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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Master-in-Equity

Joseph M. Strickland, Master

Case No. 2012-CP-40-7878  
Appellate Case No. 2015-000367

**RECEIVED**

AUG 22 2016

SC Court of Appeals

Royals Portfolio, LLC, an assignee of Bank of America, N.A.,  
formerly known as NationsBank, N.A., which is Successor by  
Merger to NCNB South Carolina, ..... Respondent,

v.

Charlie Kelly and Dorothy Simpson, ..... Appellants.

MOTION TO STRIKE PORTIONS OF APPELLANTS' DESIGNATION AND INITIAL BRIEF  
AND  
TO HOLD TIME FOR RESPONDENT'S BRIEF IN ABEYANCE PENDING A DECISION ON MOTION

Pursuant to Rules 208(b)(4), 209(b), 210(c), and 240, SCACR, Respondent moves to strike portions of Appellants' Designation and Initial Brief. Respondent further moves to hold in abeyance the time for serving and filing its Initial Brief and Designation until fifteen (15) days after the resolution of this motion. As shown below, Appellants have designated materials for the Record on Appeal which were not presented to the lower court and, therefore, are not properly includable in the Record on Appeal under Rules 209(b) and 210(c). Appellants have also cited these materials in their Initial Brief of Appellant, which is improper under Rule 208(b)(4).

## BACKGROUND FACTS

Appellants' Designation of Matter to be Included in the Record on Appeal includes the following designation:

- d. Plaintiff's [Respondent's] Motion for Summary Judgment, filed July 10, 2013
  - i. Exhibit: Deposition Transcript of Charlie Kelly [Appellant]
  - ii. Exhibit: Deposition Transcript of Dorothy Simpson [Appellant]

(App. Desig. at p. 2). Appellants cite these depositions as support for assertions made in their Initial Brief of Appellant. (See Tab D).

Respondent's summary judgment motion was filed in the Circuit Court in July 2013, before the case was referred to the Master in January 2014.<sup>1</sup> The motion was never heard or decided by the Circuit Court prior to the reference to the Master. The motion was never heard or decided by the Master after the reference.

At trial, Respondent read portions of Appellant Simpson's deposition into the record.

Those "read-ins," however, were limited to the following pages and lines:

- Dep. p. 7, lines 9-22<sup>2</sup>
- Dep. p. 8, line 25, to p. 10, line 5<sup>3</sup>
- Dep. p. 12, line 13, to p. 13, line 22<sup>4</sup>
- Dep. p. 17, line 15, to p. 18, line 20<sup>5</sup>
- Dep. p. 19, line 21, to p. 20, line 6<sup>6</sup>
- Dep. p. 21, lines 20-25<sup>7</sup>
- Dep. p. 23, line 7, to p. 24, line 3<sup>8</sup>
- Dep. p. 28, lines 14-23<sup>9</sup>
- Dep. p. 30, lines 19-24<sup>10</sup>

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<sup>1</sup> See Order of Reference at Tab A.

<sup>2</sup> Compare Tr. 56-57 at Tab B with Simpson Dep. p. 7 at Tab C.

<sup>3</sup> Compare Tr. 57-58 at Tab B with Simpson Dep. pp. 8-10 at Tab C.

<sup>4</sup> Compare Tr. 58-59 at Tab B with Simpson Dep. pp. 12-13 at Tab C.

<sup>5</sup> Compare Tr. 59-60 at Tab B with Simpson Dep. pp. 17-18 at Tab C.

<sup>6</sup> Compare Tr. 60 at Tab B with Simpson Dep. pp. 19-20 at Tab C.

<sup>7</sup> Compare Tr. 60 at Tab B with Simpson Dep. p. 21 at Tab C.

<sup>8</sup> Compare Tr. 60-61 at Tab B with Simpson Dep. pp. 23-24 at Tab C.

<sup>9</sup> Compare Tr. 61 at Tab B with Simpson Dep. p. 28 at Tab C.

<sup>10</sup> Compare Tr. 61 at Tab B with Simpson Dep. p. 30 at Tab C.

During this “read-in” process, Respondent’s trial counsel handed up the original of Simpson’s deposition to the Master so that he could follow along. (Tr. 56 at Tab B). No other portions of Appellant Simpson’s deposition were read into the record, and the deposition was not entered into evidence. Moreover, Appellants never requested or suggested that the Master should consider any other portion of Appellant Simpson’s deposition, and nothing indicates the Master did so. Thus, only those pages and lines that were read into the record are properly in the Record and properly cited by Appellants in their brief, and those citations should be to the trial transcript, not the deposition. Appellants, however, cite pages 14, 16, and 17 of the deposition in their brief. (See Init. App. Br. 6-7 at Tab D). No portion of pages 14 or 16 were read into the record at trial. (See Tab B). A portion of page 17 was read into the record, but not the portion cited in Appellants’ Brief.<sup>11</sup>

No portion of Appellant Kelly’s deposition was read into the record at trial or otherwise presented to the Master. Appellants, however, cite this deposition in their brief. (See Init. App. Br. at 2-4, 5-6 & n.2 at Tab D). The original deposition of Appellant Kelly remains in the possession of Respondent’s undersigned counsel and was never delivered to the Master.

### ARGUMENT

Rule 208(b)(4), SCACR, provides in pertinent part that the brief shall contain references to materials “which may be properly included in the Record on Appeal [*see Rule 210(c)*] to support the salient facts alleged.” (Brackets in original; emphasis added). Rule 209(b), SCACR, provides in pertinent part that a party’s designation may include only those materials “which may be properly included in the Record on Appeal [*See Rule 210(c)*].” (Brackets in original; emphasis

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<sup>11</sup> Appellants also cite page 20, lines 2-6 of the deposition at Init. App. Br. 8. (See Tab D). That portion of the deposition was read into the Record, but the citation should be to the transcript, not the deposition.

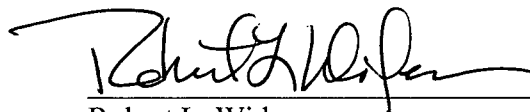
added). Rule 210(c), SCACR, provides in pertinent part that “[t]he Record shall *not*, however, *include* matter which was *not presented* to the lower court or tribunal.” (Emphasis added). The manifest purpose of these rules is to ensure that appellate review is based on matters that were actually presented to the trial court in reaching the appealed decision. Here, as shown above, Appellants have designated and cited matters that were not presented to the Master in reaching the appealed decision and, therefore, those designations and citations are improper and should be stricken. Any assertions made in Appellants’ brief that have no support other than the improperly designated and cited materials should also be stricken.

**CONCLUSION**

For all of the foregoing reasons, Respondent respectfully requests this Court to enter an order that:

1. strikes Appellants’ designation of the motion for summary judgment and the depositions of Appellant Simpson and Appellant Kelly, and directs Appellants to serve and file an Amended Designation that complies with the SCACR;
2. strikes all portions of Appellants’ brief that rely on the improper designations and directs Appellants to serve and file an Amended Initial Brief of Appellant that complies with the SCACR; and
3. provides that Respondent’s initial brief and designation shall be served and filed within fifteen (15) days after Appellants serve and file their Amended Designation and Brief.

Respectfully Submitted,



Robert L. Widener  
Paul D. Harrill  
MCNAIR LAW FIRM, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800  
ATTORNEYS FOR RESPONDENT

August 22, 2016  
Columbia, SC

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2012-CP-40-07878

Royals Portfolio LLC

Charlie Kelly

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other Dismissed without prejudice
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

This Matter is Hereby Referred to the Master-in-Equity.

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge G. V. Kelly Judge Code 2126 Date 1-14-14

For Clerk of Court Office Use Only

This judgment was entered on the 22 day of Jan, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of Jan, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Paul D. Harrill  
ATTORNEY(S) FOR THE PLAINTIFF(S)

William Frederick Schumacher IV  
ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court Janette W. McBride

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
COUNTY OF RICHLAND ) CASE #: 2012-CP-40-7878

Royals Portfolio, LLC, )  
 )  
Plaintiff, )  
v. )  
 )  
Charlie Kelly and )  
Dorothy Simpson, )  
 )  
Defendants. )

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## HEARING

\*\*\*\*\*

Wednesday, September 10, 2014  
9:25 a.m. to 2:52 p.m.

The hearing before the Honorable Joseph M. Strickland, Master in Equity for Richland County, was taken in Courtroom 2D of the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina, on the 10th day of September, 2014, before Robin K. Reibold, Court Reporter and Notary Public in and for the State of South Carolina.

**Official Court Reporter**  
Master in Equity, Richland County  
1701 Main Street – Post Office Box 192 (29202)  
Columbia, South Carolina 29201

1 in the agreement that allows them to do that; that's  
2 my question?

3 A: No. No, sir.

4 THE COURT: Nothing to allow that?

5 A: No.

6 THE COURT: Okay. All right. Thank you, sir. You may  
7 come down.

8 A: Yes.

9 THE COURT: Watch your step coming down.

10 A: Do I leave all of this up here?

11 THE COURT: Yes, sir, please. All right. Mr. Harrill?

12 MR. HARRILL: Your Honor, I don't have any other  
13 witnesses. I do -- I would like to read a few  
14 portions of Ms. Simpson's deposition into the record,  
15 if I could do that.

16 THE COURT: Well, Mr. Boger, are you going to call Ms.  
17 Simpson?

18 MR. BOGER: I am going to call the Simpsons, Your Honor.

19 THE COURT: Oh, okay. Would you rather wait until she's  
20 on the stand, or would you -- or do you want to call  
21 her as your own witness? You can call her as an  
22 adverse witness if you'd like.

23 MR. HARRILL: If you would prefer just to wait and do it  
24 live, I'm happy to do that, Your Honor. What I don't  
25 want to do is waive the right to put this in. If Mr.

1 Boger for some reason decides not to call her or  
2 otherwise, then I want to make sure I get this in.

3 THE COURT: Well, I'm going to leave your strategy  
4 decisions up to you, but under the Rules you can call  
5 her yourself.

6 MR. HARRILL: Oh, I understand that.

7 THE COURT: Yeah, yeah.

8 MR. HARRILL: But I also know I can also use the  
9 deposition for any purpose.

10 THE COURT: That's true.

11 MR. HARRILL: I just want to read in portions, and  
12 sometimes that's easier and cleaner than, than doing  
13 that. I know she's going to take the stand, but I --

14 THE COURT: Mr. Boger, you, and you object to that, is  
15 that ---

16 MR. BOGER: I do. And I don't want to take that right  
17 from him. I don't know how long it's going to take,  
18 but I've got Ms. Lane sitting here. I'd like to get  
19 her on the stand as quick as I can. She's been here  
20 ---

21 THE COURT: Well, no. The issue is though he's going to  
22 read a deposition excerpt. My suggestion was, he can  
23 use it when she's called, or you call Ms. Simpson  
24 yourself. But you think you'd be better off just  
25 reading what's in the ---

1 MR. HARRILL: It's, it's certainly I think my right, and  
2 it's a cleaner way to do it, Your Honor ---  
3 THE COURT: Okay.  
4 MR. HARRILL: --- for the purposes of my case.  
5 THE COURT: All right. Mr. Boger, your objection's  
6 overruled. All right, please proceed, Mr. Harrill.  
7 MR. HARRILL: All right. Your Honor ---  
8 THE COURT: Now, now, hold on. Now, he can't cross-  
9 examine you is what -- you understand that, right?  
10 MR. HARRILL: Yeah.  
11 THE COURT: He's not going to ask you questions about your  
12 deposition.  
13 MR. HARRILL: All right. And, Your Honor, would you like  
14 to have the original?  
15 THE COURT: All you're going to do is publish what she  
16 said in her deposition?  
17 MR. HARRILL: Yes, sir.  
18 THE COURT: Okay. One moment, please. Okay, I have the  
19 original in my hand. You may proceed, Mr. Harrill.  
20 MR. HARRILL: Thank you, Your Honor. And I'm starting on  
21 page seven, line nine. "Ms. Simpson, are you  
22 employed?" Answer, "I'm self-employed." "Give me  
23 generally the nature of what you do." Answer, "I'm a  
24 caregiver. I have two elderly veterans that I take  
25 care of." Question, "Okay. And where do you take

1 care of them?" Answer, "In my home." "And that's  
2 2800 McCords Ferry?" "Yes, sir." "And that address  
3 -- and that home is the property that's the subject  
4 of this foreclosure action?" Answer, "Yes, sir."  
5 All right, next I'm on page eight, line 25. "All  
6 right. And so you understand, do you not, that  
7 Royals Portfolio is claiming that you're in default  
8 under the terms of the note and the mortgage?"  
9 Answer, "Yes, sir." "And do you also understand that  
10 there are two bases for them claiming that you're in  
11 default?" Answer, "Yes, sir." "Okay. The first,  
12 and just tell me if you disagree or agree, the first  
13 they are claiming is that you have failed to make  
14 some payments when due." Answer, "Failed to make one  
15 payment that was due." "Okay. And you're aware that  
16 that's what they're claiming?" "Yes, sir." "And you  
17 disagree with that, is that right?" "I agree with  
18 the one payment." "Say that again?" "I agree with  
19 the one payment." "That you'd missed one payment?"  
20 "Yes, sir." All right, now over on page -- I'm still  
21 on page nine, just picking up right where I left off  
22 actually. "And then the second basis upon which  
23 Royals is claiming that there's a default is that you  
24 failed to pay the real estate taxes on the property."  
25 Answer, "Yes, sir." "Okay, do you agree that that is

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*Master in Equity, Richland County*

*1701 Main Street - Post Office Box 192 (29202)*

*Columbia, South Carolina 29201*

1 accurate, that you did not pay the real estate  
2 taxes?" Answer, "Yes, sir." All right, moving over  
3 to page 12, Your Honor, line 13. "Do you agree for  
4 the purpose of this transaction, you agree with  
5 Royals Portfolio that what we'll call the stipulated  
6 existing debt was \$400,000 on a prior existing loan?"  
7 Answer, "Yes, sir." "Okay. And that's set forth  
8 therein?" "I guess." "It's Recital I to that  
9 document? Are you still considering my question?"  
10 "I thought you were finished. Excuse me." "I asked  
11 you a question, I thought. I just asked you if it  
12 was set forth in Recital I that the parties had  
13 stipulated to \$400,000 as the debt that remained from  
14 a prior loan." Answer, "Yes, sir." "And was it your  
15 understanding when you signed this agreement that  
16 Royals was agreeing to basically require that you  
17 only pay \$125,000 instead of the \$400,000 as long as  
18 you made timely payments on the loan?" Answer, "Yes,  
19 sir." I'm picking up, Your Honor, on page 13, line  
20 eight, I think where we left off essentially. "Now,  
21 a little bit ago you said you agreed that you had not  
22 made one payment on the loan. Can you tell me what  
23 payment that was?" "That payment was a payment, I  
24 think that was due back in 2010, and it was brought  
25 to my attention that it was not made and we in turn

1       made that payment."       "Was that, was your making of  
2       the payment after a demand letter had been sent to  
3       you?"       "It wasn't a demand letter, it was a letter  
4       indicating that payment was due."       "Do you recall who  
5       wrote that letter, was it me or was it somebody  
6       else?"       Answer, "It was Paul Harrill."       Just one  
7       moment, Your Honor, I'm trying to skip ahead if I  
8       can. All right, looking at page 17, starting at line  
9       15. "Did you pay that payment after this letter that  
10       I'm showing you, Exhibit Four?"       "It was after, I  
11       think."       "Okay. All right. Did you read this entire  
12       letter, Exhibit Four, when you got it?"       "Yes, sir."  
13       "Did you understand that Royals was saying that  
14       because of the default they were accelerating the  
15       balance of the loan so that the \$400,000 stipulated  
16       existing debt was now due and owing?"       "Yes, sir."  
17       And then continuing on, "And did you also read down  
18       on the second page, second to the last paragraph,  
19       where it says, I'm going to paraphrase it a little  
20       bit, you feel free to state it however you would like  
21       to, that if you make a partial payments, or make any  
22       partial payments toward the total debt, which was  
23       identified up above, that those would just be applied  
24       to the total debt and not be applied to bring the  
25       note current. Did you understand that?"       Answer,

1 "Yes, sir." All right, looking at 19, starting at  
2 21. "Ms. Simpson, I think we've already covered  
3 this, but you acknowledge that Royals Portfolio made  
4 the real estate tax payment for the property for I  
5 think tax year 2012?" Answer, "Yes, sir." "Why did  
6 you not make that payment, or Mr. Kelly?" "That  
7 payment, I forgot all about that payment. It's not  
8 like I did it intentionally, but I did it. I just, I  
9 just forgot about it." Over on 21, line 20, "Okay.  
10 So wouldn't you agree that by failing to make the tax  
11 payments, that you failed to observe or perform an  
12 agreement set forth in the mortgage here?" Answer,  
13 "Yes, sir. But I didn't do it intentionally. I did  
14 it because I forgot." Over on page 23, line 7, "With  
15 regard to Exhibit One, the Agreement Regarding  
16 Existing Debt, you were represented by Eddy Lane at  
17 the time you and Mr. Kelly signed this document, were  
18 you not?" "Yes, sir." "Okay. And she reviewed this  
19 with you and for you?" "Yes, sir." "And she  
20 provided you advice about the document?" "Yes, sir."  
21 "Prior to signing it?" "Yes, sir." And then  
22 continuing on, "The same with Exhibit Two, the  
23 mortgage, Ms. Lane was representing you when you  
24 signed that document?" "Yes, sir." "And she  
25 reviewed it for you?" "Yes, sir." "And she provided

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*Columbia, South Carolina 29201*

1 you advice, you know, before and when you signed this  
2 document?" "Yes, sir." Moving to page 28, Your  
3 Honor, line 14. "Do you understand that in the  
4 Agreement Regarding Existing Debt, that if you and  
5 Mr. Kelly defaulted on, you know, this document, that  
6 Royals could then pursue the stipulated existing debt  
7 amount, which was \$400,000 as opposed to the \$125,000  
8 they agreed to take through monthly payments?"  
9 Answer, "I understand all of that, but I've tried to,  
10 through my attorney, to get money so that we could  
11 just pay Royals out for what we owe them besides  
12 going through the stipulated debt." All right, on  
13 page 30, Your Honor, line 19, "Okay, so are you -- so  
14 you are still" -- yes, on 19, "You are still sending  
15 a payment in, in the, whatever the note amount was in  
16 the note here, you're still sending that money to  
17 Royals every month?" Answer, "I'm sending that  
18 amount to Mr. Schumacher." Mr. Schumacher was an  
19 associate with Mr. Boger at the time, Your Honor.  
20 And the last -- well, that's the last one, Your  
21 Honor. Thank you.

22 **THE COURT:** All right. Thank you. Any other witnesses?

23 **MR. HARRILL:** No other witnesses. The plaintiffs rest,  
24 Your Honor.

25 **THE COURT:** Plaintiffs rest. All right, Mr. Boger?

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

ROYALS PORTFOLIO, LLC AN ASSIGNEE  
OF BANK OF AMERICA, N.A., FORMERLY  
KNOWN AS NATIONSBANK, N.A., WHICH  
IS SUCCESSOR BY MERGER TO  
NCNB SOUTH CAROLINA,

Plaintiff(s),

vs.

Case No. 2012-CP-40-07878

CHARLIE KELLY AND DOROTHY SIMPSON,

Defendant(s).

D E P O S I T I O N

WITNESS: DOROTHY SIMPSON

DATE: Thursday, June 20, 2013

TIME: 11:44 a.m.

LOCATION: McNair Law Firm  
1221 Main Street  
Columbia, South Carolina

TAKEN BY: Attorneys for the Plaintiff

REPORTED BY: BRADLEY H. THOMAS  
Registered Professional Reporter  
Certified Realtime Reporter

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A Full-Service Court Reporting Agency  
Post Office Box 7172  
Columbia, South Carolina 29202  
803-988-0086  
1-888-988-0086

1 Simpson, and Estrada Simpson.

2 Q. Now, have any of those taken a married  
3 name?

4 A. No.

5 Q. They all still go by Simpson?

6 A. Yes, sir.

7 Q. Are any of them married?

8 A. No, sir.

9 Q. All right. Ms. Simpson, are you employed?

10 A. I'm self-employed.

11 Q. Give me generally the nature of what you  
12 do.

13 A. I am a caregiver. I have two elderly  
14 veterans that I take care of.

15 Q. Okay. And where do you take care of them?

16 A. In my home.

17 Q. And that's 2800 McCords Ferry?

18 A. Yes, sir.

19 Q. And that address and that home is the  
20 property that's the subject of this foreclosure  
21 action?

22 A. Yes, sir.

23 Q. Okay. Now, prior to McCords Ferry didn't  
24 you have another residence?

25 A. That was off Leesburg Road, 125.

1 Steeplechase Road North, Columbia, South Carolina  
2 29209.

3 Q. All right. And when did you last live at  
4 that address?

5 A. That was back in, I think it was, 2006.

6 Q. Okay. So since 2006 you've been living at  
7 what I'll just call the property, 2800 McCords Ferry  
8 Road?

9 A. Yes, sir.

10 Q. All right. Has Mr. Kelly been living  
11 there --

12 A. Yes, sir.

13 Q. -- that entire time?

14 A. Yes, sir.

15 Q. And Mr. Kelly, I'm meaning Charlie Kelly.

16 A. Yes, sir.

17 Q. Okay. Did you ever have an opportunity or  
18 have you ever had an opportunity to review the  
19 complaint that was filed and served in this action?

20 A. Yes, sir.

21 Q. Okay. And you know that there were, I  
22 guess, a handful of exhibits, A through K, attached  
23 to that?

24 A. Yes, sir.

25 Q. All right. And so you understand, do you

1 not, that Royals Portfolio is claiming that you're  
2 in default under the terms of the note and the  
3 mortgage?

4 A. Yes, sir.

5 Q. Okay. And do you also understand that  
6 there are two bases for them claiming that you're in  
7 default?

8 A. Yes, sir.

9 Q. Okay. The first -- and just tell me if  
10 you disagree or agree. The first they are claiming  
11 is that you have failed to make some payments when  
12 due?

13 A. Failed to make one payment that was due.

14 Q. Okay. And you're aware that that's what  
15 they're claiming?

16 A. Yes, sir.

17 Q. And you disagree with that; is that right?

18 A. I agree with the one payment.

19 Q. Say that again.

20 A. I agree with the one payment.

21 Q. That you've missed one payment?

22 A. Yes, sir.

23 Q. Okay. And then the second basis upon  
24 which Royals is claiming that there's default is  
25 that you failed to pay the real estate taxes on the

1 property?

2 A. Yes, sir.

3 Q. Okay. Do you agree that that is accurate,  
4 that you did not pay the real estate taxes?

5 A. Yes, sir.

6 MR. HARRILL: Get that one marked.

7 (Exhibit No. 1 was marked for  
8 identification.)

9 BY MR. HARRILL:

10 Q. Ms. Simpson, I've handed you Exhibit 1 to  
11 your deposition. And that is a document entitled  
12 Agreement Regarding Existing Debt. Do you see that?

13 A. Yes, sir.

14 Q. Okay. Would you flip through that and  
15 just familiarize yourself with that document. And  
16 what I first and foremost want to know is whether or  
17 not that bears your signature back on Page 8 of the  
18 document?

19 A. Yes, sir.

20 Q. Okay. And does that also appear to be  
21 Mr. Kelly's signature up above yours?

22 A. Yes, sir.

23 Q. All right. Were you there in the same  
24 room when the document was signed?

25 A. Yes, sir.

1 Q. Okay. And I'll ask you the same thing I  
2 did about the note. Do you have any reason to  
3 believe that this is not a copy of the original  
4 document that you signed called Acknowledgment of  
5 Existing Liens and Mortgage of Real Estate?

6 A. No, sir.

7 Q. All right. Let me go back and ask you  
8 about the agreement regarding existing debt that's  
9 Exhibit 1. Do you agree that -- and for reference  
10 and maybe helping you, I'm looking at Page 2, it's  
11 letter I.

12 A. Page 2?

13 Q. Yes. Do you agree that for the purpose of  
14 this transaction you agreed with Royals Portfolio  
15 that what we'll call the stipulated existing debt  
16 was \$400,000 on a prior existing loan?

17 A. Yes, sir.

18 Q. Okay. And that's set forth there in, I  
19 guess, it's Recital I to that document? Are you  
20 still considering my question?

21 A. I thought you were finished. Excuse me.

22 Q. I asked you a question I thought. I just  
23 asked you if it was set forth in Recital I there  
24 that the parties had stipulated to \$400,000 as the  
25 debt that remained from a prior loan?

1 A. Yes, sir.

2 Q. Okay. And was it your understanding when  
3 you signed this agreement that Royals was agreeing  
4 to basically require that you only pay \$125,000  
5 instead of the \$400,000 as long as you made timely  
6 payments on the loan?

7 A. Yes, sir.

8 Q. Okay. All right. Now, a little bit ago  
9 you said you agreed that you had not made one  
10 payment on the loan. Can you tell me what payment  
11 that was?

12 A. That payment was a payment, I think, that  
13 was due back in 2010. And it was brought to my  
14 attention that it was not made and we in turn made  
15 that payment.

16 Q. Was that -- was your making of the payment  
17 after a demand letter had been sent to you?

18 A. It wasn't a demand letter. It was a  
19 letter indicating that that payment was due.

20 Q. Okay. Do you recall who wrote that  
21 letter? Was it me or was it somebody else?

22 A. It was Paul Harrill.

23 Q. That would be me. Okay. Let me hand you  
24 this document. I'm going to get it marked in a  
25 moment, but it is a letter. Up at the top it says

1 default for failure to make timely payments under  
2 the agreement?

3 A. Yes, sir.

4 Q. And at the time that you received this did  
5 you disagree with that?

6 A. Yes, sir.

7 Q. Do you still disagree with it?

8 A. With some of the payments that they  
9 indicated that wasn't made on time I disagree with.

10 Q. Okay. But there's one you agree was not  
11 made on time?

12 A. Yes, sir.

13 Q. And you subsequently paid that?

14 A. Yes, sir.

15 Q. Did you pay that payment after this letter  
16 that I'm showing you, Exhibit 4?

17 A. It was after, I think.

18 Q. Okay. All right. Did you read this  
19 entire letter, Exhibit 4, when you got it?

20 A. Yes, sir.

21 Q. Did you understand that Royals was saying  
22 that because of the default they were accelerating  
23 the balance of the loan so that that \$400,000  
24 stipulated existing debt was now due and owing?

25 A. Yes, sir.

1 Q. Okay. All right. And did you also read  
2 down on the second page, second to last paragraph  
3 where it says, I'm going to paraphrase it a little  
4 bit, you feel free to state it however you would  
5 like to, that if you make any partial payments  
6 toward that total debt, which was identified up  
7 above, that those would just be applied to the total  
8 debt and not be applied to bring the note current?  
9 Did you understand that?

10 A. Yes, sir.

11 (Exhibit No. 5 was marked for  
12 identification.)

13 BY MR. HARRILL:

14 Q. All right. I'm going to hand you Exhibit  
15 5, which is another letter from me. This one is  
16 dated December 14, 2012. Again I'd ask you to tell  
17 me whether you remember receiving that letter?

18 A. Yes, sir.

19 Q. Okay. And do you recall what you did  
20 after receiving that letter?

21 A. I took it to my attorney, Eddy Lane.

22 Q. And do you recall if she did anything in  
23 response to receiving that letter?

24 A. I think this was the time -- this was  
25 December. I think she called me into her office and

1 we talked. And I think this was the time that  
2 Mr. Schumacher stepped in.

3 Q. Okay. So it was shortly after that letter  
4 that Ms. Lane stopped representing you?

5 A. Exactly, yes, sir.

6 Q. And then Mr. Schumacher began representing  
7 you after that?

8 A. Yes, sir.

9 Q. Okay. And do you recall -- I'm not trying  
10 to be tricky here. It's right on the document. Do  
11 you recall when the litigation was filed in this  
12 case and when you were served with it? You can look  
13 on that and see if that --

14 A. I'm not sure of the date, but I know it  
15 was back -- I think it was back in November of 2011.

16 Q. Okay. And you think you got served  
17 sometime in November, around that time?

18 A. Yes, sir.

19 Q. Now, did you say 2011?

20 A. 2012.

21 Q. Right. Okay. All right. Ms. Simpson, I  
22 think we've already covered this, but you  
23 acknowledge that Royals Portfolio made the real  
24 estate tax payment for the property for, I think,  
25 the tax year 2012?

1 A. Yes, sir.

2 Q. Okay. Why did you not make that payment  
3 or Mr. Kelly?

4 A. That payment -- I forgot all about that  
5 payment. It's not like I did it intentionally, but  
6 I didn't. I just -- I just forgot about it.

7 Q. Okay. All right. Would you look on  
8 Exhibit 2 for me. That's the mortgage.

9 A. Which one was that?

10 Q. Acknowledgment of existing liens and  
11 mortgage of real estate.

12 A. Yes, sir. Okay.

13 Q. Okay. Do you understand that this is  
14 granting -- this document grants Royals Portfolio a  
15 mortgage over your residence, 2800 McCords Ferry  
16 Road?

17 A. Yes, sir.

18 Q. Okay. I request that you turn to Page 4  
19 and look at the paragraph numbered 4 that says Taxes  
20 and Assessments.

21 A. Yes, sir.

22 Q. Okay. Do you agree that the mortgage  
23 requires that you and Mr. Kelly as the mortgagor  
24 will pay all taxes on the property?

25 A. Yes, sir.

1 Q. Okay. And that was an agreement you all  
2 made when you signed this document, right?

3 A. Yes, sir.

4 Q. And would you turn over to Page 5 and look  
5 at Paragraph 8, which is entitled Default.

6 A. Yes, sir.

7 Q. Okay. And that says, "The occurrence of  
8 any of the following events shall be deemed a  
9 Default under this Mortgage." Do you see that?

10 A. Yes, sir.

11 Q. And the first one listed is, "Failure of  
12 Mortgagor to pay any sum secured by this Mortgage  
13 when due." Do you agree that that's what that says?

14 A. Yes, sir.

15 Q. And then B, it says, "Failure of Mortgagor  
16 to observe or perform any covenant or agreement set  
17 forth in this Mortgage or the Agreement." Do you  
18 agree that's what B says?

19 A. Yes, sir.

20 Q. Okay. And so wouldn't you agree that by  
21 failing to make the tax payments that you failed to  
22 observe or perform an agreement set forth in the  
23 mortgage here?

24 A. Yes, sir. But I didn't do it  
25 intentionally. I did it because I forgot.

1 A. Okay.

2 Q. Okay. And if I just say mortgage, I'm  
3 going to be referring to Exhibit 2, which is the  
4 acknowledgment of existing liens and mortgage of  
5 real estate. Okay?

6 A. Okay.

7 Q. With regard to Exhibit 1, the agreement  
8 regarding existing debt, you were represented by  
9 Eddy Lane at the time you and Mr. Kelly signed this  
10 document, were you not?

11 A. Yes, sir.

12 Q. Okay. And she reviewed this with you and  
13 for you?

14 A. Yes, sir.

15 Q. Okay. And she provided you advice about  
16 the document?

17 A. Yes, sir.

18 Q. Prior to signing it?

19 A. Yes, sir.

20 Q. Okay. And the same with Exhibit 2, the  
21 mortgage, Ms. Lane was representing you when you  
22 signed that document?

23 A. Yes, sir.

24 Q. And she reviewed it for you?

25 A. Yes, sir.

1 Q. And she provided you advice, you know,  
2 before and when you signed this document?

3 A. Yes, sir.

4 Q. All right. Ms. Simpson, you all haven't  
5 retained an expert witness for this case, have you?

6 A. No, sir.

7 Q. Okay. Did you assist your lawyers in  
8 preparing the answer that was filed in this case?

9 A. Yes, sir.

10 Q. Okay. Have you seen the answer that was  
11 filed and served on me?

12 A. Yes, sir.

13 Q. I just want to ask you a couple questions  
14 about it. You have alleged a defense in your answer  
15 that the plaintiff, which is Royals Portfolio, has  
16 failed to mitigate its damages. Do you know what  
17 you're referring to there?

18 A. Can you rephrase that for me?

19 Q. Yeah, sure. In your answer there's an  
20 allegation by you and Mr. Kelly that, I'll just read  
21 it to you, it's Paragraph 55 of your answer, it  
22 says, "Plaintiff's claims are barred in whole or in  
23 part by its failure to mitigate damages." Do you  
24 know the basis for that allegation?

25 A. Can you just break that down a little bit

1 working with them to try and pay them out to get  
2 them off of our back. They made no attempt to  
3 settle with us. We even has asked for a payoff  
4 several times to try to get this thing behind us.

5           Royals has given us three modifications  
6 that they have added other things to, such as  
7 increasing the payment amount, making the payment  
8 dates shorter. Whereas the payments were due at one  
9 time, they are making it like shorter where you  
10 can't make the payment, taking the payment higher.  
11 And I feel that if Royals was with us or want to get  
12 this behind us, they would try to work with us to  
13 get them paid out.

14       Q. Do you understand that in the agreement  
15 regarding existing debt that if you and Mr. Kelly  
16 defaulted on, you know, this document, that Royals  
17 could then pursue the stipulated existing debt  
18 amount, which was the 400,000, as opposed to the 125  
19 they agreed to take through monthly payments?

20       A. I understand all of that, but I have tried  
21 to -- through my attorney to get money so that we  
22 could just pay Royals out for what we owe them  
23 besides going through the stipulated debt.

24       Q. So, in other words, you've tried to do it  
25 based on what the note amount was, the 125?

1 Q. Okay. I gotcha. As far as saying tell us  
2 what the balloon payment will be?

3 A. Yes, sir. Tell us what the balloon  
4 payment would be, tell us what the attorney fees  
5 will be, and give us a figure or a payment as to  
6 everything that we owe behind the reduced payment.

7 Q. So let me make sure I understand. It is  
8 the -- are the actions that you're upset about with  
9 regard to Royals primarily its unwillingness to work  
10 with you to try to resolve this dispute?

11 A. Exactly. Yes, sir.

12 Q. Have you been making payments for the last  
13 several months on the loan?

14 A. I have been making payments the entire  
15 time on the loan.

16 Q. Okay. So you've never stopped making  
17 monthly payments on the loan?

18 A. No, sir.

19 Q. Okay. You are still sending a payment in  
20 the -- whatever that note amount was in the note  
21 here, you're still sending that amount to Royals  
22 every month?

23 A. I am sending that amount to  
24 Mr. Schumacher.

25 Q. Okay.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Master-in-Equity  
The Honorable Joseph M. Strickland

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Case No. 2015-000367

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Royals Portfolio, LLC, an assignee of Bank of America, N.A., formerly known as NationsBank, N.A., which is Successor in Merger to NNCB South Carolina, ..... Respondent,

v.

Charlie Kelly and Dorothy Simpson, ..... Appellants.

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INITIAL BRIEF OF APPELLANTS

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apply in this case. On February 23, 2015, Appellants filed a timely Notice of Appeal for both Orders.

## FACTS

Appellants Dorothy Simpson and Charlie Kelly live in the home at issue as their primary residence, along with Ms. Simpson's husband. (Tr. p. 104 lns. 2-4; p. 105 ln. 1). Simpson is Kelly's daughter. Kelly worked in the construction industry and built the house himself over thirty years ago. (Tr. p. 105 lns. 4-11). He is over eighty-one years old. (Tr. p. 134 lns. 1-4). In 2009 Simpson and her husband moved into the home with Kelly. (Tr. p. 104 lns. 10-12). Simpson is in her sixties and works as a health tech provider caring for elderly people. (Tr. p. 103 lns. 5-11).

The loans at issue in this foreclosure case involve a long history dating back to 1989 and include multiple mortgages, two bankruptcies, and a severance of the property that secured the original mortgages. A full explanation of the history shows the consumer and residential nature of the remaining mortgage and collateral.

### **I. 1989 and 1993 Notes and Mortgages of Pinewood Care Home, Inc., for Commercial and Residential Property**

On September 13, 1989, Pinewood Care Home, Inc., obtained a \$950,000.00 loan from NCNB South Carolina. (Cmplt. Exh. A). Mozell Kelly, the deceased wife of Appellant Kelly and mother of Simpson, signed the loan note as "President" of Pinewood Care. *Id.*; Tr. p. 107 lns. 409, p. 121 lns. 3-9. Pinewood Care secured the loan with a mortgage on 7.81 acres of property in Richland County that included the Kellys' personal residence and an assisted living facility owned and operated by Pinewood Care. (Cmplt. Exh. B; Tr. pp. 106-07). The residence is the property at issue in this foreclosure action. The residence is located on Highway 601 in Eastover, South Carolina. The commercial portion of the property, that included the assisted living facility, is

located behind the residence and accessible by only one entrance point on Highway 601. (Kelly Depo. p. 9 lns. 4-9).

On December 17, 1993, Pinewood Care obtained another loan for \$350,000.00 from NationsBank of South Carolina, N.A., a successor to NCNB. (Cmplt. Exh. C). Betty K. Taylor, then-President of Pinewood Care, signed the loan note. *Id.* The \$350,000 loan is secured by a mortgage from Pinewood Care and Greenbrier Retirement Village, Inc. *Id.* The mortgage includes the same 7.81 acres from Pinewood Care that secured the \$950,000 loan and also 18.20 acres “in the Greenbrier Community” in Fairfield County. *Id.*

## **II. Severance of the Residential Property**

Pinewood Care filed for bankruptcy in August 2000 after Bank of America, successor to NationsBank, obtained partial summary judgment in a foreclosure of the mortgages. (Cmplt. Exh. J p. 2). As part of the resolution of the bankruptcy, Pinewood Care severed the commercial and residential portions of the property. It then sold the commercial portion, including the assisted living facility, to Myrtlecrest Residential Home Care, LLC, in February 2001. (Cmplt. Exh. J p. 2). Bank of America applied the \$760,000 sale proceeds to the \$950,000 note. *Id.* However, the residence remained subject to the mortgages and judgments. *Id.*

In October 2002, Bank of America sold the mortgages and judgments to Respondent Royals Portfolio, LLC. *Id.* Almost two years later, on March 19, 2004, Pinewood Care deeded the Kelly residence, which is on 0.65 acres, to the Kellys. (Cmplt. Exh. G). Mozell Kelly died on August 21, 2005, and her interest in the residence transferred to Simpson on May 2, 2007, by a Deed of Distribution from the Probate Court. (Cmplt. Exh. H). Kelly and Simpson continued to make mortgage payments.

### **III. 2009 Mortgage of Kelly and Simpson for Residential Property Only**

Kelly filed for bankruptcy in March 2009. (Cmplt. Exh. J p. 2). Attorney Eddy Lane represented him in the bankruptcy proceedings. (Tr. p. 62 ln. 19). During the bankruptcy proceedings, Kelly and Simpson continued to make mortgage payments and paid them into the bankruptcy court. (Tr. p. 65 lns. 22-24). As part of the resolution of the bankruptcy, Lane represented Kelly and Simpson in the negotiation of an Agreement Regarding Existing Debt (“the Agreement”) with Royals Portfolio. (Tr. p. 63 lns. 2-5).

Under the Agreement, Royals Portfolio, Kelly, and Simpson stipulated that the outstanding balance due under the original mortgages and judgments was \$125,000.00, even though the actual amount exceeded \$400,000.00. (Cmplt. Exh. J at pp. 2-3). If Kelly and Simpson defaulted under the Agreement, Royals Portfolio could seek to collect and foreclose for the entire amount rather than the stipulated balance.<sup>1</sup> *Id.* at p. 5. Under the Agreement, Kelly and Simpson owed monthly payments of \$1,867.23. *Id.* at p. 3. The parties agreed the bankruptcy trustee would make a lump sum payment to Royals Portfolio from the payments Kelly and Simpson paid into the court during the bankruptcy. (Tr. p. 66). The lump sum would then be applied in increments to the first three months’ payments due under the Agreement from August to October, resulting in Kelly and Simpson not actually owing money out-of-pocket until October 2009. (Tr. pp. 73 ln. 21 – 75 ln. 17, pp. 83-84).

On September 9, 2009, Kelly and Simpson, as individuals, executed the Agreement and a new mortgage entitled “Acknowledgement of Existing Liens and Mortgage of Real Estate.”

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<sup>1</sup> Prior to entering into the Agreement, an appraisal of the house showed a value of \$125,000.00. (Tr. p. 71 lns. 1-3). Lane argued to Royals Portfolio that the debt amount should be the value of the house rather than the \$400,000.00 amount. (Tr. p. 71 lns. 3-5). “But they wanted to try to keep that figure there as a carrot stick I guess to get us to the table for an agreement, so that’s what we did.” (Tr. p. 71 lns. 5-7).

(Cmplt. Exhs. J-K). The only property remaining as collateral at the time of this new mortgage was the residential property where Kelly and Simpson live fulltime. Lane personally delivered the Agreement, executed by Kelly and Simpson, to counsel for Royals Portfolio on September 11, 2009. (Tr. p. 82 lns. 1-5, 20-21). She wrote a letter delivered with the Agreement that modified the terms for applying the lump sum paid by the bankruptcy trustee to the mortgage payments. (Def. Exh. 2; Tr. pp. 79-82). The letter lays out in detail how to apply the bankruptcy funds in August, September, and October 2009. (Def. Exh. 2). The letter expressly acknowledges that Royals Portfolio had not yet signed the Agreement and stated “should there be any disagreement regarding the application of the payments, please advise immediately.” (Def. Exh. 2; Tr. p. 83 lns. 9-11; p. 84 lns. 13-14; p. 100 ln. 8). Royals Portfolio signed the Agreement after receipt of this letter and did not ever contact Lane to object to or alter the payment terms in the letter that accompanied delivery of the Agreement. (Tr. p. 83 lns. 9-11, p. 100 lns. 8-22).

#### **IV. Additional Collateral of Access Area for the 2009 Mortgage**

The Agreement and new mortgage include new collateral, in addition to the residence that secured the original mortgages. The new mortgage expressly includes the access area from Highway 601 that is the only access point to the residence and the commercial property behind it. Royals Portfolio maintains there may be a title discrepancy as to who owns the access area. (Cmplt. Exh. J at p. 3). According to Royals Portfolio, a December 1996 Plat showing the access area states “Parcel A [which includes the access area] consists of areas abandoned in favor of adjoiner’s encroachment.” (Cmplt. Exh. J at p. 3; Exh. I). In May 1997, Simpson purchased a lot, marked as “Tract 11”, adjoining the southern part of “Parcel A.” *Id.* The purchase was unrelated to the residence or foreclosure at issue. Royals Portfolio asserts the access area is part of the residential property at issue through either abandonment on the December 1996 Plat, adverse possession of

Kelly by use of the access area since 1997,<sup>2</sup> or Simpson's interest in it through her unrelated purchase of the adjoining Tract 11. (Cmplt. p. 8, ¶ 43).

The Agreement states any interest Kelly and Simpson each have in the access area is subject to the new mortgage. (Cmplt. Exh. H at p. 7). If Royals Portfolio obtains the residence at issue along with the access parcel, it obtains the title to the only point of access to the commercial property. (Tr. p. 119). Simpson testified she received phone calls "from realtors asking me can they buy a portion of my property to get to the commercial building back there." (Tr. pp. 119 ln. 23 – 120 ln. 1).

**V. Alleged Default and Filing of Foreclosure Action**

On December 13, 2010, Simpson and Kelly inadvertently paid \$1,800.67 rather than \$1,867.23, as stated in the Agreement. (Tr. p. 146 lns. 4-9; Pl.'s Exh. 7 p. 2). On January 6, 2011, they paid the \$67.00 balance. (Pl.'s Exh. 7 p. 2). They made the next payment of \$1,867.66 on February 3, 2011, and continued to make full payments thereafter. (Tr. p. 23 lns. 11-21). In January 2011, Royals Portfolio began charging Kelly and Simpson a late charge, for allegedly missing the January payment. (Pl.'s Exh. 7 p. 2).

On January 27, 2012, a year after the alleged missed payment, Royals Portfolio sent Kelly and Simpson a letter notifying them of the supposed missed payment and that Royals Portfolio considered each payment thereafter late as well. (Tr. p. 24 lns. 13-17; Pl.'s Exh. 5). It instructed them "to review the [attached payment history] schedule and, to the extent you believe you have made payments that are not reflected on that schedule, please advise me immediately and provide proof." *Id.* p. 3. Simpson testified she took the letter to attorney Lane, who told Simpson she

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<sup>2</sup> Kelly's deposition, attached to Royals Portfolio's motion for summary judgment, almost exclusively focused on his use of and rights to the access area. (Kelly Depo.).

would take care of it. (Exh. to Pl.'s Mot. for Summ. J., Simpson Depo. p. 14 lns. 1-14). Royals Portfolio testified it sent the January 27, 2012 letter in "an effort to get them to come forward and make a payment to bring this current." (Tr. p. 47 lns. 2-4). Royals Portfolio did not explain why it waited a year to send the letter. Kelly and Simpson continued to make their regular mortgage payments. (Pl.'s Exh. 7).

On March 20, 2012, counsel for Royals Portfolio sent Kelly and Simpson a notice of payment default that stated "Royals has exercised its right to declare the entire [\$400,000] Stipulated Existing Debt . . . to be due and owing, less any amounts actually received by Royals." (Pl.'s Exh. 6 p. 1; Tr. p. 25 lns. 2-10). The letter states the "total debt" owed is now \$338,587.63 and requested payment within ten days. (Pl.'s Exh. 6 p. 2). Simpson also went to see Lane about this letter and subsequently made two payments in March to make up for the alleged missed payment in January 2011. (Tr. pp. 31 ln. 23 – 32 ln. 6; Pl.'s Exh. to Mot. for Summ. J, Simpson Depo. pp. 16-17). After receiving those two payments, Royals Portfolio stopped charging late fees. (Tr. p. 32 lns. 8-12).

On March 22, 2012, Lane sent a letter to counsel for Royals Portfolio requesting "a rescission of acceleration and declaration of default" and explained Kelly and Simpson made full payments which Royals portfolio deposited and collected. (Tr. p. 87 lns. 10-24, pp. 88 ln. 18 – 89 ln. 4). Lane and Simpson testified that, if Royals Portfolio correctly applied the funds from the 2009 bankruptcy, Kelly and Simpson should have been ahead by one payment, so that "missing" a payment in January was not a default. (Tr. pp. 109-10, p. 115).

Lane testified Royals Portfolio applied the entire lump sum to the September 2009 payment rather than a portion applying "back towards August, a portion to September, and a portion to October." (Tr. p. 74 lns. 19-22; Def. Exh. 7). If Royals Portfolio applied the payments as agreed,

Kelly and Simpson would have been one month ahead because the payment from the bankruptcy court should have satisfied the October 2009 payment and they made an additional, separate payment in October 2009. (Tr. p. 75 Ins. 15-23; Pl.'s Exh. 7). Based on the payment schedule in the letter attached to the Agreement, Lane believed Kelly and Simpson were one payment ahead. (Tr. p. 69 Ins. 13-17).

In 2012, Simpson forgot to pay taxes on the residence. (Pl.'s Mot. for Summ. J., Simpson Depo. p. 20 Ins. 2-6). Royals Portfolio paid the taxes on November 27, 2012. (Pl.'s Exh. 4). Royals Portfolio filed this foreclosure action on November 28, 2012. Kelly and Simpson continued to make full mortgage payments from February 2011 to December 2012. (Pl.'s Exh. 7 pp. 2-3).

#### **VI. Trial of Foreclosure Action**

William Buland testified on behalf of Royals Portfolio at trial. (Tr. p. 10 Ins. 20-22). He is the Director of Asset Management. (Tr. p. 39 Ins. 19-20). Buland testified Kelly and Simpson are in default for (1) not making "all the payments when due" and (2) "they also did not pay the taxes when due." (Tr. p. 13 Ins. 15-19). Buland testified the alleged payment default occurred in December 2010 when Kelly and Simpson made a payment on December 13 that was due on December 5. (Tr. p. 21 Ins. 5-6). They made a payment of \$1,800.67, rather than \$1867.23 but later sent in the remainder by January 6, 2011. (Tr. pp. 21 In. 15 – 22 In. 6). At trial, Royals Portfolio agreed that Kelly and Simpson caught up on the payments and they did not file for foreclosure at the time of the late payment. (Tr. p. 33 Ins. 3-7). Royals Portfolio testified it has no policy on how many payments a person must be behind before filing foreclosure, but said "this particular obligation, this particular existing debt has been a real pain in the neck for us for a long time." (Tr. p. 43 Ins. 7-14).

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

RECEIVED

APPEAL FROM RICHLAND COUNTY  
In the Court of Common Pleas  
Joseph M. Strickland, Master In Equity

AUG 22 2016

SC Court of Appeals

Case No. 2012-CP-40-7878  
Appellate Case No. 2015-000367

Royals Portfolio, LLC, an assignee of Bank of America, N.A.,  
formerly known as NationsBank, N.A., which is  
Successor by Merger to NCNB South Carolina, .....Respondent,

v.


Charlie Kelly and Dorothy Simpson, ..... Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the **Motion to Strike Portions of Appellants' Designation and Initial Brief And to Hold Time for Respondent's Brief in Abeyance Pending a Decision on Motion**, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to Appellants' counsel at the addresses shown below, on August 22, 2016:

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Brian L. Boger, Esquire  
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August 22, 2016

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Via Courier

Honorable Jenny Abbott Kitchings  
Clerk of Court  
S.C. Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RECEIVED  
AUG 22 2016  
SC Court of Appeals

Re: Motion to Strike Portions of Appellants' Designation and Initial Brief  
And to Hold Time for Respondent's Brief in Abeyance Pending a  
Decision on Motion

Dear Ms. Kitchings:

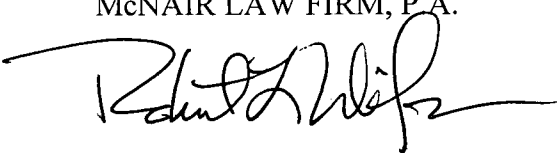
Enclosed for filing, please find the original and seven copies of the Respondent's MOTION TO STRIKE PORTIONS OF APPELLANTS' DESIGNATION AND INITIAL BRIEF AND TO HOLD TIME FOR RESPONDENT'S BRIEF IN ABEYANCE PENDING A DECISION ON MOTION, along with our check in the amount of \$25.00.

Please file the motion in your office and return the file stamped extra copy to me via our courier. By copy of this letter, we are serving counsel for Appellants with a copy of the motion.

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

RLW/as  
Enclosures

cc: Kathleen C. Barnes Esquire  
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