the requirement set forth in Paragraph 3 of the mortgage document. (App., p. 11, ¶13). The foreclosure was completed and Respondent was the successful purchaser at the Master in Equity's Auction, resulting in a deficiency judgment against Petitioner's son, Mr. Quickel, and the limited liability company, Cajun Carolina, LLC in the amount of One Hundred Seventeen Thousand Five Hundred Forty Six and 89/100ths Dollars ($117,546.89). (App., p. 12, ¶¶ 13-14; pp. 312-21). On September 2, 2011, the Master in Equity for Horry County, the Honorable Cynthia Graham Howe, executed a Release of Lien Mortgage Satisfaction

as required by statute, specifically §§29-3-780 and 790, S.C. Code Ann. (Rev. 2007). (App., p. 322-23; p. 12, ¶14; p. 242, lines 10-24).

Both Respondent and Petitioner claimed the proceeds of the insurance policy, being held by National Security Fire and Casualty Company, the insurer and due to the cross-claims by the parties for the proceeds, National Security Fire and Casualty Company filed an interpleader action and paid the proceeds into the Horry County Clerk of Court pending the outcome of the interpleader action. (App., p. 7; pp. 43-45). The matter was tried before the Honorable George C. James, Jr., Presiding Judge for the Fifteenth Judicial Circuit, Court of Common Pleas. Following a bench trial, the Trial Court found the existence of an equitable lien in favor of Respondent, and ordered that the entire amount of the insurance proceeds be paid to Respondent. (App., pp. 7-20). Petitioner filed a Motion to Reconsider the Trial Court's Order filed on February 11, 2014, on March 3, 2014. (App., pp. 91- 107). The Trial Court denied Petitioner's Motion by written Order filed June 3, 2014. (App., pp. 2-6). Thereafter, Petitioner appealed the Trial Court's Order to the South Carolina Court of Appeals. After oral argument, The Court of Appeals, in an unpublished *per curiam* opinion, affirmed the Trial Court's decision. (App., pp. 524-25). Following the filing of a Petition for Rehearing by Petitioner, the Court of Appeals denied the Petition on April 22, 2016. (App., pp. 526-42). Petitioner then filed the present Petition for *Writ of Certiorari*.

## ARGUMENTS

I. The Court of Appeals properly found an equitable lien in favor of Respondent upon the proceeds of an insurance policy where the mortgage required Petitioner to obtain insurance for the benefit of Respondent during the life of the mortgage and Petitioner failed to do so.

The South Carolina Court of Appeals properly affirmed the Trial Court's ruling that an equitable lien upon insurance proceeds existed in favor of Respondent where, in the Mortgage, Petitioner agreed to provide insurance coverage for the benefit of Respondent and assigned the proceeds of any insurance policy obtained for the subject property to Respondent. The Court of Appeals' decision in the instant matter is harmonious with the decisions in *Blackwell v. State Farm Mutual Auto. Ins. Co.*, 237 S.C. 649, 118 S.E.2d 701 (1961) and *Jones v. Equicredit Corp. of S.C.*, 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001), as well as various other precedent concerning equitable liens upon insurance proceeds, contrary to Petitioner's contentions. (See also *Knapp v. Victory Corp.*, 279 S.C. 80, 302 S.E.2d 330 (1983); *Cromer v. Cromer*, 293 S.C. 360, 360 S.E.2d 528 (Ct. App. 1987); *Swearingen v. Hartford Ins. Co.*, 52 S.C. 309, 29 S.E. 722 (1898); *Farmers' & Merchants' Nat. Bank of Lake City v. Moore, et al.*, 133 S.E.913 (1928)). Essentially, Petitioner argues that the Court of Appeals erred by affirming the Trial Court's decision and in failing to address whether Respondent was required to prove the existence of indebtedness between Petitioner and Respondent in order to prove an entitlement to an equitable lien on the proceeds of an insurance policy. Petitioner further argues that the prior precedent relied upon by the Trial Court and the Court of Appeals, particularly *Blackwell v. State Farm Auto. Ins. Co.*, "did not discuss or analyze the elements required to impose and equitable lien..." (Petition for *Writ of Certiorari*, p. 8). Petitioner supports this argument by attempting to distinguish the holding in *Blackwell* from the facts presented in this Appeal; in essence arguing that the *Blackwell* case in particular, and other cases, generally, cited by both the Trial Court and the Court of Appeals involve debtor-mortgagors; where the instant case does not. Petitioner concludes, erroneously, that this

nuance eviscerates the rule espoused by *Blackwell*, *Knapp*, *Swearingen*, and *Farmers' & Merchants' Nat. Bank of Lake City* and requires that the Court of Appeals' decision be reversed. Such a result would be inequitable.

As set forth above, Petitioner granted Respondent a mortgage covering Five (5) parcels of real property, including the property at issue here in order to induce Respondent to extend a loan to her son and his company. (App., p. 9, ¶3; p. 10, ¶ 6). Mr. Quickel also granted a mortgage to Respondent encumbering his Two (2) lots pledged as collateral for the loan extended to him and his company. (App., p. 9, ¶3). Of the Seven (7) lots pledged in this transaction, the only improved lot was the one at issue here. It is uncontested that the mortgages executed by Mr. Quickel, personally and on behalf of Petitioner, pursuant to a Specific Power of Attorney, required Petitioner and Mr. Quickel to obtain and maintain insurance on the collateral they pledged, for the benefit of Respondent in Paragraph 3 of the mortgages. (App., p. 10-11, ¶¶7-11). It is also uncontested that neither Mr. Quickel, nor Petitioner obtained the required coverage naming Respondent as a loss payee or mortgagee, in contravention of the terms of the mortgage documents. (App., p. 185, lines 19-23; p. 240, lines 18-21).The plain and unambiguous language contained in Paragraph 3 of the mortgages not only requires insurance coverage, but expressly assigns the proceeds of any policy of insurance to Respondent. Furthermore, Paragraph 17 (I) of the mortgages states: "[i]f the Borrower is not obligated on the debt which this Mortgage secures, then the Borrower acknowledges that Note was made in consideration for this transaction and the owner of the Property agrees to be bound by all the terms and conditions of the Note and Mortgage." (App., pp. 391-92). It is abundantly clear from the contractual language contained in the Mortgage executed on behalf of Petitioner, that Petitioner was required to

carry insurance for the benefit of Respondent; failed to do so; and assigned to Respondent the proceeds of any policy taken out on the real property by Petitioner as further security for the loan extended to her son, Mr. Quickel. The Trial Court and Court of Appeals' interpretation of Petitioner's contractual obligations was consistent with the longstanding jurisprudence of this State concerning this issue.

As early as 1880, the United States Supreme Court opined "it is settled by many decisions in this county that if the mortgagor is bound by covenant 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 destroyed." *Wheeler v. Factors & T. Ins. Co.,* 101 U.S. 439, 442, 25 L.Ed. 1055 (1880) citing to *Thomas's Adm'rs v. Vankapff's Ex'rs,* 6 Gill & J. (Md.) 372. This rule was adopted in South Carolina by at least 1898, where the South Carolina Supreme Court announced the rule in *Swearingen v. Hartford Ins. Co.*, 52 S.C. 309, 29 S.E.722 (1898). The appellate courts of this State have continued to affirm this rule. (See *Farmers' & Merchants' Nat. Bank of Lake City v. Moore*, 135 S.C. 391, 133 S.E.913 (1926); *Blackwell v. State Farm Mutual Auto. Ins. Co.*, 237 S.C. 649, 118 S.E.2d 701 (1961); *Freshwater v. Colonial Production Credit Association*, 286 S.C. 387, 334 S.E.2d 142 (1985); *Lewis v. Aynor Farm Center*, 290 S.C. 167, 348 S.E.2d 537 (Ct. App. 1986)). Furthermore, this rule is recognized in a majority of jurisdictions in this country. *See* 92 A.L.R. 559 (1934).

In *Blackwell*, the facts are as follows. Mr. Blackwell purchased a vehicle using the proceeds of a loan obtained from First National Bank of South Carolina. 237 S.C. at 650, 118 S.E.2d at 702. The Bank secured this loan by a chattel mortgage on the vehicle which

required Mr. Blackwell to maintain insurance listing the Bank as mortgagee on the policy. *Id.*, 237 S.C. at 651, 118 S.E.2d at 702. The Bank purchased an insurance policy from State Farm Mutual Automobile Insurance Company insuring the vehicle and paid the first premium. *Id.*, 237 S.C. at 651, 118 S.E.2d at 703. Before any further premiums were due, the vehicle was involved in a collision with two different automobiles, resulting in approximately $425.00 worth of damage to the vehicle. *Id.*, 237 S.C. at 652, 118 S.E.2d at 703. A dispute arose between Mr. Blackwell and the insurance company concerning the deductible to be applied to the particular scenario. *Id.* Subsequently, Mr. Blackwell died leaving as his only asset, the insured vehicle. *Id.* Ultimately, the Bank requested and received the insurance proceeds pursuant to the chattel mortgage provision allowing such. *Id.* As a result, the Personal Representative of Mr. Blackwell's estate filed suit against the insurance company seeking the insurance proceeds; the Trial Court granted the Estate's motion for directed verdict and awarded the Estate the sum of $325.00. *Id.* The insurance company appealed the ruling and presented the question of whether the Estate was entitled to directed verdict. *Id.*

On appeal, the South Carolina Supreme Court reversed the Trial Court's ruling. *Id.*, 237 S.C. at 655, 118 S.E.2d at 705. In reaching this decision the Court opined:

> **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. *Swearingen v. Hartford Fire Insurance Co.*, 52 S.C. 309, 29 S.E. 722; *Farmers' & Merchants' National Bank of Lake City v. Moore*, 135 S.C. 391, 133 S.E. 913, 47 A.L.R. 1001; Annotation 92 A.L.R. 559. On page 561 of this annotation, it is stated: '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.'**

*Id.*, 237 S.C. at 653-64, 118 S.E.2d at 704. The South Carolina Supreme Court reasoned that the equitable lien arises solely from an equitable maxim. Thus, it can be inferred from the *Blackwell* Court's reasoning that the elements of a "common law" equitable lien theory, as advanced in argument by Petitioner, are inapplicable in the scenario presented in *Blackwell*, as well as in the instant scenario. The equitable lien arises from an equitable obligation and the failure of a covenanting party to perform their equitable obligation in the contract. This is likewise, the reasoning supporting the numerous other cases cited above. (See *Farmers' & Merchants' Nat. Bank of Lake City v. Moore*, 135 S.C. 391, 133 S.E.913 (1926); *Freshwater v. Colonial Production Credit Association*, 286 S.C. 387, 334 S.E.2d 142 (1985); *Lewis v. Aynor Farm Center*, 290 S.C. 167, 348 S.E.2d 537 (Ct. App. 1986); *Wheeler v. Factors & T. Ins. Co.,* 101 U.S. 439, 442, 25 L.Ed. 1055 (1880); *Knapp v. Victory Corp.*, 279 S.C. 80, 302 S.E.2d 330 (1983); *Cromer v. Cromer*, 293 S.C. 360, 360 S.E.2d 528 (Ct. App. 1987)). This issue has been addressed and resolved numerous times by the appellate courts of this State; each time finding an equitable lien in favor of the lender where there is a contractual obligation imposed upon a mortgagor in the mortgage to insure the property for the benefit of the lender.

Petitioner attempts to bolster her argument by citing to the cases of *Planters' Bank v. Globe & Rutgers Fire Ins. Co.*, __ S.C. ____,153 S.E. 385 (1930)[1]; *Farmers' Loan &*

[1] Appellant's counsel cited to this case as being contained in 156 S.C. 453 in Petition for *Writ of Certiorari*, however, Respondent's counsel, after searching the South Carolina Reports could not locate this case in the South Carolina Reports volume cited by Appellant's counsel. Therefore, the South Carolina Reports citation has been omitted and citation to the South Eastern Reporter only is included herein.

*Trust Co. v. Penn Plate Glass Co., et al.*, 186 U.S. 434, 22 S.Ct. 842, 46 L.Ed. 1234 (1902); and *Chase Home Fin., LLC v. Risher*, 405 S.C. 202, 746 S.E.2d 471 (Ct. App. 2013); however, each of these cases can be distinguished factually. It is important to note that although these cases can be distinguished from the instant matter before this Court, these cases still approve of the general rule regarding the existence of an equitable lien in favor of a mortgagee on a policy of insurance obtained in the name of a mortgagor who is required by the mortgage to maintain insurance for the benefit of a mortgagee, espoused by *Blackwell*, *Knapp*, *Swearingen*, and *Farmers' & Merchants' Nat. Bank of Lake City*, among others.

*Planters' Bank* presented a novel set of facts to the South Carolina Supreme Court. Wagener Farms Company owned approximately Five Hundred (500) acres of land. 153 S.E. at 385. Through a series of transactions, Wagener Farms granted Three (3) different mortgages to different lenders, all secured by mortgages encumbering the acreage. *Id.* The second mortgage, in favor of Planters' Bank, required Wagener Farms to insure the existing structures on the real property. *Id.* Subsequently, Wagener Farms leased a portion of the property to a third party who constructed several buildings on the property, retaining the right to remove the buildings after the termination of the lease agreement. *Id.* After the construction of the buildings, the lessee took out a policy of insurance on the structures naming the third mortgagee as loss payee, although the record did not clearly reflect the reasons the lessee elected to do so. *Id.* at 385-86. Consequently, the structures were destroyed by fire and the insurance company paid the proceeds of the policy to lessee and third mortgagee jointly. *Id.* at 386. Thereafter, the first mortgagee instituted a foreclosure action and as a result of the foreclosure and sale, Planters' Bank received a deficiency

judgment against Wagener Farms. *Id.* Prior to the foreclosure action, Planters' Bank made a claim for the proceeds of the insurance policy paid to lessee and the third mortgagee. *Id.* The trial court directed a verdict in favor of the insurance company and the Supreme Court affirmed. *Id.* at 389. In doing so, the Supreme Court acknowledged the general rule espoused by *Penn Plate* and *Swearingen* concerning the entitlement of a mortgagee to an equitable lien upon insurance proceeds when the mortgage requires a mortgagor to insure the property; however, under the factual scenario presented, the Supreme Court declined to grant an equitable lien to Planters' Bank. *Id.* at 387. The Supreme Court reasoned that because it was not the mortgagor that obtained the insurance policy, and there was no connection between the insured and Planters' Bank, there could be no equitable lien on the proceeds of insurance to which Planters Bank was entitled. *Id.* As an additional matter, the Supreme Court questioned whether the buildings constructed by lessee were ever encumbered by Planters' Bank's mortgage, which the Supreme Court seems to have answered in the negative. *Id.* at 389. Unlike the present scenario, the factual scenario in *Planter's Bank*, the lessee who insured the property was not the mortgagor, and thus the lessee was not obligated to insure the property for the benefit of the lender. Based upon the reasoning of the Supreme Court in *Planter's Bank*, it can be inferred that the result may have been different had the lessee been the mortgagor obligated to insure the property for the benefit of the mortgagee.

In *Penn Plate Glass Co.*, the United States Supreme Court held that under the factual scenario presented, and by interpreting precedent from the Commonwealth of Pennsylvania, where the action arose, that the mortgagee was not entitled to an equitable lien on the proceeds of an insurance policy. However, just as with the factual scenario in

*Planters' Bank*, the factual scenario is not analogous to the present scenario. In *Penn Plate Glass Co.*, the Pennsylvania Plate Glass Company mortgaged real property to secure a Two Hundred Fifty Thousand and 00/100ths Dollars ($250,000.00) loan. 186 U.S. at 435. The mortgage did not contain a provision requiring Pennsylvania Plate Glass Company to insure the premises for the benefit of the lender or its bondholders. *Id.* at 186 U.S. at 450. Thereafter, the Pennsylvania Plate Glass Company suffered financial difficulties and a receiver was appointed, ultimately resulting in the sale of its assets to William Kann, subject to the mortgage lien. *Id.* at 186 U.S. 438-39. Subsequently, Kann transferred the property to Penn Plate Glass Company, again subject to the bank's mortgage lien. *Id.* Upon the transfer to Penn Plate Glass Company, no further payments were made to the bank and a foreclosure action was initiated. *Id.* at 186 U.S. 440-41. At this time, Penn Plate Glass Company obtained an insurance policy in its own name and for its own benefit, specifically referencing the mortgage lien, but indicating that the insurance did not cover the interest of the lender or bondholders. *Id.* at 186 U.S. 440. After the foreclosure action was initiated the lender requested that a receiver be appointed stating that the mortgage was not sufficient security for the indebtedness, which was denied. *Id.* at 186 U.S. 441. Lender requested the court to reconsider, before the Order denying the motion for appointment of a receiver was filed, arguing that the mortgage required insurance and that there was a risk of fire loss. *Id.* As a result, counsel for the parties agreed that if the defendants were bound to insure the property for the benefit of the lender, then it ought to be insured, and defendant Kann and an associate agreed to indemnify the bank for any losses resulting from a fire loss, provided that the bank was entitled by virtue of its mortgage to such proceeds. *Id.* at 186 U.S. 441-42. During the pendency of the foreclosure, a fire loss was sustained and an amended

complaint was filed seeking an equitable lien upon the insurance proceeds as well as recovery of its security. *Id.* at 186 U.S. 443. An equitable lien on the insurance proceeds was granted by the trial court. *Id.*

On appeal, the United States Supreme Court affirmed the judgment of the Third Circuit Court of Appeals which reversed the trial court's finding that the bank was entitled to the insurance proceeds. *Id.* at 186 U.S. 435. Although the Supreme Court acknowledged the existence of a right to an equitable lien under a scenario where a mortgage required the mortgagor to insure property for the benefit of the mortgagee and the mortgagor failed to do so; the Supreme Court determined that the factual scenario before it was not analogous to the scenario addressed in *Wheeler*, 101 U.S. 439, 25 L.Ed. 1055 (1880). 186 U.S. at 449, 456. Additionally, the Supreme Court utilized precedent from the Commonwealth of Pennsylvania concerning the effect on a conveyance made subject to a mortgage lien upon the obligations of the grantee to a mortgagee. In applying the Pennsylvania precedent, the Court determined that conveyances made subject to a mortgage lien only created an obligation on the part of the grantee to indemnify the grantor of the real property sold subject to the mortgage, *id est*, that the ultimate grantee was under no higher obligation than that of the original grantor/ mortgagor with regard to the duty to insure a property. *Id.* at 186 U.S. 450-452. The Supreme Court concluded, ultimately, that the Penn Plate Glass Company was entitled to the proceeds of the insurance policy at issue because the mortgage document did not require the original mortgagor, Pennsylvania Plate Glass Company to insure the property for the benefit of the lender or its bondholders and that the argument advanced by the lender concerning allegations of bad faith on the part of the defendants with regard to opposing lender's motion to appoint a receiver was unpersuasive..Clearly,

the factual scenario presented by the *Penn Plate Glass Co.* opinion is distinguishable and does not support Petitioner's argument; especially since the United States Supreme Court acknowledged the general rule applied in this matter by both the Trial Court and the South Carolina Court of Appeals.

With regard to *Chase Home Fin., LLC v. Risher*, 405 S.C. 202, 746 S.E.2d 471 (Ct. App. 2013), this too is factually distinct from the case at bar. In *Risher*, a husband and wife purchased a home with the aid of a substantial loan from a lender, secured by a mortgage lien on the property, which was later assigned to JP Morgan Chase Bank. 405 S.C. at 206, 746 S.E.2d 473-74. Both husband and wife were named in the deed, but only husband was obligated on the Promissory Note. *Id.* Peculiarly, wife was not required, and as a result did not execute the mortgage document. *Id.* Approximately a year after purchasing the real property, husband died, and wife was appointed personal representative of husband's estate, which included an undivided one-half interest in the residence. 405 S.C. at 207, 746 S.E.2d 474. No payments were made to lender pursuant to the Note and Mortgage following husband's death. *Id.* Thereafter, lender initiated suit against wife seeking foreclosure of its mortgage lien, an equitable lien upon wife's interest in the property and a judgment against wife for unjust enrichment. *Id.* After a trial before the master in equity, the trial court found that lender could proceed with its foreclosure as to husband's one-half undivided interest, but denied the remaining relief sought by lender, including the equitable lien requested. *Id.* Lender appealed and the South Carolina Court of Appeals affirmed, holding that lender failed to establish the elements for an equitable lien and that lender failed to show any act of husband that encumbered wife's interest in the property, or that husband possessed the authority to do so. 405 S.C. 209-11,746 S.E.2d 475-76. The

reasoning of the Court of Appeals was that the lender had sufficient knowledge to avoid the loss it sustained and could have taken steps to correct the omission of wife from the mortgage document, but failed to take those steps. 405 S.C. at 214746 S.E.2d 477. As with the previous cases, the factual scenario present in the instant matter is in no way analogous to the precedent Petitioner implores to aid her argument.

Because the mortgage executed by Petitioner's son, under her authority, required of Petitioner to obtain and maintain insurance for the benefit and further security of Respondent; an obligation she failed to meet; the Trial Court and the Court of Appeals properly resolved the question of entitlement to the insurance proceeds in holding that Respondent was permitted an equitable lien on the proceeds pursuant to *Blackwell.* At its heart, this matter is resolved by the application of a fundamental equitable maxim to a contractual agreement. The Trial Court and Court of Appeals correctly weighed the equities and rendered the appropriate result.

II. The Court of Appeals did not find that the deficiency judgment attached to the proceeds of the insurance policy at issue in imposing an equitable lien in favor of Respondent, but instead attached to the proceeds pursuant to a covenant contained in the mortgage between Petitioner and Respondent.

Petitioner argues that the South Carolina Court of Appeals committed reversible error by imposing an equitable lien on the insurance proceeds in favor of Respondent, in that its decision conflicts with the deficiency judgment statute, §29-3-660, S.C. Code Ann. (Rev. 2007). Specifically, Petitioner argues that because she was not obligated to Respondent on the Promissory Note and no deficiency judgment was rendered against her, the imposition of the equitable lien was inappropriate. As additional arguments, Petitioner contends that the Court of Appeals also erred in applying the rule from *Jones v. Equicredit Corp. of S.C.*, 347 S.C. 535, 556 S.E.2d 713 (Ct. App. 2001) to this matter and in failing to address

whether a deficiency judgment entered against a third party could attach to insurance proceeds belonging to a mortgagor who was not liable on the debt instrument. Petitioner's arguments are incorrect and exhibit a conflation of the material issues involved in this appeal, which Respondent will address below.

First, it is important to note that neither the Trial Court, nor the Court of Appeals, held that the deficiency judgment award against Mr. Quickel and Cajun Carolina, LLC attached to insurance proceeds at issue here, which leads to the obvious conclusion that Petitioner's reliance upon §29-3-660, S.C. Code Ann. (Rev. 2007) is misplaced. Specifically, the Trial Court acknowledged that that Respondent was "not seeking a deficiency judgment against Mrs. Jenrette. It claims an equitable lien on insurance proceeds to which Mrs. Jenrette would otherwise be entitled." (App., p. 19, ¶13). Because of this, contrary to Petitioner's argument, the deficiency statute is not applicable in this matter, which the Trial Court correctly ascertained. Respondent believes that Petitioner's confusion regarding the deficiency judgment is a result of the Respondent's confirmation, both at trial and on appeal that if Respondent prevailed, it would apply the insurance proceeds to the balance remaining due on the indebtedness. (App., p. 19, ¶13). This affirmation by Respondent is a result of the necessity to reduce the balance due because the insurance proceeds represent additional and further security for the repayment of the debt, not as Petitioner asserts, because it is applying the deficiency judgment to the insurance proceeds. As the Trial Court also acknowledged, this result may be a hollow result to Petitioner, but Respondent must so apply the insurance proceeds. (App., p. 19, ¶14). Regardless, the application of the insurance proceeds to the remaining balance due on the indebtedness to Respondent is not related to the outstanding deficiency judgment aside from the fact that the deficiency

judgment demonstrates that the mortgage indebtedness was not satisfied by the foreclosure sale of the collateral. This leads to Petitioner's contention that the Court of Appeals misapplied the *Jones* case in its opinion affirming the Trial Court in this matter.

Petitioner asserts that the Court of Appeals, and by extension, the Trial Court, erred in applying *Jones* to this case. Specifically, there are two principles contained in *Jones* that were applied to the instant case by both the Trial Court and the Court of Appeals, first: "Ordinarily, the rights of a mortgagee to insurance proceeds are determined at the time of a fire loss. *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 201,447 S.E.2d 869, 870 (Ct. App. 1994). However, a mortgagee's rights under an insurance policy are terminated, if after a fire loss, the underlying debt is satisfied by a purchaser at a foreclosure sale. *Id.* at 200-01, 447 S.E.2d at 870." *Jones*, 347 S.C. 535, 543, 556 S.E.2d 713 (Ct. App. 2001). Secondly: "[f]urthermore, the waiver of deficiency in the foreclosure action would not have prevented" lender "from pursuing the insurance proceeds. A mortgagee who waives deficiency 'simply elects to rely solely on the mortgage security for satisfaction of his debt...' *Sellars v. First Colonial Corp.*, 276 S.C. 548, 551, 280 S.E.2d 805, 806 (1981). By waiving deficiency, a mortgagee relinquishes only the right to pursue assets of the mortgagor over and above those covered by the mortgage. *Id.* We find" lender's "waiver of deficiency would not have extinguished its right to the insurance proceeds resulting from damage to the property prior to its sale." *Id.* at 544, 556 S.E.2d 713. In reviewing the Court of Appeals opinion, which stated that its ruling was based upon prior precedent, indicated in the parenthetical referencing *Jones*: "... 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." (App., p. 525). It is clear that this

reasoning was the basis for the reference to *Jones*, even though Petitioner's recitation and discussion of the facts involved in *Jones* is correct. Nonetheless, Petitioner's position that the application of the *Jones* case to the instant matter was needless is mistaken. The reason both the Trial Court and Court of Appeals included the reference to *Jones* in their rulings is, presumably, due to Petitioner's argument at both levels of this litigation that the satisfaction of the mortgage lien as required by §§29-3-780 and 790, S.C. Code Ann. (Rev. 2007) and the acquisition of a deficiency judgment by Respondent against Petitioner's son and his business entity rendered the mortgage indebtedness satisfied. This argument advanced by Petitioner at both stages of this litigation was unpersuasive due to reasoning contained in *Jones*. Now, Petitioner argues that the inclusion of the principles which fundamentally contradict her argument should be excluded from the Court of Appeals opinion, simply because they stand in direct opposition to her argument. This is plainly disingenuous.

The remainder of Petitioner's argument in Section II of her Petition for *Writ of Certiorari* seemingly advances her presupposition that Respondent's only remedy is to pursue the deficiency judgment against Mr. Quickel and his business entity; and that in essence, the establishment of an equitable lien against the insurance proceeds acts as to impose a deficiency judgment against Petitioner. However, Petitioner ignores the fact that the insurance requirement contained in the Mortgage executed under Petitioner's authority, created an affirmative obligation on behalf of Petitioner to insure the property as additional security for the repayment of the debt the mortgaged property secured and for Respondent's benefit and that Petitioner, by the plain and unambiguous language contained in the mortgage document assigned the proceeds of all insurance proceeds to Respondent. These

facts are uncontroverted by Petitioner, as is the fact that Petitioner failed to satisfy this obligation. This position also fails to acknowledge that the result would have been unchanged if Respondent had not sought and received a deficiency judgment in connection with the foreclosure. (See *Jones*, 347 S.C. at 544, 556 S.E.2d 713, (Ct. App. 2001). There still would have been an unsatisfied balance remaining on the mortgage indebtedness. In fact, at the trial, Respondent attempted to introduce evidence of the diminution in value as a result of the fire loss by discussing an appraisal obtained by Respondent. Petitioner's counsel objected saying that value of the property was irrelevant to the task at hand, and ultimately, after a discussion with the Trial Court, stipulated that if Respondent proved that it was entitled to an equitable lien, it would be entitled to the entirety of the proeeeds on deposit. (App., p.159, line 5- p.162, line 1). In light of the applicable case law cited by Respondent in Section I, *supra*, Respondent clearly established its entitlement to an equitable lien based upon the principles contained in *Blackwell,* among others. Thus, Petitioner's argument here is unpersuasive and contrary to well-established principles recognized in this State since 1898. The Court of Appeals properly affirmed the Trial Court's ruling.

III. Even if the Court of Appeals erred in affirming the Trial Court, any error was harmless and would not have affected the outcome of this action.

Even if this Court determines that the Court of Appeals committed any error in affirming the Trial Court's decision, such error was harmless and would not have affected the outcome of this matter. There is overwhelming evidence in the record through two stages of this litigation establishing Respondent's right to an equitable lien on the insurance proceeds. The uncontroverted evidence reveals that the mortgage document required

Petitioner to obtain insurance for the benefit of Respondent; she failed to do so, but did purchase a policy of insurance in her name some Two (2) months prior to the closing of the transaction; the mortgage document assigned the insurance proceeds to Respondent; there was a fire loss; and the mortgage indebtedness was unsatisfied after the foreclosure sale in an amount of One Hundred Seventeen Thousand Five Hundred Forty Six and 89/100ths Dollars ($117,546.89) which exceeded the amount of the insurance proceeds at issue here. While Petitioner argued that she was not obligated on the indebtedness, which is true, Petitioner ignores the section of the mortgage document, specifically Paragraph 17 (I), in which she acknowledges that the transaction was consummated in consideration of the Note and agreed to be bound by its terms as well.

Quite simply Petitioner's only assignments of error, although difficult at times to ascertain, is that the Court of Appeals and the Trial Court erred in applying *Blackwell* and *Jones* to this matter because: (1) *Blackwell* and many other cases interpreting equitable liens on insurance proceeds all involved debtor-mortgagors; and (2) it was unnecessary to include the *Jones* case in the orders because the deficiency judgment statute contradicted the *Jones* holding. As to the first point, Petitioner is correct that this line of cases involve debtor-mortgagors; however, contrary to her argument, there is no indication that the results would have been different had the mortgagors involved in those cases been non-debtors. Certainly this Court can take notice of the fact that there are an infinitesimally few cases which involve a non-debtor mortgagor, especially in light of the fact that rarely do property owners voluntarily encumber their property without receiving some benefit from doing so. This already small number shrinks further when the issue involves not only a non-debtor mortgagor of property, but also insurance proceeds. If the Court were to adopt

the Petitioner's argument distinguishing the obligations of a mortgagor contained in a mortgage document based upon whether the mortgagor is obligated on the debt instrument or not, this Court would then be redefining the concept of when a mortgagee is fully secured. This Court would be reversing more than One Hundred years of jurisprudence were it to adopt Petitioner's argument.

As to the inclusion by both the Court of Appeals and Trial Court of the *Jones* rule in their decisions, which Respondent addressed above, even if it were error to include the rule in the decisions, by Petitioner's own argument it was harmless error because Petitioner has argued that it was unnecessary to the facts of the matter. If the inclusion of the *Jones* rule was unnecessary to adjudicate the rights of the parties, how could it be prejudicial error? Clearly, it was not. Respondent contends that neither the Trial Court, nor the Court of Appeals committed error in deciding the matter presently before this Court. However, should this Court determine the contrary, Respondent would likewise contend that any misgivings contained in the prior rulings in this matter did not alter the outcome shown by the preponderance of the evidence elicited.

## CONCLUSION

The Court of Appeals properly affirmed the Trial Court's decision to grant an equitable lien upon the insurance proceeds to Respondent where Petitioner was required by a condition in the mortgage document to obtain insurance coverage for the benefit of Respondent; Petitioner assigned the proceeds of any insurance policy to Respondent in the mortgage document; and Petitioner, although obligated to do so, failed to obtain coverage listing Respondent as a loss-payee/ mortgagee on the insurance policy. As both the Court of Appeals and the Trial Court determined, the equitable lien arose from the operation of

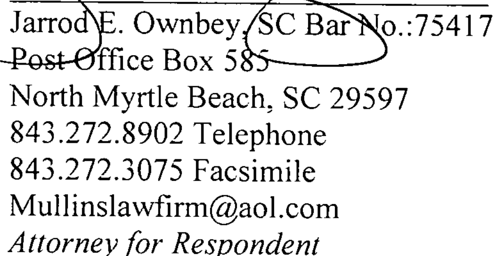
the equitable maxim: "equity regards as done, that which ought to have been done." Petitioner does not dispute that there was an obligation contained in the mortgage to obtain insurance coverage for the benefit of Respondent, nor does she dispute the fact that she failed to satisfy that obligation. Petitioner only argues that Respondent did not establish a debt between Petitioner and Respondent to support a "common law" equitable lien theory and that the Trial Court and Court of Appeals erred in failing to address the viability of attaching a deficiency judgment award obtained against a third party to the insurance proceeds of another. Petitioner's arguments are premised upon several misapprehensions of both the Trial court and Court of Appeals' decisions.

*Blackwell*, as well as numerous other cases of this State seem to suggest that when a mortgagor covenants to insure property for the benefit of the mortgagee, but fails to do so, and instead insures the property solely for the mortgagor's own benefit, the equitable maxim operates to establish an equitable lien upon those proceeds, without regard to whether a "common law" equitable lien theory is proven. Even if, as Petitioner suggests, Respondent is required to show a debt between the parties to establish an equitable lien, Paragraph 17 (I) of the mortgage satisfies that requirement. Specifically, Petitioner acknowledges in that section of the mortgage that she is to be bound by the terms and conditions of the Promissory Note in this transaction. While Petitioner attempts to distinguish the case law approved by the Court of Appeals and Trial Court in this litigation by emphasizing that the case law cited concern debtor-mortgagors; Petitioner has failed to produce any binding authority which refutes the principles contained in *Blackwell* or contains a factual scenario similar to the case at bar. In this regard, Petitioner has failed to show that either the Trial Court or the Court of Appeals erred.

Likewise, Petitioner fails to present a cogent argument regarding the Court of Appeals and Trial Court's failure to address the perceived application of a deficiency judgment to the insurance proceeds to which another is entitled. Petitioner is firmly convinced that the lower courts improperly attached the deficiency judgment obtained by Respondent, against Mr. Quickel, to the insurance proceeds; despite the Trial Court explicitly stating in its Order that this was not the case. Petitioner continued to advance this argument in her appeal, prompting the Court of Appeals to recite the applicable portion of *Jones* in its Opinion. Petitioner then takes issue with the reference to *Jones* in the Court of Appeals Opinion; calling its inclusion "unnecessary." However, beyond Petitioner bristling at the result, she has failed to establish any prejudicial error committed by the lower courts requiring this Court to review this matter. As such, Respondent respectfully requests that this Court deny the Petition for *Writ of Certiorari* and allow the Court of Appeals decision to stand.

Respectfully submitted,

MULLINS LAW FIRM, P.A.



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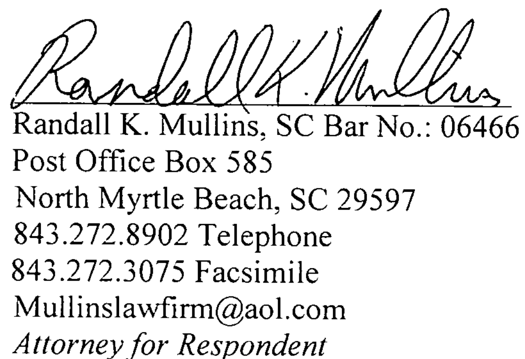

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Dated: July 6, 2016
North Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

RECEIVED
JUL 0 7 2016
S.C. SUPREME COURT

Appellate Case No.: 2016-000915

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 ................................Petitioner,

Horry County State Bank...........................................................Respondent.

## PROOF OF SERVICE

I certify that I have served a copy of the Return to Petition for Writ of Certiorari, on July 6, 2016, addressed to the following:

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[SIGNATURE FOLLOWS ON PAGE 2]

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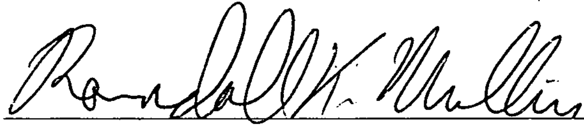

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Dated: July 6, 2016.
North Myrtle Beach, South Carolina