THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Appellate Case No. 2015-000157
Case No. 2010-CP-42-4430

Wells Fargo Bank, N.A.,
successor-by-merger to Wachovia Bank, N.A.,.....Respondent,

v.

Fallon Properties South Carolina, LLC, Timothy R. Fallon, Susan C. Fallon, Fallon Luminous Products Corporation, GE Business Capital Corporation, formerly Transamerica Business Capital Corporation, FSD Repurchase Solutions, LLC, and South Carolina Department of Revenue,..... Defendants,

OF WHOM Fallon Properties South Carolina, LLC, Timothy R. Fallon, and Susan C. Fallon are..... Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

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2. The debtors' appellate argument fails to demonstrate any reversible error by the trial court.

3. This Court should affirm the appealed order under the additional sustaining ground that the evidence presented and particular circumstances of this case demonstrate that the debtors received sufficient notice to enforce their appraisal waiver.

4. The debtors fail to challenge the trial court's specific ruling and, therefore the appealed order should be affirmed under the law of the case doctrine.

STATEMENT OF THE CASE

This is a commercial mortgage foreclosure action. (R. 2, ¶ 3). The trial court granted foreclosure, sold the property, and entered a deficiency judgment against the appellants. (Id.; R. 19-20). The appellants petitioned for an order of appraisal. (R. 25-27). The trial court denied the petition, ruling that the appellants had waived any right of appraisal by signing a waiver of that right. (R. 21 - 24). The appellants timely appealed.

The appellants are Fallon Properties, Timothy Fallon, and Susan Fallon (jointly referenced herein as "debtors"). Fallon Properties ("borrower") executed the loan and mortgage documents at issue here through Timothy Fallon. (R. 4, ¶¶ 15-16). Susan Fallon and Timothy Fallon ("guarantors") personally guaranteed the loan. (Id. at R. 5, ¶ 22). The debtors filed a petition for appraisal in an effort to reduce the deficiency judgment. (R. 25-27). The lender opposed the petition, contending the debtors had waived any appraisal rights by signing a waiver. (R. 28-30).

The master held a hearing, heard the testimony of two witnesses, admitted five exhibits into evidence, and received the argument of counsel. (R. 21-24; 32-56; *passim*; 57-64).

The principal issue was whether the debtors had been notified in writing that a waiver would be required in closing the loan. The master held that the debtor's attorney received written notice and actual knowledge that a waiver would be required, and this was sufficient notice to the guarantors under the attorney-client agency relationship:

> [D]ocuments provided in the loan closing package sent to [the debtors'] attorney prior to closing fulfill the statutory requirement. [The] loan documents were. . . transmitted to the [debtors'] attorney by letter dated February 12, 2007 which was three days prior to the execution date of the documents. The Waiver of Appraisal Rights was one of the documents transmitted to the [debtors'] attorney. *The delivery of the Waiver to the [debtors'] attorney was notice to the [debtors] that the wavier would be required as part of the mortgage loan transaction.*

(R. 23) (emphasis added).

The primary question on appeal is whether actual notice to the debtors' attorney satisfied the statutory requirement that the debtors be "notified in writing" prior to the loan closing that a waiver of appraisal rights would be required for closing the loan. S.C. Code Ann. § 29-3-680(B). It is undisputed that the debtors' attorney was so "notified in writing." Applying the axiomatic principle of law that notice to an attorney is notice to the client, the trial court held that the debtors had validly waiver their appraisal rights. (Id.). The debtors challenge this ruling, arguing that the only way to comply with the statutory requirement is for the Respondent (lender), and every lender, to ensure that each and every debtor actually receives direct and personal written notification regardless of any notification to their attorney. (Init. App. Br. 7-8).

ARGUMENT

The statute is worded as being "notified in writing." S.C. Code Ann. 29-3-680(B). The trial court and the parties used the word "notice" as shorthand in discussing and analyzing the case. This brief also uses "notice" at times, but only for ease of reference. "Notice" is a legal term of

art that includes numerous concepts, *e.g.*, substantive and procedural due process. Since the statute did not use "notice," one must guard against pulling these types of notice concepts into the analysis.

I. The trial court correctly held that written notification to the debtors' attorney was written notification to the debtors and, therefore, the debtors' appraisal waiver was enforceable.

Standard of Review: The issue presented under this argument is the meaning and interpretation of § 29-3-680(B), which is a question of law that is reviewed *de novo* on appeal. *Commissioners of Pub. Works v. City of Fountain Inn*, Op. No. 5559 (S.C. Ct. App. filed May 16, 2018) (Shearouse Adv. Sh. No. 20 at 10, 14). The relevant facts are undisputed, and the application of the law to undisputed facts also presents a question of law that is reviewed *de novo* on appeal. *McGriff v. Worsley Cos.*, 654 S.E.2d 856, 859-860 (S.C. App. 2007).

Undisputed Facts: The guarantors live in Texas, but the transaction was a South Carolina commercial loan secured by a first lien mortgage on commercial property in South Carolina. (R. 44). The debtors hired a South Carolina attorney to represent them personally in the closing. (R.. 44; 60-61; Init. App. Br. 7).

On February 12, 2007, the lender sent the debtors' attorney a closing package that included closing instructions, closing requirements, and the loan documents to be executed by the debtors. (R. 38; 60-61). This package made it clear that the debtors would be required to sign the enclosed appraisal waiver in closing the loan. (Id.). The debtors' attorney forwarded the documents to the debtors. (R. 44).

On February 15, 2007, the debtors signed the documents sent by their attorney, including the waiver of appraisal, and returned them to their attorney. (R. 44; 62). On February 19, 2007, the debtors' attorney sent the executed loan documents to the lender. (R. 64). On or after February

20, 2007, the debtors' attorney closed the loan by recording the loan documents and funding the loan. (R. 38-39; 64).

Argument: The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature. *Commissioners, supra*, Shearouse Adv. Sh. No. 20 at 14. The language of § 29-3-680(B) does not expressly answer the question of whether notice to a debtor's attorney in a commercial loan transaction is notice to the debtor. Thus, this Court must determine legislative intent.

It is an axiomatic and long-standing principle of South Carolina's common law that notice to and the knowledge of an attorney acquired in the representation of a client is imputed to that client. *Wardlaw v. Troy Oil Mill*, 54 S.E. 658 (S.C. 1906); *accord Bennett v. Carter*, 807 S.E.2d 197, 201-202 (S.C. 2017); *Charleston Library Soc. V. Citizens & Southern Nat'l Bank*, 23 S.E.2d 362 (S.C. 1942). This rule applies in foreclosure matters, and it also applies to a party's claim that it did not receive something mailed to it. *Regions Bank v. Owens*, 741 S.E.2d 51, 55 (S.C. App. 2013) (applying rule that negligence of attorney is imputable to client in a foreclosure setting); *Dorman v. Campbell*, 500 S.E.2d 786, 790 (S.C. 1998) (party's claim of not receiving a letter irrelevant when attorney had notice of the relevant information).

The General Assembly is presumed to know the common law, and statutes in derogation of the common law are to be narrowly construed. *Grier v. AMISUB of S.C., Inc.*, 725 S.E.2d 693, 696 (S.C. 2012). Here, the question is whether § 29-3-680(B) reflects a legislative intent to abrogate the long-standing common law rule that notice to an attorney is notice to the client. Nothing in the statutory language expresses any such intent, and it would make little sense to do so in the context of commercial loans, where the parties are more likely to use, rely on, and need attorneys due to the complexities of commercial loans and closings. At the very least, had the

General Assembly intended to change the common law rule on notice to an attorney in commercial loan transactions, it would have done so expressly and specifically. There is no such expression of intent and, therefore, the trial court properly held that notice to the debtors' closing attorney was sufficient to satisfy § 29-3-680(B).

II. The debtors' appellate argument fails to demonstrate any reversible error by the trial court.

The debtors' appellate argument against the trial court's ruling on the attorney-client notice question has the following parts:

A. The trial court's ruling was based solely on the cover letter for the loan closing package. (Init. App. Br. 7).

B. Absent "strict adherence" with the statute, the notice continues to violate the public policy established by the Supreme Court. (Init. App. Br. at 8).

C. Under the statute, "notice needs to be actually received by the party to whom it is required" and cannot be satisfied by notice to the attorney representing the party in the transaction. (Id. at 8; see generally id. at 7-8).

As shown below, the debtors' argument does not withstand appellate scrutiny.

A. The trial court did not rely solely on the February 12 letter.

The debtors misread the trial court's order as a "[finding] that receipt of the letter constituted notice" and that the trial court "based [its] finding solely on the [letter.]" (Init. App. Br. at 7). The trial court, however, relied on all of the documents in the closing package, including the Waiver itself:

> [D]ocuments provided in the loan closing package sent to [the debtors'] attorney prior to closing fulfill the statutory requirement. [The] loan documents were. . . transmitted to the [debtors'] attorney by letter dated February 12, 2007 which was three days prior to the execution date of the documents. The Waiver of Appraisal Rights was one of the documents transmitted to the [debtors'] attorney. *The delivery of the Waiver to the [debtors'] attorney was notice to the [debtors] that the wavier would be required as part of the mortgage loan transaction.*

(R. 22) (all emphasis added). The trial court plainly relied on the entire closing package. More importantly, the trial court specifically held that "delivery of the Waiver" to the attorney was notice to the debtors, not the attorney's receipt of the February 12 letter.

The debtors do not challenge specifically the trial court's ruling that the delivery and receipt of the Waiver itself by the debtors' attorney was notice to them. Rather, they misstate the basis of the trial court's ruling, and then challenge that misstated ruling. Given the debtors' failure to challenge the actual ruling of the trial court, the appealed order should be affirmed under the law of the case doctrine. *First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 378 (S.C. App. 1998). In any event, the debtors' argument does not otherwise demonstrate reversible error.

B. The debtors misperceive the "public policy" at issue here and how it informs the question of legislative intent.

The debtors argue the following: "[I]f strict adherence to the requirements of the Statute is not established the waiver of appraisal rights remain a violation of public policy of this state as previously declared by our supreme court." (Init. App. Br. 8). The Supreme Court, however, was not and is not the author of the public policy at issue here. Rather, the intent of the General Assembly has always been and remains the controlling inquiry on whether appraisal waivers violate South Carolina's public policy.

Public policy is the province of the legislature. *Brown v. Duke*, 270 S.E. 2d 130, 132 (S.C. 1980). The courts are bound by public policy expressed in the Act. *Hollman v. Bulldog Trucking Co.*, 428 S.E.2d 889, 893 (S.C. App. 1993); *accord State v. Baucom*, 531 S.E.2d 922, 925 (S.C. 2000); *Russo v. Sutton*, 422 S.E.2d 750, 753 (S.C. 1992). "Once the Legislature has made [a public policy] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 382 S.E.2d 11, 14 (S.C. App. 1989) (emphasis added). "The responsibility for justice or wisdom of legislation

rests exclusively with the legislature, whether or not [the courts] agree with the laws it enacts." *Adkins v. Comcar Indus., Inc.*, 447 S.E.2d 228, 230 (S.C. App. 1994).

The General Assembly created "appraisal rights" for persons who could be adjudged personally liable for a deficiency judgment in a foreclosure action. See S.C. Code Ann. § 29-3-680(A). Upon the entry of a deficiency judgment, the defendant may petition for an order of appraisal to establish the " appraised value" of the foreclosed property. If the appraised value exceeds the foreclosure sale price, the court reduces the deficiency judgment by the excess amount. Lenders began requiring a waiver of these rights in the loan closing documents. As originally enacted, the statute was silent on the waiver of appraisal rights.

Initially, the courts enforced the waivers, because the waivers did not violate South Carolina's public policy. *E.g., Tri-South Mortgage Investors v. Fountain*, 221 S.E.2d 861 (S.C. 1976). Notably, the General Assembly did not react with legislation to limit the use of waivers.

Fifteen years after *Tri-South*, the courts began viewing the waivers differently and sought to restrict them, but not on public policy grounds specifically. For example, in *Anderson Bros. Bank v. Adams*, 406 S.E.2d 173 (S.C. 1991), the Supreme Court held that a waiver was not enforceable against a guarantor, not on public policy grounds, but because the waiver appeared in small print, boilerplate language at the end of a mortgage signed only by the borrower. Here, the guarantors signed a waiver that satisfied all concerns expressed by the Court. Moreover, the Supreme Court did not discuss whether the waiver was or would be enforceable against the borrower who signed the waiver. *Id.*

One year later, this Court relied on *Anderson* to hold that a waiver of appraisal rights was ineffective against the "notemakers" in the case, *i.e.*, a borrower who signed the waiver, because the logic of *Anderson* applied more forcefully to someone who became a debtor upon signing a

note. *SCN Mortgage Corp. v. White*, 420 S.E.2d 514 (S.C. App. 1992). There was no discussion of public policy or the specific problems with the waiver signed by the "notemakers." *Id.* This Court relied heavily on the concerns expressed in *Anderson,* and the waiver at issue here satisfies the specific concerns identified by the Supreme Court in *Andersen.*

Eighteen months later, the Supreme Court affirmed this Court, overruled *Tri-South, supra* without discussion, and announced a sweeping rule that all contractual waivers were void as against public policy:

> We now join those jurisdictions that give effect to a debtor's statutory rights and hold the contractual waiver of appraisal rights invalid as against public policy. We hereby overrule *Tri-South [supra]* to the extent it is inconsistent herewith.

SCN Mortgage Corp. v. White, 440 S.E.2d 868, 869 (S.C. 1994), *aff'g* 420 S.E.2d 514 (S.C. App. 1992).

On appeal, the debtors couch the "public policy" issue as being whether applying the "attorney-client notice" rule under the common law would violate the public policy announced by the Supreme Court in *SCN, supra.* The debtors misperceive the issue. In *SCN*, the Supreme Court determined that, based on its reading of the statute, the General Assembly intended to ban all waivers of appraisal rights, *i.e.*, the Supreme Court determined and enforced a public policy decision by the General Assembly – the Court did not pronounce public policy on its own. Thereafter, the General Assembly replaced the Court's public policy determination with § 29-3-680(B).

The General Assembly determined that South Carolina public policy did not require a complete ban on appraisal waivers. Waivers cannot be enforced for certain types of loans that are

best described as "home loans."[1] As to non-home, *i.e.,* commercial/business loans, waivers are enforceable. See § 29-3-680(B).[2]

C. Section 29-3-680(B) does not require actual receipt by the debtors.

As demonstrated in Argument I, *supra*, § 29-3-680(B) did not abrogate the common law rule that notice to an attorney is notice to the attorney's client. Therefore, there is no absolute requirement that a debtor must personally and actually receive written notification. Moreover, nothing in the statute specifically requires "actual receipt" and, had the General Assembly intended "actual receipt," it would have specified this in the statute. In any event, assuming any "actual receipt" or similar requirement, the appealed order should be affirmed upon the additional

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[1] Section 29-3-680(B) defines the loans for which appraisal rights cannot be waived as "proceeding relating to a dwelling place, as defined in Section 12-37-250, or to a consumer credit transaction, as defined in Section 37-1-301(11)." Section 37-1-301(11) defines "consumer credit transaction" as "a consumer credit sale (Section 37-2-104) or consumer loan (Section 37-3-104) or a refinancing or consolidation thereof, a consumer lease (Section 37-2-106), or a consumer rental-purchase agreement (Section 37-2-701)." These "consumer credit" definitions focus on "consumer" loans secured by some interest in the debtor's real property. Read together, § 29-3-680(B), § 12-37-250, and § 37-1-301(11) demonstrate a legislative intent to bar appraisal waivers to "home loans."

[2] Section 29-3-680(B) provides in full as follows:

> Except in any real estate foreclosure proceeding relating to a dwelling place, as defined in Section 12-37-250, or to a consumer credit transaction, as defined in Section 37-1-301(11), a defendant against whom a personal judgment may be taken on a real estate secured transaction may waive the appraisal rights as provided by this section if the debtors, makers, borrowers, and/or guarantors are notified in writing before the transaction that a waiver of appraisal rights will be required and upon signing a statement during the transaction similar to the following:
>
> > "The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY."
>
> This waiver may be in any document relating to the transaction; however, the required language must be on a page containing the signature of the person making the waiver and the capitalized sentence must be underlined, in capital letters, or disclosed in another prominent manner.

sustaining ground that the facts and circumstances in this case demonstrate that the debtors validly waived their appraisal rights.

III. This Court should affirm the appealed order under the additional sustaining ground that the evidence presented and particular circumstances of this case demonstrate that the debtors received sufficient notice to enforce their appraisal waiver.

Introduction: The lender presented evidence that the debtors had received notice of and knew that a waiver of appraisal rights would be required before the loan would be closed. The trial court did not rule specifically on this question. Assuming this Court does not affirm the appealed order under Arguments I and/or II, *supra*, the lender submits that the appealed order should be affirmed under the evidence presented to the master. If this Court does not find the evidence sufficiently compelling to affirm the trial court immediately, it is respectfully submitted that this Court should remand the matter to the master for a ruling on the evidence of the debtors receiving notice and/or having knowledge that a waiver appraisal would be required to close the loan.

Standard of Review: The debtors contend that this is an action in equity and therefore, this Court may take its own view of the evidence on appeal. (Init. App. Br. 2). For purposes of this appeal, the lender agrees with the debtors. Therefore, if this Court finds the evidence sufficiently compelling, it may affirm the appealed order on the ground that the evidence demonstrates that the debtors received written notification and/or had actual knowledge that an appraisal waiver was a loan closing requirement.

Argument: The current loan and waiver of appraisal rights is not the first transaction between the debtors and lender. In 2005, the lender made a commercial loan to the borrower, *i.e.*, Fallon Properties, and this loan was secured by a second mortgage on the same property at issue here. (R. 39; 63). The guarantors (Timothy and Susan Fallon) guaranteed the borrower's payment

of the loan. (R. 63). As part of the loan closing, the borrower and guarantors signed a Waiver of Appraisal Rights. (R. 63). Immediately above their signature lines, the waiver included an acknowledgment that the debtors had received "written notification before the transaction that signing of a waiver of appraisal rights would be required during this transaction." (R. 63).

In 2007, the lender made the loan at issue here, secured by a first mortgage on the same commercial property. The guarantors again guaranteed the borrower's loan payments. The loan officer testified that the lender's standard loan closing procedures included mailing written notification to borrowers and guarantors that a waiver of appraisal rights would be required to close the loan. (R. 41-43). The loan officer candidly admitted that he did not have a specific "recollection" of doing so here given passage of time from 2007 to 2014. (R. 43). Debtor Timothy Fallon denied receiving the notification; debtor Susan Fallon did not testify. (R. 43-44). It is undisputed, however, that their attorney received written notification.

As with the prior loan, the debtors again signed a waiver of appraisal rights. (R. 62). As with the prior waiver, this waiver again included an acknowledgment above their signature lines that the debtors had received "written notification before the transaction that signing of a waiver of appraisal rights would be required during this transaction." (R. 62).

Finally, the document execution process in this case, standing alone, satisfied any written notification requirement, including the "actual receipt" argument made by the debtors on appeal. As noted earlier, the loan was closed in the following manner:

> **February 12, 2007:** The lender sent the closing package to the debtors' attorney, which included closing instructions, closing requirements, and the loan documents to be executed by the debtors. (R. 38; 60-61). The debtors' attorney thereafter forwarded the documents to the debtors. (R. 44).
>
> **February 15, 2007:** The debtors signed the loan documents sent by their attorney, including the waiver of appraisal, and returned them to their attorney. (R. 44; 62).

February 19, 2007: The debtors' attorney sent the executed loan documents to the lender. (R. 64).

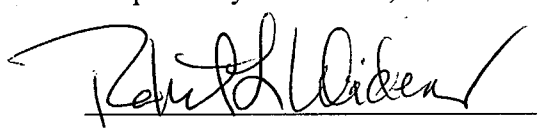
February 20, 2007 (or thereafter): The debtors' attorney closed the loan by recording the loan documents and funding the loan. (R. 38-39; 64).

The foregoing undisputed facts demonstrate that the debtors received written notification and actual knowledge of the appraisal waiver requirement no later than February 15, 2017, when they signed the appraisal waiver. The loan was not closed until on or after February 19 or 20, 2017, when their attorney sent the loan documents to the lender, recorded the loan documents, and funded the loan, *i.e.*, released the loan proceeds to the borrower. At any time prior to February 19 or 20, the debtors were free to call their attorney and stop the closing. These undisputed facts demonstrate that the debtors received written notification and actual knowledge of the appraisal waiver requirement at least four (4) days before the loan was closed. Standing alone, these undisputed facts demonstrate full compliance with any requirements under § 29-3-680(B) and, therefore, this Court should affirm the appealed order. At the very least, when considered together with the other facts outlined above, the evidentiary record as a whole demonstrates that the appealed order should be affirmed.

CONCLUSION

The trial court correctly held that notice to the debtors' attorney was notice to the debtors and, therefore, the appealed order should be affirmed. Alternatively, the appealed order should be affirmed under the evidentiary record as a whole and, absent this alternative affirmance, the matter should be remanded to the master for a decision on the merits of the evidentiary record as a whole.

Respectfully Submitted,



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June 29, 2018
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.

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