

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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JUL 28 2016

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

**SC Court of Appeals**

The Honorable R. Markley Dennis, Jr.  
Circuit Court Judge

Case No. 2013-CP-10-05329  
Appellate Case No. 2016-000028

JPMorgan Chase Bank, National Association, ..... Appellant,

v.

Delilah Starr Acheson a/k/a Delilah S. Acheson a/k/a  
Starr D. Acheson, individually, as Legal Heir and  
Personal Representative of the Estate of Joseph L.  
Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased,  
Amber Mae Acheson Reed, Joseph Lynn Acheson, Jr.,  
Jacob Lee Acheson, and Daniel Alexander Acheson, as  
Legal Heirs or devisees of the Estate of Joseph L.  
Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased,  
Ronald Lee Dowell, Ruth C. Dowell, and Charleston  
County Revenue Collections, ..... Defendants.

Of whom Delilah Starr Acheson a/k/a Delilah S.  
Acheson a/k/a Starr D. Acheson, individually, as Legal  
Heir and Personal Representative of the Estate of  
Joseph L. Acheson a/k/a Joseph Lynn Acheson, Sr.,  
Deceased, Amber Mae Acheson Reed, Joseph Lynn  
Acheson, Jr., Jacob Lee Acheson, and Daniel  
Alexander Acheson, as Legal Heirs or devisees of the  
Estate of Joseph L. Acheson a/k/a Joseph Lynn  
Acheson, Sr., Deceased, Ronald Lee Dowell, and Ruth  
C. Dowell, are ..... Respondents

**RECORD ON APPEAL**

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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
Case No. 2013-CP-10-5329

JP Morgan Chase Bank, National  
Association,

Plaintiff,

v.

Delilah Starr Acheson a/k/a Delilah S.  
Acheson a/k/a Starr D. Acheson,  
individually, as Legal Heir and Personal  
Representative of the Estate of Joseph  
L. Acheson a/k/a Joseph Lynn Acheson,  
Sr., Deceased, Amber Mae Acheson  
Reed, Joseph Lynn Acheson, Jr., Jacob  
Lee Acheson, and Daniel Alexander  
Acheson, as Legal Heirs or Devisees of  
the Estate of Joseph L. Acheson a/k/a  
Joseph Lynn Acheson, Sr., Deceased,  
Ronald Lee Dowell, Ruth C. Dowell,  
and Charleston County Revenue  
Collections,

Defendants.

ORDER

FILED  
2015 OCT -9 PM 2:55  
JULIE J. ARMSTRONG  
CLERK OF COURT

This matter came before me for a hearing on September 1, 2015, on Defendants' (all except for Charleston County Revenue Collections) Motion for Summary Judgment. Defendants' motion was supported by the Affidavits of Delilah Starr Acheson, Ronald Dowell and Ruth Dowell. Plaintiff presented no Affidavits opposing this motion so that the only evidence presented is that submitted by Defendants. After considering the arguments of counsel for Plaintiff and Defendants, I have determined that Defendants' Motion for Summary Judgment should be granted.

Amot/11

## FACTS

I find the following facts taken from the uncontradicted Affidavits submitted.

In 2008, Ronald and Ruth Dowell, along with their daughter, Delilah Starr Acheson and her husband, Joseph Acheson, owned a house located at 201 E. Huron, Folly Beach, South Carolina. Mr. Acheson applied for a loan from Quicken Loans. In order to secure the loan, all four owners were required to sign a mortgage on the Folly Beach property.

On April 24, 2008, Jean Kellogg, who introduced herself as the closing agent for Quicken Loans, came to the Dowells' house in Gastonia, North Carolina, where Mr. and Mrs. Dowell and Mr. and Mrs. Acheson were present. She had a large stack of documents that she got the four owners to sign. After they had signed everything, Ms. Kellogg gave them a bound document containing the "2008 Mortgage Documents." In that document was an uncompleted form, entitled "Closing Attorney's Statement." That document was to be completed by the attorney closing the loan. There was no attorney present at the loan closing and that document was not signed. Even though Ms. Kellogg was the only person present at the loan closing other than the mortgagors, the documents that the Defendants signed were witnessed by another person who was not present. There is no evidence that a lawyer was supervising the loan closing or had anything to do with the loan closing or the documents prepared although the loan documents implied that an attorney was supervising the loan closing.

The first page of the bound document was a letter from Nathan Kyle, Client Care Specialist for Quicken Loans, to Mr. Acheson. In that letter, Mr. Kyle said nothing about having a lawyer close the loan and, instead, stated that "[a]t the scheduled closing

RM007/2

meeting, the closing agent will open their package and review all of the documents with you....” Ms. Kellogg did open the package and told the Defendants where they should sign.

Attached to the Plaintiff’s Memorandum Opposing Summary Judgment as Exhibit A are three (3) documents allegedly signed by an attorney. The first document states that he “conducted a closing ... by telephone conference call” and the third stated that he “reviewed and explained to the Borrower(s) the terms and provisions of the Note and Mortgage.” According to the only admissible evidence, the affidavits of the Defendants, these claims are not true.

Quicken Loans subsequently transferred the loan and mortgage to the Plaintiff. Mr. Acheson made all of the required loan payments until his death on August 15, 2010. Mrs. Acheson promptly notified the Plaintiff of Mr. Acheson’s death and faxed a copy of the death certificate and her husband’s will. Plaintiff did not file a claim with Mr. Acheson’s estate, which has been handled and closed in both South Carolina and North Carolina.

Although Mrs. Acheson continued to make the loan payments, Plaintiff refused to talk to her, because she was not the “borrower.” Because Plaintiff would not deal with Mrs. Acheson and allow her to either assume or refinance the loan, Mrs. Acheson stopped making the payments in 2013, and this action was filed on September 11, 2013. Mrs. Acheson has tried to resolve the matter with Plaintiff ever since the filing of the action. The Defendants answered and asserted the affirmative defense of unclean hands in their Affirmative Defenses Nos. 4 and 8.

2/10/13

## LEGAL CONCLUSIONS

Defendants moved for summary judgment, because the Plaintiff had unclean hands, because there was no attorney present at the closing of the loan and mortgage that are the subject of this action, the lender, Plaintiff knew of the requirement that a lawyer be involved and actively misrepresented that a lawyer was involved and the Plaintiff has failed and refused to allow the Defendants to refinance or assume the loan and, instead, have sought foreclosure on this property.

As the South Carolina Court of Appeals has stated:

As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that loan closings had to be supervised by an attorney.

Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (S.C. App. 2010). In State v. Buyers Service Co., Inc., 292 S.C. 426, 433, 357 S.E.2d 15, 19 (1987), the South Carolina Supreme Court specifically held that “instructing clients in the manner in which to execute legal documents is itself the practice of law and requires a legal knowledge of statutes and case law.” In that case, the Court discussed case law from other jurisdictions where lay persons may conduct closings but held that “real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court.” 292 S.C. at 434, 357 S.E.2d at 19.

There was no lawyer present at the closing, and the Plaintiff presented no admissible evidence that the documents were prepared by a South Carolina lawyer, reviewed by a South Carolina lawyer or even that a South Carolina lawyer was

RMOT/4

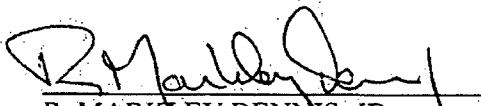
supervising the loan closing from afar. Instead, Plaintiff's counsel attached documents purported to be signed by a lawyer who closed the loan "by telephone." The Affidavits of Defendants clearly deny that any lawyer was involved in the closing. In addition, the Plaintiff's predecessor in interest falsified that a second witness was present. There is no question that Plaintiff knew that it had to have two witnesses and a lawyer closing the loan as set forth in its loan document and as evidenced by the false documents attached as Exhibit A to Plaintiff's Memorandum but elected to go forward with the loan closing without a required witness or a lawyer having anything to do with it other than to apparently sign three documents that he had closed the loan. In addition, Plaintiff has acted in bad faith since the death of Mr. Acheson by failing to deal with Mrs. Acheson or to allow her to assume or refinance the loan.

Plaintiff argued that the cases, Matrix Financial Services Corporation v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011), and BAC Home Loans Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012), controlled in this case, because those cases held that voiding a real estate mortgage secured through the unauthorized practice of law were prospective only from the date of the Matrix opinion. This matter is distinguishable from those cases in that the Plaintiff's predecessor in interest clearly knew that closing a loan without a lawyer was the unauthorized practice of law, provided loan documents that stated that there was a closing attorney who "closed the above mortgage on April 24, 2008" and who "[p]rior to the execution of the Note and Mortgage by the Borrower(s), [] reviewed and explained to the Borrower(s) the terms and provisions of the Note and Mortgage...." See Acheson Affidavit, Exhibit A.

Plaintiff and Plaintiff's predecessor in interest have unclean hands in this mortgage closing in not having a lawyer close the loan, in falsely claiming to have a second witness at the closing, in fraudulently claiming that a lawyer had closed the loan and in refusing and failing to deal with Mrs. Acheson in good faith when she attempted to refinance or assume the loan. As the Supreme Court stated in Matrix, "[l]enders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard." In the present case, not only did the Plaintiff lender ignore this state's legal requirement that a lawyer conduct the loan closing, it further ignored the laws of this State by failing to have a second witness present and then falsifying a witness and in fraudulently claiming in its loan documents that a lawyer had closed the loan. This case differs from a simple loan closing case where the lender did not have a lawyer present at the loan closing, because the lender went above and beyond that failure by falsifying the mortgage document and fraudulently claiming that a lawyer had closed the loan and subsequently dealing with Mrs. Acheson in bad faith.

IT IS, THEREFORE, ORDERED that Defendant's Motion for Summary Judgment should be granted due to the multiple illegal, fraudulent and bad faith actions of the Plaintiff's predecessor in interest in closing this loan.

AND IT IS SO ORDERED.

  
R. MARKLEY DENNIS, JR.  
CIRCUIT COURT JUDGE

October 7, 2015

Charleston, SC

EMD 6

IN THE COURT OF COMMON PLEAS  
Case No. 2013-CP-10-5329

Plaintiff,

Defendants.

ORDER

FILED  
2015 NOV 30 AM 11:19  
JULIE J. ARMSTRONG  
CLERK OF COURT  
2

AND IT IS SO ORDERED!

  
R. MARKLEY DENNIS, JR.  
Presiding Judge

November 23, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JPMorgan Chase Bank, National  
Association,

PLAINTIFF,

VS.

Delilah Starr Acheson a/k/a Delilah S.  
Acheson a/k/a Starr D. Acheson, individually,  
as Legal Heir and Personal Representative  
of the Estate of Joseph L. Acheson a/k/a  
Joseph Lynn Acheson, Sr., Deceased,  
Amber Mae Acheson Reed, Joseph Lynn  
Acheson, Jr., Jacob Lee Acheson, and  
Daniel Alexander Acheson, as Legal Heirs or  
Devises of the Estate of Joseph L. Acheson  
a/k/a Joseph Lynn Acheson, Sr., Deceased,  
Ronald Lee Dowell, Ruth C. Dowell, and  
Charleston County Revenue Collections,

DEFENDANT(S).

(120268.00690)

IN THE COURT OF COMMON PLEAS

CASE NO. 2013-CP-10 - 5329

SUMMONS

Foreclosure - Non-Jury

2013 SEP 11 PM 1:41  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

FILED

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 2712 Middleburg Drive, Suite 200, Post Office Box 2065, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service; except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by the Mortgagee immediately

and separately and such application will be deemed absolute and total in the absence of your application for such an appointment within thirty (30) days after the service of the Summons and Complaint upon you.

YOU WILL ALSO TAKE NOTICE that under the provisions of South Carolina Code §29-3-100, effective June 16, 1993, any collateral assignment of rents contained in the mortgage identified in the Complaint is hereby perfected and Plaintiff hereby gives further notice that all rents shall be payable directly to it by delivery of the same to its undersigned attorneys from the date of default forward. In the alternative, the Plaintiff will move a Judge of this Circuit Court on the tenth (10th) day after service hereof, or as soon as counsel for Plaintiff may be heard, for an Order enforcing the assignment of rents, if any, and/or profits, if any, compelling payments of all such funds covered by the mortgage and/or by status and/or by common law directly to the undersigned attorneys for the Plaintiff, which Motion is based upon the original Note and Mortgage identified in the Complaint therein and attached hereto as well as any applicable laws, statutes or regulations.

YOU WILL ALSO TAKE NOTICE that should you fail to Answer the foregoing Summons, the Plaintiff will move for an Order of Reference of this cause to the Master-In-Equity or Special Referee in/for this County, which Order shall, pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, specifically provide that the said Master In Equity or Special Referee is authorized and empowered to enter a final judgment in this cause with appeal only to the South Carolina Court of Appeals pursuant to Rule 203(d)(1) of the SCAR, effective June 1, 1999.

SCOTT LAW FIRM, P.A.

By: 

Ronald C. Scott, SC Bar #4996

Michael S. Medlock, SC Bar #65395

~~Elizabeth R. Polk, SC Bar #11673~~

Angelia J. Grant, SC Bar #78334

Priti M. Patel, SC Bar #79835

J. Harrison Rushton, SC Bar #100406

Meredith M. Robertson, SC Bar #68322

Kimberly R. Thompson, SC Bar #79161

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ATTORNEYS FOR THE PLAINTIFF

2712 Middleburg Drive, Suite 200

Columbia, SC 29204

(803) 252-3340

September 6, 2013

4842-6481-9989, v. 1

RoA\_0009

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JPMorgan Chase Bank, National  
Association,

PLAINTIFF,

VS.

Delilah Starr Acheson a/k/a Delilah S.  
Acheson a/k/a Starr D. Acheson, individually,  
as Legal Heir and Personal Representative  
of the Estate of Joseph L. Acheson a/k/a  
Joseph Lynn Acheson, Sr., Deceased,  
Amber Mae Acheson Reed, Joseph Lynn  
Acheson, Jr., Jacob Lee Acheson, and  
Daniel Alexander Acheson, as Legal Heirs or  
Devises of the Estate of Joseph L. Acheson  
a/k/a Joseph Lynn Acheson, Sr., Deceased,  
Ronald Lee Dowell, -Ruth-C. Dowell, -and  
Charleston County Revenue Collections,

DEFENDANT(S).

(120268.00690)

IN THE COURT OF COMMON PLEAS

CASE NO. 2013-CP-10

-5329

COMPLAINT

Foreclosure - Non-Jury  
(Deficiency waived)

BY

JULIE J. ARMSTRONG  
CLERK OF COURT

2013 SEP 11 PM 1:41

FILED

The Plaintiff above named, complaining of the Defendant(s) herein, alleges that:

1. This is an action for foreclosure of a mortgage upon certain real estate in Charleston County, South Carolina.
2. Plaintiff is a corporation or other legal entity doing business in the State of South Carolina and is the current holder of the Note and Mortgage described herein.
3. Plaintiff or its counsel has reviewed this mortgage loan for compliance with the Home Affordable Modification Program (HMP), as required by the Administrative Order of the South Carolina Supreme Court issued by Chief Justice Jean H. Toal on May 22, 2009. The servicer for the mortgage loan described in this foreclosure action is participating in the HMP, but the HMP process as specified by U.S. Treasury Department's Supplemental Directive 09-01 has been completed without resulting in a modification because the borrower is not interested in pursuing HAMP and such statement is recorded in the Servicer's records.
4. Some lien on or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.

5. The Defendant(s) herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of Section 15-35-840 of the Code of Laws of South Carolina (1976).

6. Heretofore, under date of April 24, 2008, Joseph L. Acheson made, executed and delivered to Quicken Loans Inc. a certain mortgage note ("Note") in writing wherein and whereby Joseph L. Acheson promised to pay to Quicken Loans Inc. the principal sum of \$363,275.00.

7. In order to secure the payment of said note, the said Joseph L. Acheson, Delilah S. Acheson a/k/a Starr D. Acheson, Ronald Lee Dowell, and Ruth C. Dowell did on the same date, to-wit, April 24, 2008, make, execute and deliver to Mortgage Electronic Registration Systems, Inc. as nominee for Quicken Loans Inc., its successors and assigns, a certain mortgage ("Mortgage") covering real property located in the County and State aforesaid, which said mortgage was recorded in the Office of the Clerk of Court/Register of Deeds for Charleston County, on May 27, 2008, in Book 660, at Page 728; Thereafter, said Mortgage was assigned to JPMorgan Chase Bank, National Association by assignment instrument dated February 8, 2012 and recorded March 13, 2012 in Book 238 at Page 675 in the ROD Office for Charleston County.

The description of the premises as contained in said mortgage is as follows:

ALL THAT CERTAIN PIECE, PARCEL OR LOT OF LAND WITH THE IMPROVEMENTS THEREON, SITUATE, LYING AND BEING LOCATED ON FOLLY ISLAND, IN THE COUNTY OF CHARLESTON AND STATE OF SOUTH CAROLINA, THE SAME BEING A PORTION OF 201 HUDSON, N/K/A EAST HURON AVENUE, AND BEING SHOWN AS A,B,C,D,E,F,A ON A SURVEY MADE BY J. O'HEAR SANDERS, JR., ENTITLED "NORTHERN 75" OF LOT 201 HUDSON AVE. EAST, FOLLY BEACH SUBDIVISION, DATED NOVEMBER 26, 1975, AND RECORDED IN PLAT BOOK W AT PAGE 37, RECORDS OF THE OFFICE OF THE REGISTER OF DEEDS FOR CHARLESTON, SOUTH CAROLINA.

This being the same property conveyed to Joseph L. Acheson and Starr D. Acheson by Deed of Priscilla R. Peterson dated July 17, 1991 and recorded July 18, 1991 in Book O-204 at Page 296 in the ROD Office for Charleston County. Thereafter, Joseph L. Acheson and Starr D. Acheson conveyed a one-half interest to Ronald Lee Dowell and Ruth C. Dowell by Deed dated August 30, 2003 and recorded September 15, 2003 in Book A467 at Page 438 in the ROD Office for Charleston County. Subsequently, Joseph L. Acheson a/k/a Joseph Lynn Acheson, Sr., died on August 15, 2010, leaving the subject property to his heirs or devisees, namely, Delilah Starr Acheson, Amber Mae Acheson Reed, Joseph Lynn Acheson, Jr., Jacob Lee Acheson, and Daniel Alexander Acheson, as is more fully preserved in the Probate records for Charleston County, in Case No. 2011ES10-00445.

TMS No. 328-10-00-011

Property address: 201 E Huron  
Folly Beach, SC 29439

8. Plaintiff is informed and believes that the Mortgage constitutes a first mortgage lien on the subject real estate and improvements thereon, including any mobile/manufactured home located thereon. Plaintiff would further allege and avail itself of the Purchase Money Mortgage Doctrine as may apply to the facts of this action as well as the After Acquired Property Doctrine.

9. Plaintiff and/or its counsel has complied with its obligation(s) under the specific terms of the Note and Mortgage being foreclosed as well as any applicable Federal or State statutes or regulations, including, but not limited to, the furnishing of any notices (where applicable), e.g. post referral loss mitigation solicitation letter and/or acceleration warning letter as to default and post acceleration reinstatement, provided to the obligor(s), if or where applicable.

10. Plaintiff's counsel has read the allegations in this pleading and to the best of his/her knowledge, and upon information and belief, there are good grounds to support it. In addition, Counsel for Plaintiff has, upon information and belief, complied with the Lis Pendens laws of this State by accomplishing a title search and attorney's report in order to make, to the best of his/her knowledge, every party claiming an interest in the property a party to this action.

11. According to the business records of the Plaintiff, which have been made available to its Counsel and also upon information and belief, neither Plaintiff or its counsel is aware of any party, who executed the Note and/or Mortgage, currently being on active duty (after mortgage was originated) or recently discharged from the active duty of the United States Military or a State Guard or Reserve Unit. In addition, Counsel for the Plaintiff has caused and/or conducted a search of the DOD website for which Counsel, upon information and belief, reports that no party, who executed the Note and/or Mortgage, and, to the best of his/her knowledge, is entitled to SCRA protection. If any party has any information or record of a defendant currently being on active duty or recently discharged, it is requested that you contact counsel for the Plaintiff immediately as you may possibly be eligible for protection under the Servicemembers Civil Relief Act (SCRA).

12. According to the business records of the Plaintiff, which have been made available to its Counsel and upon information and belief, neither Plaintiff or its counsel is aware of any party to this action currently being in active bankruptcy and under the protection of the United States Bankruptcy Court ("USBK"). In addition, Counsel for the Plaintiff has caused and/or has conducted a search of the PACER website for which Counsel, upon information and

belief, reports no party, who executed the Note and/or Mortgage, and, to the best of his/her knowledge, is currently eligible for protection of the USBK. If any party has any information or record of a defendant currently being under the bankruptcy protections, it is requested that you notify counsel for the Plaintiff immediately. Any demand for a deficiency is not applicable if a party has received a discharge in bankruptcy during the life of the mortgage, or is currently under the active protection of the bankruptcy courts.

13. In and by the terms of the Note and the Mortgage, it is provided, among other things, that on failure to pay any installment of either principal and interest or any portion thereof when due, or if any of the conditions and requirements in the Mortgage be not complied with, then the whole principal sum and accrued interest shall at the option of the legal holder thereof become at once due and payable without notice, and collectible by foreclosure.

14. In and by the terms of the Note it is further provided that the maker thereof shall pay a reasonable attorney's fee if the Note be placed in the hands of an attorney for collection after default. Any notice or compliance required by the terms of the Mortgage or by state or federal statutes has been given or complied with prior to, or in the commencement of this action and the Defendants shall be forever barred from raising such notice or compliance.

15. The installments of principal and interest falling due from and after February 1, 2012 have not been paid although demand for the payment thereof has been made and the Plaintiff, as the holder of the Note and the Mortgage, has and does hereby elect to declare the entire balance of said principal and interest due and payable at once; that there is now due and owing and unpaid upon the Note and the Mortgage the full and just principal sum of \$346,466.75, together with interest thereon at the rate of 6.375% percent per annum from January 1, 2012, together with reasonable attorney's fees for the collection thereof, escrow advances, late charges, and all other costs of this action allowable by law, equity, or contract, including but not limited to the costs or charges in reporting to this Honorable Court and/or as may be permitted under Rules 54 and 71, South Carolina Rules of Civil Procedure. Pursuant thereto, the Plaintiff has employed the undersigned legal counsel to prosecute these actions herein and add the fees, charges and costs of said counsel to the amount of the total debt as provided for in the Note and Mortgage.

16. Upon information and belief, the Defendants below named claim or may claim a subordinate lien or junior interest upon or interest in the subject property, and therefore in the event there is a surplus from the sale of the subject property, the validity, priority and amount of any such lien or claims will be determined at a hearing subsequent to the sale, in accordance with the Circuit Court Rules 53 and/or 71. The subject Defendant(s) is/are further made a party

due to the similarity in name(s) to the primary defendants against whom they claim or may claim a lien and in-order to clear title to this property as follows:

(a) The Defendant, Delilah Starr Acheson a/k/a Delilah S. Acheson a/k/a Starr D. Acheson, as Personal Representative of the Estate of Joseph L. Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased; in such fiduciary capacity as representative of any person or entity that may be a creditor or claimant against such Estate, and by virtue of the powers granted by Decedent's Will or by statute.

(b) The Defendant(s), Delilah Starr Acheson a/k/a Delilah S. Acheson a/k/a Starr D. Acheson, Amber Mae Acheson Reed, Joseph Lynn Acheson, Jr., Jacob Lee Acheson, and Daniel Alexander Acheson, as Legal Heirs or Devisees of the Estate of Joseph L. Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased, by virtue of any interest claimed under the law of succession (S.C. Code Ann. Section 62-2-101, et. seq.) or under decedent's will.

(c) The Defendant, Charleston County Revenue Collection, by virtue of a judgment against Joseph L. Acheson filed on May 31, 2013 in the original amount of \$193.85 as Case Number 2013-CP-10-03194 in the Clerk of Court Office for Charleston County.

17. The Plaintiff demands no personal or deficiency judgment and any right to the same is specifically waived.

18. Plaintiff may be forced to pay sums for taxes and insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

19. In the event the subject property is sold at Judicial Sale and the successful bidder is a third party, neither the Plaintiff nor Plaintiff's counsel make any warranties or representations as to the subject property on behalf of the third party bidder.

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein and that:

1. The amount due upon the Note and the Mortgage be ascertained and determined under the direction of this Court, together with attorney's fees and all of the costs or charges incurred in prosecuting this action.

2. The Mortgage be declared a first lien (and purchase money mortgage first lien as does apply under the specific facts of this action as well as the After Acquired Property Doctrine) and that Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums and/or costs for inspecting and securing the property which may be due or which may be or have been paid by Plaintiff, with reasonable attorney's fees as well as for all of the costs or charges of this action.

3. The mortgaged premises be sold according to law and the practice of this Court, the equity of redemption as to all defendants be barred and the lien or interest claimed by any defendant be extinguished and that the proceeds of sale be applied as follows:

First, to the costs and expenses of the within action and said sale;

Second, to the payment and discharge of the amount due on the Note and the Mortgage, together with attorney's fees as aforesaid; and

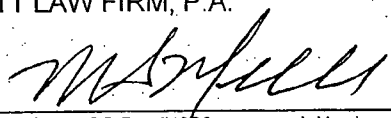
Third, the surplus, if any, be distributed according to law.

4. Appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s) and/or the grantee(s) of the mortgagor(s) and/or tenants occupying or exercising control over the mortgaged premises and hold said assets or the same subject to further Order of this Court.

5. Issue an order directing the Sheriff of Charleston County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary; and issue an order, if necessary, directing the South Carolina Department of Motor Vehicles to issue a Certificate of Title on any mobile/manufactured home collateralized under the security documents of the Plaintiff.

6. For such other and further equitable and/or legal relief as the Court may deem just and proper.

SCOTT LAW FIRM, P.A.

By: 

Ronald C. Scott, SC Bar #4996

Michael S. Medlock, SC Bar #65395

Elizabeth R. Polk, SC Bar #11673

Angelia J. Grant, SC Bar #78334

Priti M. Patel, SC Bar #79835

J. Harrison Rushton, SC Bar #100406

Meredith M. Robertson, SC Bar #68322

Kimberly R. Thompson, SC Bar #79161

Andrew M. Sullivan, SC Bar #100464

ATTORNEYS FOR THE PLAINTIFF

2712 Middleburg Drive, Suite 200

Columbia, SC 29204

(803) 252-3340

September 6, 2013

RoA\_0015

## NOTICE OF DEBT

1. As of September 6, 2013, the amount of the debt is \$412,597.11. The debt amount is made up of principal, interest, late charges, and may include other amounts, such as payment for taxes and insurance. Because many of these items may vary from day to day, the amount due on any given day may be greater. Therefore, if you wish to receive figures to reinstate (bring the loan current) or pay off the loan through a specific date, please contact Scott Law Firm, attorneys for JPMorgan Chase Bank, National Association, by calling (803) 252-3340 or via email at [lossmit@scottlaw.com](mailto:lossmit@scottlaw.com).
2. JPMorgan Chase Bank, National Association is the creditor ("Creditor") to whom the debt is owed.
3. Unless you, within thirty (30) days after receipt of this notice (the "Thirty Day Period"), dispute the validity of the debt or any portion of it, the debt will be assumed to be valid by the debt collector, which is Scott Law Firm, the attorneys for the Creditor.
4. If you notify debt collector, Scott Law Firm, in writing within the Thirty Day Period that the debt or any portion thereof is disputed, Scott Law Firm will obtain a verification of the debt, and Scott Law Firm will mail a copy of that verification to you.
5. If the Creditor named in this notice is different from the original creditor, and if you make a written request to Scott Law Firm within the Thirty Day Period, the debt collector, Scott Law Firm will mail to you the name and address of the original creditor.
6. Written requests should be addressed to the attorneys for the Creditor, the debt collector, as follows:

Scott Law Firm, P.A.  
Attention: Loss Mitigation  
P.O. Box 2065  
Columbia, SC 29202
7. This notice pertains to your dealings with the Scott Law Firm as the debt collector. It does not affect your dealings with the court, and in particular it does not change the time by which you must answer the summons and complaint. Please understand that the summons is a command from the court, not from the Scott Law Firm, and you must follow the instructions on the summons even if you dispute the validity or any portion of the debt. This notice also does not affect Scott Law Firm's relations with the court. Scott Law Firm may file additional legal papers in the court according to the court's rules and the judge's instructions.

**THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION  
OBTAINED WILL BE USED FOR THAT PURPOSE.**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JP Morgan Chase Bank, National  
Association

Plaintiff,

vs.

Delilah Starr Acheson a/k/a Delilah S. Acheson  
a/k/a Starr D. Acheson, individually, as Legal  
Heir and Personal Representative of the Estate  
of Joseph L. Acheson a/k/a Joseph Lynn  
Acheson, Sr., Deceased, Amber Mae Acheson  
Reed, Joseph Lynn Acheson, Jr., Jacob Lee  
Acheson, and Daniel Alexander Acheson, as  
Legal Heirs or Devisees of the Estate of Joseph  
L. Acheson a/k/a Joseph Lynn Acheson, Sr.,  
Deceased, Ronald Lee Dowell, Ruth C. Dowell,  
and Charleston County Revenue Collections,

Defendants.

) IN THE COURT OF COMMON PLEAS

) CASE NO. 2013-CP-10-5329

**AMENDED ANSWER  
AND COUNTERCLAIMS**  
(Jury Trial Demanded)

FILED  
2014 JUL 31 PM 4:30  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

The Defendants, by and through Counsel Christopher Inglese, Esquire would allege as follows:

**FOR A FIRST DEFENSE**

1. Defendants deny each and every allegation not specifically admitted herein except as to those matters which Defendants do not have sufficient information and belief to admit or deny, and as to those, demand strict proof thereof.

**FOR A SECOND DEFENSE**

2. Defendants repeat each and every allegation contained herein as if fully set forth verbatim.

3. In regard to paragraph 1, upon information and belief Defendants admit that this is an action for foreclosure of a mortgage upon certain real estate in Charleston County, South Carolina. Additionally, by way of this answer and counterclaim it is an action to recover damages caused by Plaintiff as enumerated below.

4. In regard to paragraph 2, Defendants are without sufficient information to form a belief.

5. Defendants deny paragraph 3 and demands strict proof thereof.

6. Paragraph 4 states a legal conclusion to which no response is necessary.

7. Paragraph 5 states a legal conclusion to which no response is necessary.

8. Defendants deny paragraph 6 and demands strict proof thereof.

9. Defendants deny paragraph 7 and demands strict proof thereof.

10. As to Paragraph 8, Defendants are without sufficient information to form a belief, and thus strictly deny and demand strict proof thereof.

11. Defendants deny the allegations set forth in paragraph 9 and crave reference to the documents set forth therein and demands strict proof of same and further alleges the Plaintiff's own negligent conduct and omissions has caused the action herein.

12. In regard to paragraph 10, 11, 12 no response is necessary. However, to the extent a response is necessary, Defendants are without sufficient information to form a belief.

13. In regard to paragraph 13, no response is necessary. However, to the extent a response is necessary, Defendants deny all statements inconsistent with the executed Mortgage.

14. As to paragraph 14, and 15, Defendants state that the mortgage speaks for itself and denies all statements inconsistent with the executed Mortgage and thus the Defendants demand strict proof thereof, including but not limited an itemized accounting including all credits paid. However, Defendants would further show that if any sums are owed to Plaintiff, then the amount owed is other than as stated in the Complaint. Consequently, this Court should require a complete accounting of all sums allegedly due under the instruments referenced in the Complaint.

15. Defendants admit paragraph 16, (a)-(b), however Defendants are without sufficient information to form a belief as to paragraph 16(c), and thus strictly deny and demand strict proof thereof.

16. In regard to paragraph 17, no response is necessary. However, to the extent a response is necessary, Defendants deny all statements inconsistent with the executed Mortgage.

17. In regard to paragraph 18, no response is necessary. However, to the extent a response is necessary, Defendants deny all statements inconsistent with the executed Mortgage.

18. In regard to paragraph 19, no response is necessary. However, to the extent a response is necessary, Defendants are without sufficient information to form a belief.

#### **AFFIRMATIVE DEFENSES**

#### **STATEMENT OF FACTS**

19. The subject property located at 201 East Huron, Folly Beach SC, was purchased by Joseph L. Acheson on April 24, 2008.

20. On April 24, 2008, Joseph L. Acheson, executed the Note and Mortgage which is the subject of this foreclosure action along with the below enumerated counterclaims.

21. Defendants Starr D. Acheson, Ronald L. Dowell, and Ruth C. Dowell co-signed the Mortgage which is the subject of this foreclosure action.

22. The subject mortgage was serviced and the payments made by Defendants were collected by the originating lender, Quicken Loans Inc., and later serviced JPMorgan Chase Bank, National Association, (hereinafter "Chase.") The Plaintiff is responsible and liable herein for all of the actions of its "predecessor-in-interest; the owner of the subject mortgage loan and the servicer/agent."

23. On August 15, 2010, Joseph Lynn Acheson, Sr. passed away and Defendant Starr D. Acheson obtained ownership of the property. Defendant Starr D. Acheson continued to make the required mortgage payments to Plaintiff.

24. In order for Defendant Starr D. Acheson to discuss the mortgage with Chase, she was required to provide a copy of the death certificate and probate documents. The documents were provided to the lender as early as September 7, 2010.

25. At the time of Joseph L. Acheson, Sr.'s death, he and Defendant Starr D. Acheson were in the process of a loan modification.

26. Due to the malfeasance, misfeasance and nonfeasance of the Plaintiff regarding their inability to process a transfer of the mortgage to Plaintiff Delilah Starr Acheson after the death of her husband Joseph Acheson, Defendants have suffered.

27. Before September 7, 2010 Defendant Delilah Starr Acheson began contacting Chase and informed Chase of the death of Joseph Acheson. Chase requested

certain documents, which Delilah Starr Acheson provided shortly thereafter including but not limited to: a death certificate, a copy of the deceased will, proof of marriage.

28. From September 2010 until February 2012, Defendants paid the monthly mortgage and requested that Chase follow up on the transfer of the mortgage to Delilah Starr Acheson. However, each month Chase would state that they could not talk to the Defendants because only Joseph Acheson was authorized to which the Defendants would respond that is impossible. Despite having provided the requested documents, the Defendants were forced to call each month to make the payment and relive the loss of Joseph Acheson because the loan had not been transferred.

29. Plaintiffs inability to make a simple transfer has caused the Defendants a great deal of pain and suffering, including sleepless nights, uncontrollable crying, loss of enjoyment of life and more due to the actions and omissions of the Plaintiff.

30. Due to Plaintiff's conduct, Defendants have had to engage the services of an attorney, a counselor, and have taken great expense because of the unreasonable positions of the Plaintiff.

31. The Plaintiff's conduct is further exacerbated by the fact that Chase continues to send correspondence, even as recently as June 2014 to Mr. Joseph Acheson, the deceased husband of Defendant Delilah Starr Acheson.

32. The Plaintiff has failed, refused and/or neglected to disclose to the defendants what options were available to them to avoid foreclosure.

33. Further, it has been reported that the Plaintiff has received TARP (Troubled Asset Relief Plan) funds under the Economic Stabilization Act of 2008 totaling \$ 3 billion dollars.

34. Further, it has been reported that the Plaintiff has entered into a \$13Billion Settlement with the Federal Government of which \$4Billion is directed to homeowners such as the Defendants in this action for the purpose of principal forgiveness, loan modifications and efforts to reduce blight.

35. The purpose of the TARP funds as stated in Public Law 110-343 known as the Economic Stabilization Act of 2008 is as stated below:

**SEC.2. PURPOSES.**

The purpose of this Act are –

- (1) To immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States; and (2) to ensure that such authority and such facilities are used in a manner that –
  - a. Protects home values, college funds, retirement accounts, and life savings;
  - b. Preserves homeownership and promotes jobs and economic growth;
  - c. Maximizes overall returns to the taxpayers of the United States; and
  - d. Provides public accountability for the exercise of such authority.

36. Pursuant to the plans and the authority provided by H.R.1424 Title I §109-110, the United States Treasury has ordered as follows:

Mortgage Foreclosure Mitigation: All recipients of capital investments under the Financial Stability Plan will be required to commit to participate in mortgage foreclosure mitigation programs consistent with guidelines Treasury released as part of its Making Home Affordable Mortgage Modification Program.

<http://www.treasury.gov/initiatives/financial-stability/Pages/default.aspx>

37. The Plaintiff, J.P. Morgan Chase, is a recipient of TARP funds subject to the U.S. Treasury's loan modification program guidelines for the Making Home Affordable Program (MHAP) the relevant portion of which is attached hereto as Exhibit A and which clearly require "Any foreclosure action. . . be temporarily suspended during the trial period, or while the borrowers are considered for alternative foreclosure

prevention options. In the event that the Home Affordable Modification or alternative foreclosure options fail, the foreclosure action may be resumed.” See page 3 of the MHAP Guidelines attached as Exhibit A.

38. The Plaintiff has already been re-numerated for its troubled assets, has sought and been given taxpayer money and agreed to undertake meaningful loan modification with its clients who are facing foreclosure in return for billions of taxpayer dollars. Plaintiff has taken the money and now seeks to recover again from the Defendants through foreclosure even though it has not complied with the loss mitigation requirements under TARP:

39. Furthermore, the \$4Billions dollars settlement money is available to the Plaintiff for principal loan forgiveness, modifications and reduction of blight and other programs.

#### **AFFIRMATIVE DEFENSE NO. 1**

40. Defendants reassert, allege and incorporate herein their statement of facts set out above.

41. Plaintiff has failed to state any claims upon which relief may be granted under SCRCF Rule 12(b)(6).

#### **AFFIRMATIVE DEFENSE NO. 2**

42. Defendants reassert, allege and incorporate herein their statement of facts set out above.

43. Defendants further state that pursuant to the Administrative Order of Justice Jean Toal dated May 2, 2011, Plaintiff may not move forward with setting a hearing date as set forth in paragraph B(2). In accordance with the Administrative Order, Defendants did on or about October 23, 2013 assert their right to foreclosure intervention.

44. Defendants have requested foreclosure intervention and Plaintiff has not performed due diligence. The Complaint is barred by Plaintiff's failure to mitigate damages, if any.

### **AFFIRMATIVE DEFENSE NO. 3**

45. Defendants reassert, allege and incorporate herein their statement of facts set out above.

46. Plaintiff has received a reported \$50 million in TARP funds under the Economic Stabilization Act of 2008, which were meant to relieve banks of their "troubled assets" including Notes and Mortgages, which are in foreclosure. Additionally, Plaintiff is now required to assist homeowners even beyond the TARP MHAP due to the recent \$13Billion settlement with \$4Billions set aside for homeowner assistance, including principal balance forgiveness or reduction.

47. It has also been reported that banks such as the Plaintiff have been paid billions for losses or "troubled assets" which include mortgages that have gone into foreclosure by insurers like AIG and United Guarantee who insured the Plaintiff against this very type of loss through credit default swaps.

48. To allow Plaintiff to come now and take the Defendants' home through foreclosure, sell it at auction and pocket the proceeds amounts to unjust enrichment and is what is known as "double dipping."

### **AFFIRMATIVE DEFENSE NO. 4**

49. Defendants reassert, allege and incorporate herein their statement of facts set out above.

50. The Plaintiff comes to court with unclean hands and is prohibited by reason thereof from obtaining the equitable relief of foreclosure from this Court.

51. The Plaintiff's unclean hands result from the Plaintiff's failure to comply with various Federal laws and regulations as a recipient of TARP funds and meets its requirements under the recent settlement of Federal lawsuit.

52. In addition to failing to comply with these regulations, Plaintiff has already been re-numerated in the amount of over \$50 million dollars from the United States Taxpayers for its "troubled assets" which include the mortgage that is the subject of this case and Plaintiff has failed to provide mortgage foreclosure mitigation programs as required by its acceptance of TARP funds. H.R. 1424 Title I § 109-110.

53. As a matter of equity, this Court should refuse to foreclose this mortgage because acceleration of the note would be inequitable, unjust, and the circumstances of this case render acceleration unconscionable.

54. This court should refuse the acceleration and deny foreclosure because Plaintiff has waived the right to acceleration or is estopped from doing so because of misleading conduct, unfulfilled contractual conditions precedent, and double dipping.

#### **AFFIRMATIVE DEFENSE NO. 5**

55. Defendants reassert, allege and incorporate herein their statement of facts set out above.

56. Plaintiff had no right to file this foreclosure action before performing in accordance with the guidelines and its obligations under TARP, therefore Plaintiff has charged and/or attempted to collect payments from Defendants for attorney fees, legal fees, foreclosure costs, vendor charges, advances, other fees, property preservation charges, inspection fees, late fees, and other charges and advances, and other predatory lending fees and charges that are not authorized by on in conformity with the terms of the

subject note and mortgage. Plaintiff wrongfully added and continues to unilaterally add these illegal charges to the balance Plaintiff claims is due and owing under the subject note and mortgage.

#### **AFFIRMATIVE DEFENSE NO. 6**

57. Defendants reassert, allege and incorporate herein their statement of facts set out above.

58. The mortgage is unconscionable in that it purports to waive rights to which the mortgagor is entitled by law.

59. Specifically, the mortgage is unconscionable in that it seeks to have the mortgagor waive their rights to a notice mandated by federal law at 12 U.S.C. §1701(x)(c)(5).

60. Specifically, the mortgage is unconscionable in that it seeks to have the mortgagor waive his right to due process prior to entry upon the land she owns.

61. Because the mortgage is unconscionable, it cannot be enforced in this action.

#### **AFFIRMATIVE DEFENSE NO. 7**

62. Defendants reassert, allege and incorporate herein their statement of facts set out above.

63. Defendants allege that Plaintiff is not the real party in interest and/or lacks standing and therefore is barred from bringing within the action.

64. Plaintiff has made no allegations and provided no evidence of any kind to establish that it is the holder of the promissory or provided sufficient evidence that it is the proper owner of the mortgage.

### **AFFIRMATIVE DEFENSE NO. 8**

65. Defendants reassert, allege and incorporate herein their statement of facts set out above.

66. Defendants specifically plead as an affirmative defense to the allegations of the Complaint, accord and satisfaction, comparative negligence, negligence, duress, fraud, illegality, laches, statute of limitations, misrepresentation, mistake, payment, release, waiver, standing, lack of consideration, failure to mitigate, unclean hands or any other matter constituting avoidance or affirmative defense which may arise and develop as discovery in this action progresses.

67. Defendants reserve the right to add such further defenses as the facts learned through discovery may warrant.

### **FOR A FIRST COUNTERCLAIM (Unfair Trade Practices Act)**

68. Defendants reassert, allege and incorporate herein their statement of facts set out above in the Defendants' Affirmative Defenses and statement of facts.

69. That the aforementioned acts and practices of the Plaintiff were unfair and deceptive.

70. That the aforementioned acts and practices of the Plaintiff are against public interest and that these acts and practices are capable of repetition.

71. That the Plaintiff's actions were willful and wanton in that the Plaintiff knew or should have known that its conduct was unfair and deceptive and, therefore, a violation of this State's Statutes concerning unfair and deceptive acts and practices.

72. That as a result of the Plaintiff's violation of the Unfair Trade Practices Act, the Defendants have been damaged in that they have incurred various expenses and

fees, they have lost the benefit of the bargain they made with the Plaintiff, and they are to paid more for the house than what it is worth.

**FOR A SECOND COUNTERCLAIM**  
(Unfair Debt Collections Act)

73. Defendants reassert, allege and incorporate herein their statement of facts set out above in the Defendants' Affirmative Defenses and statement of facts.

74. Plaintiff is in violation of state and federal Fair Debt Collection Practices Acts.

75. Plaintiff has caused Defendants mental and emotional distress and suffering due to Plaintiff's pursuit of this action in derogation of its duty to forebear all legal proceedings during the pendency of Defendants' Loan Modification.

**FOR A SECOND CAUSE OF ACTION**  
(Negligence)

76. Defendants reassert, allege and incorporate herein their statement of facts set out above in the Defendants' Affirmative Defenses and statement of facts.

77. Plaintiff owed Defendant a duty of care,

78. Plaintiff breach its duty of care in the following particulars including but not limited to:

- a) In failing to communicate with the Defendant regarding her deceased husband's mortgage,
- b) In failing to accept documents proving her authority to communicate with her regarding the mortgage,
- c) In failing to otherwise use reasonable and prudent business practices and

industry standards regarding the mortgage,

- d) In otherwise failing to act in a reasonable and prudent manner toward the Defendant.

79. As a result of the failures or omissions of Plaintiff they are liable in the amount of actual and compensatory damages, sustained by plaintiff as set forth in this complaint.

80. Defendant has been damages in amount to be determined by the finder in fact including but not limited to general damages, compensatory damages, consequential damages, punitive damages, attorney fees and court costs.

81. The Defendant maintains that the Plaintiff conducted itself, and its principals and agents, in a negligent, willful, wanton, grossly negligent manner thereby breaching the standard of care due to the Plaintiff.

**FOR A THIRD CAUSE OF ACTION**  
(Breach of Contract)

82. Defendants reassert, allege and incorporate herein their statement of facts set out above in the Defendants' Affirmative Defenses and statement of facts.

83. That the Plaintiff and her deceased husband did entered into a contract regarding a loan.

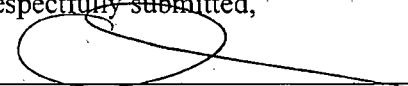
84. That the Defendant breach the Contract by not providing the loan-servicing necessarily a part of the contract either expressly or impliedly and other breaches likely to be discoverable.

85. That as a result of the Defendant's breach of contract the Plaintiff has been damaged in that she has been forced to unnecessarily Defend a foreclosure, expend attorney fees unnecessarily, to relive the death of her husband over and over again and

other damages that are likely to reveal themselves during the course of litigation. The Plaintiff submits that the Defendant should be held liable for the proximate result of their breach of contract since Plaintiff relied on and acted on the recitals, opinions, and representations contained in the written opinions of the Defendant. The damages sustained by the Plaintiff were directly and proximately caused by the lack of disclosures and negligent misrepresentation by Defendants, for which the Plaintiff is entitled to recover actual damages plus punitive damages, and damages for loss of enjoyment of life. Actual damages include the expense of repairs to the home, loss of equity in the home's value, medical bills, loss of enjoyment of the home, plus any incidental and consequential damages to the home during the repairs, plus attorneys fees and all costs herein.

WHEREFORE, having fully answered the Plaintiff's Complaint, the Defendants pray that this Honorable Court do issue its Order dismissing the Plaintiff's Complaint with prejudice, by the trier of fact, issue its Order granting Defendants reimbursement of the cost and expenses incurred in defense of this action, together with reasonable attorney's fees incurred herein and for such other and further relief as this Honorable Court shall deem just and proper.

Respectfully submitted,



Christopher Inglese  
Harrison & Inglese, LLC  
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Ph (843) 277-9785  
Fax (843) 353-2523

*Attorneys for Defendants*

State of South Carolina ) In the Court of Common Pleas  
County of Charleston ) Ninth Judicial Circuit

JP Morgan Chase Bank ) Transcript of Record  
National Association, ) 2013-CP-10-05329

Plaintiff, )

V. )

Delilah Starr Acheson, )

et al., )

Defendants. )

September 1, 2015

Charleston, South Carolina

B E F O R E:

The Honorable R. Markley Dennis, Jr., Presiding  
Judge

A P P E A R A N C E S:

Vance L. Brabham, III, Esquire

Attorney for the Plaintiff

Alice F. Paylor, Esquire

Attorney for the Defendants

SHARON L. VIZER

CIRCUIT COURT REPORTER

**RoA\_0031**

I N D E X

|                              |    |
|------------------------------|----|
| Summary Judgment Motion..... | 3  |
| Certificate of Reporter..... | 11 |

**\*\*NO EXHIBITS WERE INTRODUCED\*\***

1                    Tuesday, September 1, 2015

2                    THE COURT:    JP Morgan Chase vs. Delilah Starr.

3                    There are two motions that are still viable motions?

4                    MS. PAYLOR:    Yes, sir, Your Honor.

5                    THE COURT:    Okay.

6                    MS. PAYLOR:    If we could go forward on the summary  
7 judgment motion --

8                    THE COURT:    Sure.

9                    MS. PAYLOR:    -- that's mine.    And I'm a recent  
10 newcomer to the case.    Alice Paylor on behalf of all the  
11 defendants.    And when I got involved I started looking at  
12 it.    This is a mortgage foreclosure action.    The property  
13 is located on Folly Beach and owned by my client, Starr  
14 Acheson -- or two, my clients, her two parents.    Her  
15 deceased husband was also an owner, and in 2008 he  
16 borrowed money secured by the property in question.    All  
17 four owners signed the mortgage.

18                    There was no attorney involved in the closing.  
19 There was no attorney involved in any way, shape or form.  
20 It was a Quicken Loans matter, and as the case law says  
21 unclean hands was pled as an affirmative defense.

22                    We've submitted the affidavits of three live people  
23 who were all at the closing and they said that there was  
24 one person there, a woman who was not a lawyer, she was  
25 the closing agent, and when they got the documents back

1 it was witnessed by somebody else who was not even at the  
2 closing, and that person, I'm assuming, wasn't a lawyer.  
3 But anyway, there was even a sheet in there where an  
4 attorney was supposed to sign off on it and he didn't  
5 even -- there was no attorney's signature on that.

6 There's a long line of cases in South Carolina  
7 that's the unauthorized practice of law, unclean hands,  
8 the mortgage is invalid. So we are asking for summary  
9 judgment, Your Honor, on the mortgage foreclosure action,  
10 and that's it.

11 THE COURT: Okay. Thank you.

12 MS. PAYLOR: Thank you.

13 THE COURT: Yes, sir?

14 MR. BRABHAM: Your Honor, Vance Brabham for the  
15 plaintiff. I do have a memorandum of law --

16 THE COURT: Sure. Absolutely.

17 MR. BRABHAM: -- I'd like to hand up.

18 THE COURT: Absolutely. Any memorandum filed in  
19 conjunction with these motions are incorporated fully for  
20 purposes of review. Thank you, sir. I'll be happy to  
21 hear from you. You may rely on your contents of your  
22 memorandum.

23 MR. BRABHAM: Yes, sir. For purposes of the oral  
24 argument I just want to focus on two dates, basically,  
25 this May 27th, 2008, which is the date this mortgage was

1 recorded, and August 8th, 2011, which is the date South  
2 Carolina Supreme Court issued the Matrix v. Frazer case,  
3 which the defendant relies upon in her motion.

4 The content of the Matrix v. Frazer case is very  
5 specific that it's only to be applied prospectively so  
6 that any mortgage that is closed after the date of that  
7 case are possibly subject to being voided. I'm not sure  
8 the Court went that far, but in any event, it's not  
9 subject to being voided if the mortgage was recorded  
10 prior to that.

11 And if there was any doubt about that the Supreme  
12 Court then in BAC Home Loans vs. Kinder specifically  
13 stated that the date the Court was referring to was the  
14 August 8th, 2011 date and it was the date that the  
15 document was being enforced, was filed or recorded. So  
16 in this case I think it's very clear that this mortgage  
17 was recorded prior to any perspective effect that the  
18 Frazer case would have.

19 As alternative defenses to the motion I would say  
20 that this is not anything that was pled. The defendant  
21 had filed an answer then amended their answer about 30  
22 days later. There is no specific allegation about the  
23 closing of the loan by attorneys. The only -- there was  
24 an unclean hands defense that did not pertain to this.

25 The only place where the unclean hands otherwise

1 was contained within sort of the catch-all provision  
2 at the end. It said if we discover one of these events  
3 -- these defenses we'll amend later, and there's no  
4 amendment before the Court and I think that it's probably  
5 a little late to be asserting these, but in any event,  
6 I'm not resting on that.

7 Also, as an attachment to the motion there is some  
8 indication that I've been able to obtain from my client's  
9 files that a lawyer was involved. It's Kevin D. Phillips  
10 who to my understanding is a current member of the South  
11 Carolina Bar and was a current member at the time. He  
12 has not been suspended since he was admitted in 2001, so  
13 I would say that --

14 THE COURT: I hope he was present.

15 MR. BRABHAM: Sir?

16 THE COURT: I hope he's present if you are relying  
17 on him being there because if he's not he might be  
18 disbarred, if he signed off on a loan that he didn't  
19 participate in.

20 MR. BRABHAM: Yes, sir, and my client --

21 THE COURT: I understand. Be careful what you're  
22 representing here about this gentleman. He's not here to  
23 defend himself.

24 MR. BRABHAM: Yes, sir. And I'm just saying that  
25 that's some evidence. I don't know whether he was

1 present or not. It was not my client that closed the  
2 loan. They inherited it later down the road. I can only  
3 say from my file.

4 In the event that any of those three things don't  
5 help us today I will say this file, this case has been  
6 stayed since practically the time it was filed by the  
7 administrative order.

8 We've been negotiating -- or attempting to  
9 negotiate loss mitigation during that whole time we  
10 mediated the case pursuant to your order earlier this  
11 year and were not successful, and we sure would like to  
12 have discovery prior to a motion for summary judgment.

13 THE COURT: Okay. Response?

14 MS. PAYLOR: Your Honor, there's a whole line of  
15 cases. That one case -- I think there's been a lot of  
16 confusion over what that means but there are a whole lot  
17 of cases. They have submitted no affidavits suggesting  
18 that my clients are not right or putting anything in.

19 Rule 56 says they have to do it two days before the  
20 hearing. This was filed, sent to them in early July.  
21 They almost had two months to come up with some affidavit  
22 or something that claims that there was a lawyer  
23 involved.

24 And as far as what's been going on in the case, my  
25 young co-counsel is going to tell you about that in a few

1 minutes because that's the motion for sanctions and  
2 contempt because unfortunately they haven't followed  
3 anything that's come down in this Court and they've just  
4 not done anything they are supposed to do.

5 I didn't meet him or hear from him until today.  
6 When I appeared two months ago I was concerned that  
7 nobody was going to show up, to be honest with you,  
8 because I never got anything from them, Your Honor.

9 We've cited Wachovia Bank, a 2010 case. We've  
10 cited a 1987 case, State of South Carolina vs. Buyers  
11 Service Company, Inc. All of those cases say that it's  
12 the unauthorized practice of law and it's unclean hands,  
13 and we do have unclean hands as a defense in our answer.  
14 Thank you.

15 THE COURT: Okay. Anything further?

16 MR. BRABHAM: No, Your Honor.

17 THE COURT: Motion for summary judgment is granted.

18 MS. PAYLOR: Thank you, Your Honor.

19 THE COURT: I'll be happy to hear from you. You  
20 want to proceed with sanctions?

21 MS. HUDSON: Yes, Your Honor. My name is Mary Lee  
22 Hudson. I'm here on behalf of the defendants, and I'm  
23 Chrissy Lacy's associate.

24 Your Honor, your September 26, 2014 order, it  
25 required the plaintiff to make a decision as to the loan

1 modification within three months. We submitted documents  
2 after numerous requests from the plaintiff. We gave them  
3 everything that they needed. They continued to request  
4 the same documents over and over again and we sent them  
5 e-mails and letters, they are all in our motion,  
6 explaining that they already had that information, and to  
7 this they have still not made a decision on the loan  
8 modification and we are asking for reimbursement for  
9 mediation and attorney's fees.

10 THE COURT: Okay. What is your position?

11 MR. BRABHAM: Your Honor, the parties in this case  
12 agreed to enter into a consent order. You entered an  
13 order. Your order states that the parties would submit  
14 loss mitigation, that that would be completed within  
15 three months, but one of the requirements you had was for  
16 the defendant to submit all the information necessary for  
17 review. That has never happened.

18 THE COURT: Okay.

19 MR. BRABHAM: Specifically, what has not been  
20 submitted is evidence of the defendant's income, so  
21 specifically the rental income.

22 THE COURT: Let me just -- this is basically a rule  
23 to show cause. We're getting into an area now, there is  
24 nothing else, so it's over, at least until they reverse  
25 it. But be that as it may, your motion for sanctions is

1 denied.

2 MS. HUDSON: Thank you, Your Honor.

3 MS. PAYLOR: Thank you, Your Honor.

4 THE COURT: So prepare the order and we'll see  
5 where we come -- that will be interpreting that decision,  
6 but they'll have to interpret a lot of others, too, I'm  
7 afraid. Thank you.

8 MS. PAYLOR: Thank you very much.

9 MR. BRABHAM: Thank you, Your Honor.

10 THE COURT: You bet.

11 (WHEREUPON, the hearing was concluded.)

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## C E R T I F I C A T E

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I, Sharon L. Vizer, Official Court Reporter for the  
Ninth Judicial Circuit of the State of South Carolina, do  
hereby certify that the foregoing is a true, accurate and  
complete transcript of record of all the proceedings had  
and the evidence introduced in the hearing of the  
captioned case in Circuit Court on the 1st day of  
September 2015.

I do further certify that I am neither of kin, counsel  
nor have an interest to any party hereto.

February 10, 2016



SHARON L. VIZER

CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
Case No. 2013-CP-10-5329

JP Morgan Chase Bank, National  
Association,  
Plaintiff,

v.

Delilah Starr Acheson a/k/a Delilah S.  
Acheson a/k/a Starr D. Acheson,  
individually, as Legal Heir and Personal  
Representative of the Estate of Joseph L.  
Acheson a/k/a Joseph Lynn Acheson, Sr.,  
Deceased, Amber Mae Acheson Reed,  
Joseph Lynn Acheson, Jr., Jacob Lee  
Acheson, and Daniel Alexander Acheson, as  
Legal Heirs or Devisees of the Estate of  
Joseph L. Acheson a/k/a Joseph Lynn  
Acheson, Sr., Deceased, Ronald Lee Dowell,  
Ruth C. Dowell, and Charleston County  
Revenue Collections,  
Defendants.

**AFFIDAVIT OF STARR ACHESON**

FILED  
2015 JUL -9 AM 11:43  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY

PERSONALLY APPEARED before me, STARR ACHESON, who being duly sworn  
does state as follows:

1. I am a Defendant in the above captioned matter which seeks foreclosure of a property located at 201 E. Huron, Folly Beach, SC.
2. My parents, Ronald and Ruth Dowell, and I now own this property.
3. In 2008, when the loan and mortgage that are the subject of this foreclosure action were given, my husband, Joseph ("Joe") Acheson was also an owner. Joe was the sole borrower on the loan, but we understood that all four owners had to sign the mortgage in order for it to be valid security.
4. Joe applied for a loan through Quicken Loans, which made everything seem so simple. Because we were living in Gastonia, North Carolina, where my parents also were living, we arranged to have the "closing" at my parents' house there. My parents and I were at the "closing" of the loan along with Joe.
5. Jean Kellogg, who introduced herself as the closing agent for Quicken Loans showed up on April 24, 2008. She had a large stack of documents that she got all four of us to sign. After signing them, she left a bound document containing the "2008 Mortgage

Documents" with us. I did not thoroughly review that document until recently when I noticed a document entitled "Closing Attorney's Statement." On that uncompleted form document, which is attached hereto as Exhibit A, it states:

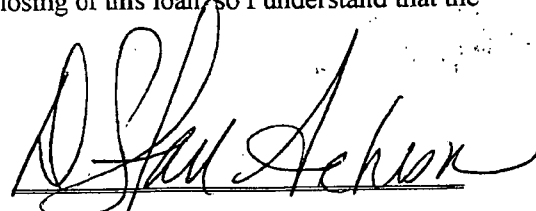
I closed the above mortgage loan on April 24, 2008. Prior to the execution of the Note and Mortgage by the Borrower(s), I reviewed and explained to the Borrower(s) the terms and provisions of the Note and Mortgage. Following my explanation, the Borrower(s) signed the Note, Mortgage and other related closing documents.

Underneath that statement is a line with the words "Closing Attorney" written under it.

However, there was no attorney present at the closing, only Ms. Kellogg, Quicken's closing agent. In addition, on the filed mortgage, there appears to be a Timothy L. Hall who signed as a witness. Mr. Hall was not present and did not witness any of us signing the mortgage.

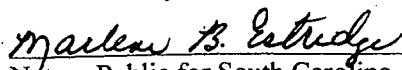
6. The first page of the bound document is a letter from Nathan Kyle, Client Care Specialist for Quicken Loans, to Joe, attached hereto as Exhibit B. In that letter, Mr. Kyle says nothing about having a lawyer close the loan and, instead, states that "[a]t the scheduled closing meeting, the closing agent will open their package and review all of the documents with you...." What happened is that Ms. Kellogg gave us the documents and told us what we had to sign, and we did.
7. Quicken Loans subsequently transferred Joe's loan and our mortgage to Chase Bank, or an affiliated entity.
8. Subsequent to the closing, Joe made all of the required loan payments until his unexpected death on August 15, 2010. On August 20, 2010, I contacted Colleen North at Chase Bank by telephone and informed her of my husband's death. On September 7, 2010, I faxed a copy of the death certificate and last will and testament to Chase. I was Joe's sole heir under his will. Chase did not file a creditor's claim with the estate, which has been fully handled and closed in South Carolina as well as in North Carolina.
9. I continued to make the loan payments and unsuccessfully tried every month to get the name changed on the loan.
10. Because Chase would not talk to me about the loan and a pending refinance application because I was not the "borrower," I stopped making the payments in 2013. The above captioned foreclosure action was filed on September 11, 2013, and I have been trying unsuccessfully to resolve the matter ever since.
11. As of this date, neither my parents nor I are a signatory on the loan secured by the mortgage.
12. I have recently learned that, to be valid, a mortgage has to be closed by an attorney. There was no attorney involved in the closing of this loan, so I understand that the mortgage is not valid.

FURTHER AFFIANT SAYETH NOT.

  
STARR ACHESON

SWORN to before me this

2nd day of July, 2015

  
Maureen B. Estridge  
Notary Public for South Carolina

1-27-20

# **EXHIBIT “A”**

**CLOSING ATTORNEY'S STATEMENT**

**Borrower(s):** Joseph L. Acheson

**Property Address:** 201 East Huron  
Folly Beach, SC 29439

**Lender:** Quicken Loans Inc.

**Date of Mortgage Loan:** April 24, 2008

I closed the above mortgage loan on April 24, 2008. Prior to the execution of the Note and Mortgage by the Borrower(s), I reviewed and explained to the Borrower(s) the terms and provisions of the Note and Mortgage. Following my explanation, the Borrower(s) signed the Note, Mortgage and other related closing documents.

Closing Attorney

Date

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**RoA\_0045**



**EXHIBIT “B”**





April 24, 2008

Joseph L. Acheson  
201 East Huron  
Folly Beach, SC 29439

Dear Joseph L. Acheson:

Congratulations! You're ready to close on your home loan from Quicken Loans!

To make your closing easy, we have prepared the following documents for you:

- Two complete closing packages
  - one for you to open and review prior to your closing
  - one for your closing agent to open -please keep this package sealed until your closing agent arrives
- "Items to be Signed at Closing" describes a few of the important documents you will sign;
- "Frequently Asked Questions" contains information our customers have found helpful in answering their questions;

So here's what happens next...

At the scheduled closing meeting, the closing agent will open their package and review all of the documents with you. The mortgage documents are signed and any monies due are collected. The entire loan closing normally takes 30 - 45 minutes. That's all there is to it!

If you have questions that the closing agent cannot answer, they may contact us at (800) 784-2536. It's just that easy!

Thank you again for choosing Quicken Loans to provide your home financing! We look forward to being of service to you in the years to come!

Sincerely,

Nathan Kyle  
Client Care Specialist

Quicken Loans. The easiest way to get a home loan.

**Quicken Loans**

America's Home Loan Experts

**1-800-QUICKEN**  
**(1-800-784-2536)**

[quickenloans.com](http://quickenloans.com)

RoA\_0047



**Quicken**

**Loans**

### Items to be Signed At Closing

Below is a list of *some* of the items you will sign at your closing, along with a brief description of each item:

#### Settlement Statement

This statement breaks down all closing costs and other monies payable at closing in connection with your mortgage loan, including loan fees, points and sums set aside for escrow payments, taxes and insurance. On purchase transactions, Realtor commissions and tax proration may also be included.

#### Federal Truth-In-Lending Statement

This federally required form sets forth the "Annual Percentage Rate" (APR) on your loan, which is your interest rate adjusted to account for points and other closing costs. You were provided with an "initial" Truth-In-Lending Statement shortly after applying for your mortgage. This "final" Truth-In-Lending Statement takes account of any changes that may have occurred between application and closing.

#### Mortgage Note

This document is your promise to us to repay your loan. It contains many of the important loan terms, such as your loan amount, interest rate, due dates and late charges.

#### Mortgage / Deed of Trust

This document contains a detailed "legal description" of your property, and confirms that you are pledging the property as collateral for repayment of your loan. The document also sets forth your agreement to keep the property insured, pay all property taxes, and otherwise keep the property in good condition. After closing, the Mortgage/Deed of Trust will be recorded in your county recorder's office and will be a matter of public record. Some Mortgages/Deeds of Trust contain "riders", which are short addendums containing additional terms.

#### Monthly Payment Letter and Coupons

This contains a detailed breakdown of your new monthly mortgage payment, as well as some coupons to be used when making your first payment(s).



**Quicken Loans**

AMERICA'S HOME LOAN EXPERT

**1-800-QUICKEN  
(1-800-784-2536)**

**quickenloans.com**

**RoA 0048**

  
**Quicken****Loans**

### Frequently Asked Questions About The Closing Process

#### What is an Annual Percentage Rate (APR)?

The "APR" is the interest rate on your new loan, adjusted upward to account for points and other closing costs. The APR allows homebuyers to compare different types of mortgages based on the total cost (i.e. interest and closing fees) for each loan.

#### What is a "three-day right to rescind"?

Per Federal law, on refinance transactions, (except for 2nd homes and investment properties), the client has a period of three business days immediately following the closing in which to cancel or "rescind" the closing. The lender cannot complete the loan and distribute any cash proceeds until after the three-day period ends.

#### What is a Signature Name Affidavit?

A document acknowledging the variations in your name.

#### What are "escrow accounts"?

These are accounts set up at the time of closing to be utilized by the lender to pay your real estate taxes, homeowners insurance premiums and private mortgage insurance (PMI). A portion of each monthly payment goes into each of these accounts.

#### How do I keep track of the activity in my escrow account?

Each and every year, the lender undertakes a formal analysis of your escrow account to ensure that the right amounts are being collected. During the analysis the lender will verify your current required payments from your taxing authority or insurance company, and determine whether it's necessary to either increase or decrease the required monthly escrow account. You will receive a copy of the annual analysis.

#### What is Private Mortgage Insurance?

On certain loans, the lender obtains Private Mortgage Insurance (commonly referred to as "PMI") to provide itself some protection if a client defaults on a loan. The client pays the premium on the PMI. Usually the lender requires PMI when the client chooses to make a small down payment on a purchase transaction or take advantage of the equity in their home. Typically, PMI is required if the loan amount exceeds 80% of the value of the home. For FHA loans, mortgage insurance is almost always required regardless of the amount of down payment.

#### Can I cancel my Private Mortgage Insurance (PMI)?

Mortgage insurance on FHA loans may be cancelled when the loan is paid down to 78% of the original property value and five years of consecutive monthly payments are made.

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(1-800-784-2536)****quickenloans.com**



**Frequently Asked Questions**  
**Page 2**

As for other types of loans, after closing you may request that PMI be removed, and the lender will consider your request. Following are the conditions that may lead a lender to cancel the PMI:

- a. A minimum number of consecutive monthly payments, which can vary from as few as 12 months to as long as 7 years, depending upon the type of loan.
- b. An excellent payment record with no delinquencies within the 12 months preceding your request for cancellation.
- c. A new appraisal from a lender approved FNMA/FHLMC appraiser, certified pursuant to state and/or local requirements (the new appraisal is paid for by the client).
- d. A loan balance below 75-80 % of the property value (if the property is owner occupied); or below 60-65% of the property value (if property is non-owner occupied).

Your request for cancellation must be in writing. If you feel you have satisfied the cancellation conditions and are eligible to have your PMI cancelled, please write or e-mail our servicing team.

**May I obtain an amortization schedule?**

For your convenience, Quicken Loans includes an amortization schedule with your closing documents. The table shows how your monthly payment will be applied to reduce the amount of interest and any principal that you owe for that month. It will also show the remaining principal balance owed after each payment is made.

**If I make a large principal payment, can my monthly payment be lowered?**

On adjustable rate mortgages (ARM's), the lower principal balance is taken in to account at the next adjustment period which may result in a lower monthly payment.

Additional payments on fixed rate mortgages will be applied directly to the principal balance of your loan. It will not reduce the amount of your required monthly payment.

Additional payments on fixed rate, interest only mortgages will be applied directly to the principal balance of your loan. Principal payments during the interest only period will reduce the amount of your required monthly interest payment for the remainder of the interest only period. Principal payments during the period when the payment consists of principal and interest will not reduce the amount of your monthly payment.

**What are the components of my payment?**

A traditional mortgage payment consists of primarily Principal and Interest, but may also include taxes, homeowners insurance, flood insurance, hurricane insurance, etc. This is commonly referred to as P.I.T.I. (Principal, Interest, Taxes, and Insurance). If you choose an interest only mortgage, the initial mortgage payment will only consist of interest. You may also be required to pay PMI on a monthly basis.

**Will I receive a coupon book?**

No. Quicken Loans provides each client a monthly loan statement providing you with important account information. Please save your monthly loan statement for future reference. Your first statement should arrive within two weeks of your first payment due date. If you would like to make a payment early, send payment to:

Quicken Loans Inc.  
P.O. Box 553154  
Detroit, MI 48255-3154

**Quicken Loans**

*America's Home Loan Experts*

**1-800-QUICKEN**  
**(1-800-784-2536)**

[quickenloans.com](http://quickenloans.com)



Frequently Asked Questions  
Page 3

**Can I overnight my payment to you?**

Yes. You may send your payment to:  
Quicken Loans  
20555 Victor Parkway, 2nd Floor  
Livonia, Michigan 48152  
Attn: Servicing Team  
(800) 863-4332

**After closing, how do I know if you received my last payment?**

The monthly billing statement provides detailed information regarding your loan, such as the date your last payment was received.

**What if I don't make my payment on time?**

Payments are typically due on the first of each month. However, we do offer you a 15-day grace period before late charges are assessed. If your payment is not received by the last business day of the month, you may risk being reported to the credit agencies.

**What if my mortgage is assigned to a new lender?**

In most instances, Quicken Loans transfers its loans to companies with whom we have a very close relationship and who share our customer service philosophy. This transfer will not affect your interest rate or other loan terms. You will receive prior written notification of any such transfer, and you will be asked to make your future payments to this company, (known as a "Loan Servicer"). Of course, if you ever have a problem with the new loan servicer, you can contact us at (800) 863-4332 and we will help you.

**Can I set up automatic payment or bi-weekly payments?**

Bi-Saver and Bi-Weekly payment plans allow you to pay off your mortgage early. Generally, these programs withdraw  $\frac{1}{2}$  of your total mortgage payment out of your bank account every other week. This results in 26 half payments or 13 full payments each year. Since only 12 payments are due, the 13th is applied directly to principal, thereby reducing the balance faster than if you made regular payments.

Although Quicken Loans does not provide automatic payment or bi-saver payment plans, many of our servicing partners offer this feature. You can also achieve the same effect by making one additional normal payment towards principal per year. Alternatively, you could make an additional 1/12th principal payment each month. The additional payment can be mailed with your normal mortgage payment.

**What happens if I receive a tax bill after closing?**

For loans without an escrow account, you are responsible for the timely payments of both taxes and insurance.

If taxes are included in your monthly payment and you receive a tax bill, mail the document to:  
Quicken Loans Inc.  
20555 Victor Parkway, 2nd Floor  
Livonia, Michigan 48152  
Attn: Servicing Team

**Quicken Loans**

American Home Loan Enterprises

For more information, call  
**1-800-QUICKEN**  
**(1-800-784-2536)**

[quickenloans.com](http://quickenloans.com)



Frequently Asked Questions  
Page 4

**Who may I call with questions or concerns about my loan?**

You can contact us at [customer\\_service@quickenloans.com](mailto:customer_service@quickenloans.com) or (800) 863-4332.

**How can I be sure my information is not accessible to others?**

Questions regarding the Quicken Loans privacy policies are available on line at [www.quickenloans.com](http://www.quickenloans.com). Or you may call client relations at (800) 863-4332 or e-mail [help@quickenloans.com](mailto:help@quickenloans.com).

**Quicken Loans**

America's Home Loan Experts

1-800-QUICKEN  
(1-800-784-2536)

[quickenloans.com](http://quickenloans.com)

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
Case No. 2013-CP-10-5329

JP Morgan Chase Bank, National )  
Association, )  
Plaintiff, )

v. )

Delilah Starr Acheson a/k/a Delilah S. )  
Acheson a/k/a Starr D. Acheson, )  
individually, as Legal Heir and Personal )  
Representative of the Estate of Joseph L. )  
Acheson a/k/a Joseph Lynn Acheson, Sr., )  
Deceased, Amber Mae Acheson Reed, )  
Joseph Lynn Acheson, Jr., Jacob Lee )  
Acheson, and Daniel Alexander Acheson, )  
as Legal Heirs or Devisees of the Estate of )  
Joseph L. Acheson a/k/a Joseph Lynn )  
Acheson, Sr., Deceased, Ronald Lee )  
Dowell, Ruth C. Dowell, and Charleston )  
County Revenue Collections, )  
Defendants. )

**AFFIDAVIT OF RUTH C. DOWELL**

FILED  
2015 JUL -9 AM 11:43  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY

PERSONALLY APPEARED before me, RUTH C. DOWELL, who being duly sworn  
does state as follows:

1. I am a Defendant in the above captioned matter which seeks foreclosure of a property located at 201 E. Huron, Folly Beach, SC.
2. My husband, Ronald Lee Dowell, my daughter, Starr Acheson, and I now own this property.
3. In 2008, when the loan and mortgage that are the subject of this foreclosure action were given, my son-in-law, Joseph ("Joe") Acheson was also an owner. Joe was the sole

borrower on the loan, but we understood that all four owners had to sign the mortgage in order for it to be valid security.

4. Joe applied for a loan through Quicken Loans, which made everything seem so simple. Because we were living in Gastonia, North Carolina, where Joe and Starr also were living, we arranged to have the "closing" at my house there. Starr, Joe, my husband and I were at the "closing" of the loan along.

5. Jean Kellogg, who introduced herself as the closing agent for Quicken Loans showed up on April 24, 2008. She had a large stack of documents that she got all four of us to sign. Ms. Kellogg came by herself. To my knowledge, she was not a lawyer, and there was no lawyer involved in the closing.

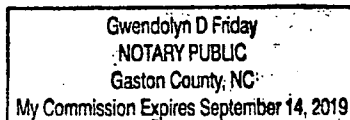
FURTHER AFFIANT SAYETH NOT.

Ruth C Dowell  
RUTH C. DOWELL

SWORN to before me this

6 day of July, 2015

Gwendolyn D. Friday  
Notary Public for North Carolina  
My commission expires: 9/14/2019



STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
Case No. 2013-CP-10-5329

JP Morgan Chase Bank, National  
Association,  
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v.

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Acheson a/k/a Starr D. Acheson,  
individually, as Legal Heir and Personal  
Representative of the Estate of Joseph L.  
Acheson a/k/a Joseph Lynn Acheson, Sr.,  
Deceased; Amber Mae Acheson Reed,  
Joseph Lynn Acheson, Jr., Jacob Lee  
Acheson, and Daniel Alexander Acheson,  
as Legal Heirs or devisees of the Estate of  
Joseph L. Acheson a/k/a Joseph Lynn  
Acheson, Sr., Deceased, Ronald Lee  
Dowell, Ruth C. Dowell, and Charleston  
County Revenue Collections,  
Defendants.

**AFFIDAVIT OF RONALD LEE DOWELL**

FILED  
2015 JUL -9 AM 11:44  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

PERSONALLY APPEARED before me, RONALD LEE DOWELL, who being duly  
sworn, does state as follows:

I am a Defendant in the above captioned matter which seeks foreclosure of a  
property located at 201 E. Huron, Folly Beach, SC.

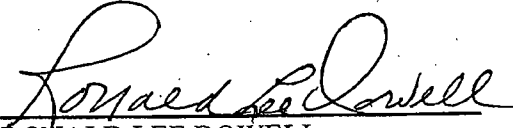
2. My wife, Ruth Dowell, my daughter, Starr Acheson, and I now own this property.
3. In 2008, when the loan and mortgage that are the subject of this foreclosure action  
were given, my son-in-law, Joseph ("Joe") Acheson was also an owner. Joe was the sole

borrower on the loan, but we understood that all four owners had to sign the mortgage in order for it to be valid security.

4. Joe applied for a loan through Quicken Loans, which made everything seem so simple. Because we were living in Gastonia, North Carolina, where Joe and Starr also were living, we arranged to have the "closing" at my house there. Starr, Joe, my wife and I were at the "closing" of the loan along.

5. Jean Kellogg, who introduced herself as the closing agent for Quicken Loans showed up on April 24, 2008. She had a large stack of documents that she got all four of us to sign. Ms. Kellogg came by herself. To my knowledge, she was not a lawyer, and there was no lawyer involved in the closing.

FURTHER AFFIANT SAYETH NOT.

  
RONALD LEE DOWELL

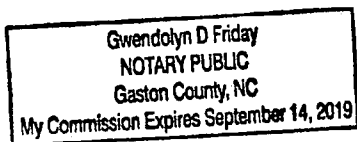
SWORN to before me this

6<sup>th</sup> day of July, 2015

Gwendolyn D. Friday

Notary Public for North Carolina

My commission expires: 9-14-2019



STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
Case No. 2013-CP-10-5329

JP Morgan Chase Bank, National  
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v.

Delilah Starr Acheson a/k/a Delilah S.  
Acheson a/k/a Starr D. Acheson,  
individually, as Legal Heir and  
Personal Representative of the Estate of  
Joseph L. Acheson a/k/a Joseph Lynn  
Acheson, Sr., Deceased, Amber Mae  
Acheson Reed, Joseph Lynn Acheson,  
Jr., Jacob Lee Acheson, and Daniel  
Alexander Acheson, as Legal Heirs or  
Devises of the Estate of Joseph L.  
Acheson a/k/a Joseph Lynn Acheson,  
Sr., Deceased, Ronald Lee Dowell,  
Ruth C. Dowell, and Charleston County  
Revenue Collections,

Defendants.

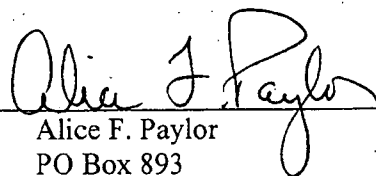
**DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Defendants (with the exception of Charleston County Revenue Collections) move pursuant to Rule 56, SCRPC, for summary judgment with regard to the action filed herein against them. This motion is supported by the Affidavits of Starr Acheson, Ronald Dowell and Ruth Dowell filed herewith. Based on the facts set forth in these affidavits, there was no attorney present at the closing of the mortgage that is the subject of this mortgage foreclosure action. In South Carolina, the Courts have held that not having a lawyer close a loan constitutes an unauthorized practice of law by the mortgagee, the Plaintiff or the Plaintiff's predecessor. As these cases have further held, Defendants in

FILED  
2015 JUL -9 AM 11:43  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

such actions are not bound by the mortgages. See Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (S.C. App. 2010); and State of South Carolina v. Buyers Service Company, Inc., 292 S.C. 426, 357 S.E.2 15 (1987). Therefore, Defendants are entitled to judgment as a matter of law.

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ATTORNEYS FOR DEFENDANTS  
(except Charleston County Revenue  
Collections)

Charleston, SC  
July 8, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JPMorgan Chase Bank, National Association,

PLAINTIFF,

VS.

Delilah Starr Acheson a/k/a Delilah S. Acheson a/k/a Starr D. Acheson, individually, as Legal Heir and Personal Representative of the Estate of Joseph L. Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased, Amber Mae Acheson Reed, Joseph Lynn Acheson, Jr., Jacob Lee Acheson, and Daniel Alexander Acheson, as Legal Heirs or Devisees of the Estate of Joseph L. Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased, Ronald Lee Dowell, Ruth C. Dowell, and Charleston County Revenue Collections,

DEFENDANT(S).

(120268.00690)

IN THE COURT OF COMMON PLEAS

CASE NO. 2013-CP-10-05329

**MEMORANDUM OF LAW  
IN OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff, by and through its undersigned counsel, hereby submits its memorandum in opposition to Defendant's Motion for Summary Judgment and avers as follows:

**STATEMENT OF FACTS**

Plaintiff commenced this action to foreclose its note and mortgage on a beach cottage located at 201 E. Huron Avenue in Folly Beach, South Carolina ("Property").

The Note that is the subject of this action was given by Joseph L. Acheson to Quicken Home Loans, Inc. on or about April 24, 2008. Mr. Acheson was the sole party to the Note and thus the only party personally responsible for repaying the obligation. The original Note is

currently in the possession of Plaintiff, which services the loan on behalf of Federal National Mortgage Association ("Fannie Mae").

The Mortgage securing the obligation was executed on the same date as the Note in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") and was duly recorded on May 27, 2008 in the office of the Register of Deeds for Charleston County in Book 660 at Page 728. The Mortgage has subsequently been assigned by MERS to the Plaintiff.

The Mortgage was executed by the owners of record of the Property as security on the Note given by Mr. Acheson. The mortgagors are Joseph L. Acheson, Delilah S. Acheson a/k/a Starr D. Acheson, Ronald Lee Dowell and Ruth C. Dowell.

Delilah S. Acheson is the widow of Joseph L. Acheson. The Dowells are, upon information and belief, Mrs. Acheson's parents. Neither Mrs. Acheson nor the Dowells are personally responsible for the payment of the Note.

On or about August 15, 2010, Joseph L. Acheson died leaving his interest in the Property to his heirs. Because no deed of distribution has yet been issued out of the Estate, Plaintiff named the children of Joseph L. Acheson as defendants by virtue of any interest that they may have inherited in the property from their father.

Following the death of Mr. Acheson in August 2010, Plaintiff continued to receive and accept payments on the Property until payments stopped in February 2012. After payments ceased, Plaintiff accelerated the debt and filed this action on or about September 11, 2013.

Defendants thereafter made a timely request to be considered for foreclosure intervention under South Carolina Supreme Court Administrative Order 2011-05-02-01. As the Defendants are mortgagors as defined by the Administrative Order, this action has been stayed since that time while the parties engaged in efforts to engage in loss mitigation.

Notwithstanding the action being stayed, on or about July 3, 2014, Defendants filed an Answer with Counterclaims responding to the allegations of the Complaint. Defendants subsequently amended their Answer and Counterclaims on July 31, 2014. Plaintiff has filed a Reply to the Defendants' counterclaims denying any liability to the Defendants.

Defendants' Answer and Counterclaims assert several affirmative defenses and a number of counterclaims including a claim under the Unfair Trade Practices Act, a claim under what is referenced as the "Unfair Debt Collections Act," a claim for Negligence, and a claim for Breach of Contract. The Defendants also assert numerous affirmative defenses.

Notably, the Defendants do not make any reference in their Answer and Counterclaims that the subject mortgage was not closed by an attorney. Defendants further do not plead the lack of attorney supervision over the closing of the loan as an affirmative defense or counterclaim.

In filing their Motion for Summary Judgment, Defendants' express now for the very first time that the subject loan was not closed by a South Carolina licensed attorney and that the Mortgage is unenforceable.

### **ARGUMENT**

- I. Defendants' Motion for Summary Judgment must be denied because it asserts an affirmative defense that was waived when it was not raised in Defendants' Amended Answer and Counterclaims.**

A defendant must plead in his or her answer all affirmative defenses. SOUTH CAROLINA RULE OF CIVIL PROCEDURE 8(C). A defendant waives his right to assert an affirmative defense when he fails to plead the affirmative defense in his Answer. *See Am. Color and Chem. Corp v.*

*Tenneco Polymers, Inc.* 918 F. Supp. 945, 958 (D.S.C. 1995); *Howard v. S.C. Dep't of Highways*, 343 S.C. 149, 154, 538 S.E.2d 291, 294 (Ct. App. 2000).

Here, Defendants have filed an Amended Answer, but nowhere within the original or amended Answer is any reference to the subject loan not having been closed by a licensed South Carolina attorney. As parties to the mortgage, Defendants knew or should have known when responding to the Complaint whether the subject loan was closed by an attorney. In fact, since the parties have not engaged in discovery of any kind, this new defense must have come from information already within the Defendants' possession or control at the time the action commenced.

Further, Defendants have not, as of the date of this memorandum, filed a motion to amend their Answer to assert this "newly discovered" affirmative defense. Plaintiff has therefore not been placed on notice of this potential defense and has not had an opportunity to conduct discovery regarding the defense. For these reasons the Defendants' Motion for Summary Judgment must be denied.

**II. Defendants' Motion for Summary Judgment must be denied because Plaintiff's mortgage was recorded prior to August 8, 2011, and is therefore not void even if it was not closed by a South Carolina licensed attorney.**

As discussed above, Defendants now assert for the first time in the instant Motion for Summary Judgment that the Note and Mortgage in this action were not closed under the supervision of an attorney. Defendants argue that the Mortgage would therefore be void under the South Carolina Supreme Court's holding in *Matrix Financial Services Corp. v. Frazer*, 394

S.C. 134, 714 S.E.2d 532 (2011). A close reading of *Matrix* and later cases expounding upon the holding of *Matrix*, make it clear that the Defendants' argument is meritless.

In *Matrix*, the Court stated "...a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law." *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532, 535 (2011). The Court went on to state:

"We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law. We apply this ruling to all filing dates **after** the issuance of this opinion." *Id.* (emphasis added).

In concurring with the majority decision, Justice Kittredge wrote, "[c]oncerning the majority's broader holding voiding a real estate mortgage secured through the unauthorized practice of law, I join today's result because of its **prospective-only application**." *Id.* (Kittredge, J., concurring) (emphasis added).

Therefore, the Court made it very clear in *Matrix* that its holding was not to be applied retroactively to existing mortgages. The Court removed any lingering doubt as to whether it intended the holding to be prospective-only in *BAC Home Loans Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012). There the South Carolina Supreme Court considered whether a second mortgage holder (BAC) was entitled to receive surplus funds from a foreclosure sale. In contesting the second mortgage holder's right to receive surplus funds, the borrower alleged that the second mortgage had not been closed by an attorney and therefore was unenforceable. The Court in addressing the issue of the alleged unauthorized practice of law stated:

...We find it unnecessary to address the factual issue of whether an attorney was present at the closing because even if one had not been present, our holding in *Matrix* would allow [mortgagee's] claims to proceed."

In *Matrix* we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from obtaining equitable relief...

However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would "apply this ruling to all filing dates after the issuance of this opinion," which was August 8, 2011...

To the extent some confusion apparently exists as to what filing date *Matrix* referred to, we clarify that it is the date the document a party seeks to enforced was filed. Here Systems' mortgage was recorded on April 20, 2007, well before the issuance of *Matrix*. Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality.

*Kinder*, 398 S.C. at 624, 731 S.E.2d at 549, 550.

Therefore, it is settled law in South Carolina that a mortgage closed prior to August 8, 2011, is not subject to being invalidated based upon the mortgage not having been closed by a South Carolina licensed attorney. The mortgage involved in this matter was recorded on May 27, 2008. Therefore, the mortgage was closed prior to the *Matrix* decision and is not subject to being invalidated. Defendants' motion must be dismissed on that basis.

**III. Even were the Court to disregard the clear holdings of the South Carolina Supreme Court regarding the prospective application of *Matrix*, the Defendants' Motion for Summary Judgment must be denied by the Court because there is a question of material fact as to whether the closing of the loan was supervised by an attorney.**

As discussed above, Plaintiff is the successor to the original lender, Quicken Loans, Inc. Because it did was not the originator of the subject loan, Plaintiff has no direct knowledge of the

specifics of the loan closing beyond what documents it has obtained following its purchase of the property and what testimony might be taken throughout the course of discovery.

Plaintiff has made an investigation of the circumstances surrounding the closing of the loan and has located documents from the closing file that suggest that the loan was closed under the supervision of Kevin D. Phillips, Esq. True and accurate copies of these documents are attached hereto as *Exhibit A*.

According to the online records of the South Carolina Bar, Mr. Phillips is an active member of the South Carolina Bar and has been a licensed South Carolina attorney since 2001. There are no indications that he has at any point since that time resigned or been suspended from the practice of law. Therefore, there is evidence before the Court that the loan was in fact closed by a South Carolina attorney who was duly licensed at the time of the closing.

Therefore, Defendants' motion for summary judgment must be denied.

**IV. Defendants' Motion for Summary Judgment must be denied because the parties have not had a full and fair opportunity to engage in discovery.**

Even if the Court should allow Defendants to assert this new affirmative defense by way of a Motion for Summary Judgment, prior case law indicates that the Court should deny the motion so that the parties can engage in discovery on this issue.

"Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E. 2d 537, 543 (quoting *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C.1975)). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.*

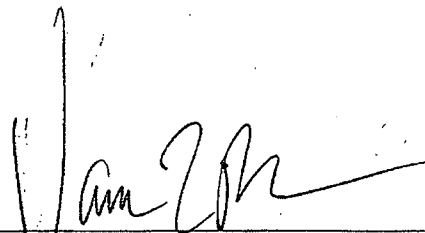
Here, the parties have not engaged in any discovery whatsoever in this matter because the matter has been stayed pursuant to South Carolina Supreme Court Administrative Order 2011-05-02-01. The parties have engaged in loss mitigation efforts and conducted a court ordered mediation. At this point in time, Plaintiff has not certified compliance with the Administrative Order though it appears that Defendants' are now declining to further participate in that process.

Even to the extent that the parties might have engaged in discovery in contravention of the Administrative Order, Plaintiff was not made aware of the new allegations concerning the closing of the loan without an attorney until this new motion for summary judgment was filed. Under these circumstances, the Court should allow the parties to conduct discovery on this issue before considering the Defendants' motion. As the motion is premature, it should be denied.

#### CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants' Motion for Summary Judgment.

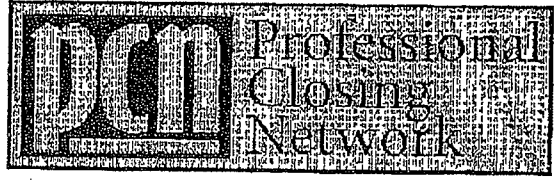
SCOTT & CORLEY, P.A.



Vance L. Brabham, III, SC Bar No. 71250  
Andrew M. Sullivan, SC Bar No. 100464  
2712 Middleburg Drive, Suite 200  
Columbia, SC 29204  
(803) 252-3340  
ATTORNEYS FOR THE PLAINTIFF

August 31, 2015

EXHIBIT A



Attorney Phone Closing Confirmation

Please complete and fax this form to PCN at 412-928-2459

Borrower Name(s) Joseph L. Acheson Order # 745  
Delilah S. Acheson  
Ronald Lee Dowell Closing Date 4/24/08  
Ruth C. Dowell  
Closing Attorney Name (please print) Kevin D. Phillips

Address 300 W. Coleman Boulevard, Suite 203 Phone Number 843-875-0287  
Mt. Pleasant, SC 29464

This loan successfully closed. ☒

This loan adjourned following commencement ☐

Reason for adjournment \_\_\_\_\_  
\_\_\_\_\_

I, KEVIN D. PHILLIPS (attorney name), conducted a closing on behalf of the above referenced borrowers by telephone conference call. This is to certify that I conducted the closing and answered all of the borrower's (s)' questions. I have instructed the signing agent to return the original signed documents as described in your Closing Instructions.

Attorney Signature Kevin D. Phillips Date 4/24/08

Authorization to Disburse and Record Documents

South Carolina Transactions

To: Title Source  
Re: Order No: [REDACTED] 745  
Name: Joseph L. Acheson, Delilah S. Acheson  
Ronald Lee Dowell, Ruth C. Dowell  
Property Address: 201 East Huron  
Folly Beach, SC 29439  
Loan # [REDACTED] 745 Lender: Quicken Loans, Inc.

Closing date: 4/24/08

From: Kevin D. Phillips, Attorney at Law  
300 West Coleman Blvd., Suite 203  
Mount Pleasant, SC 29464  
Phone: (843) 875-0287 Fax: (843) 875-0287  
After Hours: (843) 270-9718  
Email: [pilotlawyer@msn.com](mailto:pilotlawyer@msn.com)

Enclosed herewith, please find the completed loan document package for the above referenced order. You are now authorized to process the recording of executed mortgage(s) and other recordable documents which include any Assignments or Subordinations, if applicable, the Deed, if applicable, and any "piggy back" mortgages. Please send such recordable documents with the appropriate recording fees to the records office for the above address in CHARLESTON COUNTY, South Carolina. Ensure that the applicable deeds are recorded prior to the mortgage and, if there are two mortgages, ensure that they are recorded in proper order. Finally and upon the completion of the rescission period, you are required to forward a copy of the disbursement log to [pilotlawyer@msn.com](mailto:pilotlawyer@msn.com) for review.

By: Kevin D. Phillips

Kevin D. Phillips, Closing Attorney  
South Carolina Bar # 68843

4745

## CLOSING ATTORNEY'S STATEMENT

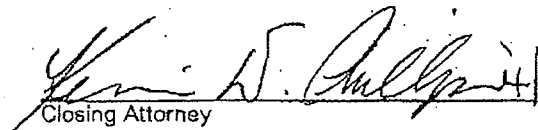
**Borrower(s):** Joseph L. Acheson

**Property Address:** 201 East Huron  
Folly Beach, SC 29439

**Lender:** Quicken Loans Inc.

**Date of Mortgage Loan:** April 24, 2008

I closed the above mortgage loan on April 24, 2008. Prior to the execution of the Note and Mortgage by the Borrower(s), I reviewed and explained to the Borrower(s) the terms and provisions of the Note and Mortgage. Following my explanation, the Borrower(s) signed the Note, Mortgage and other related closing documents.

  
Closing Attorney

4/24/08  
Date



**EXHIBIT B**

394 S.C. 134

Supreme Court of South Carolina.

MATRIX FINANCIAL SERVICES  
CORPORATION, Respondent,

v.

Louis M. FRAZER, Linda S. Frazer,  
Matthew Kunding, and Parks Grove  
Homeowners Association, Inc., Defendants,  
of whom Matthew Kunding is the, Appellant.

No. 26859. | Heard April 21,  
2009. | Re-filed Aug. 8, 2011.

#### Synopsis

**Background:** Mortgagee brought foreclosure action with respect to refinanced mortgage that closed after mortgagors' judgment creditor enrolled a default judgment against mortgagors. Mortgagors' judgment creditor counterclaimed, asserting the priority of its default judgment. The Circuit Court, Greenville County, Charles B. Simmons, Jr., J., granted equitable subrogation to mortgagee. Judgment creditor appealed.

**Holdings:** After transfer, and on rehearing, the Supreme Court, Toal, C.J., held that:

[1] equitable subrogation is not a remedy available to a lender that refinances the original debt owed to it, and

[2] mortgagee's unclean hands, in engaging in unauthorized practice of law, precluded any equitable relief.

Reversed.

Kittredge, J., filed an opinion concurring in result.

Pleicones, J., filed a dissenting opinion.

#### Attorneys and Law Firms

**\*\*532** David Alan Wilson, of Horton Drawdy Ward & Jenkins, of Greenville, and Edward Scott Sanders, of Greenville, for Appellant.

Earle G. Prevost and Michael J. Giese, both of Leatherwood Walker Todd & Mann, of Greenville, for Respondent.

#### Opinion

Chief Justice TOAL.

**\*135** Matthew Kunding (Appellant) enrolled a default judgment against Louis and Linda Frazer (the Frazers) before the Frazers closed a refinance mortgage with Matrix Financial Services Corporation (Matrix). In **\*\*533** Matrix's foreclosure action, the master-in-equity granted Matrix equitable subrogation, giving the refinance mortgage priority over Appellant's judgment lien. We certified the case pursuant to **\*136** Rule 204(b), SCACR, and reversed in *Matrix Financial Services Corp. v. Frazer*, No. 26859, 2010 WL 3219472 (S.C. Sup. Ct. Aug. 16, 2010). This Court granted a petition for rehearing and we now withdraw that opinion and substitute this opinion, which also reverses the master-in-equity's grant of equitable subrogation.

#### FACTS/PROCEDURAL BACKGROUND

In 1998, Appellant brought suit against the Frazers in California. In 2000, the Frazers moved to South Carolina, and defaulted in Appellant's California lawsuit.

In January 2001, the Frazers purchased a home in Greenville County. That mortgage was assigned to Matrix in June 2001. In September 2001, Matrix and the Frazers entered into a loan commitment to refinance the January 2001 mortgage. A title search was conducted on September 18, 2001. The parties closed the refinance loan on November 26, 2001, but the new mortgage was not recorded until April 3, 2002.

Meanwhile, on September 4, 2001, Appellant obtained a default judgment against the Frazers in California, and enrolled that judgment in Greenville County on October 31, 2001.

The Frazers filed bankruptcy, and Matrix sought to foreclose its November 2001 refinance mortgage. Appellant counterclaimed, alleging his judgment had priority over Matrix's mortgage because it had been recorded first. Matrix, attempting to gain the primary priority position, then sought to have the refinance mortgage equitably subrogated to the rights of the January 2001 mortgage. The master-in-equity granted Matrix's request, and Appellant appeals that order.

## ISSUES

I. Did the master-in-equity err in granting Matrix equitable subrogation to the rights of the January 2001 mortgage, giving Matrix priority over Appellant's judgment lien?

II. Does the doctrine of unclean hands prevent Matrix from receiving the remedy of equitable subrogation?

## \*137 ANALYSIS

## I. Equitable Subrogation

Appellant argues the master-in-equity erred in holding Matrix was entitled to equitable subrogation. We agree.

[1] The requirements a mortgagee must meet to qualify for equitable subrogation are: (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; (4) no injustice will be done to the other party by the allowance of equitable subrogation; and (5) the party asserting the doctrine did not have actual notice of the prior mortgage. *Dedes v. Strickland*, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992).

In *Dedes*, a bank refinanced its initial mortgage and sought to be equitably subrogated to the rights of that mortgage to gain priority over the rights of an intervening mortgagee. The Court held that the bank could not meet the elements of equitable subrogation because it merely paid "itself [the] outstanding debt by refinancing the balance owed" and had no "direct interest necessitating discharge of the debt...." *Id.* at 159, 414 S.E.2d at 136. The Court further stated, "The record is silent as to what secondary liability [the bank] could have had for [the mortgagor's] debt secured by its own first mortgage lien." *Id.* While the *Dedes* Court appears to have conflated the requirements of secondary liability and a direct interest in discharging the debt,<sup>1</sup> the heart of \*\*534 its reasoning was that the bank could not be subrogated to the rights of its \*138 own prior mortgage. This conclusion comports with the general view that equitable subrogation contemplates a third party satisfying the original mortgage, not the same party to whom the original debt is owed. See

Restatement (Third) of Property (Mortgages) § 7.6 cmt.e (1995) ("Obviously subrogation cannot be involved unless the second loan is made by a different lender than the holder of the first mortgage; one cannot be subrogated to one's own previous mortgage."); Black's Law Dictionary (9th ed. 2009) ("Subrogation: The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor.").

[2] Thus, equitable subrogation is simply not a remedy available to a lender that refinances the original debt owed to it. This seems to yield the proper result, as opposed to the mangled logic that comes about when reasoning that a lender refinancing the original debt owed to it cannot prove secondary liability or a direct interest in discharging the debt. Matrix is not asserting priority under a theory of replacement and modification. Matrix expressly pled equitable subrogation in its reply to Appellant's counterclaim. Both *Dedes*, controlling South Carolina precedent, and section 7.6 of the Restatement stand for the proposition that a lender that refinances its own debt is not entitled to equitable subrogation. We do not decide whether a lender that refinances its own debt could attain priority under the theory of replacement and modification illustrated in section 7.3 of the Restatement (Third) of Property (Mortgages).

## II. Unclean Hands

[3] Appellant also argues Matrix is not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus has unclean hands. We do not believe the doctrine of unclean hands is the appropriate basis for resolution of this case. However, we do agree that even if Matrix met the requirements for equitable subrogation, Matrix would be precluded from receiving that remedy because of its unauthorized practice of law.

[4] [5] All real estate and mortgage loan closings must be supervised by an attorney. \*139 *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003); *State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987). Performing a title search, preparing title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law. *Buyers Serv.*, 292 S.C. at 430-34, 357 S.E.2d at 17-19.

In *Wachovia Bank v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct.App.2010), Wachovia closed a home equity loan without the supervision of an attorney and later instituted foreclosure proceedings. Our court of appeals held that Wachovia, having committed the unauthorized practice of law in closing the loan without attorney supervision, came to the court with unclean hands and thus was barred from seeking equitable relief. In so holding, the court of appeals said:

The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large for the reason so cogently stated in *Buyers*:

The reason preparation of instruments by lay persons must be held to constitute the unauthorized practice of law is not for the economic protection of the legal profession. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.

*Coffey*, 389 S.C. at 76, 698 S.E.2d at 248 (citing *State v. Buyers Serv. Co.*, 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987)).

Similarly, in this case Matrix hired LandAmerica OneStop to perform the title search, prepare the documents, and close the refinance loan—all admittedly without the supervision of a licensed attorney. Thus, Matrix committed the unauthorized practice \*\*535 of law in closing the refinance mortgage, clearly violating South Carolina law.<sup>2</sup> Matrix now comes to this \*140 Court, seeking equitable relief, based upon a mortgage contract it entered into in violation of the laws of this state.

This Court has previously held the presence of attorneys in real estate loan closings is for the protection of the public and that “protection of the public is of paramount concern” in loan closings. *Buyers Serv.*, 292 S.C. at 433, 357 S.E.2d at 19. Enforcing this requirement will come as no surprise to any lender. Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard. We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law. We apply this ruling to all filing dates after the issuance of this opinion.

## CONCLUSION

For the above reasons, we hold Matrix is not entitled to equitable subrogation. The master-in-equity's order is

**REVERSED.**

BEATTY, J., and Acting Justice JOHN H. WALLER, JR., concur. KITTREDGE, J., concurring in result in a separate opinion. PLEICONES, J., dissenting in a separate opinion.

Justice KITTREDGE.

I concur in result. I join Chief Justice Toal and vote to reverse due to Matrix's unauthorized practice of law. I would not reach the issue of whether Matrix otherwise satisfied the requirements of equitable subrogation. Concerning the majority's broader holding voiding a real estate mortgage secured through the unauthorized practice of law, I join today's result because of its prospective-only application.

\*141 Justice PLEICONES.

I respectfully dissent. I would affirm the master's order equitably subrogating Matrix's refinanced mortgage to its original mortgage, and would not impose the draconian remedy of denying equitable relief to lenders who “fail[ ...] to have attorney supervision during the loan process as required by law.”

### A. Equitable Subrogation

Equitable subrogation is a remedy favored by the courts, and it is to be liberally and expansively applied. *So. Bank and Trust Co. v. Harrison Sales Co., Inc.*, 285 S.C. 50, 328 S.E.2d 66 (1985). The doctrine:

is founded on the fictional premise that an obligation extinguished by a payment made by a third person is to be treated as still subsisting for the benefit of such third person, whereby he is substituted to the rights of the creditor when he has made such payment.

*St. Paul—Mercury Indem. Co. v. Donaldson*, 225 S.C. 476, 83 S.E.2d 159 (1954) citing *Aetna Life Ins. Co. of Hartford v. Town of Middleport*, 124 U.S. 534, 8 S.Ct. 625, 31 L.Ed. 537 (1888).

"The purpose of subrogation is to prevent a junior lien holder from converting the mistake of the lender into a magical gift for himself." *United States v. Baran*, 996 F.2d 25 (2nd Cir.1993) (internal citation omitted).

It appears that the majority would agree with me that a refinancer has a right to lien priority, if that refinancer uses the theory of "replacement and modification" rather than \*\*536 equitable subrogation. Heretofore, South Carolina has used the doctrine of equitable subrogation to restore a refinancer's lien to priority, and I would not reverse this order because it used this theory rather than the newly announced "replacement and modification" rule.

In 1927, this Court held that a lender who pays the original mortgage itself, or furnishes money to the mortgagor to pay off an existing mortgage, pursuant to an agreement by which the lender will give a new mortgage, has the equitable right to be subrogated to the paid-off mortgage. *Enterprise Bank v. Fed. Land Bank*, 139 S.C. 397, 138 S.E. 146 (1927). In this \*142 situation, the lender furnishing the money is not a volunteer, and becomes secondarily liable for the discharge of the first mortgage under the instruments creating the new mortgage which require the satisfaction of the first mortgage as a condition of the giving of the second. *Id.*;<sup>3</sup> see also *James v. Martin*, 150 S.C. 75, 147 S.E. 752 (1929) (applying *Enterprise Bank* and quoting: One satisfying a lien note at the request of the property owner, upon the understanding that he is to have new security upon the property released, acting in ignorance of a second mortgage lien upon the property, although it is on record, is entitled to subrogation to the rights of the first lien holder?).

As the Washington Supreme Court explained, several considerations support a rule that, absent material prejudice to a junior lienholder, equitable subrogation should be automatically available to a mortgage refinancer who can show it expected to have first priority:

- 1) Equitable subrogation preserves priorities by keeping mortgages and other liens in their proper recordation order;
- 2) Equitable subrogation accomplishes substantial justice and rests on the maxim that no one (here, the junior lienholder) should be enriched by another's loss;
- 3) Facilitating refinancing helps prevent foreclosures; and

- 4) A liberal equitable subrogation policy reduces title insurance premiums.<sup>4</sup>

*Bank of America v. Prestance Corp.*, 160 Wash.2d 560, 160 P.3d 17 (2007).

The majority would punish the respondent in this case for failing to anticipate the majority's decision to alter the theory under which respondent pled, proved, and obtained the result it sought below. I would affirm the master's decision to equitably subrogate Matrix's second mortgage to its first, a \*143 result which is consistent with both our existing law and sound public policy. *Cf.* Rule 220(c), SCACR (court may affirm for any reason appearing in the record).

### B. Unclean Hands

The majority also would expand the relief afforded by the Court of Appeals to a mortgagor who has been the "victim of the unauthorized practice of law" to all lienholders of that mortgagor. See *Wachovia Bank v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct.App.2010) *cert. pending* (mortgagee cannot foreclose mortgage where loan closed without attorney supervision); compare *Hambrick v. GMAC Mort. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct.App.2006) *cert. dismissed* April 5, 2007 (mortgagor has no private right of action against mortgagee for the unauthorized practice of law). The purpose of equitable subrogation/replacement and modification is to prevent a windfall to a junior lienholder. I cannot square the policy underlying this purpose with the Court's proclamation that refusing equitable relief to "bad" lenders will somehow protect the public at loan closings. I see only detriment to the borrowing public<sup>5</sup> and a windfall to junior lienholders in \*\*537 this decision which would deny all equitable relief to any "lender who fail[s] to have attorney supervision during the loan process as required by our law ... [in] all filing dates<sup>6</sup> after the issuance of this opinion."

### CONCLUSION

I respectfully dissent and would affirm the Master's order.

### All Citations

394 S.C. 134, 714 S.E.2d 532

Footnotes

- 1 The logic surrounding the elements of secondary liability and direct interest has been tortured in our case law because the current definition does not distinguish between a party who pays off the prior debt and a party who advances funds to the debtor for the purpose of paying off the prior debt. Judge Howard's concurrence in *Dodge City of Spartanburg, Inc. v. Jones*, 317 S.C. 491, 454 S.E.2d 918 (Ct.App.1995), explains the difficulties our courts have encountered concerning this issue. While we disagree with Judge Howard's conclusion that the lender in *Dodge City* could receive equitable subrogation when it refinanced the debt already owed to it, we agree with his analysis that a lender who either pays the debt itself or provides the debtor funds with the understanding the debtor will satisfy the obligation may seek equitable subrogation.
- 2 *Buyers Service* established in 1987 that attorney supervision is required for the four steps in the residential real estate loan and mortgage process: preparation of deeds, notes, and other instruments; preparation of title abstracts; the closing; and recording the instruments. 292 S.C. at 430-34, 357 S.E.2d at 17-19. No language, analysis, or discussion in *Buyers Service* indicates the Court intended to limit the holding to purchase money mortgages. In *Doe v. McMaster*, the petitioner suggested to the Court that *Buyers Service*'s holding did not apply because the buyer and lender were refinancing an existing mortgage rather than purchasing new property. 355 S.C. at 312, 585 S.E.2d at 776. The Court said, "This distinction is without significance" because "[i]n refinancing a real estate mortgage the four steps in the initial purchase still exist." *Id.* *Doe v. McMaster* did not change the landscape regarding refinance loans, but simply stated the existing law.
- 3 It appears that the lender in *Dedes v. Strickland*, 307 S.C. 155, 414 S.E.2d 134 (1992) was denied equitable subrogation because it failed to present evidence that its refinancing was conditioned upon the repayment of the first loan. *Id.* at 159, 414 S.E.2d at 136.
- 4 Citing Nelson & Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L.Rev. 305.
- 5 I suspect that many mortgagees, denied hope of equitable relief, including the ability to foreclose if an attorney should fail to supervise any of the acts required of him in a loan closing, will choose not to do business in South Carolina, or choose to increase fees to cover potential unrecoverable liabilities.
- 6 I am unsure what filing date the majority is referring to in this passage.

398 S.C. 619  
Supreme Court of South Carolina.

BAC HOME LOAN SERVICING, L.P., f/  
k/a Countrywide Home Loan Servicing,  
L.P., successor in interest to Defendant  
Mortgage Electronic Registration Systems, Inc.,  
MIN # : 100039032108093192, Appellant,

v.

Debra KINDER, Personal Representative  
of the Estate of George William Brelsford,  
IV a/k/a George W. Brelsford, and Debra  
Kinder, Personal Representative of the  
Estate of Patricia M. Brelsford, Respondents.

No. 27146. | Heard June 6, 2012. | Decided  
July 25, 2012. | Rehearing Denied Sept. 6, 2012.

#### Synopsis

**Background:** Following foreclosure sale on first mortgage, second mortgagee's assignee filed claim for surplus funds from foreclosure. The Master-in-Equity, Robert A. Smoak, Jr., Aiken County, ruled that assignee had no right to surplus funds and awarded surplus funds to mortgagor's estate. Assignee appealed.

**Holdings:** The Supreme Court, Hearn, J., held that:

[1] assignment of second mortgage after foreclosure sale on first mortgage had no bearing on rights of assignee to file claim for surplus funds from sale;

[2] extinguishment of second mortgagee's lien on real property by virtue of foreclosure sale on first mortgage did not extinguish mortgagee's interest in surplus funds from sale; and

[3] Supreme Court's holding in *Matrix Financial Services Corp. v. Frazer* that lender who was engaged in unauthorized practice of law by closing mortgage without supervision of attorney could not recover in equity did not apply retroactively to second mortgage that was closed prior to *Matrix*.

Reversed.

#### Attorneys and Law Firms

**\*\*548** Sean A. O'Connor, of Finkel Law Firm, LLC, of Charleston, for Appellant.

James L. Verenes, of Fox & Verenes, of Aiken, for Respondent.

#### Opinion

Justice HEARN.

\*621 This case presents us with two issues: (1) whether an assignee of a note and mortgage has a right to surplus funds generated by the foreclosure of a prior mortgage on the property, and (2) whether that assignee is barred from recovering the surplus funds because the note and mortgage assigned to it allegedly were closed without attorney participation. We hold the assignee may recover the surplus funds even though it was not a lienholder of record at the time of the sale. We also clarify our decision in *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), and hold because the mortgage was filed before *Matrix*, whether it was closed without the services of an attorney would not bar the assignee from receiving the surplus funds.

#### FACTUAL/PROCEDURAL BACKGROUND

George Brelsford executed and delivered a promissory note and mortgage (Mortgage 1) for \$30,000 to Citizens Bank of Effingham (Bank) on July 2, 2004. Mortgage 1 was secured by real property in Aiken County and recorded in the Aiken County Register of Mesne Conveyance on July 6, 2004. Brelsford executed and delivered a second promissory note to Quicken Loans, Inc. on March 21, 2007, for the sum of \$149,000 and secured payment of this note with a mortgage (Mortgage 2) in favor of Mortgage Electronic Registration Systems, Inc. (Systems) as nominee for Quicken. Mortgage 2 was secured by the same real property as Mortgage 1 and was duly recorded on April 20, 2007.

Brelsford died on August 11, 2009. After determining its loan was in default, Bank foreclosed on the property. Brelsford's estate as well as Systems were named as defendants and properly served, but neither responded nor were present at the sale, and they were therefore held in default. The property was sold on July 6, 2010 to a third party for the sum of \$116,000,

which, after satisfying the debt to Bank, left \$79,405.25 in surplus funds.

On July 30, 2010, Systems assigned its note and mortgage to BAC Home Loan Servicing, L.P., and BAC recorded this assignment on August 20, 2010. BAC then filed a claim for the surplus funds pursuant to Rule 71(c), SCRCP, and a hearing was held on October 28, 2010. In the master's \*622 original order, he found that BAC did not have standing to claim the surplusage under Rule 71(c) because it did not have "a lien on the mortgaged premises at the time of sale," specifically noting that BAC did not have a recorded interest until August 20, 2010, well after the July 6, 2010 sale date. Although arguments were also made that Mortgage 2 was closed without attorney participation in contravention of the law, the master held he did not have sufficient evidence to make a ruling on the issue and invited the submission of additional evidence in a Rule 59(e), SCRCP, motion. Pending the submission of a Rule 59(e) motion, the master awarded the surplus funds to Brelsford's estate.

BAC made a Rule 59(e) motion arguing that the master erred in barring its recovery of the funds because, as an assignee, it was not required to record its assignment to have a valid claim. Similarly, BAC argued that as an assignee it received all the rights Systems would have had, including the right to request the surplus funds. It further contended whether Mortgage 2 was closed by an attorney was irrelevant because BAC was not a party to that closing. Finally, BAC argued that as a holder in due course of the note underlying the mortgage, it took free from the defense that the transaction was illegal.

The master disagreed and again held BAC could not claim the surplus funds, reasoning that Rule 71(c) only allowed claims by those who had a "lien" at the time of the sale and because the lien on the property was extinguished by the sale, Systems' assignment of the mortgage to BAC was "an empty shell, since the lien no longer existed." Also, although no additional evidence was presented, \*\*549 the master concluded that the HUD-1 closing statement, which had been the only evidence before him at the initial hearing, was proof that no attorney participated in the closing of Mortgage 2. He therefore held that even if BAC were a holder in due course, because Systems would be barred from recovery because of this illegality, so would BAC. He therefore denied BAC's motion. This appeal followed.

## ISSUES PRESENTED

I. Did the master err in holding BAC could not recover surplus funds because it was not a lienholder of record at the time of the sale?

\*623 II. Did the master err in holding BAC was barred from recovering surplus funds because he found no attorney participated in the closing of Mortgage 2?

## LAW/ANALYSIS

### I. STATUS AS LIENHOLDER

[1] BAC first argues the master erred in holding that it could not recover the surplus funds from the foreclosure sale because it was not a lienholder of record at the time of the sale. We agree.

[2] Rule 71 states, in part, that "[i]n the event of a surplus fund resulting from the sale [on foreclosure], ... [a]ny party to the action, or any person who had a lien on the mortgaged premises at the time of the sale, ... may have a hearing to determine [entitlement to the surplus fund]." Rule 71(c), SCRCP. In the master's original order, he found that because the assignment was not recorded until after the sale, BAC did not have a valid "lien on the mortgaged premises at the time of sale." However, the assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee. *Singleton v. Singleton*, 60 S.C. 216, 235, 38 S.E. 462, 469 (1901). Therefore the date of recordation of the assignment has no effect on the transfer of Systems' rights to BAC.

[3] [4] Additionally, although the master noted that Systems was a party to the foreclosure action and had a lien on the subject property, he concluded that the lien was terminated by the foreclosure sale and thus the subsequent assignment to BAC "was an empty shell, since the lien no longer existed." See S.C. Code Ann. § 29-3-780 (2007) ("Upon ... 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."). He also found no evidence Systems had "specifically assigned its right to pursue the surplus funds under Rule 71(c), SCRCP." However, the extinguishment of the lien has no bearing on this case because BAC is not claiming it still has a lien

over the property. Instead, it merely claims an interest in the proceeds from the foreclosure sale. The master's ruling ignores the fact that Systems retained the right to claim the surplus funds pursuant \*624 to its original lien and the underlying note, and it is this right Systems assigned to BAC. Moreover, in assigning the note and mortgage, we see no reason why Systems would be required to explicitly assign the right to surplus funds for BAC to exercise it. An assignee stands in the shoes of the assignor. *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct.App.2007). Thus, an innocent assignee receives all the rights of his assignor. *Singleton*, 60 S.C. at 234–35, 38 S.E. at 469. Because Systems could have made this claim under Rule 71(c), BAC is entitled to make the same claim. To hold otherwise would ignore settled principles governing assignments.

## II. ATTORNEY PARTICIPATION IN CLOSING

[5] BAC also argues the master erred in finding Mortgage 2 was closed without attorney supervision which should bar BAC's claims. We find it unnecessary to address the factual issue of whether an attorney was present at the closing because even if one had not been present, our holding in *Matrix* would allow BAC's claims to proceed.

In *Matrix* we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful

\*\*550 behavior would preclude a lender from obtaining equitable relief. *Id.* at 140, 714 S.E.2d at 535. However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would “apply this ruling to all filing dates after the issuance of this opinion,” which was August 8, 2011. *Id.* To the extent some confusion apparently exists as to what filing date *Matrix* referred to, we clarify now that it is the date the document a party seeks to enforce was filed. Here, Systems' mortgage was recorded on April 20, 2007, well before the issuance of *Matrix*. Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality.

## CONCLUSION

Based on the foregoing, we reverse the master's order and award the surplus funds to BAC.

TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ., concur.

## All Citations

398 S.C. 619, 731 S.E.2d 547

306 S.C. 101

Supreme Court of South Carolina.

Frank Joe BAUGHMAN, et al., Appellants,

v.

AMERICAN TELEPHONE AND TELEGRAPH  
COMPANY, a Corporation, and AT & T Nassau  
Metals Corporation, a Corporation, Defendants,

of whom AT & T Nassau Metals

Corporation is Respondent.

(and 3 other cases)

No. 23399. | Heard Dec. 14,

1990. | Decided May 13, 1991.

| Rehearing Denied Dec. 6, 1991.

Property owners brought action against operator of refinery and alleged personal injury, property damages and nuisance caused by pollution from refinery. The Circuit Court, Lexington County, C. Bruce Littlejohn, Special Judge, granted refinery operator partial summary judgment, and appeal was taken. The Supreme Court, Chandler, J., held that: (1) property owners notified operator promptly of expert who had diagnosed illness or injury caused by materials from refinery; (2) grant of partial summary judgment as to personal injury claims was premature where property owners had not been able to complete discovery on issue of medical causation; and (3) property owners failed to present any competent evidence showing either existence or amount of damage to property.

Affirmed in part; reversed and remanded in part.

#### Attorneys and Law Firms

**\*\*539 \*103** Sheldon E. Bernstein, Del Rey Beach, Fla., Lawrence M. Mann, Washington, D.C.; and Frank B. Register, Jr., Lexington, for appellants.

Stephen G. Morrison, Richard H. Willis and Laura S. Campbell, Columbia, for respondent.

#### Opinion

CHANDLER, Justice:

These actions were originally commenced by 271 plaintiffs claiming personal injury, property damage, and nuisance

caused by pollution from a refinery operated by Respondent AT & T Nassau Metals Corporation (Nassau). Presently, 187 plaintiffs (Plaintiffs) remain in the case. They appeal orders granting Nassau's motions for partial summary judgment and denying their motion to set aside prior partial summary judgments.

We affirm in part, reverse in part, and remand for further proceedings.

#### \*104 FACTUAL BACKGROUND

The actions were commenced on July 11, 1985. Simultaneously with service of the Summonses and Complaints, Plaintiffs served interrogatories seeking, among other things, to discover the chemicals emitted from Nassau's plant. Nassau answered and served its first set of interrogatories. Over the next two years more than 300 depositions were taken, including one for almost every plaintiff in the case.

On June 26, 1987, Nassau served its second set of interrogatories. Interrogatory 6 asked for "any medical doctor who has diagnosed any illness or medical condition as being proximately caused by exposure to materials emanating from the Nassau facility...."

Both Plaintiffs and Nassau sought at various times to compel the other to respond or provide more complete answers to various interrogatories.

On July 22, 1987, the trial court ordered Nassau to furnish complete answers to several of Plaintiffs' interrogatories, and ordered Plaintiffs to respond to Nassau's first set of interrogatories, or provide supplemental answers thereto. This was followed by an order, dated September 29, 1987, which required Plaintiffs to answer certain of Nassau's second set of interrogatories, including Interrogatory 6, and required Nassau to provide summaries of information sought by Plaintiffs' interrogatories.

On October 12, 1987, Nassau filed the first of several motions for partial summary judgment, this on the personal injury and property damage claims of a single plaintiff, Harold Ford. Plaintiffs subsequently moved for a protective order "staying all dispositive motions until discovery is completed...." At hearings on these motions, counsel for Plaintiffs conceded that a medical expert who could testify to the necessary degree

of medical certainty had not then been obtained, contending additional time was necessary to locate such an expert. Trial court nevertheless granted Nassau's motion on the ground that Ford had made no showing his injuries were proximately caused by Nassau.

On December 8, 1987, Plaintiffs moved to have the grant of partial summary judgment reconsidered. Nassau moved for sanctions due to Plaintiffs' failure to answer the second set of interrogatories as required by the order of September 29, \*105. 1987. At the hearing which followed, Plaintiffs' counsel disclosed a recently-discovered expert witness, Dr. Elaine Panitz, and submitted a letter from her, dated December 11, 1987, in which she made a preliminary assessment of the case and recommended further study. Counsel took the position that summary judgment was premature until Plaintiffs were "given the opportunity to develop this subject...."

By order dated January 27, 1988, the trial court denied Plaintiffs' motion for reconsideration and for a protective order. It granted Nassau's motion for sanctions, stating:

It is, therefore, ordered that the plaintiffs shall not be allowed any medical testimony, witnesses, documents or exhibits \*\*540 of any kind required by defendant's second set of interrogatories and not now fully disclosed in their answers to interrogatories or depositions. Plaintiffs are precluded from developing facts in the trial of the case through sources they have failed to reveal heretofore as required by my Order of September 29, 1987. The defendant is entitled to, and has been deprived of, information necessary or at least desirable to its defense, all to its prejudice.

Notwithstanding the foregoing, Nassau took Dr. Panitz's deposition on February 11, 1988. Dr. Panitz testified she had not formed an opinion concerning causation, but she did specify the type of study she thought would be appropriate.

Thereafter, Nassau moved for partial summary judgment on several additional personal injury and property damage claims. At the hearing on this motion, Nassau's counsel

asserted that Dr. Panitz's testimony was precluded by the order of January 27, 1988. Counsel for Plaintiffs responded that the order did not apply to witnesses procured in the future. In a subsequent order filed on August 22, 1988, granting Nassau's motion for partial summary judgment, the trial court stated:

At the hearing a discussion was had relative to the possibility of procuring additional expert medical testimony on behalf of the Plaintiffs from Dr. Elaine Panitz of New Jersey and perhaps others. Any evidence, by deposition or otherwise, inconsistent with my Order of January 27, 1988, need not be pursued and is hereby forbidden.

\*106 In the meantime, on July 29, 1988, Nassau served a Request for Admissions upon each of the plaintiffs. Altogether, the requests totalled approximately 900 pages. Many required Plaintiffs to provide certain information in the event the request was denied. Within the time for responding,<sup>1</sup> Plaintiffs filed a motion for protective order, alleging the requests were "so voluminous and so framed that they are clearly unduly burdensome" and contending they were "not in proper form" because their effect was "nothing more than interrogatories (guised as requests for admission) seeking to ascertain knowledge of facts."

At the October 13, 1988, hearing on Plaintiffs' motion for protective order and on a motion later filed by Nassau for partial summary judgment on six more personal injury claims, Nassau served a Supplemental Response to Plaintiffs' Motion for Protective Order. It contended the requests should be deemed admitted for Plaintiffs' failure to respond in a timely manner. Also at that hearing, Plaintiffs' counsel, in response to the summary judgment motion, again asserted that additional time was necessary to develop Dr. Panitz's testimony. By order dated October 28, 1988, the trial court denied Plaintiffs' motion for protective order and, simultaneously, deemed Nassau's requests admitted. It also granted Nassau partial summary judgment on the six personal injury claims.

On October 24, 1988, Plaintiffs served responses to Nassau's requests for admissions. Thereafter, they moved that these responses be accepted and the deemed admissions withdrawn.

Plaintiffs also moved pursuant to Rule 54(b), S.C.R.C.P., to set aside all partial summary judgments which had been granted for lack of medical evidence of permanent injuries. The motion was based upon a notarized letter from Dr. Panitz, dated November 29, 1988, which states in part:

3. Review of Dr. Lieberman's medical records on 18 plaintiffs reveals that more than 90% have similar respiratory and neurologic complaints, and more than 80% have similar eye and skin complaints. This constellation of neurologic, respiratory, eye and skin complaints is entirely consistent with chronic exposure to volatile organic compounds (VOC).

\*107 4. To investigate the issue of chronic VOC exposure, 15 of the 18 plaintiffs had preliminary serum testing for antibodies to formaldehyde, trimellitic anhydride, and isocyanates.... The existence of formaldehyde antibodies in this group of Gaston residents is clear indication of \*\*541 formaldehyde exposure. Some of the residents also have antibody titers to TMA and isocyanates.

4. [sic] In my opinion, there is considerable evidence that the Gaston residents are suffering health effects from chronic exposure to airborne volatiles emitted from uncontrolled burning of plastics by Nassau Metals. This problem may well have originated from the burning of plastic scrap in the blast furnace (1979-1984), before the pyrolysis unit came on line. Unfortunately, any residents sensitized to formaldehyde during that time period may never be able to live in the vicinity of the AT & T plant without reacting to the presumably lower levels of formaldehyde now being emitted.

Plaintiffs also relied on this letter in response to Nassau's motion, then pending, for partial summary judgment on all remaining personal injury and property damage claims.

After a hearing, the trial court denied Plaintiffs' motion to vacate the prior summary judgments, and also their motion to have the deemed admissions withdrawn and the October 24, 1988, responses substituted. Additionally, the court granted Nassau's motion for partial summary judgment on the remaining claims for property damage and personal injury. It rejected Dr. Panitz's letter as being precluded by prior orders filed on January 27 and August 22, 1988, and, alternatively, as failing to meet the "most probably" standard for receiving medical evidence of causation. Finally, the trial court granted partial summary judgment for Nassau on the

nuisance claims of four plaintiffs, Floyd and Edna Busbee, and O.M. and Jacqueline Shealy.

## ISSUES

We address the following:

- I. Discovery involving interrogatories and requests for admissions; and
- II. Grant of summary judgments.

### \*108 I. DISCOVERY

#### A. Interrogatories

Plaintiffs contend the trial court erred in ruling that Dr. Panitz's testimony was precluded by its prior orders prohibiting the development of evidence unresponsive to Nassau's second set of interrogatories. Alternatively, Plaintiffs contend that, assuming a violation of the discovery orders, the sanction precluding Dr. Panitz's evidence was too severe. We agree.

[1] In determining the sufficiency of responses to interrogatories, each answer must be read in the light of the question asked. 8 Wright & Miller, *Federal Practice and Procedure* § 2177, p. 560 (1970). Absent any specification, the interrogatory should be construed as seeking current information as of the time the question is asked and answered. *Young Spring & Wire Corp. v. American Guarantee & Liability Ins. Co.*, 32 F.R.D. 345 (W.D.Mo.1963). There is, however, a continuing duty to supplement responses with new information concerning the identity of persons having knowledge of discoverable matters and persons expected to be called as expert witnesses. Rules 33(b) and 26(e)(1), S.C.R.C.P.; see also *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974); *Briggs v. Richardson*, 288 S.C. 537, 343 S.E.2d 653 (Ct.App.1986).

Here, Plaintiffs properly responded to Nassau's Interrogatory 6, which sought information concerning any medical doctor who has diagnosed illness or injury caused by materials from Nassau's plant. When Dr. Panitz's identity became known to them, Plaintiffs promptly notified Nassau. Thus, Plaintiffs did not violate the requirements of Rule 33. See *Jackson v. H & S Oil Co.*, 263 S.C. 407, 211 S.E.2d 223 (1975).

[2] Nor do we find a violation of the discovery orders of January 27 and August 22, 1988. These orders merely precluded any evidence not responsive to Nassau's second set of interrogatories. As noted above, Plaintiffs' answers were sufficient.

[3] Moreover, even if there were a violation, we agree with Plaintiffs that preclusion of Dr. Panitz's testimony was not an appropriate sanction under Rule 37(b) or (d), S.C.R.C.P. The exclusion of a witness is a sanction which "should never be lightly \*\*542 invoked." *Kirkland v. Peoples Gas* \*109 Co., 269 S.C. 431, 435, 237 S.E.2d 772, 774 (1977); *Jackson, supra*, 263 S.C. at 411, 211 S.E.2d at 225. Where the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party. 4A *Moore's Federal Practice* ¶ 37.03 [2.-4], pp. 37-78 to -79. (2d ed. 1990); *Campbell v. Johnson*, 101 F.Supp. 705 (S.D.N.Y. 1951). No such showing has been made, or even alleged, here.

#### B. Request For Admissions

[4] Plaintiffs contend their timely motion for a protective order prevented Nassau's requests from being deemed admitted pursuant to Rule 36(a), S.C.R.C.P. In the alternative, Plaintiffs contend the trial court erred in denying their motion to withdraw the deemed admissions and to substitute in their place the responses offered by Plaintiffs on October 24, 1988. Again, we agree.

[5] A motion for protective order may be an appropriate response of a party upon whom a request for admissions is served. 8 *Wright & Miller, supra*, § 2259, p. 726 (1970). When made in good faith, as here,<sup>2</sup> such a motion operates to prevent the matters from being deemed admitted. *Graham v. Three or More Members of Army Reserve Sel. Bd.*, 556 F.Supp. 669 (S.D.Tex. 1983); *In re City of Ridgeland*, 494 So.2d 348 (Miss. 1986). Otherwise, requiring a party to answer a request for admissions during the pendency of a motion for protective order "would negate the utility of such a motion...." *St. Regis Paper Co. v. Upgrade Corp.*, 86 F.R.D. 355, 356 (W.D.Mich. 1980).

Furthermore, Plaintiffs should have been permitted to withdraw the deemed admissions and file the responses of October 24, 1988. Rule 36(b), S.C.R.C.P., sets forth the test

for withdrawal of an admission and, by implication, the filing of a late response. *See Pleasant Hill Bank v. United States*, 60 F.R.D. 1 (W.D.Mo. 1973). The rule provides:

\*110 [T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

[6] In this case, both requirements of the test are satisfied. First, presentation of the merits will be subverted since the admissions, if not dispositive, involve key factual elements of Plaintiffs' causes of action. *See Westmoreland v. Triumph Motorcycle Corp.*, 71 F.R.D. 192 (D.Conn. 1976); *Pleasant Hill Bank, supra*. Second, since Plaintiffs' responses were filed even before the requests were ordered admitted, Nassau's defense could not possibly have been prejudiced. *See Herrin v. Blackman*, 89 F.R.D. 622 (W.D.Tenn. 1981).

## II. SUMMARY JUDGMENT

### A. Personal Injury Claims

Plaintiffs contend trial court erred in granting partial summary judgment on all remaining personal injury claims and in denying their motion to set aside prior partial summary judgments. They argue, first, that Dr. Panitz's letter of November 29, 1988, in and of itself, was sufficient to overcome summary judgment and, second, that even if not, the grant of summary judgment was premature.

#### 1. The Panitz Letter

Having already addressed trial court's ruling that Dr. Panitz's letter was precluded by the discovery orders, we consider its alternative ruling that the letter did not satisfy the legal standard for admissibility \*\*543 of expert medical testimony on the issue of causation.<sup>3</sup>

\*111 [7] Rule 56(e), S.C.R.C.P., requires that on motion for summary judgment "[s]upporting and opposing affidavits

shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Thus, opinion testimony, including that of an expert, which would be inadmissible if testified to at trial may not properly be set forth in an affidavit. 6-Pt. 2 *Moore's Federal Practice* ¶ 56.22[1], pp. 56-743 to -746 (2d ed. 1988); see also *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C.Cir.1977); *In re Agent Orange Product Liability Litigation*, 611 F.Supp. 1223 (E.D.N.Y.1985).

[8] Our cases generally hold that, before expert testimony is admissible upon the question of the causal connection between plaintiff's injuries and the acts of the defendant, the testimony must satisfy the "most probably" rule. *Armstrong v. Weiland*, 267 S.C. 12, 225 S.E.2d 851 (1976); *Martin v. Mobley*, 253 S.C. 103, 169 S.E.2d 278 (1969); *Gambrell v. Burleson*, 252 S.C. 98, 165 S.E.2d 622 (1969). The rule has been succinctly stated as follows:

It is not sufficient for the expert ... to testify merely that the ailment might or could have resulted from the alleged cause. He must go further and testify that taking into consideration all the data it is his professional opinion that the result in question most probably came from the cause alleged.

*Eubanks v. Piedmont Natural Gas Co.*, 198 F.Supp. 522, 526-27 (W.D.S.C.1961).

In determining whether particular evidence meets this test it is not necessary that the expert actually use the words "most probably." *Gamble v. Price*, 289 S.C. 538, 347 S.E.2d 131 (Ct.App.1986). It is sufficient that the testimony is such "as to judicially impress that the opinion ... represents his professional judgment as to the most likely one among the possible causes...." *Norland v. Washington General Hospital*, 461 F.2d 694, 697 (8th Cir.1972).

[9] Viewed in this light, it cannot be said that Dr. Panitz's letter rises to the "most probably" level. A plain reading of the letter reveals that her opinion is within the realm of possibility only, not the required standard of probability.

#### \*112 2. Summary Judgment Premature?

[10] Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson*

*v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C.1975); see also *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, *Federal Practice and Procedure* § 2741, p. 543 (1983); 6 *Moore's Federal Practice* ¶ 56.02[6], p. 56-39 (2d ed. 1990); see, e.g., *First Chicago Int'l v. United Exchange Co.*, 836 F.2d 1375 (D.C.Cir.1988); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230 (2d Cir.1985); *Tyler v. City of Enterprise*, 521 So.2d 951 (Ala.1988); *Gangadean v. Leumi Fin. Corp.*, 13 Ariz.App. 534, 478 P.2d 532 (1970); *Commercial Bank of Kendall v. Heiman*, 322 So.2d 564 (Fla.Dist.Ct.App.1975); *Board of Education v. Van Buren & Firestone, Architects, Inc.*, 165 W.Va. 140, 267 S.E.2d 440 (1980); cf. \*\*544 Rule 56(f), S.C.R.C.P.<sup>4</sup> Under the circumstances, we agree with Plaintiffs that the grant of partial summary judgment on the personal injury claims was premature.

[11] [12] [13] First, Plaintiffs have demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issue of medical causation and that they are not merely engaged in a "fishing expedition." *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209 (Minn.1985); cf. *Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068 (7th Cir.1978). This fact is confirmed by Dr. Panitz's letter of November 29, 1988, which indicates that Plaintiffs' illnesses \*113 are "entirely consistent" with exposure to toxic substances and that there is "considerable evidence" they were caused by chemicals emitted from Nassau's facility. While, as discussed earlier, the opinion expressed does not reach the degree of certainty necessary to overcome summary judgment, it does highlight the need for further testing and analysis of Plaintiffs' medical conditions.

[14] Second, Plaintiffs were not dilatory in seeking discovery on the issue of causation, but have been reasonably diligent in pursuit of a qualified expert to substantiate their claims. *Bixler, supra*; *Harrison v. Falcon Products, Inc.*, 103 Nev. 558, 746 P.2d 642 (1987); cf. *Siits v. United States*, 811 F.2d 736 (2d Cir.1987); *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1031 (5th Cir.1983) (listing factors).

We acknowledge that more than three years elapsed between the filing of these actions and the final granting of partial summary judgment as to personal injury. The delays in completing discovery, however, may not fairly be attributed

solely to Plaintiffs' inaction. See *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551 (2d Cir.1977). Rather, from the beginning, discovery was dominated by Nassau's demands and Plaintiffs' efforts to respond: the taking of hundreds of depositions, including that of almost every named plaintiff; waves of interrogatories addressed to each plaintiff individually; then, requests for admissions seeking information, in addition to stipulations. Moreover, two years into the litigation, Plaintiffs had not yet received satisfactory responses to their interrogatories regarding the substances emitted from the Nassau plant, information critical to their obtaining expert opinion evidence concerning causation.

Finally, the delay in locating Dr. Panitz is tempered by the complexity of these cases and the hardship encountered in proving causation. Other courts have recognized that proof of causation is especially difficult in actions seeking recovery for prolonged exposure to toxic substances. *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 173-74 (Mo.App.1988);<sup>5</sup> *Ayers v. Jackson Township*, 106 N.J. 557, 585, 525 A.2d 287, 301 (1987). The \*114 following statement by the Supreme Court of Nebraska concerning the difficulty of obtaining expert witnesses in medical malpractice actions is even more applicable to toxic tort cases:

[T]he real and obvious obstacle, by the very nature of the case—medical malpractice—was access to and availability of a qualified physician who was ready, willing, and able, in terms of time and temperament, to be a witness or affiant in [the] case. In practicality, the complexities of an action for malpractice and \*\*545 the problems of gaining information and enlisting a reliable expert witness as well as formulating and preparing a malpractice case are myriad and usually major, a situation almost a matter of judicial notice.

*Wachtel v. Beer*, 229 Neb. 392, 403-4, 427 N.W.2d 56, 64 (1988).

Plaintiffs acted with due diligence in the procurement of an expert medical witness in this protracted litigation. Now that they have located such an expert in the person of Dr. Panitz, the development of this evidence should not be precipitously terminated by summary judgment. Accordingly, entry of all partial summary judgments on claims for personal injury is reversed. Of course, Nassau may renew its motions once Plaintiffs have been afforded an adequate opportunity to complete discovery on the issue of medical causation.<sup>6</sup>

## B. Property Damage Claims

Plaintiffs challenge, on the merits, entry of partial summary judgment on their claims for property damage. Trial court granted Nassau's motions on the ground that Plaintiffs presented no evidence that any alleged property damage was proximately caused by the operation of the Nassau facility.

In reviewing the grant of a summary judgment motion, we apply the same standard which governs the trial court under Rule 56(c), S.C.R.C.P.: summary judgment is proper when "there is no genuine issue as to any material fact and ... the \*115 moving party is entitled to judgment as a matter of law." See 10 Wright & Miller, *Federal Practice and Procedure* § 2716, p. 643 (1983); *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990); *Irby v. Richardson*, 278 S.C. 484, 298 S.E.2d 452 (1982). This standard "mirrors" the standard for a directed verdict under Rule 50(a), S.C.R.C.P. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986); see also *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); see also *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing'—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case." *Celotex* 477 U.S. at 325, 106 S.Ct. at 2554, 91 L.Ed.2d at 275. The moving party need not "support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* at 323, 106 S.Ct. at 2553, 91 L.Ed.2d at 274. (Emphasis in original).

Once moving party carries its initial burden, opposing party must, under Rule 56(e), "do more than simply show that there is some metaphysical doubt as to the material facts" but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986) (emphasis in original). Indeed, Rule 56(e) specifically prohibits the nonmoving

party from resting upon the mere allegations or denials of its pleadings. See *SSI Medical Services, supra*; *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449 (Ct.App.1988).

[15] In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. *SSI Medical Services, supra*; *Standard Fire, supra*. The court then applies the standard set out in Rule 56(c):

\*116 [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish \*\*546 the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

*Celotex* 477 U.S. at 322-23, 106 S.Ct. at 2552, 91 L.Ed.2d at 273.

Plaintiffs do not take issue with the trial court's conclusion that Nassau met its burden under Rule 56(c). Rather, they contend that evidence contained in answers to interrogatories and depositions was sufficient to create a genuine issue of fact concerning property damage. We disagree.

In *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438 (1971), this Court upheld the granting of an involuntary nonsuit at the close of plaintiff's case<sup>7</sup> where plaintiff had failed to present evidence of any physical damage to his property. We stated:

While proof, with mathematical certainty, of the amount of loss or damage is not required, in order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation. See *Piggy Park Enterprises, Inc. v. Schofield*, 251 S.C. 385, 162 S.E.2d 705, [ (1968) ] and cases therein cited.

The evidence as to the diminution of market value is, in \*117 our view, speculative, not only as to the amount but speculative as to the portion thereof proximately and directly resulting from the one delict on the part of the respondents complained of and proved. Accordingly, such evidence was of no real probative value in ascertaining the amount of any actual damage to the market value of appellant's property resulting from respondent's single wrongful act.

*Id.* 256 S.C. at 570-71, 183 S.E.2d at 444.

[16] Plaintiffs' case suffers from a similar deficiency. Although many individual plaintiffs asserted in their answers to interrogatories and depositions that pollution from Nassau's plant had caused a diminution in the value of their property, these "bald allegations" are insufficient to create a genuine issue of fact. See *Stevens v. Barnard*, 512 F.2d 876, 879 (10th Cir.1975). There is a total absence of any competent evidence showing either the existence or the amount of damage to property, or that any such damage was proximately caused by the acts of Nassau. Accordingly, we affirm trial court's grant of partial summary judgment on Plaintiffs' claims for property damage.

### C. Nuisance Claims

Finally, Plaintiffs contend the trial court erred in granting Nassau's motion for partial summary judgment on the nuisance claims of Floyd and Edna Busbee, and O.J. and Jacqueline Shealy. They argue summary judgment was premature before completion of discovery. This argument comes too late.

[17] Unlike with their personal injury claims, Plaintiffs at no time asserted to the trial court that outstanding discovery should preclude summary judgment on these nuisance claims. "Generally, a contention of the opposing party that he was not given sufficient time to present matter in opposition cannot be successfully made for the first time on appeal." 6-Pt. 2 *Moore's Federal Practice* § 56.24, pp. 56-820 to -821 (2d ed. 1988). Having not been raised to the trial court, this issue is not preserved for appellate review. See West's S.C. Digest *Appeal & Error*, Key No. 169.

### \*118 CONCLUSION

The grant of partial summary judgments on Plaintiffs' property damage claims and \*\*547 the four nuisance claims is affirmed. The partial summary judgments on all claims for personal injury are reversed and the matter remanded for further proceedings consistent with this opinion.

HARWELL, Acting C.J., and FINNEY and TOAL, JJ.,  
JAMES E. MOORE, Acting Associate J., concur.

**All Citations**

AFFIRMED IN PART; REVERSED IN PART AND  
REMANDED.

306 S.C. 101, 410 S.E.2d 537

**Footnotes**

<sup>1</sup> See Rule 36(a), S.C.R.C.P.

<sup>2</sup> The amount and form of Nassau's requests were arguably oppressive. Additionally, many of the requests called upon Plaintiffs to provide information if denied, an improper use of this device. See 8 Wright & Miller, *supra*, § 2253, p. 706 (1970); *Adams v. Orr*, 260 S.C. 92, 194 S.E.2d 232 (1973) (purpose of request for admissions).

<sup>3</sup> The trial court indicated the letter was defective in form because, although notarized, it was not a sworn affidavit. See *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300 (5th Cir.1988); *Flowers v. Abex Corp.*, 580 F.Supp. 1230 (N.D.Ill.1984). We overlook this defect for two reasons. First, Nassau did not raise an objection so that Plaintiffs would have the opportunity to obtain an affidavit which technically complied. See *United States v. Western Elec. Co.*, 337 F.2d 568 (9th Cir.1964). Second, Nassau submitted numerous unsworn letters in support of its motions for partial summary judgment. See *DeCintio v. Westchester County Medical Center*, 821 F.2d 111 (2d Cir.1987).

<sup>4</sup> Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Although Plaintiffs did not file an affidavit invoking this provision, other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the trial court. *First Chicago Int'l, supra*; *Snook v. Trust Co. of Ga. Bank of Savannah*, 859 F.2d 865 (11th Cir.1988).

<sup>5</sup> The *Elam* case, in particular, vividly illustrates the complexity of proving causation in a toxic tort case, the extensive medical testing and analysis which is involved, *id.* at 82, 91-94, and the enormous expense incurred, *id.* at 193-94 & n. 74.

<sup>6</sup> On remand, it may be advisable for the trial court to impose reasonable limitations upon the discovery, such as by establishing a cut-off date, while according it priority over other matters. See *Manual for Complex Litigation, Second* § 21.421 (1985).

<sup>7</sup> Under present procedure, this is a motion for directed verdict. Rule 50(a), S.C.R.C.P.

JPMorgan Chase Bank, National Association, ) Civil Action No. 2013-CP-10-05329  
)

VS.

Defendants.

FILED  
2015 OCT 26 PM 2:31  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

1. The Order misapplied our Supreme Court's holdings in *Matrix Financial Services Corp v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), and *BAC Home Loan*

*Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012). In *Kinder*, the Supreme Court unequivocally held that the conduct at closing or whether the loan was closed with the supervision of a South Carolina attorney is immaterial and cannot be used to render a mortgage unenforceable when the mortgage was filed prior to August 8, 2011. The Court held:

BAC also argues the master erred in finding Mortgage 2 was closed without attorney supervision which should bar BAC's claims. **We find it unnecessary to address the factual issue of whether an attorney was present at the closing** because even if one had not been present, our holding in *Matrix* would allow BAC's claims to proceed. In *Matrix* we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from obtaining equitable relief. *Id.* at 140, 714 S.E.2d at 535. However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would "apply this ruling to all filing dates after the issuance of this opinion," which was August 8, 2011. *Id.* To the extent some confusion apparently exists as to what filing date *Matrix* referred to, we clarify now that it is the date the document a party seeks to enforce was filed. Here, Systems' mortgage was recorded on April 20, 2007, well before the issuance of *Matrix*. Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality.

*Kinder*, 398 S.C. at 624, 731 S.E.2d at 549-50 (emphasis added).

The only evidence before this Court established that the Mortgage was recorded prior to August 8, 2011. The holdings in *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), and *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987), do not alter this rule. The Supreme Court cited those cases

but still held any relief based on the failure of an attorney to close the loan only exists for mortgages recorded after August 8, 2011. *See Kinder*, 398 S.C. at 624, 731 S.E.2d at 549-50. Thus, the Court erred in granting summary judgment to Defendants.

2. The Court also overlooked the fact that a genuine issue of fact exists. Chase introduced evidence (admissible as a business record of Chase and the authenticity of that document was not challenged by Defendants) that noted a South Carolina attorney supervised the closing. This evidence was not an affidavit, and therefore, it was not subject to the time restrictions of Rule 56, SCRPC. That evidence directly contradicted Defendants' claims and created a genuine issue of material fact as to whether an attorney supervised the closing. Thus, summary judgment was improper. This Court should grant reconsideration to correct this error and deny Defendants' motion.

3. Finally, this Court ruling that a purported failure to have two witnesses present renders the Mortgage unenforceable runs contrary to settled South Carolina law. South Carolina law provides that where a mortgage is not attested by two witnesses, it is unenforceable as a legal mortgage. *Stelts v. Martin*, 90 S.C. 14, 16-17, 72 S.E. 550, 551 (1911). However, that does not mean the holder or servicer cannot foreclose on the mortgage. The mortgage is still enforceable between the parties as an equitable mortgage if it was actually signed by a borrower who intended it to secure a debt. *Id.*; see also *Farmers' Bank & Trust Co. v. Fudge*, 113 S.C. 25, 36, 100 S.E. 628, 632 (1919) ("Another reason why this exception cannot be sustained is that the mortgage, even without witnesses, would have been good between the parties; and the fact that the witnesses may be disqualified by interest would not have the effect of

destroying its validity.”). Accordingly, “[a] mortgage executed without witnesses or with incompetent witnesses is nevertheless valid between the parties.” 27 S.C. Jur. *Mortgages* § 9 (emphasis added). Therefore, this Court erred in finding the Mortgage unenforceable on this basis. Rehearing should be granted to correct this error.

This motion is further supported by the South Carolina Rules of Civil Procedure, applicable case and statutory law, and any supporting memorandum that may be submitted before, during, or after the hearing on this motion.

Respectfully submitted,

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October 23, 2015

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
Case No. 2013-CP-10-5329

JP Morgan Chase Bank, National  
Association,

Plaintiff,

v.

Delilah Starr Acheson a/k/a Delilah S.  
Acheson a/k/a Starr D. Acheson,  
individually, as Legal Heir and Personal  
Representative of the Estate of Joseph L.  
Acheson a/k/a Joseph Lynn Acheson, Sr.,  
Deceased, Amber Mae Acheson Reed,  
Joseph Lynn Acheson, Jr., Jacob Lee  
Acheson, and Daniel Alexander Acheson,  
as Legal Heirs or devisees of the Estate of  
Joseph L. Acheson a/k/a Joseph Lynn  
Acheson, Sr., Deceased, Ronald Lee  
Dowell, Ruth C. Dowell, and Charleston  
County Revenue Collections,

Defendants.

**MEMORANDUM OPPOSING MOTION  
FOR RECONSIDERATION**

FILED  
2015 NOV 16 PM 4:16  
JULIE J. ARMSTRONG  
CLERK OF COURT

Plaintiff's Motion for Reconsideration sets forth three different grounds for reconsideration of this mortgage foreclosure action. However, the motion does not address the totality of misconduct of Plaintiff and its predecessor in closing the loan and mortgage and dealing with the Defendants after the death of the Borrower, Joseph Acheson.

Plaintiff is correct that, if the only misdeed by Plaintiff was not having a lawyer conduct the loan closing, the prior rulings of the South Carolina Supreme Court would require that the mortgage foreclosure action proceed. In our case, the facts were undisputed that the Plaintiff and/or its predecessor failed to have a lawyer close the loan and mortgage even though Plaintiff stated in its closing packet that a lawyer was closing the loan, so it knew that a lawyer was

required and simply did not have one at the closing. The Order quoted from a letter to the Defendants conveying the closing documents in which Plaintiff's predecessor stated that "an agent" (not an attorney) would close the loan. However, buried in the closing documents was an uncompleted form, the purpose of which was to identify the lawyer who was "closing" the loan. Thus, Plaintiff knew that a lawyer was to close the loan and actually sent documents with a form to be completed by the lawyer but still do not have one. At the summary judgment hearing, Plaintiff produced to the Court an inadmissible document stating that an attorney conducted the closing by telephone conference call and had reviewed and explained to the Borrower the terms and provisions of the Note and Mortgage. This statement was not submitted by affidavit and was inadmissible evidence that could not be considered in ruling on a Motion for Summary Judgment. See Maryland Highways Contractors Ass'n v. Maryland, 933 F.2d 1246, 1251-52 (4<sup>th</sup> Cir. 1991) ("hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment.") Plaintiff's lawyers continue to hold this inadmissible document out as "proof" that an attorney closed the loan. The undisputed facts remain that there was no lawyer present in person or by telephone at the loan closing even though the Plaintiff's predecessor has attempted to cover up its misconduct by fraudulently stating that a lawyer was present.

The second misdeed by Plaintiff was failing to have a second witness present and then fraudulently completing the documents showing that there was a second witness to the closing.

The third misdeed happened after the death of the Borrower, Mr. Acheson. The Defendant, Mrs. Acheson tried over and over to get Plaintiff to change the name on the note and to deal with her regarding her husband's debt. Plaintiff repeatedly told Mrs. Acheson that it could only deal with her deceased husband.

All of these misdeeds when taken together support the granting of summary judgment by the Court because of the Plaintiff's unclean hands. The Plaintiff's motion for reconsideration should be denied.

Respectfully submitted,

November 16, 2015

By: Alice F. Paylor  
Alice F. Paylor  
Rosen, Rosen & Hagood, LLC  
134 Meeting Street, Suite 200  
Charleston, SC 29401  
ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16<sup>th</sup> day of November, 2015 a true and correct copy of Memorandum Opposing Motion for Reconsideration was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following.

Michael J. ANZELMO, Esquire  
Nelson Mullins.  
PO Box 11070  
Columbia, SC 29211

Alice F. Paylor

FILED

2015 NOV 16 PM 4: 16

JULIE J. ARMSTRONG  
CLERK OF COURT

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr.  
Circuit Court Judge

Case No. 2013-CP-10-05329

**RECEIVED**

JAN 06 2016

SC Court of Appeals

JPMorgan Chase Bank, National Association, ..... Appellant,

v.

Delilah Starr Acheson a/k/a Delilah S. Acheson a/k/a  
Starr D. Acheson, individually, as Legal Heir and  
Personal Representative of the Estate of Joseph L.  
Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased,  
Amber Mae Acheson Reed, Joseph Lynn Acheson, Jr.,  
Jacob Lee Acheson, and Daniel Alexander Acheson, as  
Legal Heirs or Devisees of the Estate of Joseph L.  
Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased,  
Ronald Lee Dowell, Ruth C. Dowell, and Charleston  
County Revenue Collections, ..... Defendants.

Of whom Delilah Starr Acheson a/k/a Delilah S.  
Acheson a/k/a Starr D. Acheson, individually, as Legal  
Heir and Personal Representative of the Estate of  
Joseph L. Acheson a/k/a Joseph Lynn Acheson, Sr.,  
Deceased, Amber Mae Acheson Reed, Joseph Lynn  
Acheson, Jr., Jacob Lee Acheson, and Daniel  
Alexander Acheson, as Legal Heirs or Devisees of the  
Estate of Joseph L. Acheson a/k/a Joseph Lynn  
Acheson, Sr., Deceased, Ronald Lee Dowell, and Ruth  
C. Dowell, are ..... Respondents

**Notice of Appeal**

JPMorgan Chase Bank, National Association ("Appellant") appeals the order  
granting Respondents' Motion for Summary Judgment filed October 9, 2015, attached  
as Exhibit A, and the order denying Appellant's Motion for Reconsideration filed

November 30, 201, attached as Exhibit B, in the above-captioned action. Appellant received written notice of the entry of the November 30th order on December 8, 2015.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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Attorneys for JPMorgan Chase Bank, National  
Association

Columbia, South Carolina

January 6, 2015

EXHIBIT

A

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
Case No. 2013-CP-10-5329

JP Morgan Chase Bank, National  
Association,

Plaintiff,

v.

Delilah Starr Acheson a/k/a Delilah S.  
Acheson a/k/a Starr D. Acheson,  
individually, as Legal Heir and Personal  
Representative of the Estate of Joseph  
L. Acheson a/k/a Joseph Lynn Acheson,  
Sr., Deceased, Amber Mae Acheson  
Reed, Joseph Lynn Acheson, Jr., Jacob  
Lee Acheson, and Daniel Alexander  
Acheson, as Legal Heirs or devisees of  
the Estate of Joseph L. Acheson a/k/a  
Joseph Lynn Acheson, Sr., Deceased,  
Ronald Lee Dowell, Ruth C. Dowell,  
and Charleston County Revenue  
Collections,

Defendants.

**RECEIVED**

JAN 06 2016

SC Court of Appeals

ORDER

FILED  
2015 OCT -9 PM 2:35  
JULIE J. ARMSTRONG  
CLERK OF COURT

This matter came before me for a hearing on September 1, 2015, on Defendants' (all except for Charleston County Revenue Collections) Motion for Summary Judgment. Defendants' motion was supported by the Affidavits of Delilah Starr Acheson, Ronald Dowell and Ruth Dowell. Plaintiff presented no Affidavits opposing this motion so that the only evidence presented is that submitted by Defendants. After considering the arguments of counsel for Plaintiff and Defendants, I have determined that Defendants' Motion for Summary Judgment should be granted.

## FACTS

I find the following facts taken from the uncontradicted Affidavits submitted.

In 2008, Ronald and Ruth Dowell, along with their daughter, Delilah Starr Acheson and her husband, Joseph Acheson, owned a house located at 201 E. Huron, Folly Beach, South Carolina. Mr. Acheson applied for a loan from Quicken Loans. In order to secure the loan, all four owners were required to sign a mortgage on the Folly Beach property.

On April 24, 2008, Jean Kellogg, who introduced herself as the closing agent for Quicken Loans, came to the Dowells' house in Gastonia, North Carolina, where Mr. and Mrs. Dowell and Mr. and Mrs. Acheson were present. She had a large stack of documents that she got the four owners to sign. After they had signed everything, Ms. Kellogg gave them a bound document containing the "2008 Mortgage Documents." In that document was an uncompleted form, entitled "Closing Attorney's Statement." That document was to be completed by the attorney closing the loan. There was no attorney present at the loan closing and that document was not signed. Even though Ms. Kellogg was the only person present at the loan closing other than the mortgagors, the documents that the Defendants signed were witnessed by another person who was not present. There is no evidence that a lawyer was supervising the loan closing or had anything to do with the loan closing or the documents prepared although the loan documents implied that an attorney was supervising the loan closing.

The first page of the bound document was a letter from Nathan Kyle, Client Care Specialist for Quicken Loans, to Mr. Acheson. In that letter, Mr. Kyle said nothing about having a lawyer close the loan and, instead, stated that "[a]t the scheduled closing

RW007/2

meeting, the closing agent will open their package and review all of the documents with you....” Ms. Kellogg did open the package and told the Defendants where they should sign.

Attached to the Plaintiff's Memorandum Opposing Summary Judgment as Exhibit A are three (3) documents allegedly signed by an attorney. The first document states that he “conducted a closing ... by telephone conference call” and the third stated that he “reviewed and explained to the Borrower(s) the terms and provisions of the Note and Mortgage.” According to the only admissible evidence, the affidavits of the Defendants, these claims are not true.

Quicken Loans subsequently transferred the loan and mortgage to the Plaintiff. Mr. Acheson made all of the required loan payments until his death on August 15, 2010. Mrs. Acheson promptly notified the Plaintiff of Mr. Acheson's death and faxed a copy of the death certificate and her husband's will. Plaintiff did not file a claim with Mr. Acheson's estate, which has been handled and closed in both South Carolina and North Carolina.

Although Mrs. Acheson continued to make the loan payments, Plaintiff refused to talk to her, because she was not the “borrower.” Because Plaintiff would not deal with Mrs. Acheson and allow her to either assume or refinance the loan, Mrs. Acheson stopped making the payments in 2013, and this action was filed on September 11, 2013. Mrs. Acheson has tried to resolve the matter with Plaintiff ever since the filing of the action. The Defendants answered and asserted the affirmative defense of unclean hands in their Affirmative Defenses Nos. 4 and 8.

2/10/13

## LEGAL CONCLUSIONS

Defendants moved for summary judgment, because the Plaintiff had unclean hands; because there was no attorney present at the closing of the loan and mortgage that are the subject of this action, the lender, Plaintiff knew of the requirement that a lawyer be involved and actively misrepresented that a lawyer was involved and the Plaintiff has failed and refused to allow the Defendants to refinance or assume the loan and, instead, have sought foreclosure on this property.

As the South Carolina Court of Appeals has stated:

As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that loan closings had to be supervised by an attorney.

Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (S.C. App. 2010). In State v. Buyers Service Co., Inc., 292 S.C. 426, 433, 357 S.E.2d 15, 19 (1987), the South Carolina Supreme Court specifically held that "instructing clients in the manner in which to execute legal documents is itself the practice of law and requires a legal knowledge of statutes and case law." In that case, the Court discussed case law from other jurisdictions where lay persons may conduct closings but held that "real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court." 292 S.C. at 434, 357 S.E.2d at 19.

There was no lawyer present at the closing, and the Plaintiff presented no admissible evidence that the documents were prepared by a South Carolina lawyer, reviewed by a South Carolina lawyer or even that a South Carolina lawyer was

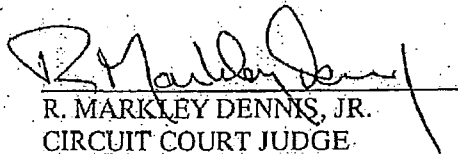
supervising the loan closing from afar. Instead, Plaintiff's counsel attached documents purported to be signed by a lawyer who closed the loan "by telephone." The Affidavits of Defendants clearly deny that any lawyer was involved in the closing. In addition, the Plaintiff's predecessor in interest falsified that a second witness was present. There is no question that Plaintiff knew that it had to have two witnesses and a lawyer closing the loan as set forth in its loan document and as evidenced by the false documents attached as Exhibit A to Plaintiff's Memorandum but elected to go forward with the loan closing without a required witness or a lawyer having anything to do with it other than to apparently sign three documents that he had closed the loan. In addition, Plaintiff has acted in bad faith since the death of Mr. Acheson by failing to deal with Mrs. Acheson or to allow her to assume or refinance the loan.

Plaintiff argued that the cases, Matrix Financial Services Corporation v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011), and BAC Home Loans Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012), controlled in this case, because those cases held that voiding a real estate mortgage secured through the unauthorized practice of law were prospective only from the date of the Matrix opinion. This matter is distinguishable from those cases in that the Plaintiff's predecessor in interest clearly knew that closing a loan without a lawyer was the unauthorized practice of law, provided loan documents that stated that there was a closing attorney who "closed the above mortgage on April 24, 2008" and who "[p]rior to the execution of the Note and Mortgage by the Borrower(s), [] reviewed and explained to the Borrower(s) the terms and provisions of the Note and Mortgage....". See Acheson Affidavit, Exhibit A.

Plaintiff and Plaintiff's predecessor in interest have unclean hands in this mortgage closing in not having a lawyer close the loan, in falsely claiming to have a second witness at the closing, in fraudulently claiming that a lawyer had closed the loan and in refusing and failing to deal with Mrs. Acheson in good faith when she attempted to refinance or assume the loan. As the Supreme Court stated in Matrix, "[l]enders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard." In the present case, not only did the Plaintiff lender ignore this state's legal requirement that a lawyer conduct the loan closing, it further ignored the laws of this State by failing to have a second witness present and then falsifying a witness and in fraudulently claiming in its loan documents that a lawyer had closed the loan. This case differs from a simple loan closing case where the lender did not have a lawyer present at the loan closing, because the lender went above and beyond that failure by falsifying the mortgage document and fraudulently claiming that a lawyer had closed the loan and subsequently dealing with Mrs. Acheson in bad faith.

IT IS, THEREFORE, ORDERED that Defendant's Motion for Summary Judgment should be granted due to the multiple illegal, fraudulent and bad faith actions of the Plaintiff's predecessor in interest in closing this loan.

AND IT IS SO ORDERED.

  
R. MARKLEY DENNIS, JR.  
CIRCUIT COURT JUDGE

October 7, 2015

Charleston, SC

EMD 6

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MICHAEL J. ANZELMO  
PO BOX 11070  
COLUMBIA SC 29211-1070

**NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC**

**Order/Defnt's mot for sum judg should be granted etc**

**CASE NO: 2013CP1005329**

**JPMorgan Chase Bank National Association VS Delilah Starr Acheson , defendant, et al**

This judgment was entered on the 09th day of October, 2015, and notice mailed first class on Monday, October 12, 2015, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

R

**JULIE J. ARMSTRONG**

CLERK OF COURT, C.P. & G.S.  
100 BROAD STREET, SUITE 106  
CHARLESTON, SC 29401-2258

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MICHAEL J. ANZELMO  
PO BOX 11070  
COLUMBIA SC 29211-1070

**NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC**

**Order/Plntff's mot for reconsideration is denied**

**CASE NO: 2013CP1005329**

**JPMorgan Chase Bank National Association VS Delilah Starr Acheson , defendant, et al**

This judgment was entered on the 30th day of November, 2015, and notice mailed first class on Wednesday, December 02, 2015, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr.  
Circuit Court Judge

Case No. 2013-CP-10-05329  
Appellate Case No. 2016-000028

JPMorgan Chase Bank, National Association, ..... Appellant,

v.

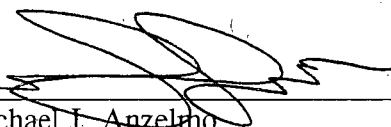
Delilah Starr Acheson a/k/a Delilah S. Acheson a/k/a  
Starr D. Acheson, individually, as Legal Heir and  
Personal Representative of the Estate of Joseph L.  
Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased,  
Amber Mae Acheson Reed, Joseph Lynn Acheson, Jr.,  
Jacob Lee Acheson, and Daniel Alexander Acheson, as  
Legal Heirs or Devisees of the Estate of Joseph L.  
Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased,  
Ronald Lee Dowell, Ruth C. Dowell, and Charleston  
County Revenue Collections; ..... Defendants.

Of whom Delilah Starr Acheson a/k/a Delilah S.  
Acheson a/k/a Starr D. Acheson, individually, as Legal  
Heir and Personal Representative of the Estate of  
Joseph L. Acheson a/k/a Joseph Lynn Acheson, Sr.,  
Deceased, Amber Mae Acheson Reed, Joseph Lynn  
Acheson, Jr., Jacob Lee Acheson, and Daniel  
Alexander Acheson, as Legal Heirs or Devisees of the  
Estate of Joseph L. Acheson a/k/a Joseph Lynn  
Acheson, Sr., Deceased, Ronald Lee Dowell, and Ruth  
C. Dowell, are ..... Respondents

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo

SC Bar No. 72933

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Attorneys for JPMorgan Chase Bank, National Association

Columbia, South Carolina

July 14, 2016

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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable R. Markley Dennis, Jr.  
Circuit Court Judge

Case No. 2013-CP-10-05329  
Appellate Case No. 2016-000028

JPMorgan Chase Bank, National Association, ..... Appellant,

v.

Delilah Starr Acheson a/k/a Delilah S. Acheson a/k/a  
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Amber Mae Acheson Reed, Joseph Lynn Acheson, Jr.,  
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Of whom Delilah Starr Acheson a/k/a Delilah S.  
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Alexander Acheson, as Legal Heirs or Devisees of the  
Estate of Joseph L. Acheson a/k/a Joseph Lynn  
Acheson, Sr., Deceased, Ronald Lee Dowell, and Ruth  
C. Dowell, are ..... Respondents

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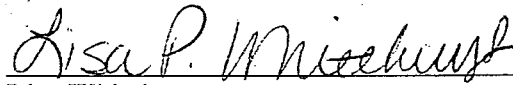
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for JPMorgan Chase Bank, National Association, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Record on Appeal

Counsel Served:

Alice F. Paylor, Esquire  
Rosen Rosen & Hagood, LLC  
Post Office Box 893  
Charleston, SC 29402



Lisa Whitehurst  
Administrative Assistant

July 14, 2016