

The Supreme Court of South Carolina

Walter Mortgage Company, Respondent,

v.

Natasha L. Green and Shilon L.
Green, Petitioners.

Honorable William O. Spencer, Jr.
Chesterfield County
Trial Court Case No. 2008-CP-13-00025


ORDER

For good cause having been shown, the time for serving and filing the Brief of Respondent in the above entitled matter is hereby extended until May 11, 2012.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

April 13, 2012

cc: Ms. Natasha L. Green
Mr. Shilon L. Green
J. Kershaw-Spong, Esquire
Charles H. McDonald, Esquire

April 13, 2012

RECEIVED

APR 13 2012

Rebecca H. Schwind
1901 MAIN STREET, SUITE 1200
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(803) 744-1557
rschwind@robinsonlaw.com

Via Hand Delivery

S.C. Supreme Court

Ms. Linda Allen
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29211

**Re: Walter Mortgage Company v. Green, Natasha L. and Shilon L. Green
Case No. Case Tracking No. 2011-189826**

Dear Ms. Allen:

Enclosed please find the filing fee for the extension of time requested by Chuck McDonald on April 10 in the above referenced matter.

Sincerely,

ROBINSON, MCFADDEN & MOORE, P.C.



Rebecca H. Schwind
Paralegal to Charles H. McDonald

RHS/rhs

Enclosure

Check # 24289
\$2500

ROBINSON MCFADDEN
ATTORNEYS AND COUNSELORS AT LAW

ROBINSON, MCFADDEN & MOORE, P.C.

COLUMBIA, SOUTH CAROLINA

April 10, 2012

Charles H. McDonald

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cmcdonald@robinsonlaw.com

The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Walter Mortgage Company v. Natasha L. Green and Shilon L. Green
Case Tracking No. 2011-189826
Our File No. 30829-0062

Dear Mr. Shearouse:

This firm represents Walter Mortgage Company, the respondent in the above matter. On April 5, 2012, petitioners served a copy of their brief by mail on counsel for the respondent. Counsel for the respondent respectfully requests a thirty-day extension to file the brief of respondent in this matter. The basis for this request is that counsel for the respondent has initial briefs due in other appellate matters in late April and also has some family circumstances dealing with a terminally ill family member.

Thank you for the Court's consideration of this request and please advise if we may be of further service to the Court on this matter.

Very truly yours,

ROBINSON, MCFADDEN & MOORE, P.C.


Charles H. McDonald

RECEIVED

APR 11 2012

S.C. SUPREME COURT
pm 4-10-12

CHM/rhs

cc: Natasha L. Green and Shilon L. Green

sending check

March 21, 2012

The Honorable Daniel E. Shearouse, Clerk of Court
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Charles H. McDonald
1901 MAIN STREET, SUITE 1200
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cmcDonald@robinsonlaw.com

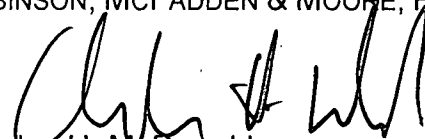
Re: Walter Mortgage Company v. Natasha L. Green and Shilon L. Green
Case Tracking No. 2011-189826
Our File No. 30829-0062

Mr. Shearouse:

I, along with Kerk Spong in our firm, will be representing Walter Mortgage Company in this matter. Enclosed is a copy of your letter notifying the parties that the Green's petition for writ of certiorari had been granted as well as a copy of the Order. There are two issues on which we need clarification. First, we have no record of the Petitioners filing the Appendix with their petition for writ of certiorari. If one has been filed, we request that the Court please forward a copy to us. If not, we request that Petitioners be directed to prepare and file the Appendix. Second, we are uncertain of the question or questions on which the Court has granted the petition for writ of certiorari. Pursuant to Rule 242(i), SCACR, we request that the Clerk please notify the parties of the question or questions to be considered.

Very truly yours,

ROBINSON, MCFADDEN & MOORE, P.C.


Charles H. McDonald

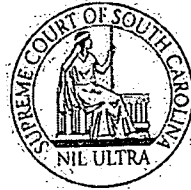
RECEIVED
MAR 22 2012
S.C. SUPREME COURT
pm 3-21-12

CHM/chm

Enclosures

cc: Mr. and Mrs. Shilon L. Green

3-22-12 - called and spoke
with Mr. McDonald



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 9, 2012

Ms. Natasha L. Green
PO Box 334
McBee, SC 29101

Re: Walter Mortgage v. Green, Natasha L.

Dear Ms. Green:

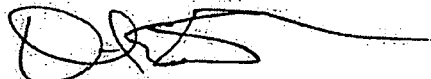
Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before April 9, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,



CLERK

DES/lda

cc: J. Kershaw Spong
The Honorable Tanya Gee

RECEIVED

MAR 22 2012

S.C. SUPREME COURT

The Supreme Court of South Carolina

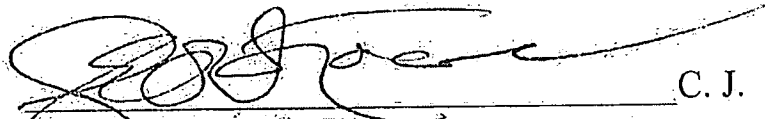
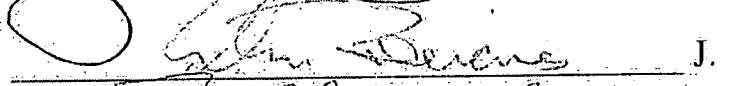

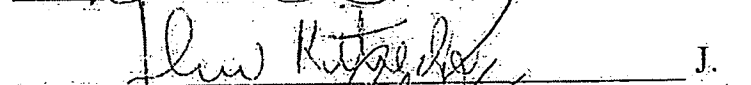
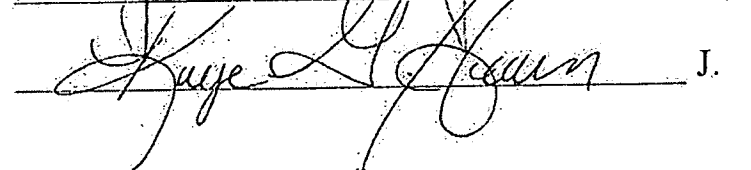
Walter Mortgage Company, Respondent,

v.

Natasha L. Green and Shilon L.
Green, Petitioners.

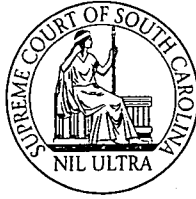
ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *Walter Mortgage Co. v. Green*, Op. No. 2011-UP-071 (S.C. Ct. App. filed February 23, 2011). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

March 9, 2012



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 9, 2012

Ms. Natasha L. Green
PO Box 334
McBee, SC 29101

Re: Walter Mortgage v. Green, Natasha L.

Dear Ms. Green:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before April 9, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,



CLERK

DES/lda

cc: J. Kershaw Spong
The Honorable Tanya Gee

The Supreme Court of South Carolina


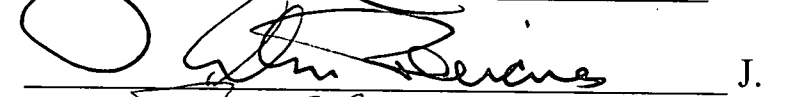

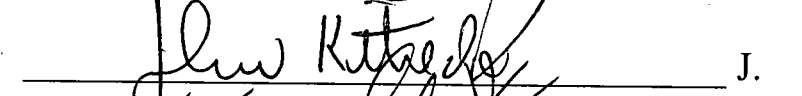

Walter Mortgage Company, Respondent,

v.

Natasha L. Green and Shilon L.
Green, Petitioners.

ORDER

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 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

March 9, 2012

THE STATE OF SOUTH CAROLINA
Supreme Court

RECEIVED

APR 13 2011

S.C. Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

William O. Spencer, Jr., as Special Referee

Unpublished Opinion No. 2011-UP-071

Walter Mortgage Company Respondents

v.

Natasha L. Green and Shilon L. Green Petitioners'

PETITION FOR A WRIT OF CERTIORARI

Natasha L. Green and Shilon L. Green
Post Box 334
McBee, SC 29101
Petitioners'
(843)335-5794

J. Kershaw Spong
Robinson, McFadden & Moore, P.C.
Post Office Box 944
Columbia, SC 29202
Attorney for Respondent
(803)733-8300

INDEX

Questions Presented.....I

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Argument

1. The Trial Court and Court of Appeal erred by finding no genuine issue of material fact upon which to deny Respondent's motion for summary judgment, since the issue of whether or not the Respondent is a mere lender is genuine issue of material fact giving rise to Petitioners' defenses against foreclosure.

2. The Trial Court and Court of Appeal erred because there was evidence that the home did not pass inspection nor was the Code Inspector called to inspect the home before being released and that the home should have never been released; therefore, the mortgage payment should have never begun until the home was properly inspected and then released.

3. Petitioners' was the non-moving party. If any genuine issue of material fact was properly alleged by us, Petitioners', and conclusively refuted by evidence before the Court, summary judgment is improper, and the Lower Court's Order must be reversed and this case remanded for a full evidentiary hearing on all claims and defenses.

Conclusion.....7

Certificate of Petitioners'8

Petitioners' certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 25, 2011

Question Presented

1. Did the Court of Appeals err by finding no Genuine Issue of material fact upon to which to disagree with the Special Referee in that the Respondent's motion for summary judgment should have never been granted?
2. Did the Court of Appeals err by finding evidence that our home should have never been released before going through inspection; therefore, the mortgage payment should have never began until the home passed inspection?
3. Is the Respondent more than a mere lender in this matter?
4. Was Walter Mortgage Company and Jim Walter Homes made aware that the home failed inspection?
5. Is it Walter Mortgage Company's standard practice not to be sure that a home has been properly inspected and released to their customers before they disperse money to Jim Walter Homes for the work that they complete at each stage?
6. Does Walter Mortgage Company require Jim Walter Homes to submit a copy of the building permit signed by the inspector stating that a house has passed inspection, and can be released to the homeowner?
7. Does Walter Mortgage Company know that in different cities, towns, or states the building code laws may differ?
8. Is Walter Mortgage Company aware that in Chesterfield County whoever applies for the building permit is responsible for obtaining the Certificate of Occupancy?

Table of Authority

Kirkman vs. Parex, Inc. 369 S.C.477, 632 S.E. 2d 854 (2006)

Walker vs. Oswald, 151 S.C. 152, 148 S. E. 722 (1929)

Whittle vs. Jones 79 S.C. 205, 60 S.E. 522 (1908)

Summer vs. Carpenter 328 S.C. 36, 492 S.E. 2d 55 (1997)

Osborne vs. Adams, M.D., 346 S.C. 4, 550 S.E. 2d 319 (2001)

Baughman vs. American Tel. & Tel. Co. 306 S.C. 101, 410 S.E. 2d 537 (1991)

William vs. Chesterfield Lumber Co. 267 S.C. 607, 230 S.E. 2d 447 (1976)

J. Randy Craps, Kathy D. Craps, David B. Bookhardt, Maria B. Bookhardt, Brian Carrier and Bonnie L. Carrier on behalf of themselves and all others similar vs. Jim Walter Homes, Inc. and Mid-State Homes, Inc. Civil action number 3:94-3285-17 (this case was decided in the SC Supreme Court, Columbia Division, in which, this Court ruled against Jim Walter Homes, Inc. and Mid-State Homes, Inc.) (1995)

STATEMENT OF CASE

We, Natasha and Shilon Green, Petitioners, on March 7, 2007, went into the Jim Walter Homes office in Florence, South Carolina where we signed all contractual documents, including the Construction Agreement, Financing Agreement and the Mortgage (ROA pg. 1-16). There was no Hud-1 Statement nor was there an attorney present at this closing (ROA pg. 128). We were told by James (Jim) Hoffman that Jim Walter Homes and Walter Mortgage Company handle things differently and an attorney was not needed. Mr. Hoffman told us to check the line that states, "NO ATTORNEY", then initial it. At this time a down payment was not required, because we did not own any land. Even though we did not own any land, Mr. Hoffman stated to us that we could continue to sign documents; and bring a copy of the deed and title once we found land. One or two weeks after closing the loan, we purchased a half acre of land in McBee, SC. We took the deed and title to the Florence office just as we were instructed to do. One week later, Kaye called to inform us that Jim Walter Homes had sent someone out to obtain a value for our land; and the value came in at \$13,500. As a result, no down payment was required. We were approved for a 90 % loan, which meant that we were responsible for utilities, flooring, painting and appliances (ROA pg.17 & pg. 112).

On June 27, 2007, we signed the Tender Agreement. On June 29, 2007, our home was released to us (ROA pg. 126). According to the Jim Walter Homes manual for New Homeowners ("Your Jim Walter Home booklet", pg. 7 says, "If you are unavailable or unwilling to sign the Tender Acknowledgment, the home will automatically be released to you with notice by mail), so we had no choice, but to accept the home. We did not know that the home was not inspected before we signed the Tender Agreement. We received a letter from Walter Mortgage Co. on July 10, 2007 informing us that our first payment was to begin on September 1, 2007 (ROA pg.11 & pg. 50). The home was not 90% completed as promised by

Ray Hardwick, construction manager, the contract; nor by the Jim Walter Home new homeowner booklet (ROA pg. 1-3) and Walter Mortgage Company.

On October 30, 2007, I contacted David Wilkes (Code Inspector for Chesterfield County) to request a Certificate of Occupancy in order to move into the home. Mr. Wilkes stated he could not issue a certificate because the home was not inspected before being released to us. Mr. Wilkes came out to inspect the home and the home failed inspection. Jim Walter Homes and Walter Mortgage were immediately notified by phone and emails (ROA pg. 48, Email dated Oct. 30, 2007). According to Mr. Wilkes (Code Inspector), the home should have never been released on June 29, 2007 (ROA pg 126). Jim Walter Homes and Walter Mortgage Company failed to up hold their end of the contract for 90% completion. The home has not been brought to code to this very day. David Wilkes also gave testimony at the arbitration hearing that in Chesterfield County whoever applies for a building permit is responsible for obtaining the Certificate of Occupancy. According to Jim Walter Homes' handbook, the homeowner is responsible for obtaining this certificate (ROA pg. 17 L12). Once again we were misinformed by this company. This court will find evidence that the only thing Jim Walter Homes, Inc. and Walter Mortgage Company wanted to do was get rid of us once everyone knew the home failed inspection and should have never been released. In the beginning when we complained about the items that were not finished, Jim Walter Homes and Walter Mortgage Company were trying to work with us. In fact, they changed the payment start date from September 5, 2007 to October 5, 2007 (ROA pg. 48). Once we all found out that the home was not inspected before being released and that the home failed inspection, Jim Walter Homes and Walter Mortgage Company had to get rid of us. (ROA pg. 49 L6)

On January 16, 2008, we were served with foreclosure papers (ROA pg. 51-67). Our attorney immediately filed an answer and complaint on the following affirmative defenses: Plaintiff's Documents are Unconscionable and should not be enforced, Plaintiff's Documents were Procured by Crime and should not be enforced, Breach of Contract, Fraud and Misrepresentation and Unfair Trade Practices

(ROA pg. 69-83).

On December 3, 2008 we went before James L. Bruner, Arbitrator, and were awarded \$4,300.00. In his findings it states, "the claims and issues framed by the first-party pleadings are not within the scope of the parties' agreement and are not considered or decided herein (ROA pg. 100).

On March 3, 2009, our attorney filed paperwork in the Chesterfield County Courthouse demanding a jury trial. On March 16, 2009, after hearing both parties arguments, Judge Paul Burch, Circuit Judge, referred this case to Special Referee William O. Spencer, Jr. Judge Burch also stated in his ruling that the Special Referee was to take testimony, rule upon motions, including motions presented to the Court and to direct entry of final judgment in this action and all matters arising from or reasonably related to such action. His order also states that the Special Referee shall have the authority to remand any issues back to the Court that he deems necessary for trial by jury (ROC pg. 101).

In May 2009 the hearing was held before William Spencer, Special Referee. This hearing was not recorded. Issues raised before the COA were raised before, William Spencer, Special Referee. We were told in Mr. Spencer's opening statement that our attorney could not ask us any questions nor could we ask any questions. Witnesses were not allowed. David Wilkes, Code Inspector, was willing to come and testify that we, Petitioners were not responsible for obtaining the Certificate of Occupancy nor should the home has been released. During this hearing, Mr. Spong, Respondent's Attorney, stated that we received the award money, but actually we did not receive the award that was ruled upon by Mr. Bruner before this hearing. In August 2009, Mr. Wilkes (Chesterfield County Code Inspector) found out the wiring was wrong in the house along with other issues not being bought up to code (letter August 17, 2009). We were notified of the ruling against us in the foreclosure matter.

We filed a motion for petition with the Court of Appeals in a timely manner (ROA pg. 131). We received a letter that the Court of Appeals affirmed the decision of Special Referee on March 25, 2011. We sent in a motion for rehearing and that motion was denied. We sent a supplement to Motion to Petition for Rehearing and was denied.

The Court of Appeals affirmed the judgment of the Special Referee. Natasha L. Green and Shilon L. Green vs. Jim Walter Homes, Inc. and Walter Mortgage Co. case number 2008-CP-13-0025. Petitioners seek a writ of certiorari to review that decision.

ARGUMENT

THE TRIAL COURT ERRED BY FINDING NO GENUINE ISSUE OF MATERIAL FACT UPON WHICH TO DENY RESPONDENT'S MOTION FOR SUMMARY JUDGMENT SINCE THE ISSUE OF WHETHER OR NOT THE RESPONDENT IS A MERE LENDER IS A GENUINE ISSUE OF MATERIAL FACT GIVING RISE TO APPELLANTS' DEFENSES AGAINST FORECLOSURE.

In reviewing the grant of summary judgment motion, the Court should apply the same standard which governs the trial court; summary judgment is proper when there is no genuine issue as to any material fact and the moving-party is entitled to judgment as a matter of law. Osborne v. Adams, M.D., 346 S.C. 4, 550 S.E.2d 319 (2001); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Summer vs. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997).

We, the Petitioners were the non-moving party. Consequently, if any genuine issue of material fact was properly alleged by us, Petitioners, and not conclusively refuted by evidence before the court below, summary judgment is improper, and the lower court's Order must be reversed and this case remanded for a full evidentiary hearing on all claims and defenses.

Wrongs committed by a foreclosing lender against a mortgagee can bar the lender from foreclosure by application of the doctrine unclean hands. Walker vs. Oswald, 151 S.C. 152, 148 S.E. 722 (1929). Even adjudicated third party claims, while not actions against the lender for damages, can nevertheless be valid defenses to foreclosure. Whittle vs. Jones, 79 S.C. 205, 60 S.E. 522(1908).

There was sufficient evidence before the Special Referee at the hearing on Respondent's Motion for Summary Judgment to indicate the Respondent might be more than a mere lender in this matter. At the beginning of the summary judgment, both parties stipulated to the admission into evidence of the

court's file and also all documents submitted into evidence at the arbitration of us, the Petitioners' claim against Jim Walter Homes. The filed Affidavit of Shilon Green alleges Jim Walter Homes and Jim Walter Mortgage acted in concert in this matter. The e-mail messages in evidence before the Special Referee and COA indicated the Respondent was at least aware of the actions of Jim Walter Homes in this matter (ROA pg. 48 & pg. 49). Additionally, Jim Walter Homes and Jim Walter Mortgage Company appear to be collocated at 4211 W. Boy Scout Road in Tampa, Florida. From the documents before this Court and in evidence before the courts below, they also appear to be divisions of the same parent company, Jim Walter Industries. From the evidence, Respondents may be more than a mere lender in this matter. As such wrongs, committed against us, the Petitioners, may be attributable to the Respondent and may give rise to defenses in the foreclosure action. The Respondent's status is an issue of fact properly determined by the fact finder at an evidentiary hearing. Randy J. Craps vs. Jim Walter Homes, Inc. and Mid-State Homes, Inc. (civil action no. 3:94-3285-17).

Taken as a whole, the allegations and evidence before the Special Referee indicated there was a genuine issue of material fact in this matter as to whether or not we, the Petitioners had legitimate defenses to Respondent's foreclosure action. Summary judgment should have been denied, and we, the Petitioners should have been allowed an evidentiary hearing to bring these matters before a fact finder.

The Special Referee Order did not contain any findings of fact relative to our, the Petitioners' affirmative defenses, other than to state the Court did not find any "material issue of disputed fact".

CONCLUSION

The e-mail messages in evidence before the Special Referee indicate the Respondent was at least aware of the actions of Jim Walter Homes in this matter. Additionally, Jim Walter Homes and Walter Mortgage Company appears to be collocated at 4211 W. Boy Scout Road in Tampa, Florida (ROA pg. 14 & pg. 50). From the documents before this Court and in evidence before the COA and the Special Referee, they also appear to be divisions of the same parent company, Jim Walter Industries. From the

evidence, Respondent may be more than a mere lender in this matter. As such, wrongs committed against the Petitioners, be attributable to the Respondents and may give rise to defenses by the fact finder at evidentiary hearing.

This issue of fact is material, since there are serious allegations of wrongdoing by Jim Walter Homes. In fact, evidence before the Special Referee was that the arbitration of us, Petitioners' claims against Jim Walter Homes had resulted in an award granted to us, Petitioners. The Arbitration Award does not contain factual findings, but it is against Jim Walter Homes and must indicate some wrongdoing in this matter by Jim Walter Homes.

Taken as a whole, the allegations and evidence before the Special Referee indicate there was a genuine issue of material fact in this matter as to whether or not we, Petitioners had legitimate defenses to Respondent's foreclosure action. Summary judgment should have been denied, and we, Petitioners should have been allowed an evidentiary hearing to bring these matters before a fact finder.

Consequently, the lower court's Order should have been reversed and this matter remanded to the Special Referee for an evidentiary hearing.

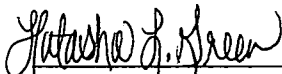
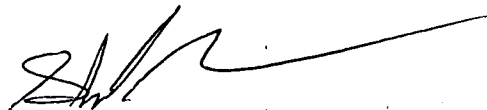
We would like compensation for the items that have not been brought to Code, so that we may hire a licensed contractor that will correct these problems. We would also like to be compensated for the flooring, paint for the walls due to the fact the wiring in the whole house will need to be replaced because it was not properly installed from the beginning. We would like compensation for the sheet rock and mudding to replace the walls for this reason also. We would like to be compensated for punitive damages, the land, and work done to the land. Also we would like our credit reports corrected and updated removing foreclosure, any judgments and any late mortgage payments showing. We would like the mortgage documents reformed, payments lowered, loan term reduced, and interest rate lowered.

Proof of Service by Mail
Unpublished Opinion No. 2011-UP-071
Filed January 4, 2011-February 23, 2011

We, Natasha L. Green and Shilon L. Green, Petitioners, do hereby certify that we have on April 12, 2011 served a copy of our PETITION FOR A WRIT OF CERTIORARI on attorney for RESPONDENTS and Tanya Gee, clerk for SC Court of Appeals by mailing a copy thereof to the addresses indicated below.

J. Kershaw Spong
Robinson, McFadden & Moore, P.C.
1901 Main Street, Ste 1200
Columbia, SC 29202

Tanya A. Gee
SC Court of Appeal
1015 Sumter Street
Columbia, SC 29201

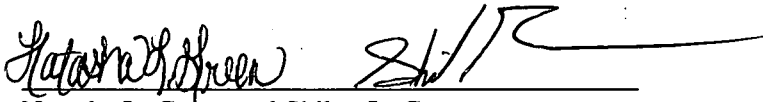
 

Natasha L. Green and Shilon L. Green
PO Box 334
McBee, SC 29101

For these reasons stated, we are asking the Court to grant the petition for writ of certiorari.

Respectfully submitted,

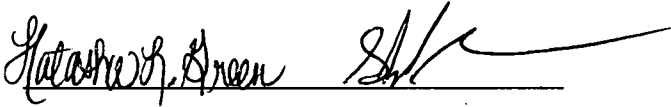
April 12, 2011

Handwritten signatures of Natasha L. Green and Shilon L. Green. The signature for Natasha L. Green is on the left, and the signature for Shilon L. Green is on the right, both written in black ink.

Natasha L. Green and Shilon L. Green
PO Box 334
McBee, SC 29101
PETITIONERS
(843)335-5794

Certification of Petitioners'

The undersigned Petitioners certify that the foregoing PETITION FOR WRIT OF CERTIORARI complies with Rule 242.

Handwritten signatures of Natasha L. Green and Shilon L. Green, with a horizontal line underneath.

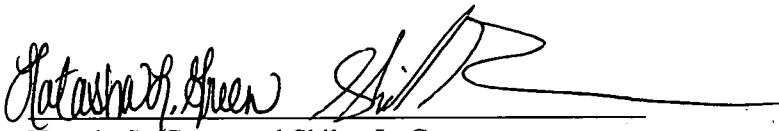
Natasha L. Green and Shilon L. Green
PO BOX 334
MCBEE, SC 29101
(843)335-5794
PETITIONERS

Proof of Service by Mail
Unpublished Opinion No. 2011-UP-071
Filed January 4, 2011-February 23, 2011

We, Natasha L. Green and Shilon L. Green, Petitioners', do hereby certify that we have on April 12, 2011 served a copy of the APPENDIX on attorney for RESPONDENTS and Tanya Gee, clerk for SC Court of Appeals, by mailing a copy thereof to the addresses indicated below.

J. Kershaw Spong
Robinson, McFadden & Moore, P.C.
1901 Main Street, Ste 1200
Columbia, SC 29202

Tanya A. Gee
SC Court of Appeal
1015 Sumter Street
Columbia, SC 29201



Natasha L. Green and Shilon L. Green
PO Box 334
McBee, SC 29101

THE STATE OF SOUTH CAROLINA
Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

William O. Spencer, Jr., as Special Referee

Case No. 2008-CP-13-0025
(Case Tracking No. 2011-189826)

Walter Mortgage Company..... Respondent,

v.

Natasha L. Green and Shilon L. GreenPetitioners.

RESPONDENT'S RETURN TO PETITION

J. Kershaw Spong
Robinson, McFadden & Moore, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorney for Respondents

May 30th, 2011

RECEIVED

MAY 31 2011

S.C. Supreme Court

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STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT RULE ON THE ISSUE NOW UNDER APPEAL?
2. DOES THE RECORD ESTABLISH A SUFFICIENT ISSUE OF MATERIAL FACT TO PRECLUDE SUMMARY JUDGMENT?
3. DOES THIS CASE PRESENT SPECIAL OR IMPORTANT ENOUGH REASONS TO JUSTIFY A GRANT OF THE WRIT OF CERTIORARI?

STATEMENT OF THE CASE

On or about March 7, 2007, Petitioners Natasha L. Green and Shilon L. Green entered into a construction agreement whereby Jim Walter Homes, Inc. agreed to build a house for the Greens on credit. (R. pp. 1-10) They also executed and delivered to Jim Walter Homes, Inc. a financing agreement in writing, wherein they promised to pay to Jim Walter Homes, Inc. the sum of \$123,330.00, plus a finance charge. (R. pp. 11-13) Pursuant to paragraph one of the Financing Agreement, payments were to begin on the 5th day of the month following the 45th day after release of the home to the Greens. The Greens were not required to make any deposit or down payment for the house. However, in paragraph six of the financing agreement, the Greens agreed to execute and deliver to Jim Walter Homes, Inc. a mortgage on the subject real property to secure the construction on credit of the house.

Thereafter, the Greens executed the subject mortgage which was recorded in the Office of the Clerk of Court for Chesterfield County in Book 419 at page 960. Thereafter, by assignment dated the 8th day of January, 2008, and recorded in said Clerk of Court's Office, Jim Walter Homes, Inc. assigned said mortgage to the Respondent.

Jim Walter Homes, Inc. constructed the house. On or about June 29, 2007, Jim Walter Homes, Inc. released the house to the Greens who accepted the house by signing the Tender Acknowledgement/Completion Certificate. (R. p. 126) The Tender Acknowledgement provided in part:

- That the home has either been fully completed or is substantially complete and is built according to their contract.
- That the Greens thoroughly inspected the home; that there is no further work to be done nor any materials or fixtures to be supplied by the Builder.
- That the Greens accept release of the home and assume full possession, control of, responsibility for, and the insurable interest in the building site, home and contracted items.
- That their obligation to make monthly home payments will now begin and that their first payment will become due and payable on the 5th day of the month following at least 45 days from today's date.

Accordingly, under the terms of the construction and financing agreement, payments were to start August 5, 2007.

Nevertheless, despite having signed the Tender Acknowledgement/Completion Certificate, the Greens complained about certain aspects and scope of the work under the construction agreement, which could not be resolved to their satisfaction. On January 16, 2008 – six months after payments were to commence, and the Greens having failed to make a single payment – Respondent commenced the present foreclosure action. No deficiency judgment was demanded.

The Greens answered and asserted certain claims against Jim Walter Homes, Inc. which were outlined in their third-party complaint. (R. pp. 71-76) The answer admitted the execution of the construction and financing agreements, and further, raised unspecified issues of unconscionability and

unspecified violations of state and federal consumer protection laws. The relief prayed for in defense to the foreclosure cause of action was reforming the contract documents to require payment only after the house was completed. (R. p. 75) No prayer for monetary damages was requested against Respondent. The third party claims against Jim Walter Homes, Inc. asserted claims of breach of contract, fraud and misrepresentation, and unfair trade practices. (R. pp. 71-76)

These third party claims were submitted to binding arbitration on November 11, 2008. The Greens were represented by counsel Barry L. Thompson II. The arbitrator issued his award on December 3, 2008. (R. p. 127)

The Arbitration Award provided:

The undersigned James L. Bruner, the duly appointed arbitrator in the above-captioned action, having received the evidence presented by the parties and considered the argument of counsel for each party, hereby makes the following award with respect to all issues framed by the third-party pleadings and in accordance with the South Carolina Uniform Arbitration Act:

The Third-Party Defendant shall pay to the Third-Party Plaintiffs the sum of \$4,300.00.

This award is in full satisfaction of all claims and issues framed by the third-party pleadings in the above-referenced case. The claims and issues framed by the first-party pleadings are not within the scope of the parties' arbitration agreement and are not considered or decided herein. Each party shall bear his own attorneys' fees and costs.

The Arbitration Award, which represented less than 3.5% of the contract price, was subsequently paid to the Greens, in full by Jim Walter Homes, Inc. and

the third party action dismissed with prejudice.

On or about February 6, 2009, Respondent moved for summary judgment on its foreclosure action. (R. pp. 103-130) On May 28, 2009, the motion was heard by William O. Spencer Jr. as Special Referee, who granted the motion by order dated July 20, 2009. The Greens were represented at the hearing by attorney Thompson.¹

On September 8, 2009, over two years after the Greens had accepted the house and during which time they never made a single payment, the house sold at foreclosure. The Greens refused to post a bond to stay the foreclosure sale as required by S.C. Code Ann. §18-9-170 (1976), and on September 8, 2009 the property was sold to the highest bidder, Walter Mortgage Company, LLC, which was deeded the house on September 14, 2009.

ARGUMENT

I. PETITIONERS CONTENTION THAT RESPONDENT, BECAUSE IT WAS ALLEGEDLY INVOLVED IN COMPLETING CONSTRUCTION OF THE SUBJECT HOME, COULD BE HELD RESPONSIBLE FOR DEFECTS IN THE CONSTRUCTION THEREOF, WAS NOT PRESENTED TO OR RULED ON BY THE LOWER COURT, AND THEREFORE PETITIONERS ARE PRECLUDED FROM RAISING THIS ISSUE ON APPEAL.

Petitioners assert that a lender involved in completing construction of a home can be held legally responsible for defects in construction under Kirkman v. Parex, Inc., 369 S.C. 477, 632 S.E.2d 854 (2006).

In Kirkman, the Court held that a lender may be liable for breach of implied warranty of habitability where it forecloses on a developer in the midst of

¹ After filing Petitioner's appeals brief and record in the Court of Appeals, Mr. Thompson petitioned the Court to be relieved as counsel. This Petition was granted by Order of Jasper M. Cureton, dated October 23, 2009.

construction of homes, takes title, has substantial involvement in completing the construction, and sells the home. Id. at 483, 632 S.E.2d at 857.

However, nowhere in Petitioners' affidavit, pleadings or in the lower court's order was the issue of liability under an implied warranty of habitability advanced against the Respondent as a "controlling lender."

Where an issue is not raised in the lower court, not explicitly ruled on by the lower court, and appellant made no Rule 59(e), SCRCP motion to alter or amend the order, it is not preserved for appeal. Hawkins v. Mullins, 359 S.C. 497, 502, 597 S.E.2d 897, 899 (Ct. App. 2004). The issue in Hawkins concerned an appeal from a family court order. The Court of Appeals held that since the issue was raised but not ruled upon in the family court and the appellate did not make a post-trial motion for reconsideration, the issue was not preserved for appeal. Id.

In Townsend v. City of Dillon, 326 S.C. 244, 486 S.E.2d 95 (1997), the Court held that the issue of whether the city council was required to submit an ordinance to the planning commission was not preserved for appeal because the issue had not been ruled upon by the trial judge. Id. at 247, 486 S.E.2d at 97.

In Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991), the state Supreme Court reversed the Court of Appeal's remand on an issue and reinstated the judgment of the circuit court on that issue because it had not properly been before the Court of Appeals. Id. at 58, 403 S.E.2d at 124. One party had argued to the Court of Appeals that Noisette failed to prove that Ismail was a permissive user of the automobile at the time of the accident. Id. at 57,

403 S.E.2d at 123. The Court of Appeals remanded the permissive user question because the trial court had not made findings of fact on the issue. Id. However, when the case was appealed to the Supreme Court, the Court found that the circuit court had not originally ruled on the permissive user issue. Id. Since the party had not made a Rule 59(e) motion to preserve that issue, the Supreme Court held that the issue had not properly been before the Court of Appeals and should not have been addressed. Id. at 58, 403 S.E.2d at 124.

See also 15 S.C. Jur. Appeal and Error § 71-76 (1992); Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 612 S.E.2d 719, (Ct. App. 2005); S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001); Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006).

II. PETITIONER'S AFFIDAVIT WAS SO CONCLUSORY AND DEFENSES SO VAGUE AND UNSPECIFIED THAT THERE REMAINED NO MATERIAL ISSUE OF FACT PRECLUDING SUMMARY JUDGMENT ON RESPONDENT'S FORECLOSURE ACTION.

The affidavit Mr. Green submitted in opposition to Respondent's Motion for Summary Judgment stated in part:

* * *

As soon as the builder fixes my house or pays me the money that I won from them on arbitration for their breach of contract to me so I can fix my home, I will be glad to begin paying my mortgage payments.

(R. p. 128)

It is undisputed the claims against the builder were fully and finally adjudicated in arbitration, and an award made in Appellants' favor for which they

have been paid in full by the contractor. Accordingly, Appellant's own affidavit acknowledged that payment was due under the financing agreement and mortgage. Yet at no time have Petitioners ever made any payment whatsoever to Respondent for the house.

The remaining defenses were so vague, ambiguous and unspecified, that coupled with Petitioner's conclusory affidavit, no material issue of fact remained to be determined subsequent to the arbitration.

The Greens' answer alleged the construction agreement, financing and mortgage are "unconscionable in that they were procured in violation of state and federal law." Green Answer ¶ 5. (R. p. 2) Yet the answer fails to specify how the documents were unconscionable, and what state and federal laws were violated.

When a party is faced with a Motion for Summary Judgment that is supported by evidence, the party cannot defeat the motion by relying upon the mere allegations of his pleadings, but must disclose facts he intends to rely on by affidavit or other proof. Sharpe v. Settle, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994).

A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. Id.; German v. New York Life Ins. Co., 286 S.C. 34, 38, 331 S.E.2d 385, 388 (Ct. App. 1985).

To allege someone has violated unspecified state and federal law is not sufficient to create an issue of fact. Moreover it was undisputed the Greens had

never made a single payment on the house which they certified in 2007 to be substantially complete.

Presented with such a record, the lower court properly concluded Respondent was entitled to foreclose on the subject property.

III. PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI SHOULD BE DENIED SINCE NONE OF THE FACTORS OUTLINED IN SOUTH CAROLINA APPELLATE COURT RULE 242(b) EXISTS.

A writ of certiorari is not a matter of right, but of sound judicial discretion, and should be granted only where there are special and important reasons. SC Appellate Court Rule 242(b).


There is no novel question of law presented. There was no dissent in the decision of the Court of Appeals, nor does the decision of the Court of Appeals conflict with a prior decision of the Supreme Court. There are no substantial constitutional issues involved. Finally, no federal question is included which presents a conflict between the decision of the Court of Appeals and the United States Supreme Court. Since no special reason exists to review this case which was correctly decided by the Court of Appeals, the petition for the writ should be denied.

CONCLUSION

Appellants' theory of liability against Respondent as a "controlling lender" was not raised in the lower court, or ruled on by the lower court. Moreover, once the construction claims were fully and finally adjudicated in arbitration, the remaining claims against Respondent were too vague and unspecified to prevent summary judgment for foreclosure. Finally, the petition should be denied

because no special or important reason, as contemplated by SCACR Rule 242, exists. For these reasons, the petition should be denied.

Respectfully submitted,



J. Kershaw Spong
Robinson, McFadden & Moore, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorney for Respondents

May 30th, 2011

THE STATE OF SOUTH CAROLINA
Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

William O. Spencer, Jr., as Special Referee

Case No. 2008-CP-13-0025
(Case Tracking No. 2011-189826)


Walter Mortgage Company..... Respondent,

v.

Natasha L. Green and Shilon L. GreenPetitioners.

CERTIFICATE OF COUNSEL

The undersigned certified that this Return of Respondent complies with Rule 242(b), SCACR.



J. Kershaw Spong
Robinson, McFadden & Moore, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorney for Respondents

May 30^r, 2011

THE STATE OF SOUTH CAROLINA
Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

William O. Spencer, Jr., as Special Referee

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MAY 31 2011

Case No. 2008-CP-13-0025
(Case Tracking No. 2011-189826)

S.C. Supreme Court

Walter Mortgage Company..... Respondent,

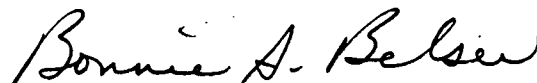
v.

Natasha L. Green and Shilon L. GreenPetitioners.

PROOF OF SERVICE

I, Bonnie A. Belser, an employee with the law firm of Robinson, McFadden & Moore, P.C. hereby certify that I have on May 31, 2011 served a copy of the Respondent's Return to Petition in the foregoing action upon the individuals below by causing same to be deposited with the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as follows:

Natasha L. Green
Shilon L. Green
Post Office Box 334
McBee, SC 29101



Bonnie A. Belser

THE STATE OF SOUTH CAROLINA
Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

William O. Spencer, Jr., as Special Referee

Unpublished Opinion No. 2011-UP-071

Walter Mortgage Company Respondents

v.

Natasha L. Green and Shilon L. Green Petitioners

REPLY TO RESPONDENT'S PETITION

Natasha L. Green and Shilon L. Green
Post Box 334
McBee, SC 29101
Petitioners
(843)335-5794

J. Kershaw Spong
Robinson, McFadden & Moore, P.C.
Post Office Box 944
Columbia, SC 29202
Attorney for Respondent
(803)779-8900

S.C. SUPREME COURT

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md

We, Natasha and Shilon Green, Petitioners, acknowledged that we signed all of the documents that were presented to us on March 3, 2007 and also the Tender Agreement on June 29, 2007.

However, Mr. Spong failed to answer our questions in our Petition to Certiorari. The issues that are raised were also raised to James Bruner, Arbitrator and also William Spencer, Special Referee. In fact in Mr. Bruner's order he states that there were issues that were not in his scope to rule upon. We have requested recordings of the hearings to ensure what was and was not argued, but none has been provided.

William Spencer, Special Referee stated he didn't have access to a recorder. Without having any recording from the hearing before William Spencer, Special Referee, how can any court believe that Mr. Spong is being truthful about what was and was not argued? In fact, our previous counsel, Barry Thompson stated that both party arguments were consistent with their arguments before the Arbitrator. So it would be fair to both parties to argue before this court. Allow the Petitioners to call the code inspector, David Wilkes, to the stand. He will state that the home should have never been released without going through final inspection. If the home should not have been released, how can payments begin? Was it our job to make sure the home passed inspection before we signed the Tender Agreement or was it Walter Mortgage/Jim Walter Homes responsibility? This argument was presented to William Spencer, Special Referee.

On page 7 of Mr. Spong's petition, he points out sections of the affidavit by Shilon Green. If this court grants our petition we will prove that we did not receive the award money until after William Spencer, Special Referee made his ruling on July 20, 2008. In fact, Mr. Spong stated to the Special Referee that the money was on its way. This is almost nine months after the Arbitrator made his ruling. Allow us to prove to this court when we received the award money.

Mr. Spong stated that we did not provide a down payment nor made any mortgage payments. This court will find a copy of the deed and title given to Kay Peebles in the ROA. According to Kay Peebles a down payment was not required due to the fact that the land was worth \$13,500.00, which would have been 10% of the original loan amount? We were informed that if the land value wasn't high enough, we would have to put down some additional money. We had nothing to do with appraising the land to obtain a value that would make this loan go through. Along with using our land we also had to furnish the appliances, flooring, carpeting, painting, and utilities. If this Court will consider this case and allow us, we will subpoena James Owens (licensed contractor), Kay Peebles, (office manager) James Hoffman (sales agent), Ray Hardwick (construction manager), Ronnie Ham, Michael Lee, Tom Emerson, Chuck Knorp, Steven Campbell and Jeff Thorner to the stand to prove what we are arguing is true.

Mr. Spong also stated on page 3 that our payments were to start on August 5, 2007. On page 50 of the ROA the court will find evidence that the first payment date was to begin on September 5, 2007. We will present evidence that the payment date was moved to October 5, 2007 due to incompleteness to our home we complained to Ray Hardwick about when we signed the Tender Agreement on June 29, 2007, but was promised to be completed. If this Court will consider this case, we will prove that in their Handbook on page 7 it states, "If you are unavailable or unwilling to sign the Tender Acknowledgment, the home will automatically be released to you with notice by mail." Whether we signed the Agreement or not they were still going to release the home to us. This Court will find evidence in the ROA on page 49 that Walter Mortgage/Jim Walter Homes wanted to pursue us aggressively after they were informed the home never went through proper inspection before being released to us nor did the home pass inspection.

This Court will find evidence in the ROA that the only thing we, the Petitioners, ever asked Walter Mortgage/Jim Walter Homes to do was to fix the items that violated code regulations so that we could begin making payments and move into our new home. Walter Mortgage/Jim Walter Homes have continued to get away with wrong doing. Jim Walter Homes/Walter Mortgage has done wrong, but they are walking away free. For the last four years my wife, my two kids, and I had to look across the street every single day and night regretting the day we ever decided to allow Jim Walter Homes/Walter Mortgage build our first home. Never in our life would we ever imagine Jim Walter Homes/Walter Mortgage Company providing us keys to a home that the wiring is completely wrong, smoke detectors control by a switch that are tied to the breaker box, steps too low, etc. We are asking this Court if they will put themselves in our position and help us fight for Justice. Mr. Spong stated that this is not a serious matter, but it is very serious to us. We seriously pray that this Court will read over the documents carefully and grant our petition.

Respectfully submitted,

June 6, 2011




Natasha L. Green and Shilon L. Green
PO Box 334
McBee, SC 29101
PETITIONERS
(843)335-5794

Proof of Service by Mail

We, Natasha L. Green and Shilon L. Green, Petitioners, do hereby certify that we have on June 6, 2011 served a copy of our reply to Respondent's Return to Petition on Attorney for RESPONDENTS by mailing a copy thereof to the addresses indicted below.

J. Kershaw Spong
Robinson, McFadden & Moore, P.C.
1901 Main Street, Ste 1200
Columbia, SC 29202

Handwritten signatures of Natasha L. Green and Shilon L. Green in cursive script, positioned above a horizontal line.

Natasha L. Green and Shilon L. Green
PO Box 334
McBee, SC 29101

J. Kershaw Spong

1901 MAIN STREET, SUITE 1200

POST OFFICE BOX 944

COLUMBIA, SOUTH CAROLINA 29202

RECEIVED

MAY 31 2011

PH

(803) 779-8900

FAX

(803) 771-9411

May 31, 2011

S.C. Supreme Court

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

**Re: Walter Mortgage Company v. Green, Natasha L. and Shilon L.
Case No. 2008-CP-13-0025
Case Tracking No. 2011-189826
File No. 30829-0062**

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of Respondent's Return to Petition and the Proof of Service regarding the above referenced matter. Please file the originals and return the clocked copies to our courier.

Thank you for your assistance in this matter.

Sincerely,

ROBINSON, MCFADDEN & MOORE, P.C.



J. Kershaw Spong

JKS:bb
Enclosure

cc: Natasha and Shilon Green (w/enc)

The Supreme Court of South Carolina

Walter Mortgage Company, Respondent,

v.

Natasha L. Green and Shilon L.
Green,

Petitioners.

Honorable William O. Spencer, Jr.
Chesterfield County
Trial Court Case No. 2008-CP-13-0025

ORDER

For good cause having been shown, the time for serving and filing the Return to the Petition for Writ of Certiorari in the above entitled matter is hereby extended until June 13, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Drenda J. Shealy*
Chief Deputy Clerk

Columbia, South Carolina

May 11, 2011

cc: Ms. Natasha L. Green
J. Kershaw Spang

NET CLERK



ROBINSON MCFADDEN
ATTORNEYS AND COUNSELORS AT LAW

ROBINSON, MCFADDEN & MOORE, P.C.

COLUMBIA, SOUTH CAROLINA

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May 10, 2011

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MAY 11 2011

S.C. Supreme Court

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
1015 Sumter Street
Columbia, SC 29201

Re: Walter Mortgage Company v. Natasha L. Green and Shilon L. Green
Case Tracking No. 2011-189826
Our File No. 23185-0448

Dear Mr. Shearouse:

I represent Respondent, Walter Mortgage Company in the above referenced appeal. This letter to request a thirty (30) day extension to file Respondent's Response to Petition for a Writ of Certiorari in the above matter. There have been no previous requests for an extension. Enclosed is our check in the amount of \$25.00 for the filing fee for this request.

By copy of this letter, I am advising Petitioners of this request. Thank you for your attention to this matter.

Sincerely,

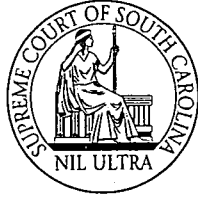
ROBINSON, MCFADDEN & MOORE, P.C.

J. Kershaw Spong

JKS:bb
Enclosure

cc: Natasha and Shilon Green

Check # 21215
\$25.00



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 13, 2011

Ms. Natasha L. Green
PO Box 334
McBee, SC 29101

Re: Walter Mortgage v. Green, Natasha L.
Case Tracking No. 2011-189826

Dear Ms. Green:

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

Daniel E. Shearouse
CLERK ^{ES}

DES/lda

Enclosure

cc: J. Kershaw Spong
The Honorable Tanya Gee