THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas
The Honorable Richard L. Booth, Sumter County Master-in-Equity

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Appellate Case No. 2017-001407
Opinion No. 2017-UP-046
Appellate Case No. 2015-000349
Case No. 2010-CP-43-00823



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Wells Fargo Bank, N.A., Respondent,

v.

Delores Prescott and Wells Fargo Financial Bank (SD), Defendants,

Of Whom Delores Prescott is the Petitioner.

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# REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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July 29, 2017

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## COUNTERSTATEMENT TO WELLS FARGO'S STATEMENT OF THE CASE

This case is unique and has meaningful issues that warrants writ of certiorari review by the Supreme Court of South Carolina because the actions of Wells Fargo Bank, N.A., and its counsel have a real and substantial potential for repetition and is a threat to the public interest (¶49, R. p. 58).

## COUNTERSTATEMENT TO WELLS FARGO'S STATEMENT OF THE CASE

Petitioner signed a note and mortgage in her home in June 24, 2003 without a supervising attorney present (R. pp. 200-205). July 1, 2003 a different mortgage was recorded with Sumter County Register of Deeds which was materially altered (R. pp. 208-213).

Prior to March of 2009 Petitioner had made all payments on her note and mortgage and had no accumulated arrearage. (R. p. 36, line 4).

June 1, 2009, and continuing through April 12, 2010, Petitioner entered into a series of "Special Forbearance Agreements" (herein TPP) with Wells Fargo Bank (R. p. 36, ¶2).

On April 12, 2010, Wells Fargo Bank issued a 3rd Forbearance Agreement to Petitioner that required Petitioner to pay $563.05 a month, beginning May 12, 2010, June 12, 2010 and July 12, 2010. (R. p. 38, ¶9-10).

June 5, 2010 Petitioner made the $563.05 TPP payment under the terms of the forbearance agreement then in force. (R. p. 151). Wells Fargo accepted the payment June 7, 2010 (R. p. 152) and cashed the money order on June 14, 2010 (R. p. 153) but refused to apply the payment to Petitioners' account until August 2010 as shown on the statement dated August 5, 2010 (R. p. 160).

As a result of its own conduct, Wells Fargo Bank, N.A. commenced this action April 15, 2010, alleging Petitioner was in default on the note and mortgage (R. p. 22). Petitioner answered the Complaint in due course and did not receive a reply from Wells Fargo (R. pp. 24-34).

Petitioner filed for Chapter 13 relief with the U.S. Bankruptcy Court August 2, 2010 (R. p. 341, line 2). Due to an unresolved issue with a creditor other than Wells Fargo Bank, confirmation of the plan was denied and the case was dismissed January 19, 2011 (R. p. 338). Petitioner refiled a petition with the bankruptcy court March 28, 2011 (R. p. 340-342).

August 2011, due to a medical emergency, Petitioner contacted her bankruptcy attorney and asked if the plan could be modified to include September, October, November and December 2011 mortgage payments. The Trustee would not agree to amend the plan but gave Petitioner permission to discuss the circumstances with Wells Fargo Bank (Appx. p. 37, lines 8-13). Wells Fargo would only agree to a settlement order (R. p. 438).

The order stated that Petitioner was to continue to remit the regular monthly payment of $647.64 and cure the post-petition arrearage by making nine (9) consecutive installments of $379.03 per month commencing on February 2012.

Petitioner complied with the order and made regular monthly mortgage payments of $648.00 and a stipend of $379.03 (R. p. 219).

The August 2012 the regular mortgage payment of $648.00 cleared the bank. The stipend of $379.03 was returned to Petitioner's bank September 3, 2012. Petitioner immediately contacted the Bank to advise there was an issue with her checking account. Wells Fargo employee Scott S. advised Petitioner that the check would automatically redeposit. It did not. Petitioner mailed a money order of $379.03 to Wells Fargo Bank to cover the returned check. (R. p. 219, line 13-14).

Due to language stipulated in the settlement order (¶4, R. p. 439). Wells Fargo moved for relief from the stay September 21, 2012, in which relief was granted September 26, 2012 (R. p. 442 ). Petitioner continued to honor the payments in the settlement order through October 2012.

December 2012 Petitioner found issues that appeared to be fraudulent regarding the mortgage and note attached to the Motion for Relief from Automatic Stay. (R. p. 429-430). Specifically, the mortgage note Wells Fargo submitted to the bankruptcy court. The bankruptcy attorney advised Petitioner the alleged fraudulent issues discovered about the note were civil matters that should be addressed in state court because the property was no longer apart of the bankruptcy. (R. p. 62, lines 6-10).

February 2013 Petitioner spoke to an attorney specializing in foreclosures and devoted to foreclosure issues. March 2013 after hiring counsel and conducting extensive discovery, Petitioner learned that the issues regarding her induced default, mortgage, assignment and note were actionable (R. p. 73-82).

**The Mortgage**

In the Court below Petitioner's counsel filed a motion to dismiss and alleged that: (R. pp. 73-79).

> " The mortgage documents recorded on July 1, 2003 is not the mortgage Petitioner signed in her home.
>
> The mortgage Petitioner signed bears:
> When recorded Mail To:
> "Watermark Financial Partners, Inc.....(R. p. 75)
>
> The recorded mortgage bears:
> Return To:
> "General American Corporation.....(R. p. 75)

**The Assignment**

> Suzanne E. Brown an attorney hired by
> Wells Fargo with the law firm of Brock and Scott initiated

this foreclosure action and the assignment of note and mortgage. Both documents were executed on April 15, 2010. Suzanne E. Brown's signature is on the Foreclosure Complaint (R. p. 22). Her signature is also on the Assignment of Mortgage to Wells Fargo as VP of MERS (R. p. 91).

The assignment of Mortgage was not filed with Sumer County until May 17, 2010. Petitioner's answer was due on May 17, 2010. Petitioner had no way of knowing about the Assignment when she filed her answer. The document was purported to be a genuine "Assignment of Mortgage" and presented to the Court as such. (R. pp. 51-52, lines ).

The assignment of mortgage by an attorney from Brock and Scott saying she is "VP of MERS" is illegal unless she can prove she was VP at MERS at the time of the transfer. (R. p. 57, lines).

The assignment doesn't address the conflict of interest created when an attorney for Wells Fargo is also the VP of MERS, assigning a mortgage to Wells Fargo so the bank could bring a foreclosure action. *See*, In Re Conway, 305 S.C. 388 (1991) (R. p. 76, lines 28-31).

Petitioner's motion to dismiss was denied due to the pleadings being outside of the foreclosure complaint (R. p. 13). Judge Booth ruled Petitioner's permissive counterclaims may be brought through a separate action (R. p. 16, lines).

## I. The Court of Appeals ruling that the abandonment issue was not persevered for appellate review is misapplied and in Conflict with the South Carolina rules on Issue Preservation.

Wells Fargo did not raised that the abandonment issue was not preserved for appellate review. Now, for the first time in its Return to Writ of Certiorari the Bank is stating to the Supreme Court of South Carolina that the "Petitioner" argued for the first time on appeal, "the Bankruptcy Trustee, not Ms. Prescott herself," abandoned her interest in the property, and noted [Appx. pp. 41-43] in support of the allegation.

This assertion is simply not true as the facts are stated in [Appx. p. 42, lines 5-7]:

> "Typically, a trustee or debtor in possession will abandon property of the estate after a determination that the property does not yield any value to the estate or its administration will reduce the available assets of the estate."

In [Appx. p. 42, lines 13-18]:

> "The trustee or debtor in possession may abandon any estate property after notice and a hearing. 11 U.S.C. § 554(a); Fed. R. Bankr. P. 6007. By filing a motion, any party in interest may seek a court order requiring the trustee or debtor in possession to abandon property. U.S.C. §554(b); Fed R. Bankr. P. 6007(b). In the event an objection is filed to the notice of abandonment or the motion requesting abandonment, the court will schedule a hearing.

At the Summary Judgment hearing the issue was orally argued and in the Defendant's Supplemental Memorandum In Opposition of Summary Judgment it was argued that:

> "When a trustee abandons property of a bankruptcy estate, ownership of that property vests once again in the debtor. In re Carter Paper Co., Inc., 220 B.R. 276 (Bankr. M.D. La., 1998) (Also, explaining historical development of abandonment in bankruptcy). Because the bankruptcy trustee (or the debtor-as-trustee in a Chapter 13 case) has the exclusive right of action over the bankruptcy estate, there must be an affirmative abandonment of the property from the bankruptcy estate before the debtor can challenge a foreclosure in state court."
>
> [T]he trustee, as the representative of the bankruptcy estate, is the real party in interest, and the party with exclusive standing to assert causes of action belonging to the estate. 11 U.S.C. §§323, 541 (a)(1). If a claim belongs to the estate, then the bankruptcy trustee has exclusive standing to assert it...[W]here "the claims are property of the bankruptcy estate, the Trustee is the real party in interest with exclusive standing to assert them"..."[A]ll rights held by the debtor in the asset are extinguished *unless the asset is abandoned*" by the trustee to the debtor under 11 U.S.C. §554. (R. p. 191).

Petitioner's counsel raised the issues orally at the summary judgement hearing November 14, 2014 and in written form in the Defendant's Supplemental Memorandum In Opposition to Summary Judgment, December 8, 2014. The master-in-equity ruled on the abandonment issue in the Order of Summary Judgment, January 9, 2015. (R. p. 9). If Wells Fargo Bank had a question

concerning the property's ownership, the bankruptcy court was the proper forum to address the issue *see* Venture Eng. Inc. vs. Tishman, 360 S.C. 156, 162 (S.C. Ct. App. 2004).

Petitioner raised the issue of both Trustee and Debtor with regards to abandonment in her pleadings below and in her appellate brief. The South Carolina Appellate Court have consistently found issues preserved for review when the issue was raised to and ruled upon by the trial court. *See, e.g.*, State v. Williams, 417 S.C. 209, 228 n.10, 789 S.E.2d 582, 592 n.10 (Ct. App. 2016) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." (quoting State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003))). While a party may not argue one ground at trial and another ground on appeal, State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989), we do not require a party to use the same language on appeal as it did at trial, Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

The Court of Appeals ruling is in conflict South Carolina Rules on Preservation. The Petitioner prays that the Supreme Court grant Writ of Certiorari to review the Court of Appeals decision.

**The Court of Appeals incorrectly affirmed the basic legal doctrine of res judicata to the circumstances on this case.**

The reliance on Celli v. First National Bank of Northern New York, 460 F.3d. 289, 295-96 (2d Cir. 2006) is misplaced and does not support the Court of Appeals or the lower Court in its decision with regards to the circumstances in this case.

In Celli, the bank had "inadvertently discharged" its mortgage on the debtor's homestead. The bankruptcy court confirmed the Chapter 13 plan which provided the bank's claim was secured by a valid first mortgage on the debtor's homestead and the debtor would make monthly

payments directly to the bank. Seventeen months later, the debtor and the trustee filed an adversary proceeding to avoid the mortgage. The Second Circuit held that the plan confirmation order barred the subsequent challenge, even though the trustee was unaware of the earlier cancelled lien. The court explained that a simple check of the county real estate records would have revealed the cancelled lien so that the lien could have been challenged before confirmation.

The present case is distinguishable from Celli. Here, the Petitioner's allegations are related to the conduct of Wells Fargo Bank that occurred with respect to forbearance agreements, not the note and mortgage (¶¶23-43, R. pp. 131-134).

In bankruptcy cases, when a bankruptcy order has confirmed a plan, and the plan contains an express reservation of rights, that reservation may preserve the right of a party to later litigate an issue *see* Russo-Chestnut v. Wells Fargo (In re Russo-Chestnut), 522 B.R. 148, 158 (Bankr. D.S.C. 2014) (holding that a reservation of rights provision in a chapter 13 plan reserved the debtor's right to pursue a cause of action against her mortgage company for damages in connection with state law foreclosure proceedings). Litigants cannot unilaterally reserve rights to bring claims in later actions. Rather, the preservation of claims in this manner is the exclusive province of the court hearing the action. "Under a generally accepted exception to the res judicata doctrine, a litigant's claims are not precluded if the court in an earlier action expressly reserves the litigant's right to bring those claims in a later action" (emphasis added) *see* Santos v. U.S. Bank Nat'l Ass'n, 54 N.E.3d 548, 693 (Mass. App. Ct. 2016).

**The approved plan form for this district states:**

> **I. NOTICE TO CREDITORS AND PARTIES IN INTEREST:**
> The debtor has filed the following chapter 13 plan and motions which may affect your rights. **Failure to object may constitute an implied acceptance of and consent to the relief requested in this document.** (R. p. 446).

**B. Secured Creditor Claim:** The Plan treats secured claims as follows:

1. General Provisions: The terms of the debtors pre-petition agreement with a secured creditor shall continue to apply except as modified by this plan, the order confirming the plan, or other order of the Court. Holders of secured claims shall retain liens to the extent provided by 11 U.S.C. § 1325(a)(5)(B)(i)....(R. p. 448)

**V. PROPERTY OF THE ESTATE, STATUS AND OBLIGATIONS OF THE DEBTOR AFTER CONFIRMATION:** ...
Nothing herein is intended to waive or affect adversely any rights of the debtor, the trustee, or party with respect to any causes of action owned by the debtor (R. p. 450)

The reservation of this category of rights is a permissible reservation, particularly in light of how chapter 13 administration occurs in this district. If Wells Fargo disagreed that the reservation was inappropriate, it could have objected to the provision prior to the plan confirmation July 17, 2013. It, too, is bound by confirmation, see United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 274 (2010) (holding that a creditor was bound by the terms of the plan despite the fact that the plan should not have been confirmed because the creditor had notice of the plan and did not object).

Petitioner prays this Court Grant this Petition for Writ of Certiorari to the Court of Appeals, and accept briefs on the issue of whether the Court of Appeals Erred in Affirming the doctrine of res judicata, prohibiting Petitioner from proceeding with her claims to the foreclosure action.

**The Court of Appeals erred in affirming the doctrine of judicial estoppel and misapplied the authorities in support of its decision.**

The Court of Appeals reliance on Dwyer and Bates are misplaced because these cases are distinguishable. The appeal in Dwyer involves a negligence action brought against the

Respondents Tom Jenkins Realty, Inc., and Consolidated Multiple Listing Service, Inc. (CMLS). *See*, Dwyer v. Tom Jenkins Realty, Inc, 289 S.C. 118, 119 (S.C. Ct. App. 1986).

In Bates v. Long Island R. Co, 997 F.2d 1028, 1037 (2d Cir. 1993) the doctrine of judicial estoppel had not been uniformly adopted by federal courts and its elements had never been clearly defined in the Second Circuit.

The present case, South Carolina officially recognized the doctrine of judicial estoppel and adopted the doctrine as it relates to matters of fact, not law in 1997. Cothran v. Brown, 357 S.C. 210, 215 (S.C. 2004) ("In Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

The elements necessary for the doctrine to apply:

> (1) two inconsistent positions taken by the same party or parties in privity with one another;
> (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
> (3) the party taking the position must have been successful in maintaining that position and have received some benefit;
> (4) the inconsistency must be part of an intentional effort to mislead the court; and
> (5) the two positions must be totally inconsistent

Cothran v. Brown, 357 S.C. 210, 215-16 (S.C. 2004)

Judicial estoppel has often been applied to bar a civil lawsuit brought by a debtor who concealed the existence of the legal claim from creditors by omitting the lawsuit from the bankruptcy petition. Cannon-Stokes v. Potter, 453 F3d 446, 448 (7th Cir. 2006) ("All six appellate courts that have considered this question hold that a debtor in bankruptcy who denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after bankruptcy ends."). (Appx. 46, lines 9-14).

In this case, Petitioner did not concealed or deny owning an asset. Petitioner presented evidence to the Bankruptcy and Civil Court that in May and June of 2010 she made trial plan payments to Wells Fargo under the forbearance agreement then in force and listed these payments in her sworn statement of Financial Affairs under penalty and perjury (¶3, ¶4; R. pp. 323-324) and in her pleadings in civil court and presented documents to support her statements. (R. p. 151-152, 153 and 160).

Judicial estoppel is a principle developed to prevent a party from taking a position in a judicial proceeding that is inconsistent with a stance previously taken in court. Without bad faith, there can be no judicial estoppel. Zinkand v. Brown, 478 F.3d 634, 638 (4th Cir. 2007). (Appx. p. 46, lines 5-7).

Federal law controls the application of judicial estoppel, since it relates to protection of the integrity of the federal judicial process. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1168 n.4 (4th Cir. 1982). (Appx. p. 46 lines, 21-23).

The foreclosure complaint and answer were disclosed in the bankruptcy. Even if Petitioner should have supplemented her bankruptcy pleadings after she actually filed this action, her initial disclosure of the claims precludes from finding that she acted in bad faith. *See*, Zinkand v. Brown, 478 F.3d 634, 638 (4th Cir. 2007) (noting that bad faith is "the determinative factor" of a judicial- estoppel analysis (internal quotation marks omitted)). (Appx. 47, lines 5-6).

Finally, there is absolutely no evidence that the allegedly contradictory positions were taken in a deliberate attempt to mislead the bankruptcy or civil courts. *See* Cothran, 357 S.C. at 217, 592 S.E.2d at 632 (requiring some evidence of intent to mislead). (Appx. 47, lines, 6-9).

"Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 15, 532 S.E.2d 876, 878 (2000). (Appx. p. 47, lines 9-15).

The Petitioner has steadfastly asserted its defenses, and has notified Wells Fargo of its defenses and counterclaims throughout this action. It is undisputed that Petitioner did not disclose, in her bankruptcy petition, the existence of the Trial Payment Plan Agreements with Wells Fargo that forms the basis of the claims and defenses in this action, the bankruptcy filings do not preclude her claims and defenses under a theory of judicial estoppel. The failure of the Petitioner to include the Wells Fargo's "Special Forbearance" Trial Payment Plan agreement which forms the basis of the defenses and counterclaims in this action, the doctrine of judicial estoppel does not bar this action Koch v. National Basketball Assn., 245 A.D. 2d 230, 231 (N.Y. App. Div. 1997). (Appx. 98 lines 7-11).

In Whitten v. Fred's Inc., 601 F.3d 231 (4th Cir., 2010), the court held a Plaintiff's failure to list certain claims in its bankruptcy documents did not prevent the party from raising them later, noting that all interested parties were aware of the claims despite the omission. The court noted that "[e]ven if Whitten should have supplemented her bankruptcy pleadings after she filed this action her initial disclosure of the claims precluded from finding that she acted in bad faith." Whitten, 601 F. 3d at 242. (R. p. 180, lines 5-11).

In Petitioner's initial responsive pleadings and supporting documents filed in 2010, the Petitioner asserted numerous defenses and pleaded all relevant facts contesting Wells Fargo entitlement to foreclosure. Those claims have be clarified in the Petitioner's subsequent amendments, however, the positions espoused are not contradictory to those taken at earlier stages in this litigation. (R. p. 180, lines 12-16).

March 2014 Petitioner's Bankruptcy Plan was dismissed. Under 11 U.S.C. § 349(b)(8), "the pre-discharge dismissal of a bankruptcy case returns the parties to the positions they were in before the case was commenced." Unless the court indicates otherwise, the general effect of an Order of dismissal is to restore the status quo ante; it is as though the bankruptcy case had never been brought. *In re* Keener, 268, B.R.912, 920 (Bankr. N.D. Tex. 2001). (R. p.192, lines 10-16).

Petitioner prays this Court Grant this Petition for Writ of Certiorari to the Court of Appeals, and accept briefs on whether the Court of Appeals Erred in its reliance on Dwyer and Bates to support the Ruling of judicial estoppel and prior decision of this Court.

**The Court of Appeals erred in ruling that Petitioner's affidavit is a "sham" and is in conflict with the ruling of the Supreme Court of South Carolina**

The Court of Appeals affirmed the lower court's ruling that Petitioner's affidavit is sham and gave no opinion other than citing: Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (allowing a court to disregard a subsequent affidavit as a "sham" if submitted by a party to contradict his or her own prior sworn statement) and McMaster v. Dewitt, 411 S.C. 138, 144, 767 S.E.2d 451, 454 (Ct. App. 2014) (noting South Carolina has adopted the abuse of discretion standard in reviewing whether a lower court properly rejected an affidavit as a sham). (¶1, Appx. p. 2.)

In Cothran v. Brown, 357 S.C. 210, 218-19 (S.C. 2004) this Court ruled that the Court of Appeals misapplied the competing affidavit rule under the facts of that case. Holding, Brown did not intend to create a sham issue and had consistently asserted throughout the criminal and civil proceedings that he was blinded by the headlights of the vehicle and therefore, cannot be

said Brown's second affidavit was admitted for the sole purpose of creating a "sham" issue of fact.

In the present case Petitioner presented the documents allowed by Rule 56, which says in subsection (e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

In its ruling, the Court of Appeals has not identified any contradictions to Petitioner's affidavit. Petitioner's November 2014 affidavit is consistent with the statements in the May 2010 *pro se* Answer (R. pp. 24-34), the May 2010 Hardship Affidavit (R. pp. 36-39) and the August 2010 Sworn Statement of Financial Affairs (R. p. 323).

The affidavit of 2014 involves the period of 2008 through 2010. The affidavit clarifies the relevant facts which led to the foreclosure complaint in the present case (Appx. pp. 31-37).

The Court of Appeals has not issued an opinion in distinguishing between a "sham" affidavit versus one that merely corrects or clarifies genuine issues of material facts previously addressed. Petitioner's November 2014 affidavit (R. p. 144-147) is based on personal knowledge and documents were presented in support of the affidavit. (R. pp. 149,151-153, 160).

Petitioner prays this Court Grant this Petition for Writ of Certiorari to the Court of Appeals, and accept briefs on whether the Court of Appeals Ruling is in Conflict with a prior decision of this Court.

**The Court of Appeals gave no opinion or ruling on Petitioner's Breach of Contract argument.**

From the face of the Amended Answer and Counterclaim it is obvious that Petitioner has not plead a "stand-alone" claim for a breach of the covenant of good faith and fair dealing, but

plead that breach in conjunction with a breach of contract claim. No independent or unique remedy has been sought from the claim, and it is clearly an additional breach of the same contract that is the basis for Respondent's own action. (R. p. 178, lines 1-21).

In the Motion for Summary Judgment Wells Fargo reliance on Rotec Servs. V. Encompass, Servs., 359 S.C. 467, 472-73, 597 S.E.2d 881, 883-84, is misplaced. In Rotec, the court held that there was no contractual obligation breached, and as a result a claim for a breach of implied covenants of that contract could not stand alone. (¶4, R. p. 141). Here, Petitioner has alleged breaches of specific provisions of the contract between the parties and that the Wells Fargo acted in bad faith in allowing those breaches to occur. Specifically, Petitioner has alleged that Wells Fargo mismanaged and misapplied payments from Petitioner's, as it was required to do under the terms of paragraph 3 of the Mortgage Agreement. (R. p. ¶3, lines 1-8, ¶3; 209, lines 1-8). The application of funds was clearly a discretionary act controlled by Wells Fargo, which discretion was abused in repeatedly failing to properly apply funds. (¶2-10; R. pp. 129-137) (R. p. 145).

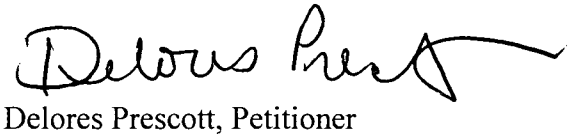
Additionally, the Wells Fargo points to good reason for disallowing the Petitioner's breach of contract claim. There is no dispute that there was a contract between the parties. The Petitioner has alleged a breach of a material term that relates directly to the performance and obligation of the parties. Wells Fargo failure to apply payments in accordance with the contract had a bearing on Petitioner's alleged failure to comply with the payment terms of the note and mortgage. Accordingly, the Petitioner's breach of contract claim should be considered at the liability stage and not, as Wells Fargo contends, as an afterthought at the damages stage. (¶12; R. p. 31).

Petitioner prays this Court Grant this Petition for Writ of Certiorari to the Court of Appeals, and accept briefs on the legal issue of whether the Petitioner is entitlement to a determination of her Breach of Contract claim and defenses.

## CONCLUSION

For the foregoing reasons Petitioner, Delores Prescott respectfully requests that the Supreme Court grant the Petition for a Writ of Certiorari to review the final decisions of this case.

Respectfully submitted,



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**PROOF OF SERVICE**

The undersigned hereby certifies on the 29th day of July 2017, she served a copy of the **Reply to Return Petition for a Writ of Certiorari** by depositing same in the United States Mail first class, mail, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

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