

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell Scarborough, Master in Equity Court Judge

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SEP 19 2016

S.C. SUPREME COURT

Opinion No. 2016-002694 (S.C. Ct. App. Filed June 27, 2016)

Nationstar Mortgage, LLC

Respondent,

v.

Rhonda Meisner,

Petitioner.

REPLY TO PETITION FOR A WRIT OF CERTIORARI

Rhonda Meisner
Post Office Box 689
Blythewood, South Carolina 29016
(803) 206-3402
Petitioner

Attorneys for Respondent Nationstar:
Robert F. Muckenfuss
McGuire Woods, LLP
201 N. Tryon Street Suite 3000
Charlotte, North Carolina 28202
(704) 343-2052
Magalie Arcure
Finkel Law Firm
4000 Farber Place Drive #450
North Charleston, South Carolina 29405
(843) 593-0399

The petitioner, Rhonda Meisner, respectfully submits this reply to the Petition for a Writ of Certiorari. This reply is submitted in the event this Honorable Supreme Court allows respondents brief to be considered in its decision to entertain a Petition for the issuance of a Writ of Certiorari (“Petition”).

As an initial matter, based on the admissions to the Nebraska Supreme Court that MERS never holds the notes they record, there is no evidence in the record that “the note and mortgage” were subsequently assigned to Aurora Loan Services, LLC (“Aurora”) on February 10, 2011. **Return to Petition at p. 2: 8-10; Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance** 270 Neb. 529, 704 N.W. 2d 784, 787 (Neb. 2005).

This Court, along with several other state supreme courts, and the United States Supreme Court has determined a plaintiff in a foreclosure action must own both the note *and* the mortgage *prior* to initiating a foreclosure action to have standing to pursue the claims. Carpenter v Longen, 83 U. S. 16 Wall. 271 (1872) Hahn v. Smith 157 S.C. 157, 167, 154 S.E. 112, 115 (1930); also Ballou v. Young 42 S.C. 170, 176 20 S.C. 84, 85 (1894). The note is the principal and the mortgage the accessory. Hahn v. Smith 157 S.C. 157, 167, 154 S.E. 112, 115 (1930). Therefore, the petitioner avers the petitioner cannot waive standing *during* the litigation when the plaintiff’s standing does not exist at the time the complaint was filed because there is not a justiciable controversy before the court.

The petitioner argues the opinion of the Court of Appeals conflicts with this Court's rulings in: Lennon v. South Carolina Coastal Council, 330 S.C. 414, 415, 498 S.E. 2d 906, 906 (Ct. App. 1998) (citations omitted). Holden v. Cribb, 349 S.C. 132, 136 561 S.E. 2d 634, 637 (Ct. App. 2002) Hahn v. Smith 157 S.C. 157, 167, 154 S.E. 112, 115 (1930); also Ballou v. Young 42 S.C. 170, 176 20 S.C. 84, 85 (1894) and the United States Supreme Court opinion of Carpenter v Longen, 83 U. S. 16 Wall. 271 (1872).

The petitioner argues the issues of standing, real party in interest and capacity to sue once raised and ruled on by the circuit court judge cannot be waived later in a subsequent referral to the master- in- equity without violating the due process clause of the United States Constitution. It is at all times, the obligation of the plaintiff, to prove standing and the allegations in the plaintiff's case.

This Court has previously explained waiver, real party in interest, standing and capacity to sue in Bardoon Properties v. Eidolon. This Court determined that said challenges to real party in interest could be waived *if not raised early* in the litigation, but made the distinction between real party in interest, capacity to sue and standing. Here, the opinion of the Court of Appeals determines that capacity to sue, real party in interest, and standing can be waived even after being raised and ruled on by the circuit court in a later referral to the Master- in- Equity.

This Court has previously held the plaintiff's standing must be proved at the outset of the case to determine if there is a justiciable controversy before the Court. Lennon v. South Carolina Coastal Council, 330 S.C. 414, 415, 498 S.E. 2d 906, 906 (Ct. App. 1998) (citations omitted). (R pp.215-219).

ARGUMENT

I. A PLAINTIFF'S LACK OF STANDING TO INITIATE A MORTGAGE FORECLOSURE SUIT, ONCE RAISED AND RULED ON IN A MOTION TO DISMISS BY THE CIRCUIT COURT, CANNOT BE WAIVED LATER IN A SUMMARY JUDGMENT HEARING BEFORE THE MASTER IN EQUITY WITHOUT VIOLATING THE DUE PROCESS CLAUSE.

It is axiomatic that if a plaintiff does not have standing to initiate the lawsuit, another party to the suit cannot grant standing during the litigation. Such a determination would violate the due process clause by allowing a plaintiff with no legal interest in the property to take the property from the defendant with the Court's assistance.

The Court of Appeals decision is inconsistent with the rulings of this Honorable Court because the Court of Appeals determined that the petitioner conceded summary judgment and therefore, standing. However, the petitioner avers because standing, in part, implicates the actual injury of the plaintiff and therefore, whether or not there is a justiciable controversy before the court,

standing cannot be waived once raised and ruled on by the Circuit Court Judge in a summary judgment proceeding with the Master-in-Equity Judge.

Here, the challenges to real party in interest and standing were raised and ruled on by the circuit court *prior* to the referral to the Master in Equity. Therefore, even if the Court of Appeals is correct that the petitioner conceded summary judgment, petitioner did not waive the challenges already raised and ruled on by the circuit court. Additionally, the petitioner avers that the Court of Appeals did not give the appropriate weight to the Master in Equity's comments during the proceedings. The petitioner argues she never conceded the plaintiff had standing to initiate the lawsuit for four reasons: (1) The issue of real party in interest issue was raised and ruled on by the circuit court prior to referral to the Master in Equity. (2) The issue of the plaintiff's standing to initiate the lawsuit was raised and ruled on by the circuit court prior to referral to the Master in Equity. (3) The issue of whether the plaintiff had the authority to act on behalf of its principal (as there was no filed affidavit on record or entered into evidence) was raised and ruled on by the circuit court prior to the referral to the Master in Equity. (4) The Master in Equity's comments during the hearing made it clear that he was going to grant summary judgment in either this year or the next year due to his reliance on Draper that the plaintiff had standing as the servicer. Bank of America v. Draper 405 SC 214, 222-223 (Ct. App. 2013). The Respondent argues that the plaintiff did have standing

based on Draper **Return to Petition p. 5:6-10**. There is no evidence that the plaintiff was acting on behalf of its principal in this case.

This Honorable Court determined in Lennon v. South Carolina Coastal Council that a Court must determine standing at the outset of the case and whether the case presents a justiciable controversy. **Petition for re-hearing p. 1.**

This Honorable Court has long required, as part of its due process analysis, that the plaintiff must have the requisite standing and a justiciable injury to invoke the power of the Court to render the relief requested. In Bardoon Properties v. Eiodolon, this Court explained “there is a difference between the concepts of ‘standing,’ ‘capacity to sue’, and ‘real party in interest.’” *Id.* at 169. N.3, 485 S.E. 2d at 373 n. 3 (citing 6A Charles A. Wright et al, Federal Practice and Procedure § 1542, at 328-29 (1990); Firestone v. Galbreath, 976 F.2d 279, 283 (6th Cir. 1992)

The petitioner challenged (1) the real party in interest, (2) the standing of the petitioner to act on behalf of its principal without a filed power of attorney and (3) the standing of the petitioner to initiate the suit on its own accord, prior to the referral to the Master in Equity. The Master in Equity receives its authority via the referral from the Circuit Court Judge so the Master in Equity Judge cannot change, review, or overrule the Circuit Court Judge’s orders; however, the Master-in-Equity can make his own determinations which relied upon the Draper opinion.

The Court of Appeal's waiver analysis begins at the summary judgment portion of the case; however, the issues were raised and ruled on in the motion to dismiss, a much earlier interlocutory order by another Judge.

At all times, the respondent is required to prove standing and as such it is difficult to reconcile waiver with the responsibilities of the respondent to prove standing at all junctions of the case when during the summary judgment hearing it was brought to the Court's attention that the respondent offered two owners of the note. **(R. p. 83) (R. pp.15-34; 113-115)**

This Honorable Court has long required, as part of its due process analysis, that the plaintiff must have the requisite standing and a justiciable injury to invoke the power of the Court. In Bardoon Properties v. Eiodolon, this Court explained "there is a difference between the concepts of 'standing,' 'capacity to sue', and 'real party in interest.'" *Id.* at 169. N.3, 485 S.E. 2d at 373 n. 3 (citing 6A Charles A. Wright et al, Federal Practice and Procedure § 1542, at 328-29 (1990); Firestone v. Galbreath, 976 F.2d 279, 283 (6th Cir. 1992)

The decision of the Court of Appeals basically equates the waivable affirmative defenses of 'real party in interest' with the concept of 'standing' which this Court had determined implicates the due process clause. This Court along with the United States Supreme Court has determined a plaintiff in a foreclosure action

must own and have injury to both the note *and* the mortgage. Carpenter v Longen, 83 U. S. 16 Wall. 271 (1872). Petitioner avers that neither Nationstar, nor its predecessor in interest, Aurora Loan Services, LLC owned and possessed *both* the note and the mortgage at the inception of the lawsuit in order to have the requisite standing to initiate this mortgage foreclosure action. In fact, the assignments in this case are made by the mortgagee which originated with Mortgage electronic registration services or MERS, which has admitted it never owns or holds the notes it records. Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance 270 Neb. 529, 704 N.W. 2d 784, 787 (Neb. 2005).

The respondent ignores that it is their own admission to the Court that the note is owned by a securitized trust which conflicts with their pleadings and creates a genuine issue of fact that should have precluded summary judgment. **(R. p. 83)** **(R. pp.15-34; 113-115)** The admission also evidenced the fact that Nationstar and Aurora did not have the required ownership of the note and the mortgage at the inception of the action. Therefore, without the requisite standing and a justiciable injury to the plaintiff, the jurisdiction or power of the Court is not invoked.

The Court of Appeals ruled the petitioner conceded summary judgment and therefore conceded the issue of standing. The petitioner avers because standing is required to invoke the jurisdiction or the Court's power to grant the relief

requested, standing cannot be waived or conferred by consent of the parties, much like subject matter jurisdiction.

This Honorable Court has long required as part of its due process analysis that the plaintiff must have the requisite standing and a justiciable injury to invoke the power of the Court. Waters v. South Carolina Land Resources Conservation Comm'n, 321, 219,467 S.E. 2d 913 (1996). The plaintiff in a foreclosure action must have a real and not a nominal interest in the outcome of the case order to have a redress able injury and therefore, present a justiciable controversy to the Court in order to invoke the jurisdiction or power of the Court. Power v. McNair, 255 S.C. 150,153,177 S.E. 2d 551,552 (1970).

In a mortgage foreclosure action, the petitioner argues it is not enough for a plaintiff to be the holder of *either* the note or the mortgage they *must hold both* and have an injury to both instruments to have a justiciable controversy before the Court. Here, the plaintiff suggests at different times in the foreclosure proceeding that it owns the note and that a securitized trust owns the note. Not only do they create a genuine issue of material fact, but they make the petitioner's argument that the plaintiff did not have standing at the inception of the case because in the answers to interrogatories, the plaintiff states a securitized trust owns the note. Therefore, they have as the petitioner avers given evidence that the plaintiff

received only the mortgage in the assignment and not the note which precludes the plaintiff from having the requisite standing to foreclose.

The petitioner did not and could not have conceded standing prior to the initiation of the lawsuit. Once the issue of standing was raised via a S.C. R. C. P. Rule 12(b)(6) and 23(b)(7) and ruled on by the circuit court, the issue of standing cannot be conferred by consent because it implicates the jurisdiction or power of the Court.

Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its "failure to state facts sufficient to constitute a cause of action." In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). For a plaintiff to possess standing three elements must be satisfied. First, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001). Second, a causal connection must exist between the injury and the challenged conduct. Id. Third, it must be likely that a favorable decision will redress the injury. Id. The Court of Appeals has held "[a] threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy" and that "[t]he

concept of justiciability encompasses the doctrines of ripeness, mootness and standing.” Holden v. Cribb, 349 S.C. 132, 136 561 S.E. 2d 634, 637 (Ct. App. 2002).

The petitioner avers that both the motion to dismiss and the motion for summary judgment are reviewed by the appellate Courts de-novo and as such a ruling by the Court of Appeals that only reviews the summary judgment portion of the case conflicts with multiple cases of procedure and this Court’s rulings on standing and justiciable controversy and should be reviewable pursuant to SCACR 242.

Respondent also complains that the petitioner did not explicitly explain why the anniversary of Lehman Brothers should suggest relevancy to these proceedings. It is the petitioners position that once Lehman Brothers filed for federal bankruptcy protection then all of the assets owned by Lehman Brothers were under the subject matter jurisdiction of the Federal Bankruptcy Court in New York. This means if the asset (the note) was still owned by Lehman Brothers after the filing of the bankruptcy then the federal bankruptcy Court in New York would have jurisdiction over the asset and the Circuit Court never had subject matter jurisdiction because the assignment occurred after the bankruptcy filing. Therefore, the case was never properly before the circuit court and once the Court took judicial notice of the

bankruptcy, the Court was on notice that subject matter jurisdiction may not be proper because the assignments occurred after the filing.

II. THE PETITIONER AVERS THE DETERMINATIONS BY THE MASTER IN EQUITY ARE PRESERVED DUE TO THE DE-NOVO REVIEW OF THE APPELLATE COURTS.

The de-novo review makes whether the property should have been the petitioners primary home under the administrative Order and a review of the legal and tax advice administered by the Master in Equity should be reviewed.

Foreclosure is a very stressful and emotional time and outside influences to the court processes should be considered. With regard to the primary home, the South Carolina Constitution gives the right for a married woman to own property equally as a married man. As was argued before, the Isle of Palms house was the only house that Ms. Meisner *both owned and lived in*, therefore the house should have qualified as “her” primary residence and this was not conceded by the petitioner.

In Conclusion, the petitioner avers she has made a strong case that the Supreme Law of South Carolina was not followed in the Court of Appeals opinion and that the respondent did not have standing at the inception of the trial and that the bankruptcy Court of New York may have had subject matter jurisdiction over the enforcement of the note in this case. For the above reasons and all references to the record, the petitioner requests this Honorable Court grant the petition for

certiorari. The petitioner requests a hearing if this Honorable Court grants the petition.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Rhonda Meisner". The signature is written in a cursive, flowing style.

Rhonda Meisner
Post Office Box 689
Blythewood, South Carolina
Pegasus333@icloud.com
(803)206-3402

Sept 19, 2016

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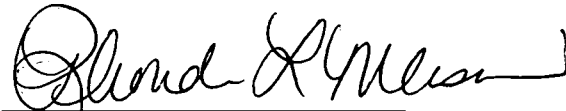
v.

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The petitioner Rhonda Meisner certifies she served a copy of the return to petition for certiorari by mailing a copy U.S. postage pre-paid to the addresses listed below.

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Rhonda Meisner
Post Office Box 689
Blythewood, South Carolina 29016
Pegasus333@icloud.com
(803) 206-3402

Robert F. Muckenfuss
McGuire Woods, LLP
201 N. Tryon Street Suite 3000
Charlotte, North Carolina 28202
(704) 343-2052
Magalie Arcure
Finkel Law Firm, LLC
4000 Farber Place Drive #450
North Charleston, South Carolina 29405
(843)593-0399