THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Dale E. Van Slambrook, Master-in-Equity

Appellate Case No. 2016-000292

Branch Banking and Trust Company ..... Plaintiff/ Respondent,

v.

Wilton H. Cain; Cassandra M. Durrah-Cain;
Liberty Hall Residential Property Owners
Association, Inc..... Defendants,

Of Whom Wilton H. Cain and Cassandra
M. Durrah-Cain are the ..... Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE[1]

This appeal results from the circuit court's Order Confirming Deficiency Judgment and Denying Defendant's Motion to Alter, Amend, or Reconsider, which was filed on January 26, 2016. (Order Confirm. Def. J.).

The underlying foreclosure action was filed on October 4, 2010 by Respondent Branch Banking and Trust Company (hereinafter referred to as "BB&T"). (Order Confirm. Def. J. ¶ 1).

A final non-jury trial was held on June 16, 2011, and the Judgment of Foreclosure and Sale was entered on June 30, 2011, finding a total debt owed by the borrowers, Wilton H. Cain and Cassandra M. Durrah-Cain (hereinafter referred to collectively as "Appellants", "Cains" or individually as "Mr. Cain" and "Ms. Cain," respectively), in the amount of $201,660.89. (Order Confirm. Def. J. ¶¶ 7-8).

Following the judicial sale of the mortgaged property, a Deficiency Judgment was entered in the amount of $83,893.82, based upon the difference between the total judgment and the sale price at the judicial sale.[2] (Order Confirm. Def. J. ¶ 10).

On September 29, 2011, Appellants filed a Petition and Proposed Order for Appraisal, pursuant to S.C. Code Ann. § 29-3-700. (Order Confirm. Def. J. 11). Without response from BB&T, the Honorable Kristi Lea Harrington first granted the right to an appraisal and then, *sua sponte*, withdrew that order and entered an order indicating the Cains were not entitled to exercise a demand for appraisal pursuant to the statute. (Order Confirm. Def. J. ¶¶ 11-12). The Cains then appealed that Order. (Order Confirm. Def. J. ¶ 14).

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[1] BB&T objects to the Statement of the Case presented by the Cains as in violation of Rule 208(C), SCACR, because it contains contested matters and arguments.

[2] BB&T's bid at the foreclosure sale was $121,500.00. The deficiency judgment was calculated by subtracting that bid amount from the total debt at the time of the entry of judgment, $205,393.82, which included an additional $3,732.93 in post-judgment fees, costs and advances. (Order for Deficiency Judgment ¶4).

On September 24, 2014, this Court issued an Order, in Appellate Case No. 2011-205089, remanding the issue to the circuit court for an explanation as to why the Cains did not have the right to an appraisal pursuant to S.C. Code Ann. § 29-3-700. (Appellate Order).

On May 29, 2015, a Form 4 Order was entered, reinstating the September 28, 2011, Order for Appraisal, and requiring the parties to obtain independent appraisals of the mortgaged property as of the date of the judicial sale. (Order Confirm. Def. J. ¶ 15). On December 4, 2015, after the appraisals were completed, the Honorable Dale E. Van Slambrook then issued an Order Reducing Deficiency, reducing the judgment against the Cains to $37,393.82. (Order Confirm. Def. J. ¶¶ 16-17).

On December 29, 2015, the Cains filed a Motion to Dismiss Deficiency, which the Master in Equity treated as a Motion to Alter, Amend, or Reconsider the Order Reducing Deficiency. (Order Confirm. Def. J.). A hearing was held on January 14, 2016, and on January 26, 2016, the Master in Equity entered an Order Confirming Deficiency Judgment and Denying the Cains' Motion to Alter, Amend, or Reconsider. (Order Confirm. Def. J.). The Cains filed their Notice of Appeal on February 16, 2016.

STATEMENT OF FACTS

This appeal arises out of a foreclosure of a residential real estate mortgage, filed by BB&T on October 4, 2010, regarding property located in Berkeley County, South Carolina. (Order Confirm. Def. J. ¶ 1). The mortgage at issue in the foreclosure was recorded in the Office of the RMC/ROD for Berkeley County on September 20, 2007, in Mortgage Book 6868 at Page 165. (Compl. ¶ 9). This Mortgage was subsequently assigned to BB&T. (J. Foreclosure and Sale. ¶ 11). The Mortgage includes a provision regarding mortgage insurance which reads, in

part: "Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. *Borrower is not a party to the Mortgage Insurance.*" (Mortg. ¶ 10) (emphasis added).

Appellants failed to make their payments pursuant to the terms of their note and mortgage. (Compl. ¶ 13). As such, BB&T elected to declare the entire balance due and payable. (Compl. ¶ 13). BB&T further demanded the right to a personal or deficiency judgment against Appellants. (Compl. ¶ 14). Appellants failed to answer or otherwise respond to the complaint within thirty days of service and as a result, on December 8, 2010, the Clerk of Court for Berkeley County entered an Order of Default, finding the Appellants to be in default in the action. (Order Confirm. Def. J. ¶ 3). The matter was referred to the Master-in-Equity that same day. (Order Confirm. Def. J. ¶ 4). Although they had been held in default, Appellants filed a late answer on March 28, 2011, but did not file a Motion to be Relieved from Default pursuant to Rule 55(c) of the *South Carolina Rules of Civil Procedure* or other motion allowing the late answer. (Order Confirm. Def. J. ¶ 6). A final judgment hearing was conducted on June 16, 2011, and the Master-in-Equity entered a Judgment of Foreclosure and Sale on June 30, 2011. (Order Confirm. Def. J. ¶¶ 7-8). While it is alleged that there was a discussion of mortgage insurance at the final judgment hearing, there is no mention of mortgage insurance in the resulting order, and the transcript is no longer available (Order Confirm. Def. J. FN2). On September 2, 2011, the property was sold at the final judicial sale, where BB&T was the successful bidder in the amount of $121,500.00, thereby acquiring the property. (Order Confirm. Def. J. ¶ 9). Consequently, on September 19, 2011, the Master-in-Equity entered a deficiency judgment in the amount of $83,893.82, representing the difference between the judgment

amount, plus post-judgment interest and supplemental costs, and the final sales price. (Order Confirm. Def. J. ¶ 10).

Thereafter, Appellants filed a Petition and Proposed Order for Appraisal, which was signed, but rescinded the following day. (Order Confirm. Def. J. ¶¶ 11-12). Following an appeal of the order that was rescinded, the Master in Equity required that the appraisal process be completed pursuant to S.C. Code Ann. §29-3-660, *et seq.* (Order Confirm. Def. J. ¶¶ 15-16). Ultimately, the court found the value of the subject property as of the date of sale to be $168,000.00, thereby reducing the deficiency judgment to $37,393.82. (Order Confirm. Def. J. ¶ 17). The reduced deficiency judgment reflected the total amount after final judgment, including post-judgment interest and additional costs, less the newly determined value of the Subject Property. (Order Confirm. Def. J. ¶ 17). However, Appellants objected to the entry of the deficiency judgment on the basis of alleged an mortgage insurance payment to BB&T. (Order Confirm. Def. J. ¶ 18). Appellants did not object to the valuation of the property as decided by the Master. (Id.)

Appellants filed a Motion to Dismiss Deficiency Judgment on December 29, 2015, which the court treated as a Motion to Alter, Amend, or Reconsider the Order Reducing Deficiency Judgment filed on December 4, 2015. (Order Confirm. Def. J. ¶ 19). However, Appellants presented no evidence or affidavits regarding their position. (Order Confirm. Def. J. ¶ 20). Accordingly, the Master-in-Equity confirmed the deficiency judgment and denied Appellants' Motion on several basis: (1) the Cains presented no evidence to support their allegations; (2) the appraisal statute does not contemplate insurance payments or other collateral sources in the setting of a deficiency judgment, and (3) the collateral source rule applies in this situation such that the Cains should not benefit from the payment of any mortgage insurance proceeds.

Appellants appealed the Master's decision to this Court raising ten (10) issues for consideration, most of which were either not preserved or have been abandoned. The true crux of Appellants argument appears to be that the Master in Equity applied the collateral source rule, or the tenants of the collateral source rule, in determining that any alleged mortgage insurance proceeds paid to BB&T should not reduce the deficiency judgment owed by the Cains. (Brief of Appellant).

SCOPE OF REVIEW

In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence. *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id.* at 387-88, 544 S.E.2d at 623.

ARGUMENT

I. APPELLANTS DID NOT PROPERLY PRESEVRE ALL ISSUES RAISED IN THE APPEAL.

Appellants raise issues on appeal that were never raised to or ruled upon by the Master-in-Equity. As such, Appellants' arguments are not properly before this Court and should not be considered.

"Preserving issues for appellate review is a fundamental component of appellate practice." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532-33, 564 S.E.2d 322, 323 (2001). "[T]o

preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court." *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998)). "The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) (citations omitted)). "A bald assertion, without supporting argument, does not preserve an issue for appeal." *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (citing *Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998)). "If [a] review of the record establishes that an issue is not preserved, then [this Court] should not reach it." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

Here, Appellants raise multiple issues which are either raised for the first time in their initial brief to this Court or were never ruled upon by the Master in Equity. Specifically, those issues raised without having previously been ruled upon are:

(A) Issue #1: The exact amount of insurance paid by the PMI insurer Republic Mortgage Insurance Company to BB&T;

(B) Issue #3: Whether BB&T's attorney has legal authorization from the mortgage company to represent BB&T or do they represent a third party;

(C) Issue #5: Does BB&T represent the insurer RMIC;

(D) Issue #6: Whether the mortgage company has a right under South Carolina law to enrichment in a foreclosure case; and

(E) Issue #7: Whether BB&T is required under South Carolina law to give proper and timely notice to defendant that they represent the insurer or third party in a subrogation action.

These issues were never ruled upon by the lower court, as required to preserve them for Appellate review. (*See generally* Transcript of January 14, 2016 hearing and Order Confirm. Def. J.). The Cains never raised Issue #7 in the lower court and now attempt to raise it for the first time in the appeal. The Cains do make some argument regarding Issues 1, 3, 5, and 6 in their Motion to Dismiss Deficiency Judgment, (*see generally* Mot. to Dismiss Def. J.), but those same arguments were not made at the hearing, and there was no mention of or any ruling on those arguments in the Order Confirming Deficiency Judgment. (*See generally* Trans. of Hrg. on 1/14/16 and Order Confirm. Def. J.). Even if a party raises an issue in argument, if the issue is not ruled upon by the court and the party fails to move to alter or amend the order to include a ruling on those issues, the issues are not preserved for appellate review. *Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 522 S.E.2d 144 (1999).

The Appellants have failed to properly preserve these issues, either by raising them for the first time in this appeal or by failing to make a motion to alter or amend the Order Confirming Deficiency Judgment to request a ruling on the issues contained in their motion. Therefore, Appellants' issues 1, 3, 5, 6, and 7 are not preserved and should not be considered.

II. APPELLANTS HAVE ABANDONED THEIR ISSUED RAISED ON APPEAL BY MAKING ONLY CONCLUSORY ARGUMENTS WITHOUT ANY LEGITIMATE SUPPORTING AUTHORITY.

Appellants have raised issues in this appeal by making only conclusory arguments without providing any statutory or common law in support of their allegations. As a result, Appellants have abandoned these arguments and they should not be considered by this Court.

In essence, abandonment is akin to issue preservation. As established, *supra*, Part I, "[a] bald assertion, without supporting argument, does not preserve an issue for appeal." *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (internal citation omitted). "An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory." *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011); *see also Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 331, 781 S.E.2d 737, 742 (Ct. App. 2015) (holding "[b]ecause [appellant] cited no authority in this section and his argument was largely conclusory...this issue is abandoned on appeal."). Mere allegations are not enough, Appellant must provide supporting authority for his arguments, or he has abandoned such arguments. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).

Moreover, the *South Carolina Appellate Court Rules* provide that "[t]he brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority." Rule 208(b)(1)(D), SCACR. "Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) (citing *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540

S.E.2d 113, 120 (Ct. App. 2000); *Welch v. Epstein*, 342 S.C. 279, 288 n. 1, 536 S.E.2d 408, 412 n. 1 (Ct. App. 2000)).

First and foremost, most of Appellants' "issues" are simply questions the Appellants request an answer to, as opposed to being issues for this Court to consider. Additionally, Appellants have not broken their brief into sections addressing their itemized issues on appeal and providing any argument for their position. Further, most of these issues are simply restated in the Appellants' brief without any additional argument or support in the form of statutory authority or case law. To the extent that there is any case law or statutes cited, those cases and statutes do not support the Appellants contentions. Finally, the Appellants do not actually make any arguments to support their claim for relief from this court. They do not detail any reasons that they would be entitled to the relief sought, nor do they even tend to flesh out the background or facts of the case which support their claims.

As Appellants have abandoned their issues by failing to provide any authority for their arguments, this appeal should not be considered by this Court.

In an effort to fully address the potential issues, however, Respondent submits the following argument regarding the mortgage insurance issue raised by Appellants.

III. THE MASTER IN EQUITY PROPERLY FOUND THAT THE COLLATERAL SOURCE RULE APPLIES IN THIS CONTRACT ACTION AND THAT A PRIVATE MORTGAGE INSURANCE PAYMENT TO A MORTGAGEE DOES NOT REDUCE A DEFICIENCY JUDGMENT OWED BY A MORTGAGOR.

Appellants attempt to argue that the Master in Equity erred in considering the collateral source rule in ruling that a payment of private mortgage insurance proceeds do not reduce the deficiency judgment entered against a mortgage loan borrower following a foreclosure action. The basis of their argument appears to be two-fold: (1) that the collateral source rule applies to

torts only and (2) that even if it were to apply to contract cases, it would not apply here as the mortgage insurance carrier is not wholly independent of the mortgage borrowers.

For the reasons set forth below, the Master in Equity both properly applied the collateral source rule in this contract related action and properly held that the collateral source rule prevented the consideration of a private mortgage insurance payment to BB&T in entering a deficiency judgment against the Appellants following the foreclosure action.

A. As an initial matter, Appellants were in default in the underlying foreclosure and have not entered any evidence that mortgage insurance was paid to BB&T or, if it was, what amount was paid.

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy...making it impossible for [the] reviewing Court to grant relief." *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). Appellants contend that the collateral source rule should not apply and that mortgage insurance proceeds received by BB&T from the mortgage insurance company should reduce the deficiency judgment entered against the Appellants. However, this argument is essentially moot because even if the court determined that was the case, there has been no evidence entered by the Appellants regarding confirmation that BB&T was paid by the mortgage insurance carrier and if it was, how much it was paid. The Appellants operate off of a set of assumptions without evidence and for which they made no effort to confirm. This Court could grant no effectual relief to the Appellants in the event it ruled for them because there is no amount in evidence to effectuate a set-off. Therefore, Appellants' issue as to mortgage insurance payment is moot and cannot be addressed.

However, in the event the Court wishes to address the arguments made by Appellants with regard to the collateral source rule and mortgage insurance, those are addressed below.

B. The Master in Equity properly found that the collateral source rule applies in certain contract actions and is not limited in application to torts only.

"The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer." *In re W.B. Easton Constr. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) (citing *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989); *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797 (1969); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967)). "This rule has been liberally applied in South Carolina to preclude the reduction of damages." *Id.* The collateral source rule applies to total or partial compensation received from a collateral source. *See New Found. Baptist Church v. Davis*, 257 S.C. 443, 446, 186 S.E.2d 247, 249 (1972) (holding that "the collateral source rule is that which holds that total or partial compensation...from a collateral source...does not operate to lessen the damages recoverable from the wrongdoer."). "Such doctrine has been applied by this Court in quite a variety of factual situations." *Id.* (citations omitted).

The Appellants' mortgage loan was a contractual obligation, and a default on that loan amounts to a breach of contract. Appellants argue that the applicability of the collateral source rule is limited to torts, and cannot be applied in a mortgage foreclosure action, founded in contract. It is true that application of the collateral source rule is usually only considered in addressing damages in a tort case. Although this issue does not appear to have been specifically addressed by South Carolina courts, many courts across the country have varied in their view of application of the collateral source rule to contractual damages.

Some jurisdictions take the position that the collateral source rule does not apply to what are described as "pure breach of contract" cases. Most courts find that the collateral source rule

does not apply to breach of contract actions because the application of the rule would violate a basic tenet of contract law that damages for a breach of contract should not put the injured party in a better position than he would have been in if there had been performance. *Maro v. Lewis*, 389 S.C. 216, 222, 697 S.E.2d 684, 688 (Ct. App. 2010) (quoting *Minter v. GOCT, Inc.*, 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996)). Other courts base their holdings on the premise that the application of the rule would essentially amount to punitive damages which are not available in pure breach of contract actions without a willful or tortious intent. *See Centon Elecs., Inc. v. Bonar*, 614 So.2d 999, 1004 (Ala.1993) (noting that "collateral source rule is not applicable to a claim for breach of contract"); *Grover v. Ratliff*, 120 Ariz. 368, 586 P.2d 213, 215 (Ct.App.1978) (holding that "collateral source rule is a concept of damages in tort cases and does not apply to an ordinary breach of contract case"); *City of Miami Beach v. Carner*, 579 So.2d 248, 253–54 (Fla.Dist.Ct.App.1991) (collateral source rule not applicable in pure breach of contract cases; in contract cases, "measure of damages is the plaintiff's injury, rather than the defendant's culpability"). However, most of these cases do not consider the effect of a subrogation agreement between the collateral source and the injured party.

Other jurisdictions have considered application of the collateral source rule in a breach of contract action where the collateral source is subrogated to the rights of the injured party, preventing the possibility of a "double recovery." *See Metoyer v. Auto Club Family Ins. Co.*, 536 F. Supp. 2d 664, 671 (E.D. La. 2008) (holding that a subrogation right negates the negative effects of the collateral source rule in a contract claim). Additionally, some scholars have agreed that the collateral source rule should be applied to contract law, arguing that where the non-breaching party has subrogated its rights to the collateral source, the collateral source rule ought to apply. *See* Joseph M. Perillo, *The Collateral Source Rule in Contract Cases*, 46 San Diego

L.Rev. 705, 708–12, 719–21 (2009); John G. Fleming, *The Collateral Source Rule and Contract Damages*, 71 Calif. L.Rev. 56, 63–73, 77–86 (1983). This is because there is no chance of double recovery when the collateral source is entitled to subrogation as to the amounts paid to the injured party.

In the instant case, the alleged collateral source, Republic Mortgage Insurance Company ("RMIC"), and BB&T have a subrogation agreement. (*See* Ex A to Order Confirming Def. J., p. 21). To the extent RMIC paid any amounts to BB&T pursuant to a mortgage insurance agreement, RMIC is subrogated to the rights of BB&T in the collection of the deficiency judgment entered against the Appellants. As such, any collection of the amounts owed would not result in a double recovery for BB&T. This directly contradicts the reasoning in the line of cases which provide that the collateral source rule does not apply in breach of contract actions as it would provide for a windfall or other recovery beyond what BB&T is entitled to. In that regard, the reasoning for non-application of the collateral source rule in breach of contract cases evaporates.

As a result of the foregoing analysis, BB&T respectfully puts forth the argument that this Court should adopt the rationale that the collateral source rule may apply in a breach of contract action where the collateral source is subrogated to the rights of the injured party or non-breaching party. In so doing, BB&T requests that this court affirm the order of the Master in Equity.

C. The Master in Equity properly determined that the mortgage insurance carrier is wholly independent from the Appellants.

As previously established, the collateral source rule precludes the reduction of damages when an injured party receives compensation from a source wholly independent of the wrongdoer. *See Davis*, 257 S.C. 443, 446, 186 S.E.2d 247, 249 (1972); *see also Johnston v.*

Aiken Auto Parts, 311 S.C. 285, 428 S.E.2d 737 (1993). In fact, "[t]he *only* requirement for qualification as a collateral source is that the source be 'wholly independent of the wrongdoer.'" *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) (emphasis added). "Other jurisdictions have specified a source is wholly independent, and therefore a collateral source, when the wrongdoer has not contributed to it...*and* when payments to the injured party were not made on behalf of the wrongdoer...." *Id.* (citing *Kistler v. Halsey*, 173 Colo. 540, 481 P.2d 722 (1971); *Maduff Mortg. Corp. v. Deloitte, Haskins & Sells*, 98 Or. App. 497, 779 P.2d 1083 (1989)) (emphasis added).

Appellants contend that the mortgage insurance carrier is not wholly independent from them because the "insurance premium was paid by [Appellants]." (App. Initial Brief p. 2). However, Appellants did not pay the premium to the insurer, but instead, made payments to BB&T, which were then paid by BB&T to the mortgage insurance carrier. Specifically, the Mortgage provides:

> Borrower shall pay *to Lender* on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for...Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10.

(Mortg. ¶ 3) (emphasis added). This provision of the Mortgage provides confirmation that the Appellants were to include in their monthly payments to BB&T an amount which was designated as mortgage insurance premiums, but the Appellants were not to make the payments directly to the insurance carrier. As such, Appellants did not pay the policy premiums to the insurer as they allege.

Even more important, the mortgage insurance policy is for the benefit of BB&T and any payments made to BB&T would not be made on the behalf of the Appellants. Mortgage

insurance protects only the mortgagee in the event of default. The Appellants did not interact with the insurer and are not a party to the insurance contract. In that same vein, "[t]he contractual beneficiaries of PMI are mortgagees and investors. Mortgagors have no right to the proceeds of a PMI policy. In fact, mortgagors cannot purchase PMI for themselves, since PMI insurance does not insure a mortgagor against the risk of his own default." *Key Pac. Mortg., Inc. v. Indus. Indem. Co. of Alaska*, 845 P.2d 1087, 1089 (Alaska 1993). As such, Appellants have failed to show they are not wholly independent from the collateral source in this case, because they have failed to meet both elements of this standard: (1) contribution to the source and (2) payments made on behalf of the wrongdoer. Therefore, the Master in Equity correctly ordered that the mortgage insurance carrier is a source wholly independent from the borrowers.

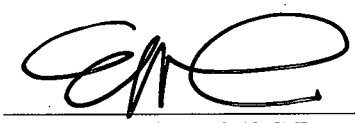
BB&T would, therefore, respectfully request that this court affirm the order of the Master in Equity as to the application of the collateral source rule.

CONCLUSION

This Court should decline to address the arguments of Appellants as the issues were either not properly preserved for appellate review, abandoned by virtue of failing to provide authority or support, or because they are moot.

To the extent the Court does take up the issue of the application of the collateral source rule to breach of contract actions where there is a subrogation agreement, this Court should affirm the Master in Equity's ruling that the collateral source rule applies in a breach of contract case where, as in this case, the collateral source is subrogated to the rights of the non-breaching party.

Respectfully submitted,



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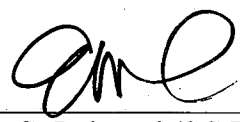
PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **INITIAL BRIEF OF RESPONDENT** on Appellants Wilton H. Cain and Cassandra M. Durrah-Cain by depositing copies of it in the United States Mail, postage prepaid, on September 12, 2016, addressed to Appellants Wilton H. Cain and Cassandra M. Durrah-Cain at 6476 N. Highway 17, Awendaw, SC 29429.



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September 12, 2016

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals Clerk of Court
1015 Sumter Street
Columbia, SC 29201

RE: *Branch Banking and Trust Company v. Wilton H. Cain; Cassandra M. Durrah-Cain; Liberty Hall Residential Property Owners Association, Inc.*
C/A # 2010-CP-08-03514
RTT File # 504335-02111

Dear Ms. Kitchings:

Enclosed are an original and one copy of Respondent's Brief and Designation of Matter and Proof of Service in the above referenced matter. Please file the original document, and return the clocked copy to me in the envelope provided for the Court's convenience.

With kind regards, I remain

Cordially yours,

Erica G. Lybrand

Enclosures

cc:

Wilton H. Cain
Cassandra M. Durrah-Cain
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Awendaw, SC 29429