

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Joseph M. Strickland, Master-In-Equity

Appellate Case No. 2016-00958

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JAN 04 2019  
SC Court of Appeals

Wells Fargo Bank, N.A., Plaintiff,

v.

William R. Hudspeth, Marcia E. Hudspeth; TD Bank, N.A. s/b/m to Carolina First Bank; The Lender Group, Inc.; Business Carolina, Inc.; South Carolina Department of Revenue; Carapace, LLC; Wurth Wood Group, Inc.; The Estate of Harry William Boyd, by Joan L. Boyd, Personal Representative; Adecco USA, Inc., Defendants,

Of Whom TD Bank, N.A. successor by merger to Carolina First Bank is the Appellant,

and Of Whom The Lender Group, Inc. is the Respondent.

APPELLANT'S RETURN IN OPPOSITION TO PETITION FOR REHEARING

This Court should deny the petition for rehearing. This Court correctly determined in its Unpublished Opinion filed November 14, 2018 that the trial court's erroneous application of the merger of title doctrine should be reversed. *See Wells Fargo v. Hudspeth*, Op. No. 2018-UP-423 (S.C. Ct. App. Filed November 14, 2018) ("*Opinion*").

**Summary**

This Court has not overlooked or misapprehended any points of law or point in the record. The Respondent's Petition for Rehearing ("*Petition*") is merely an attempt to reargue many of the same grounds considered and previously rejected by this Court. Further, the Opinion issued by this

court correctly awarded the surplus funds to TD Bank because (1) the merger doctrine is inapplicable to this case and (2) TD Bank's lien attached to the surplus funds generated by the foreclosure sale in the order in which it had attached to the property prior to the sale. The Petition should be denied.

### **Law/Analysis**

#### **I. THE OPINION IS CONSISTENT WITH SOUTH CAROLINA LAW AS EVIDENCED BY THE AUTHORITIES CITED BY THE COURT.**

The Petition argues the Court misapplied the case of *Agnew v. Charlotte, C. & A.R. Co.*, 24 S.C. 18 (1885); however, Respondent's position is incorrect. The Respondent argues that because TD Bank was a second lien holder purchasing the property at the first mortgagee's foreclosure sale it should alter the result of an analysis under *Agnew*. However, *Agnew* does not contain any such distinction. While, the Court in *Agnew* considered the doctrine of merger in the context of deed in lieu transaction, it also held that the merger doctrine would not apply in a foreclosure action; which is the exact situation here. *See Agnew* at 22.

While the respondent is correct that the Supreme Court in *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547 (2012) examined a separate issue resulting from a foreclosure action the court specifically held: "the extinguishment of the lien has no bearing on this case because [the junior mortgage holder] is not claiming it still has a lien over the property. Instead, it merely claims an interest in the proceeds from the foreclosure sale." *Id.* As in *Kinder*, the trial court's ruling in the present action "ignores the fact that [second mortgagee] retained the right to claim the surplus funds pursuant to its original lien and the underlying note." *Id.* This Court was correct in its application of *Kinder* to the present action.

This Court was also correct in its application of 27 S.C. Jur. Mortgages § 61. As cited in this Court's opinion, this authority plainly states: "the doctrine of merger operates to extinguish a mortgage where the mortgagee purchases the property *other than* through the foreclosure process" and does not draw a distinction, as the Respondent asserts, between which parties' mortgage is being foreclosed.

## **II. FURTHER SUPPORT FOR THE COURT'S DECISION.**

The Court was correct in its decision to reverse the Master in Equity for Richland County's award of the surplus funds to the Lender Group, Inc. for two reasons:

- (1) First, the merger doctrine is inapplicable to the foreclosure in this case because TD Bank did not purchase the property through a foreclosure of its lien, but rather as a second-priority lienholder whose lien in the real property was extinguished in the sale.
- (2) Second, TD Bank's lien attached to the surplus funds generated by the foreclosure sale in the order in which it had attached to the property prior to the sale.

### **a. The Merger Doctrine is Inapplicable to this Case.**

As the Lender Group conceded, merger applies when a purchaser at a foreclosure sale is the foreclosing plaintiff. Lender Group Brief at 12-13. That is not the case here. Here, TD Bank purchased the property at the foreclosure sale to satisfy Wells Fargo's first lien.

The foreclosure and sale of Wells Fargo's first lien on the Property extinguished the interests of all joined junior lienholders in the property, including those of TD Bank and the Lender Group. TD Bank *does not claim any lien interest in the Property*, because all liens junior to Wells Fargo were foreclosed as a result of the sale. *See, e.g., Stewart v. Groce*, 20 S.E. 411, 415 (S.C. 1894) ("all one acquires as a purchaser under a sale of property by virtue of a junior lien is the property sold, free from all junior liens, but still subject to the senior liens."); Restatement (Third) of Property (Mortgages) § 7.1 cmt. A ("It is a fundamental principle of mortgage law that a valid

judicial foreclosure of a senior mortgage terminates not only the owner's title and equitable redemption rights, but also all other junior interests..."). Because TD Bank does not have any lien interest in the Property, there is no fee title into which the lien could possibly merge. Accordingly, TD Bank's identity as the purchaser of the property is of no consequence to this case because its lien in the property was extinguished in the foreclosure sale, and the doctrine of merger is wholly inapplicable.

**b. TD Bank's Lien attached to the surplus funds generated by the foreclosure sale in the order in which it had attached to the property prior to the sale.**

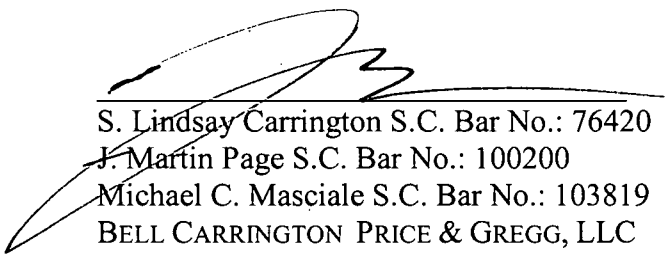
The trial court erred in equating the extinguishment of TD Bank's lien in the real property with the extinguishment of its lien in the surplus funds generated after the sale. TD Bank's only lien relevant to this appeal is its lien in the surplus proceeds. Established South Carolina law states that when surplus proceeds result from a foreclosure sale, the liens of the junior creditors attach to the proceeds *in place of* the extinguished interests in the Property as a substitute *res*, which "represents what remains of the equity of redemption." Restatement (Third) of Property: Mortgages § 7.4, cmt. a; TD Bank's Initial Brief at 13; *see also, BAC Home Loan Servicing, L.P. v. Kinder*, 731 S.E.2d 547, 549 (S.C. 2012).

Further, TD Bank undisputedly had a properly perfected second-priority lien in the property before the sale, and therefore upon timely filing its claim to the surplus funds pursuant to Rule 71(c), SCRCF, it enjoyed the same priority in the surplus funds. "Upon the sale of [foreclosed] property, the liens attach to the proceeds thereof in the same manner, order, and effect as they bound the premises before the sale, the new securities standing in substitution for the old." *Markey v. Langley*, 94 U.S. 142, 150 (1985); *see also* 27 S.C JUR. MORTGAGES § 137. Surplus Funds; Restatement (Third) of Property: Mortgages § 7.4, cmt. b; 1 Real Estate Finance Law §

7:32 (6th ed.) (2014) (“[T]he liens and other interests terminated by the foreclosure attach to the surplus in order of the priority they enjoyed *prior to the foreclosure*. Payment of the surplus will be *governed by that priority*.”).

TD Bank’s Mortgage was properly recorded in the Richland County Register of Deeds Office on July 14, 2004, thereby perfecting TD’s lien as of the date of recordation. The judgment in favor of the Lender Group, which gave rise to its lien on the property, was not filed until December 12, 2008, four years after TD Bank’s mortgage was recorded. Therefore, as discussed *supra*, because the merger doctrine is inapplicable to this case and TD’s lien in the property was perfected first, TD Bank’s substitute lien remains in the surplus proceeds, and it is entitled to priority in the surplus over the lien of the Lender Group. The Court was correct in so holding, and the Petition for rehearing should be denied.

January 3, 2019



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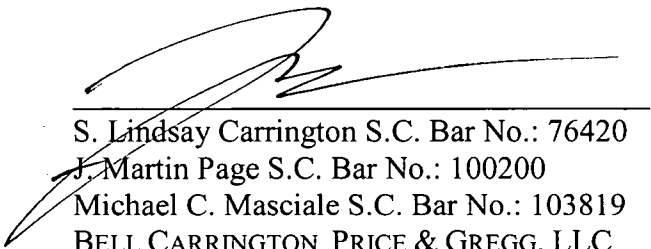
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Of Whom TD Bank, N.A. successor by merger to Carolina First Bank is the Appellant,

and Of Whom The Lender Group, Inc. is the Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the *APPELLANT'S RETURN IN OPPOSITION TO PETITION FOR REHEARING* upon Respondents by depositing a copy of the same in the United States Mail, postage prepaid, on January 3, 2019, addressed to Respondent's Attorney of record, Robert B. Lewis, 1330 Lady Street, Suite 400, Columbia, SC 29201.

  
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January 3, 2019

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**ATTORNEYS AT LAW**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
SC Court of Appeals  
1015 Sumter Street - 5th Floor  
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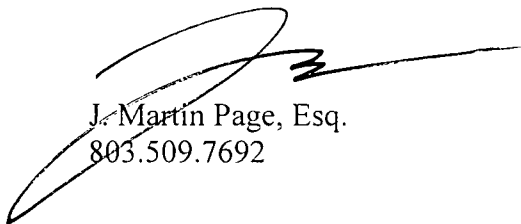
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RE: Appellant Case No.: 2016-000958  
Wells Fargo Bank v. William Hudspeth (TD Bank v. The Lender Group)

Dear Ms. Allen:

Please find enclosed the Appellant's Return as requested by this Court. If you have any questions please do not hesitate to contact me.

Sincerely,

  
J. Martin Page, Esq.  
803.509.7692

cc: Robert E. Lewis, Esquire  
Christopher Boguski, Esq.