THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

Wells Fargo Bank, N.A., Respondent,

v.

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

Of Whom Delores Prescott is the Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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June 23, 2017

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CERTIFICATE OF PETITIONER

Petitioner certifies that the Petition for Rehearing was made and denied by the Court of Appeals. May 26, 2017.

QUESTIONS PRESENTED

1. Did the Court of Appeals properly rule that Petitioners Abandonment argument was not preserved for Appellate review?

2. Did the Court of Appeals properly find that Petitioner filed a "Sham" affidavit when responding to Wells Fargo's summary judgment motion?

3. Did the Court of Appeals ruling regarding Petitioners arguments concerning judicial estoppel, collateral estoppel, and the statute of limitations conflict with the laws of South Carolina?

4. Did the Court of Appeals properly rule that res judicata prohibits Petitioner from proceeding on the amended defenses and counterclaims as a matter of law?

5. Did the Court of Appeals err in not giving an opinion or a ruling on Petitioners Breach of Contract argument as a matter of law?

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 23rd day of June 2017, she served a copy of the foregoing **PETITION OF WRIT OF CERTIORARI** by depositing same in the United States Mail first class, certified 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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STATEMENT OF THE CASE

Wells Fargo Bank, N.A. ("Respondents") initiated this foreclosure action against Petitioner on a note and mortgage signed in her home in June 24, 2003 without a supervising attorney present. Respondent commenced this action April 16, 2010, alleging Petitioner was in default on the note and mortgage. Petitioner filed for Chapter 13 relief with the U.S. Bankruptcy Court August 2, 2010 (R. p. 341, line 2). January 19, 2011 confirmation of the plan was denied. (R. p. 338). March 28, 2011 Petitioner filed for Chapter 13 relief (R. p. 341, line 6) and the court issued a stay of the state court foreclosure proceedings. Respondent moved for relief from the stay in which relief was granted September 26, 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 Respondent 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).

Procedural History and Rulings Below

February 2013 Petitioner contact Robert C. Ray of the Greenville Bar and discussed the new information that Petitioner discovered regarding her mortgage documents. (R. p. 63, line 18).

March 2013 Petitioner hired Mr. Ray and he contacted Brock and Scott to first seek permission to amend Petitioner's *pro se* Answer in lieu of completing the Foreclosure Intervention document forwarded to Petitioner. Soon after Petitioner hired counsel, Respondent

changed its counsel to Womble, Carlyle, Sandridge & Rice of Greenville, S.C. and representatives of the law firm contacted Petitioner's counsel. Petitioner's attorney had been negotiating Petitioner's Amended Answer and Counterclaim with Respondent's new attorney since April 2, 2013. (R. p. 44, lines 9-11).

On June 17, 2013 Petitioner moved to modify the Chapter 13 plan to surrender property from the bankruptcy estate which was a prerequisite for Petitioner to assert claims and defenses in state court (R. p. 191, lines 8-9) confirmation was granted July 17, 2013. (R. p. 453).

Mr. Ray moved to amend Petitioner's *pro se* answer. The First Amended Answer and Counterclaim asserted six defenses against Respondent for (1) denial (2) unclean hands (3) duress and fraud (4) fraud and misrepresentation (5) illegality and (6) *in pari delicto*. (R. pp. 45-46) and five defenses by way of counterclaim (7) violation of the South Carolina Consumer Protection Code S.C. Ann. §37-10-102 (8) violation of the South Carolina Consumer Protection Code as Unconscionable Conduct S.C. Code Ann. §37-10-108, (9) breach of fiduciary duty, negilence) (10) lack of standing (11) Unfair Trade Practices (R. p.53-59).

December 2, 2013 the Honorable Richard L. Booth granted Petitioner leave to amend her *pro se* answer. (R. p. 16). A hearing was held November 20, 2013 and the Order to amend the *pro se* answer was granted December 2, 2013 and filed on the record January 4, 2014. (R. p. 16).

Extensive discovery was conducted and based on the information counsel discovered regarding the mortgage and assignment Mr. Ray moved to have the foreclosure case dismissed. (R. p. 73-92) A hearing was held on April 9, 2014. The motion to dismiss the foreclosure was denied April 17, 2014 and filed on the record April 22, 2014. (R. p. 13) Respondent moved for Summary Judgement May 2014. A hearing was held November 19, 2014. (R. p. 124). The

Order of Summary Judgment was decided January 9, 2015 and filed on the record January 13, 2015. (R. p. 2).

Petitioner received written notice of entry for the order of Summary Judgment Friday, January 30th, 2015 from counsel stating the Order of Summary Judgment including emails of the decision which, resulted in the conclusion of this case. The email advised Petitioner she had until February 12, 2015 to appeal the Order of Summary Judgment. (R. p. 216).

Counsel withdrew representation on Appeal. (R. p. 216) Petitioner was not able to secure a South Carolina attorney, therefore, appealed the decision to the Court of Appeals *pro se*. The Court of Appeals Affirmed the Master's Order of Summary Judgment on the issues and arguments presented on Appeal January 25, 2017. A petition for rehearing and petition for rehearing *en banc* was submitted and denied on May 26, 2017. Petitioner seeks a Writ of Certiorari to review that decision.

Summary of Material Facts

As stated in the pleadings of the trial court the following facts were not in dispute:

September 2001, Petitioner had a permanent residential mortgage with Principal Mortgage on her residence in Rembert, South Carolina, Sumter County. (R. p. 73).

June 2003, Petitioner refinanced the mortgage agreement with Watermark Financial Partners, LLC, at her home in Sumter, South Carolina and rescinded the loan on the same day. (R. p. 74).

July 2003, a different mortgage document was filed in the Sumter County Register of Deeds, which had been materially altered from the documents Petitioner signed. (R. pp. 200-205).

October 2008 Petitioner became unemployed and notified Respondent of her change in income. Respondent's agents and employees advised Petitioner that she would not qualify for refinancing or a reduction in interest because her loan was current. (R. p. 149, lines 11-13).

February 2009, Petitioner was advised by telephone that she would be considered for a new Home Affordable Modification Program if she defaulted on her loan and instructed to reapply March of 2009. (R. p. 149, line 11-13).

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).

Petitioner submitted a hardship letter, a letter of authorization from the bankruptcy attorney, current expenditures, weekly unemployment compensation, food stamp approval letter and letter from the Chapter 13 Trustee in accordance with the instructions received from agents and employees of Wells Fargo, and commemorated the advice she received from Respondent's agent Kim Dehining (R. p. 149, lines 16-24). Petitioner received a discharge from the Bankruptcy Court May 2009. (R. p. 343, line 2).

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

Agents and employees of Wells Fargo repeatedly represented to Petitioner that if she successfully completed the payments outlined in the agreement that she would be considered for a loan modification (R. pp. 36-39).

On April 12, 2010, Respondent issued a 3rd Forbearance Agreement to Petitioner, but still never made any determination as to her modification, as was promised nine months earlier. The 3rd Forbearance Agreement required Petitioner to pay $563.05 a month, beginning May 12, 2010, June 12, 2010 and July 12, 2010. (R. p. 38, ¶9-10).

Three days after sending the 3rd Forbearance Agreement to Petitioner, Respondent initiated this foreclosure action on April 15, 2010. (R. p. 22) Respondent never communicated their intent to foreclose. (¶11; R. p. 38,).

Petitioner answered the Complaint in due course and did not receive a reply from Wells Fargo. The answer raised several affirmative defenses. (¶5-13; R. pp. 24-31).

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. pp. 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 Wells Fargo's own conduct, it declared Petitioner had violated the terms of the forbearance agreement and placed Petitioner's property in "active foreclosure."

Petitioner was unable to bring the account current and was forced to file for a second bankruptcy Monday, August 2, 2010. (R. p. 341, line 2)

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S ABANONMENT ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW.

In ruling this argument unpreserved, the Court of Appeals erred and gave no opinion other than citing Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E. 2d 505, 510 (2006) (It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [lower] court to be preserved.") in support of its ruling.

The decision in Pye is distinguishable and inapplicable. In Pye, the Court of Appeals held for the first time on appeal the theory that counsel should be held liable for civil conspiracy on the basis of a duty he owed to them. The issue was not presented to or ruled upon by the trial judge, raised at the summary judgment or the Rule 59(e) hearings. Therefore, not preserved for appellate review. Pye, 369 S.C. 555, 565 (S.C. 2006).

In the present case, Petitioner's argument on the issue abandonment began at the very start of the trial in Wells Fargo Bank's Memorandum in Opposition in Motion to Dismiss (R. p. 98, line 15). The arguments were continued through the summary judgment hearing. At the hearing the Court requested additional briefing from counsel on both sides on the issue:

> "What is the legal effect of a debtor abandoning or surrendering property in the bankruptcy context?" (R. p. 182, line 10).
>
> "What preclusive effect, if any, does the dismissal of a bankruptcy proceeding in which a plan has been confirmed have a debtor's right to assert the affirmative defense of unclean hands against the creditor in a subsequent foreclosure?" (R. p. 189, lines 4-6)

In the Defendant's Supplemental Memorandum on abandonment counsel clearly argued that the "Defendant did not Abandon the Property to Wells Fargo, but rather, the Defendant as

Debtor-Trustee, abandoned the Property· from the Possession of the Bankruptcy Estate, and returned the title and rights in the property to the Defendant, individually." (R. p. 191).

The Order of Summary Judgment states:

> "Because Ms. Prescott....affirmatively abandoned her interest in the property during the proceedings as part of an amendment to her Chapter 13 plan, she is estopped from disputing Wells Fargo's entitlement to foreclose its lien." "Accordingly, Wells Fargo is entitled to judgment as a matter of law on its foreclosure claim."

(R. p. 9, lines 8).

There is no requirement at law that counsel goes further and specifically offer argument on what would cure the alleged meaning of "abandonment in the bankruptcy context" when the same is plainly inherent in the argument raised to the court, (the lack of specific or precise language of this will not render the issue not preserved); *see generally* Wilder Corp, V. Wilke, 330 S.C. 71, 497 S.E. 2d 731 (1998); Delta Apparel, Inc. v. Farina, 406 S.C. 257, 269, 750 S.E. 2d 615, 621 (Ct. App. Oct. 30, 2013) (finding that there are no special requirements to preserving an issue for appeal so long as it is sufficient to bring the nature of the alleged error into focus so that it can be "reasonably understood by the trial court") (citing Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2012) (indicating an issue need only be raised to the degree that it was understood by the trial court).). A motion under Rule 59(e) is unnecessary in this case because the trial court's decision with respect to the appellant's claims was clear. *See*, Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998).

The same holds true in this case, the rules of issue preservation did not require the Petitioner to offer to the trial court any evidence other than the issue of abandonment in the bankruptcy context and that the abandonment was a necessary prerequisite for the Defendant to assert her claims and defenses in state court. (¶ I; R. p. 191, lines 3-7). The 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))). (Appx. p. 104, lines 8-13).

The argument was clearly raised to and ruled upon by the trial court. (R. p. 9, lines 8-11). Based on these differences, Petitioner prays this Court Grant this Petition for Writ of Certiorari to the Court of Appeals, and accept briefs on this novel issue as to whether the Court of Appeals erred in finding this issue not preserved for appellate review contrary to South Carolina's well-established Rules of Issue Preservation.

II. 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), a case on facts so similar as to be persuasive, even if not controlling, this Court ruled that the Court of Appeals misapplied the competing affidavit rule under the facts of the 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, the Court of Appeals did not offer any opinion to counter the statements in Petitioner's affidavit. Rule 56(c), SCRCP is clear with regard to the responsibilities of the adverse party countering a Motion for Summary Judgment:

> The adverse party may service opposing affidavits no later than two days before the hearing. The judgment south shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

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 distinguishing between a sham affidavit and a correcting or clarifying affidavit, the following considerations provide guidance:

> (1) whether an explanation is offered for the statements that contradict prior sworn statements;
>
> (2) the importance to the litigation of the fact about which there is a contradiction;
>
> (3) whether the nonmovant had access to this fact prior to the previous sworn testimony;
>
> (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact;
>
> (5) whether the previous sworn testimony indicates the witness was confused at the time;
>
> (6) when, in relation to summary judgment, the second affidavit is submitted.
>
> *See* Pittman v. Atlantic Realty Co., 754 A.2d 1030, 1042 (Md. 2000).

Cothran v. Brown, 357 S.C. 210, 218 (S.C. 2004).

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 (See App. Brf. pp. 10-16).

Petitioner's Sworn Statements

1. The August 2010 sworn statement says;
   "List all payments on loans, installments purchases of goods or services and other debts to any creditor within 90 days immediately preceding the commencement of this case."
   ....." (R. p. 323)

2. Under Section 3, Payments to Creditors lists Wells Fargo Home Mortgage and list the dates of payments as May 2010 and June 2010, and the amount paid $1,126.10 which are to two monthly trial plan payments at $563.05.

3. The nature of the proceeding is listed as "Breach of Contract" and the Status or Disposition is listed as "Foreclosure Pending" (R. p. 324).

4. The Declaration Under Penalty of Perjury by Individual Debtor is dated August 15, 2010 (R. p. 329).

The prior statements in Petitioner's Answer and Hardship Affidavit to the lower court are consistent with the sworn statements in her 2014 Affidavit.

1. **The Answer of May 2010** is consistent with the facts in the 2014 Affidavit **(1)** Plaintiff did not disclose to Defendant that the "loan type" was not eligible for a "HMP" or "FHA-HAMP" loan modification, nor did Plaintiff disclose to Defendant that unemployment compensation cannot be used as "income" when applying for a :HMP" or FHA-HAMP modification. On or about June 2009, Plaintiff offered Defendant the first out of many "Special Forbearances" without disclosing the options available to Defendant under said guidelines. (R. p. 30, ¶10) **(2)** Plaintiff has overstated and exaggerated the amount that is owed, by not applying all payments directly to the default amount that is owed but instead applying payments as "Unapplied." (R. p. 29, ¶8).

2. **The Hardship Affidavit of May 2010** is consistent with the facts in the 2014 Affidavit as follows: **(1)** October 2008 I became unemployed **(2)** Please note that prior to this arrangement I was not behind with my mortgage. (R. p. 36, ¶2a)
   (3) I mailed a certified check for $3,200.00 requesting that it be applied to the January 15, 2010, February 15, 2010 and March 15, 2010 payment and the remainder be applied to the outstanding balance. Therefore, my home loan should have been reviewed for a final modification as stated in the December 2009 agreement. (R. p. 37, ¶5). **(4)** I received in the mail a "Special Forbearance" dated April 12, 2010 to begin making payments of $563.05 effective May 12th, 2010, June 12th, 2010 and July 12th, 2010. The agreement states I would be considered for a permanent modification after this trial period. Please note, the agreement I signed in December 2009 stated the same, however, no permanent modification has occurred with or without employment. (R. p. 38, ¶9-10.) **(5)** I received a Foreclosure notice on Sunday, April 18, 2010. (R. p. 37, ¶8). **(6)** I called Wells Fargo regarding the Foreclosure

> Notice. I was told that there is "no sale date" and as long as I make the payments per the agreement I would be fine. How is it possible for Wells Fargo Bank, N.A. to send me to Foreclosure the same time they initiate another agreement without even notifying me of their intent to do so? (R. p. 38, ¶ 11).

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.

III. THE COURT OF APPEALS ERRED IN APPLYING THE DOCTRINE OF JUDICIAL ESTOPPEL TO PRECLUDE PETITIONER FROM ASSERTING DEFENSES AND COUNTERCLAIMS IN THE STATE FORCLOSURE ACTION.

The Court of Appeals misapplied the doctrine of judicial estoppel and gave no opinion other than citing, "As to Prescott's arguments concerning judicial estoppel, collateral estoppel, and the statute of limitations: Dwyer v. Tom Jenkins Realty, Inc., 289 S.C. 118, 120, 344 S.E.2d 886, 888 (Ct. App. 1986) (stating when a decision is based on two grounds, either of which can support it independently of the other, the decision will be affirmed whether or not the other ground is correct). 749-750) and "to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings" (Bates v. Long Is. R. R. Co., 997 F2d 1028, 1038 [2d Cir]). "[T]he integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets"). (¶3, Appx. p. 2).

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).

The same conclusion was decided, 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 Appellants' initial responsive pleadings and supporting documents filed in 2010, the Appellant asserted numerous defenses and pleaded all relevant facts contesting Respondent's entitlement to foreclosure. Those claims have be clarified in the Appellant'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 Appellant'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.

IV. THE COURT OF APPEALS ERRED IN AFFIRMING RES JUDICATA PROHIBITING PETITIONER FROM PROCEEDING ON THE DEFENSES AND COUNTERCLAIMS

The Court of Appeals gave no opinion other than citing , "As to whether the master erred in relying on res judicata in prohibiting Prescott from proceeding on certain defenses and counterclaims: Plum Creek Dev. Co.v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties."); id. (providing res judicata bars a litigant from raising issues that could have been raised in the prior lawsuit as well as issues actually litigated in the prior lawsuit); Venture Eng'g, Inc. v. Tishman Constr. Corp. of S.C., 360 S.C. 156, 163, 600 S.E.2d 547, 550(Ct. App. 2004) ("When a bankruptcy court's order is erroneous, it is correctable only through the federal court and, under the circumstances, the trial court and this court are required to accept the bankruptcy court's order as it was rendered and entered.")." (Appx. ¶2, Appx. p. 2).

A creditor or other party in interest that wishes to prevent a debtor from reserving pre-confirmation claims should timely raise an objection prior to confirmation for determination by the bankruptcy Court. Once confirmed, a plan, even with general reservation language, would be binding Student Aid Funds, Inc. v. Espinosa, 559 U.S. at 269, 130 S. Ct. 1367 L. Ed. 2d 158 (2010).

The form plan required by the Bankruptcy Court provides:

> **"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."

By failing to object to the Reservation Language, no matter how general or specific, before confirmation, Wells Fargo, Bank, N.A., itself is barred by res judicata from disputing its effectiveness. *See* In re Hearn, 337 B.R. 615 (Bankr. E.D. Mich. 2006) (holding that a creditor was bound under § 1327 to a specific reservation of rights provision in the confirmed plan).

In this case, Wells Fargo Bank, N.A., who are sophisticated creditors, were properly served and made no appearance in the case by filing an objection to the modified plan. At the summary judgment hearing, counsel argued that the reservation of rights language in section V. of the Notice to Creditors, entitled "Property of the Estate, Status and Obligations of the Debtor After Confirmation," ("Reservation Language") in the Order of the confirmed modified plan of July 13, 2013 preserved Petitioner's rights to bring the claims set forth in her Defenses and Counterclaims (R. p. 190, line 1-15).

Petitioner moved to amend her Answer and to assert the defense of Unclean Hands, affirmative defenses and counterclaims in the state court foreclosure action on September 20, 2013. Respondent did not raise any preclusion arguments based on the bankruptcy action at the initial hearing on the motion to amend, and the court granted leave to amend by order dated December 2, 2013 (R. p. 16).

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 defenses and claims to the foreclosure action.

V. THE COURT OF APPEALS GAVE NO OPINION OR RULING ON PETIONER'S BREACH OF CONTRACT AGRUMENT.

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. lines 1-21).

In the Motion for Summary Judgment Respondent's 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. (R. p. 141 at ¶4). Here, Petitioner has alleged breaches of specific provisions of the contract between the parties and that the Respondent 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.

WHEREFORE, the Petitioner prays for an Order granting a Writ of Certiorari to review the final decision of the Court of Appeals in this case.

Respectfully submitted,

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