THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-In-Equity

Case No. 2010-CP-32-00514

Chase Home Finance, LLC.....Appellant,

v.

Cassandra S. Risher, individually and as Personal Representative and Legal Heir of the Estate of Sidney Risher, Justin R[redacted], a minor, Sydney R[redacted], a minor, Ashley R[redacted], a minor, Sidney J. Risher, Pierre Risher and Drayon Holmes, as Legal Heirs to the Estate of Sidney Allan Risher and Highland Hills Homeowners Association, Inc.; Of whom Cassandra S. Risher is.....Respondent.

FINAL BRIEF OF APPELLANT CHASE HOME FINANCE, LLC

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STATEMENT OF THE CASE

On February 3, 2010, Chase Home Finance, LLC ("Appellant") filed a Summons and Complaint in the Court of Common Pleas for Lexington County. Appellant's causes of action are (i) foreclosure, (ii) establishment of an equitable lien and (iii) unjust enrichment. (Complaint, R. p. 32). Respondent timely answered on March 5, 2010, asserting general denials. (Answer, R. p. 39). This matter was referred to the Honorable James O. Spence on May 11, 2010. (Order of Reference, R. p. 3).

A hearing on Appellant's claims for equitable lien and unjust enrichment was held on May 12, 2011. In a written order dated July 11, 2011 and filed July 14, 2011, the Master held that Appellant had not established an equitable lien upon the undivided one-half interest of Cassandra Risher in the real property that is the subject of this action. (Order filed July 14, 2011, R. p. 4). Appellant filed a Motion to Alter or Amend Judgment on July 29, 2011. (Motion filed November 29, 2011, R. p. 16). The Master denied Appellant's Motion to Alter or Amend Judgment by written order dated and filed November 29, 2011. (Order filed November 29, 2011, R. p. 16). The Master amended his November 29, 2011 order by Amended Order Denying Motion to Reconsider dated and filed December 7, 2011. (Order filed December 7, 2011, R. p. 24).

This appeal followed. Notice of Appeal was filed and served December 22, 2011 and an Amended Notice of Appeal was filed and served January 3, 2012. An Order extending the time for serving and filing Appellant's Initial Brief and Designation of Matter until February 22, 2012 was filed on January 24, 2012.

STATEMENT OF THE FACTS

On June 17, 2008, Sidney A. Risher and Cassandra S. Risher entered into an Agreement to Buy and Sell Real Estate (the "Contract") with Robert Beagle and Debra Beagle (the "Sellers") to purchase a residence located at 135 Lochweed Drive in the County of Lexington, State of South Carolina (the "Property"). (Contract, R. p. 114). The purchase price for the Property was $505,000.00. (Contract, R. p. 114).

Closing on the contract occurred in the Law Office of Ronald C. Dodson before attorney Tynika A. Claxton on July 7, 2008. (Transcript to Hearing on May 12, 2011 p. 19, l. 8 – p. 21, l. 3, R. pp. 58 - 62). Both Sidney Risher and Cassandra Risher were present at closing. (See e.g. Hearing on May 12, 2011, Plaintiff's Ex. 3, 4, 5, 6 and 7, R. pp. 118 - 123). Sellers executed a deed in favor of Sidney A. Risher and Cassandra P. Risher dated July 2, 2008 and recorded July 10, 2008 in Book 13022 at Page 315 in the Office of the Register of Deeds for Lexington County (the "Deed"). (Deed, R. p. 129). The Deed was not prepared by the original lender, Midland Mortgage Corporation. (Settlement Statement, R. p. 131).

At closing and to finance the Risher's purchase of the Property, Sidney A. Risher obtained a loan from Midland Mortgage Corporation in the original principal sum of $479,750.00 (the "Loan"). (Settlement Statement, R. p. 131). In connection with the Loan, a note for the purchase money (the "Purchase Money Note") was executed by Sidney A. Risher in favor of Midland Mortgage Corporation. (Purchase Money Note, R. p. 133). To secure the payment of the Purchase Money Note, a purchase money mortgage was executed by Sidney A. Risher on July 7, 2008 and recorded July 10, 2008 in Book 13022 at Page 317 in the Office of the Register of Deeds

for Lexington County (the "Purchase Money Mortgage"). (Purchase Money Mortgage, R. p. 133). The Purchase Money Mortgage describes the following real property:

> All that certain piece, parcel or lot of land, situate, lying and being in the County of Lexington, State of South Carolina, containing .67 acres, more or less, and designated as Lot 6 on a Master Plat of Highland Hills Subdivision, Phase I, dated April 2, 1998, which has not been recorded. Being further shown and delineated on a plat of property prepared for Wilkins Family Limited Partnership by Whitworth & Associates, Inc., dated July 23, 2003 and recorded in the Office of the ROD for Lexington County in Book 8565 at page 6. For a more accurate description of said lot reference is made to latter mentioned plat.
>
> This being the same property conveyed to Sidney A. Risher and Cassandra S. Risher by deed of Robert L. Beagle and Debra A. Beagle dated July 2, 2008 and recorded on July 10, 2008 in the Office of the Lexington County Register of Deeds in Book 13022 at Page 315.
>
> TMS No. 001848-01-026
>
> Property address: 135 Lochweed Drive
> Columbia, SC 29212

The Purchase Money Mortgage was not executed by Cassandra Risher. (Purchase Money Mortgage, R. p. 133). The Purchase Money Note and Mortgage were thereafter assigned to JPMorgan Chase Bank, N.A. by assignment of mortgage dated July 7, 2008 and recorded July 24, 2008 in Book 13049 at Page 305 in the Office of the Register of Deeds for Lexington County. (Assignment 1, R. p. 150). The Purchase Money Note and Mortgage were further assigned to Appellant by Assignment of Real Estate Mortgage recorded March 5, 2010 in Book 14126 at Page 139 in the Office of the Register of Deeds for Lexington County. (Assignment 2, R. p.15.1).

At the time of Closing, two mortgages of Sellers were matters of public record encumbering the Property. (Transcript to Hearing on May 12, 2011, p. 55, l. 19 – p. 57, l. 11; Plaintiff's Ex. 17 and 18, R. pp. 94 – 96 and 161 and 168, respectively). The first mortgage was from the Sellers to Bank of America dated March 15, 2005 and recorded March 18, 2005 in Book

9983 at Page 17 in the Office of the Register of Deeds for Lexington County, securing a note in the original principal sum of $359,650.00 ("Beagle Mortgage 1"). (Beagle Mortgage 1, R. p. 153). The second mortgage of record was from the Sellers to Bank of America dated August 16, 2006 and recorded October 3, 2006 in Book 11430 at Page 94 in the Office of the Register of Deeds for Lexington County, securing a credit line of $150,000.00 ("Beagle Mortgage 2"). (Beagle Mortgage 2, R. p. 157). As shown on the Settlement Statement executed by the Sellers and Sidney A. Risher at closing, the Loan proceeds were used to pay off and satisfy Beagle Mortgage 1 and Beagle Mortgage 2. (Settlement Statement, R. p. 131). The sums collected and paid to Bank of America under Beagle Mortgage 1 and Beagle Mortgage 2 as of closing totaled $510,845.14. (Settlement Statement, R. p. 131).

Sidney A. Risher died on or about August 23, 2009 and a probate estate was opened in the Lexington County Probate Court as Estate File Number 2009-ES-32-01004. (Third Supplemental Inventory and Appraisement, R. p. 161). Purchase Money Note payments due to Plaintiff from and after September 1, 2009 have not been made, despite demand. (Complaint, R. p.32). As of February 2, 2010 the amount owed under the Purchase Money Note was $474,385.05, together with interest at the rate of 6.500% per annum from August 1, 2009, together with reasonable attorney's fees for the collection thereof and the costs of the within action. (Complaint, R. p. 34). The Purchase Money Mortgage encumbers the one-half undivided interest of Sidney A. Risher. (Purchase Money Mortgage, R. p. 133). Defendant Cassandra Risher currently resides on the Property. (Third Supplemental Inventory and Appraisement, R. p. 161).

STANDARD OF REVIEW

An action to establish an equitable lien is an action in equity. *Fibkins v. Fibkins*, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct.App. 1990). Unjust enrichment is also an equitable doctrine. *Dema v. Tenet Physician Servs. Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). In an appeal from an equitable action, the Court may find the facts in accordance with its own view of the preponderance of the evidence. *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct.App. 2004).

ARGUMENTS

I. The Master erred in holding that Appellant failed to prove the elements neccesary to establish an equitable lien against the one-half undivided interest of Cassandra Risher in the Property.

The Master erred in finding that Appellant failed to prove the elements necessary to establish an equitable lien against the one-half undivided interest of Cassandra Risher in the Property.

An equitable lien or charge is neither an estate or property in the thing itself, nor a right to recover the thing, but is simply a right of a special nature over the thing, which constitutes a charge upon the thing so that the very thing itself may be proceeded against in equity for payment of a claim. *Horry County v. Ray*, 382 S.C. 76, 83, 674 S.E.2d 519, 523 (Ct.App. 2009); *Fibkins*, at 115, 399 S.E.2d at 160 (Ct.App. 1990) (citing *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 145, 337 S.E.2d 244, 247 (Ct.App. 1985)). For an equitable lien to arise as to specific property, there must be a debt, a duty or obligation owing from one person to another, a res to which the obligation attaches, which can be described with reasonable certainty, and an intent, express or implied, that the property serve as security for the payment or obligation. *Carolina Attractions,*

Inc., at 145, 337 S.E.2d at 247. In other words, for an equitable lien to arise, there must be a debt owing from one person to another, specific property to which the debt attaches, and an intent, express or implied, that the property will serve as security for the payment of the debt. *First Fed. Sav. & Loan Assn. of Charleston v. Bailey*, 316 S.C. 350, 356, 450 S.E.2d 77, 80-81 (Ct.App. 1994) (citing the Honorable Randall T. Bell in *Perpetual Federal Sav. & Loan Assn. v. Willingham*, 296 S.C. 24, 370 S.E.2d 286 (Ct.App. 1988)).

A. The Master erred in holding that Plaintiff failed to show a debt, duty or obligation owing from one person to another.

The first element of an equitable lien is "a debt, duty or obligation owing from one person to another." *Carolina Attractions, Inc.*, 287 S.C. at 145, 337 S.E.2d at 247. At closing and to finance the Risher's purchase of the Property, Sidney A. Risher obtained the Loan. In connection with the Loan, a Purchase Money Note was executed by Sidney A. Risher in favor of Midland Mortgage Corporation. (Purchase Money Note, R. p. 125). A debt, therefore, is owed from Sidney A. Risher to Appellant based upon the Purchase Money Note, as the same was assigned to Appellant. The debt owing from Sidney A. Risher to Appellant establishes the first element to prove an equitable lien in favor of Appellant.

B. The Master erred in requiring the Appellant to show a specific debt, duty or obligation owing from Defendant Cassandra Risher.

The Master held that the debt, duty or obligation owed to Appellant must originate with the Respondent in order for an equitable lien to arise against Respondent's interest in the Property. (Order filed July 14, 2011, p. 8, R. p. 11; Order filed Dec. 7, 2011, p. 3, R. p. 28). The Master held specifically that Appellant failed to establish a debt because the Respondent did not sign a note or mortgage in connection with the Loan. (Order filed Dec. 7, 2011, p. 3, R. p. 28). The Master,

while acknowledging the debt owed Respondent by Sidney Risher, failed to hold that debt as sufficient to meet the first element to prove an equitable lien. (Order filed July 14, 2011, p. 8, R. p. 11; Order filed Dec. 7, 2011, p. 3, R. p. 26). Rather, the Master placed an additional burden on Appellant, requiring Appellant to show an additional debt owing from Respondent to Appellant. (Order filed July 14, 2011, p. 8, R. p. 11; Order filed Dec. 7, 2011, p. 3, R. p. 26).

South Carolina law simply requires proof of a debt, duty or obligation existing in favor of the party seeking the lien. *See Evans v. Pegues*, 102 S.C. 186, 86 S.E. 480 (1915); *Groce v. Ponder*, 63 S.C. 162, 41 S.E. 83 (1902); *Mortgage Electronic Registration Systems, Inc. v. Wilson*, 2005 WL 1284047 (N.J. Super. Ct. Ch. Div. 2005); *Lipps v. Lipps*, 87 N.E.2d 823 (Oh Ct. App. 1949). The undersigned can discover no case law or secondary sources relating to equitable liens which contain a requirement that the debt, duty or obligation shown to prove the equitable lien must be the debt, duty or obligation of the party against whose property the lien is sought.

Appellant has established a debt owed from Sidney Risher to Appellant, and South Carolina law does not require a further showing of debt owed by additional parties.

C. The Master erred in requiring the Appellant to show an expressed, affirmative action on the part of Cassandra Risher to make the debt owed by Sidney Risher to Appellant the debt of Cassandra Risher.

The Master held that failure by the Appellant to show an "expressed affirmative action on the part of [Respondent] to make the debt, duty or obligation owed by Sidney Risher to [Appellant] the debt, duty or obligation of [Respondent]." (Order filed July 14, 2011, p. 8, R. p. 11). South Carolina law does not require the showing of an express, affirmative action by Respondent to assume the debt or obligation of Sidney Risher for an equitable lien to attach to the Property.

Nonetheless, the Loan provided financing for the purchase of the Property, without which the Rishers would not have been able to purchase the Property. Respondent admits that the purpose of the Loan was to purchase the Property. (May 12, 2011 Hearing Plaintiff's Ex. 20, p. 14, l. 4 -12; R. pp. 173). Respondent admits that she and her husband could not have purchased the Property without the Loan from Midland Mortgage Corporation. (Transcript to May 12, 2011 Hearing, Plaintiff's Ex. 20, p. 19, l. 6 - 10; R. pp. 175). The Loan funds were used to pay off prior encumbrances on the entire Property. (May 12, 2011 Hearing, p. 21, l. 18 – p. 24, l. 3, Plaintiff's Ex. 11, 18 and 19; R. pp. 60 – 63; 131, 168 and 170, respectively). Therefore, Respondent would not have obtained any interest in the Property but for the Loan.

"Equitable liens arise either by contract or by implication . . . and a lien may be created by the conduct of the parties." 51 AM.JUR.2d *Liens* § 45 (West 2011). One function of an implied equitable lien is to enforce a purchase money obligation that is not otherwise secured. 51 AM.JUR.2d *Liens* § 49 (West 2011). An equitable lien may arise in favor of one who advances money to pay the purchase price of real or personal property under an agreement, or circumstances showing an intention, that the property shall stand as security for the advancement. *Id.*

The Purchase Money Mortgage was executed at the closing of the Loan upon the execution of the Purchase Money Note. The Purchase Money Mortgage describes the Property in full. The fact that the Purchase Money Mortgage was executed at the same time as the deed to the Property was delivered, and that the Deed and Purchase Money Mortgage were recorded in the public records on the same day, is evidence of the parties' intent to secure the Loan using the entire Property as collateral. *Wilson*, 2005 WL 1284047, *2.

Appellant has established, and the lower court acknowledged, the debt owing from Sidney Risher to Appellant. South Carolina law does not require Appellant to show an express, affirmative act or intent of Respondent to assume that debt as her own. South Carolina law only requires proof of a debt or obligation, specific property to which the debt attaches, and intent of the parties, express or implied, that the property serve as collateral for the debt. *First Federal Sav. & Loan Assn. of Charleston v. Bailey*, at 356, 450 S.E.2d at 80-81.

D. The Master erred in holding that, because there was no debt, duty or obligation owed by Cassandra Risher to Appellant, there was no property to which the obligation could attach.

The Master acknowledges that the debt owed from Sidney Risher to Appellant. (Order filed July 14, 2011, p. 8, R. p. 11.) as evidenced by the Purchase Money Note. (Purchase Money Note, R. p. 125.) In conjunction with that Purchase Money Note, Midland Mortgage Corporation took back a Purchase Money Mortgage from Sidney Risher. (Purchase Money Mortgage; R. p. 133). The Purchase Money Mortgage is to secure purchase money, intended to be one transaction with the deed of the Property to Sidney Risher and Cassandra Risher. The Purchase Money Mortgage describes with particularity the real property to which the obligation owed by Sidney Risher attached. The Property is described in full and is not limited to the one-half undivided interest of Sidney Risher. The Purchase Money Mortgage and other closing documents evidence the intent of the parties that the Property described therein serve as security for said obligation.

A purchase money mortgage is a "mortgage or security device taken back to secure the performance of an obligation incurred in the purchase of the property." BLACK'S LAW DICTIONARY 861 (6th ed. 1991). A purchase money mortgage is recognized at common law and in equity where a purchaser of land, contemporaneous with the acquisition of the legal title or

afterward, but as a part of the same transaction, executes a mortgage to secure the purchase money. *C&S Nat'l Bank of SC v. Smith*, 277 S.C. 162, 284 S.E.2d 770 (1981); *Crystal Ice Co. of Columbia v. First Colonial Corp.*, 273 S.C. 306, 257 S.E.2d 496 (1979); 55 AM.JUR.2d *Mortgages* § 349 (1971). In a purchase money mortgage transaction, "[t]he deed and mortgage, although in themselves separate and distinct instruments, nevertheless. . . are regarded as parts of the same contract." *Groce v. Ponder*, 63 S.C. 162, 41 S.E. 83, *85 (1902).

The crux of the issue is the fact that the Property was intended to be collateral for the funds used by Sidney Risher and Respondent to purchase the Property. The Appellant is not seeking to have Respondent assume the debt under the theory of equitable lien, but merely seeks in equity that the intended collateral be used to fulfill the obligations owed to Appellant by Sidney Risher, as intended by the parties as a part of the purchase money transaction in which the deed and mortgage are one transaction.

Appellant has established the Property was the specific property to which the lien of Appellant was intended to attach.

E. The Master erred in finding no evidence of express or implied intent that the Property serve as collateral to secure the purchase money loan.

"Equitable liens arise either by contract or by implication . . . and a lien may be created by the conduct of the parties." 51 AM.JUR.2d *Liens* § 45 (West 2011). One function of an implied equitable lien is to enforce a purchase money obligation that is not otherwise secured. 51 AM.JUR.2d *Liens* § 49 (West 2011). An equitable lien may arise in favor of one who advances money to pay the purchase price of real or personal property under an agreement, or circumstances showing an intention, that the property shall stand as security for the advancement. *Id.*

South Carolina courts have held that the creation of a lien is an affirmative act. *Perpetual Fed. Sav. & Loan Assn. v. Willingham*, 296 S.C. 24, 26, 370 S.E.2d 286, 288 (Ct.App. 1988). The intent to create a lien cannot be implied from an express negative. *Id.* (citing *Equitable Trust Co. v. Imbesi*, 287 Md. 249, 412 A.2d 96 (1980); *Knott v. Shepherdstown Mfg. Co.*, 30 W.Va. 790, 5 S.E. 266 (1888)).

> An agreement for value to give a mortgage on land, to secure a particular debt, has been regarded in equity as creating a lien on the land, on the principle, it has been said, that equity regards that as done which ought to have been done, in other words, that since equity recognizes an obligation to give the mortgage as agreed, it will regard the mortgage as already given. . . . The theory of a lien thus arising, in the view of a court of equity, as a result of an agreement that a lien shall be created, or shall exist, appears to be that the court regards such an agreement as a valid contract, to which it will give effect, on principles analogous to those underlying the doctrine of specific performance, as against not only the promisor himself, *but also as against third persons acquiring an interest in the land as volunteers or with notice of the agreement.*

5 TIFFANY REAL PROP. § 1563 (West 2011) (emphasis added). The agreement may be enforceable if verbal, if supported by valuable consideration, such as indebtedness created at the time of agreement, and based on part performance, such as advancing funds. *Id.*

While there are no South Carolina cases directly on point factually, New Jersey and Ohio courts have found equitable liens in cases similar to the within action. In *Mortgage Electronic Registration Systems, Inc. v. Wilson*, 2005 WL 1284047 (N.J. Super. Ct. Ch. Div. 2005), a case factually directly on point although unpublished, a wife obtained a loan to purchase certain real property. At closing, wife executed a note and mortgage and the property was deeded to husband and wife. *Id.* at *1. The New Jersey Superior Court of Chancery, in impressing an equitable lien against the husband's one-half undivided interest in the property, stated:

In *J.W. Pierson Co. v. Freeman*, 113 N.J.Eq. 268 (E. & A. 1933), the court stated:

> If a transaction resolves itself into a security, whatever may be its form and whatever name the parties may choose to give it, it is, in equity, a mortgage. If a deed or contract, lacking the characteristics of a common-law mortgage, is used for the purpose of pledging real property, or some interest therein, as security for a debt or obligation, and with the intention that it shall have effect as a mortgage, equity will give effect to the intention of the parties. Such is an equitable mortgage.
>
> In *Rutherford Nat'l Bank v. H.R. Bogle & Co.,* 114 N.J.Eq. 571 (Ch. 1933), the court stated:
>
> > The whole doctrine of equitable liens or mortgages is founded upon that cardinal maxim of equity which regards as done that which has been agreed to be, and ought to have been, done. To dedicate property, or to agree to do so, to a particular purpose or debt is regarded in equity as creating an equitable lien thereon in favor of him for whom such dedication is made. This wholesome equitable principle is one of wide, if not universal recognition and application.
> >
> > The form which an agreement shall take in order to create an equitable lien or mortgage is quite immaterial, for equity looks at the final intent and purpose rather than at the form. If an intent to give, charge, or pledge property, real or personal, as security for an obligation, appears, and the property or thing intended to be given, charged, or pledged is sufficiently described or identified, then the equitable lien or mortgage will follow as of course. *Gutermuth v. Ropiecki*, 159 N.J.Super. 139, 146-7 (Ch. 1977); See also *Rutherford Nat'l Bank*, 114 N.J.Eq. at 571.
> >
> > Therefore, the way in which the parties agreed to create a mortgage does not matter. So long as the parties intended to secure a debt by a certain piece of property, an equitable mortgage will have been created. *James Talcott, Inc. v. Roto Am. Corp.*, 123 N.J.Super. 183 (Ch. 1973).

Wilson, 2005 WL 1284047 *1-2.

Based on the foregoing, the court found sufficient intent on the part of both husband and wife to secure the loan with the property and found an equitable lien in favor of plaintiff purchase money lender:

> Here the parties' intent was to use the property to secure money lent by Plaintiff. The money was directly used to purchase the property and it is clear that both [husband] and [wife] should be held responsible for this debt as both benefited. Both the deed and mortgage were recorded on June 8, 2004. This demonstrates that the mortgage and deed are intertwined creating one transaction. The fact that

> [husband] was left off the mortgage document should not permit him to gain a windfall. There can be no doubt that it was intended that the property would be used to secure the loan made by Plaintiffs. Therefore, an equitable mortgage was created. . .

Id. at *2.

In *Lipps v. Lipps*, 87 N.E.2d 823 (Ohio Ct.App. 1949), a husband intended to purchase real property in his name and in the name of husband's paramour but, at closing, the property was actually titled in the name of husband and wife. Husband obtained a purchase money loan from The Central Fairmount Building and Loan Company and, at closing delivered a purchase money mortgage against the property, purportedly executed by husband and wife. *Id.* at 822. However, wife's signature was forged by husband's paramour. *Id.* at 826-7. The Ohio Court of Appeals held:

> While it is true that the mortgage unaided by equitable principles does not create a lien as against the plaintiff [wife] who did not sign it, the fact that it was executed at the same time as the deed shows that there was no intent to convey a title free of the incumbrance [sic] to secure the purchase price. There was no intent to convey to the plaintiff [wife] an unincumbered [sic] title. Her donor-Frank A. Lipps-had no such unincumbered [sic] title to convey to her. It is a general principle running through the law that no one can convey a better title than he himself has and that a transferee obtains no better title than his transferor had, and where an attempt is made to transfer a greater title than the transferor has, the real owner can pursue the property until it reaches the hands of an innocent purchaser for value. Every principle of equity would limit her title to that of her donor, especially as against an innocent grantee who had advanced money in good faith.
>
> This principle has had frequent application in Ohio to the claim of the widow to dower in premises subject to a purchase money mortgage which she had not signed, or to a vendor's lien. In 14 O.Jur., 657, it is said: 'The right of dower is subject to a purchase-money mortgage given by the consort at the time of receiving the deed. It has been said that a purchase-money mortgage is superior to a claim of dower, even though the mortgage is not signed by the wife, because the debt is a higher claim than the claim of dower. The technical seisin of the consort does not confer upon the other spouse a contingent right of dower in the land, as against those deriving title at judicial sale of the land on the mortgage, although he or she did not join in executing the mortgage.' . . .

> And as the law is that the mortgage to a third person who advances the money to finance the purchase has the attributes of a purchase-money mortgage, we can see no logical reason for not holding that such person should not have a vendor's lien to secure the repayment of the purchase money advanced by him under the same circumstances that would give a vendor such a lien.

Id. at 827-8. The Ohio Court of Appeals ultimately held, "upon equitable principles the plaintiff [wife] holds the legal title to her undivided one-half of this real estate, subject to a charge or lien, or in trust, to secure the payment of the balance due The Central Fairmount Building & Loan Company upon its purchase-money mortgage. . ." *Id.* at 828.

In *Lipps*, the wife, owner of a one half undivided interest in the property, did not execute the purchase money mortgage and, in fact, her signature was forged thereon and she had no knowledge of the transaction at the time it occurred. *Id.* at 825. The *Lipps* Court found specifically that without the advancement of the loan proceeds, the wife would not have received the benefit of ownership in the property and, therefore, the ownership interest she received was subject to an equitable lien in favor of the lender. *Id.* at 828.

In the case of *Knott v. Shepherdstown Mfg. Co.*, 30 W.Va. 790, 5 S.E. 266, 268 (1888), cited by the South Carolina Court of Appeals in *Perpetual Fed. Sav. & Loan Assn. v. Willingham*, *supra*, the Supreme Court of Appeals of West Virginia held:

> [The] form or particular nature of the agreement which shall create a lien is not very material, for equity looks rather at the final intent and purpose than at the form; and if the intent appears to give, or to charge, or pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows.

In *Equitable Trust Co. v. Imbesi*, 287 Md. 249, 412 A.2d 96 (1980) (citing 1 L. Jones, Law of Mortgages of Real Property § 225 (8th ed. 1928), the Maryland Court of Appeals held:

> An equitable mortgage may be broadly defined as a transaction which has the intent, but not the form, of a mortgage, and which a court of equity will enforce to the same extent as a mortgage. There are many kinds of equitable mortgages as many as there are varieties of ways in which parties may contract for security by pledging some interest in lands. An agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage or to appropriate specific property to the discharge of a particular debt, will create an equitable mortgage, or a specific lien on the property intended to be mortgaged. So, an equitable mortgage will result from different forms of transactions, in which there is present an intent of the parties to make a mortgage, to which intent, for some reason, legal expression is not given in the form of an effective mortgage; but in all such cases the intent to create a mortgage is the essential feature of the transaction.

The Appellant's intent that the Property serve as collateral for the Loan is evidenced by the Purchase Money Mortgage of record, which describes the Property in full, not limited to a one-half undivided interest. Appellant's intent is further supported by the fact that the loan transaction is a purchase money transaction and neither Sidney Risher nor Respondent could have obtained any legal interest in the Property but for the Loan from Midland Mortgage Corporation. *Wilson*, *supra*; *Lipps*, *supra*. The fact that the Purchase Money Mortgage was executed at the same time the Deed to the Property was delivered to the Rishers, and that the Deed and Purchase Money Mortgage were recorded in the public records on the same day, is further evidence of all of the parties' intent to secure the Loan from Midland Mortgage Corporation to the Rishers using the entire Property as collateral. *Wilson*, 2005 WL 1284047 at *2.

Further, there is an express and contractual intent by Sidney Risher that the Property serve as collateral for the Loan, evidenced by his execution of the Purchase Money Note and Mortgage at closing.

Respondent has not pled or testified that she did not intend to or would not have executed the Mortgage at closing. There is an implied intent by Respondent that the Property serve as

collateral for the Loan, as evidenced by her actions before, at and after closing. Respondent admits in her deposition that she wanted to buy the Property. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 20, l. 22 - 24, R. p. 176). Respondent executed the Agreement to Buy and Sell Real Estate for the Property, under which the Rishers' obligations were specifically contingent upon obtaining financing for the purchase. (Contract, R. p. 114). Respondent admits that she was present at the closing. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 18, l. 21 - 23, R. pp. 174). Respondent executed a number of documents at closing, including a Century 21 Home Protection Plan, Acknowledgment, Important Notice Regarding Real Estate Taxes, Closing Disclaimer, Representation Disclaimer, and Privacy Policy Notice. (Hearing on May 12, 2011, Plaintiff's Ex. 2, 3, 4, 5, 6 and 7, R. pp. 118, 119, 120, 121, 122 and 123). Respondent admits that the Loan from Midland Mortgage Corporation was to purchase the Property. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 19, l. 6 - 10, R. p. 175). Respondent admits further that she and her husband could not have purchased the Property without the Loan from Midland Mortgage Corporation. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 19, l. 6 - 10, R. p. 175).

Intention of the parties may be inferred from conduct and the general surrounding circumstances. 1 The Law of Debtors and Creditors § 9.13 *Equitable Liens* (West 2011). Equitable liens will be applied particularly to avoid unjust enrichment. *Id.* "The intention also may be found from the failure of the parties to properly create a lien upon the equitable maxim that 'equity heeds substance, not form' or upon the maxim that 'equity treats as done that which ought to be done.'" *Id.* In the current action, intent can be inferred from the circumstances of a real estate closing whereby Sidney Risher and Defendant Cassandra Risher obtained title to the

Property with the use of the purchase money funds borrowed from Midland Mortgage Corporation.

The Loan was a purchase money transaction and the proceeds were used to purchase the Property, and pay off prior encumbrances against the Property. (Transcript to Hearing on May 12, 2011, p. 21, l. 18 – p. 24, l. 3, R. p. 59). Therefore, Respondent could not have obtained any interest in or title to the subject property without the purchase money Loan from Midland Mortgage Corporation. The fact that the Loan is a purchase money transaction provides further evidence of the intent of the parties that the Property serve as collateral for the Loan.

Courts in South Carolina and across the nation have recognized the unique priority of purchase money mortgages and have employed equitable principles to infer the intent of parties benefitting from purchase money transactions to find equitable liens in favor of vendors and purchase money lenders. *See Evans v. Pegues*, 102 S.C. 186, 86 S.E. 480, 481 (1915); *Groce v. Ponder*, 63 S.C. 162, 41 S.E. 83, 85 (1902); *De Saussure v. Bollmann*, 7 S.C. 329 (1876); *SunTrust Bank v. Bryant*, 392 S.C. 264, 268, 708 S.E.2d 821, 823 (Ct.App. 2011); *South Carolina Federal Sav. Bank v. San-A-Bel Corp.*, 307 S.C. 76, 80, 413 S.E.2d 852, 855 (Ct.App. 1992); *Hursey v. Hursey*, 248 S.C. 323, 327, 326 S.E.2d 178, 180 (Ct.App. 1985); *Wilson*, 2005 WL 1284047(N.J. Super. Ct. Ch. Div. 2005); *Lipps*, 87 N.E.2d 823 (Ohio Ct.App. 1949); RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 cmt b (1997).

Appellant presented undisputed evidence that the Purchase Money Mortgage is a purchase money mortgage. A purchase money mortgage is a "mortgage or security device taken back to secure the performance of an obligation incurred in the purchase of the property." BLACK'S LAW DICTIONARY 861 (6th ed. 1991). A purchase money mortgage is recognized at common law and

in equity where a purchaser of land, contemporaneous with the acquisition of the legal title or afterward, but as a part of the same transaction, executes a mortgage to secure the purchase money. *C&S Nat'l Bank of SC v. Smith*, 277 S.C. 162, 284 S.E.2d 770 (1981); *Crystal Ice Co. of Columbia v. First Colonial Corp.*, *supra*; *Hursey v. Hursey*, 248 S.C. at 327, 326 S.E.2d at 180; 55 Am.Jur.2d *Mortgages* § 349 (1971). In a purchase money mortgage transaction, "[t]he deed and mortgage, although in themselves separate and distinct instruments, nevertheless. . . are regarded as parts of the same contract." *Groce v. Ponder*, 63 S.C. 162, 41 S.E. 83, *85 (1902). In addition, "[t]he common law recognition of the simultaneous effect of the conveyance to the purchaser of an interest capable of being encumbered with the conveyance by the purchaser of the purchase money mortgage establishes the priority." *Friarsgate, Inc. v. First Federal Sav. & Loan Assn. of SC*, 317 S.C. 452, 454 S.E.2d 901 (Ct.App. 1995). "A purchase money mortgage is given priority over all other claims or liens arising through the mortgagor although they are prior in time to the execution of the purchase money mortgage." *SunTrust Bank v. Bryant*, 392 S.C. at 268, 708 S.E.2d at 823 (Ct.App. 2011) (citing *Hursey v. Hursey*, at 327, 326 S.E.2d at 180). "The rationale for this special priority is that the mortgagor's interest in the property is made possible by the purchase money loan, so that the mortgage should come ahead of other interests that attach merely because the mortgagor acquires the property." *SunTrust Bank*, 392 S.C. at 268, 708 S.E.2d at 823 (citing *South Carolina Federal Sav. Bank v. San-A-Bel Corp.*, at 80, 413 S.E.2d at 855).

According to the Restatement (Third) of Property (Mortgages), Section 7.2:

> (a) A "purchase money mortgage" is a mortgage given to a vendor of the real estate or to a third party lender to the extent that the proceeds of the loan are used to: (1) acquire title to the real estate; or (2) construct improvements on the real estate if the mortgage is given as part of the same transaction in which title is acquired; and (b) A purchase money mortgage, whether or not recorded, has priority over any mortgage, lien or other claim that attaches to the real estate but is created by or

> arises against the purchaser-mortgagor prior to the purchaser-mortgagor's acquisition of title to the real estate.

RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 (1997). "[W]here the [loan] proceeds are used in their entirety to acquire [property], the full amount of the mortgage loan will qualify as a purchase money mortgage." RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 cmt c (1997).

It is long established that a purchase money mortgage has priority over other liens or claims arising against the purchaser-mortgagor. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 cmt b (1997). This rule reduces title risk in connection with such transactions and thus encourages purchase money financing by vendors. *Id.* The purpose of this rule is grounded in fundamental fairness. *Id.* The vendor-mortgagee should prevail because the general lien creditor has not extended credit or perfected the lien in reliance on the right to be repaid out of any specific property. *Id.*

> This principle is not limited to judgment lienors; those whose claims are based on mortgages of after-acquired property, community property, or similar rights should fare no better against the vendor. But for the willingness of the vendor to part with the real estate, it would have been completely unavailable to those persons for the satisfaction of their claims. To give such claimants priority over the vendor would confer on them a pure windfall. This section extends the same priority preference to third party purchase money lenders. The policy reasons for this result are much the same and are equally as strong as in the vendor context. Because third party lending is the dominant source of purchase money land financing in this country, a rule which facilitates such lending is especially beneficial to the national real estate economy. Applying the rule to benefit third party lenders is plainly fair. While it is true that such lenders, unlike vendors, do not give up ownership of specific real estate, they nevertheless part with money with the expectation that they will have security in that real estate. Without this advance of money, the purchaser-mortgagor would never have received the property and the other claimants would never have had the opportunity to satisfy their claims from such a convenient source. As in the vendor purchase money context, this section seeks to avoid conferring a windfall on those claimants.

Id.

There is widespread support for the proposition that a mortgage given to a vendor or third party to finance all or any part of the purchase price of land is senior to any other lien or claim attaching to the land through the purchaser-mortgagor. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 Reporters' Note to cmt b (1997); *See, e.g., Belland v. O.K. Lumber, Inc.*, 797 P.2d 638 (Alaska 1990); *Sunshine Bank of Fort Walton Beach v. Smith*, 631 So.2d 965 (Ala. 1994); *Garrett Tire Center, Inc. v. Herbaugh*, 740 S.W.2d 612 (Ark. 1987); *Mercantile Collection Bureau v. Roach*, 15 Cal.Rptr. 710 (Ca. Ct.App. 1961); *Pinellas County v. Clearwater Fed. Sav. & Loan Assn.*, 214 So.2d 525 (Fla. Dist. Ct.App. 1968); *Assocs. Discount Corp. v. Gomes*, 338 So.2d 552 (Fla. Dist .Ct.App. 1976); *Aetna Casualty & Sur. Co. v. Valdosta Fed. Sav. & Loan Assn.*, 333, S.E.2d 849 (Ga. Ct.App. 1985); *Liberty Parts Warehouse, Inc. v. Marshall County Bank*, 459 N.E.2d 738 (Ind. Ct.App. 1984); *Midland Savings Bank FSB v. Stewart Group*, 533 N.W.2d 191 (Iowa 1995); *Resolution Trust Corp. v. Bopp*, 850 P.2d 939 (Kan. Ct.App. 1993); *Hill v. Hill*, 345 P.2d 1015 (Kan. 1959); *Libby v. Brooks*, 653 A.2d 422 (Me. 1995); *Stewart v. Smith*, 30 N.W. 430 (Minn. 1886); *Commerce Sav. Lincoln, Inc. v. Robinson*, 331 N.W.2d 495 (Neb. 1983); *Fleet Mortgage Corp. v. Stevenson*, 575 A.2d 63 (N.J. Super. Ct. 1990); *Slate v. Marion*, 408 S.E.2d 189 (N.C. Ct.App. 1991); *Giragosian v. Clement*, 604 N.Y.S.2d 983 (N.Y.App.Div. 1993); *Hursey v. Hursey*, 326 S.E.2d 178 (Ct.App. 1985); *United States v. Dailey*, 749 F.Supp. 218 (D.Ariz. 1990); *Royal Bank of Canada v. Clarke*, 373 F.Supp. 599 (D.Virgin Islands 1974).

"The purchase money priority rule has not only been applied against simple judgment liens, it has also been victorious over liens representing arguably stronger public policy concerns." RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2 cmt c (1997). *See, e.g., Pinellas County*

v. Clearwater Fed. Sav. & Loan Assn., 214 So.2d 525 (Fla.Dist.Ct.App. 1968) (state welfare lien); *Fleet Mortgage Corp. v. Stevenson*, 575 A.2d 63 (N.J. Super. Ct. 1990) (state medical assistance lien); *Midland Savings Bank FSB v. Stewart Group*, 533 N.W.2d 191 (Iowa 1995) (mechanic's lien); *Gaston Grading & Landscaping v. Young*, 449 S.E.2d 475 (N.C. Ct.App. 1994) (mechanic's lien). "Moreover, federal legislation gives the purchase money mortgagee priority over previously filed tax liens against the mortgagor." *Id.*; *see* 26 U.S.C.A. § 6323(c); *Slodov v. United States*, 436 U.S. 238, 257-58 & n.23 (1978).

Additionally, the purchase money mortgage priority also prevails over a variety of other non-lien interests arising through the purchaser-mortgagor. *Id.*; *See, e.g., Assocs. Discount Corp. v. Gomes*, 338 So.2d 552 (Fla.Dist.Ct.App. 1976) (homestead; dower); *Stow v. Tifft*, 15 Johns. 458, 8 Am. Dec. 266 (N.Y. 1818) (dower); *Wheatley's Heirs v. Calhoun*, 39 Va. 264 (1841) (dower); *Kneen v. Halin*, 59 P. 14 (Idaho 1899) (community property); *Davidson v. Click*, 249 P. 100 (N.M. 1926) (community property); *Martin v. First Nat'l Bank*, 184 So.2d 815 (Ala. 1966) (homestead); *Foster Lumber Co. v. Harlan County Bank*, 80 P. 49 (Kan. 1905) (homestead).

Oklahoma courts have held that purchase money mortgages are superior to wife's homestead claim, even when wife did not execute purchase money mortgage. *See Cimarron Federal Sav. Assn. v. Jones*, 832 P.2d 426 (Ct.App. 1991); *In re Gardner's Estate*, 122 Okl. 26, 250 P. 490 (1926) (homestead may be sold for purchase money); *Zehr v. May*, 67 Okl. 97, 169 P. 1077 (1917) (no homestead right can be acquired or asserted in land upon which the purchase money is unpaid as against party to whom purchase money is due); *Hamra v. Fitzpatrick*, 55 Okl. 780, 154 P. 665 (1916) (purchasers have no homestead exemption against levy and sale under execution to satisfy judgment for part of purchase money).

In the case of *Pinellas County, supra*, the Florida District Court of Appeals held that a purchase money mortgage had priority over state welfare assistance lien. The court stated:

> The law relating to the superiority of purchase money mortgages is well settled. Purchase money mortgages generally take priority over any other prior or subsequent claims or liens attaching to the property through the mortgagor. Purchase money mortgages are recognized as being senior to claims of dower and homestead as well as to judgment liens and mortgages on after-acquired property.

Id. at 526; *see* 59 C.J.S. *Mortgages* § 231; 36 AM.JUR. *Mortgages* § 230; G. OSBORNE, MORTGAGES p. 555 (1951); G. GLENN, MORTGAGES § 345.1 (1943); R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 32.04 (1968). The court went on to state:

> It is a fundamental principle of law . . . that where a purchase money mortgage is taken back in consideration of a conveyance to a grantee, the purchase money mortgage, or the rights thereto, become vested before or in the exact point of time as the grantee acquires title and that subsequently the rights of the purchase money mortgage holder stand as a buffer between the interest of the grantee in the land and other lien holders, even though the other liens are senior in time of acquisition. . . . The legal fiction has been promulgated by the law for the logical and commendable reason that it is only through the contribution of the purchase money mortgagor (sic) that the security ever came into being, and by granting to the purchase money mortgagor (sic) priority other lienors are in no wise damaged or injured or detrimented, for as was stated if it were not for the willingness of the purchase money mortgagor (sic) to convey to the grantee, nothing would exist to which the other liens could attach even in a subordinate position. This principle derives its virtue from the policy that it encourages commercial and real estate transactions generally and provides a lien debtor the opportunity to continue making transactions requiring the giving back of mortgages when otherwise he would be prohibited from doing so for the reason that no owner of property would sell with the knowledge that the property conveyed to the grantee would be subject to paramount claims over and above his.

Pinellas County, 214 So.2d at 528-9.

South Carolina courts have held that a mortgage executed in favor of a vendor to secure the purchase money is paramount and superior to dower rights of the purchaser's wife. *Evans v.*

Pegues, 102 S.C. 186, 86 S.E. 480, 481 (1915); *Groce v. Ponder*, 63 S.C. 162, 41 S.E. 83, 85 (1902); *De Saussure v. Bollmann*, 7 S.C. 329 (1876).

The South Carolina case of *De Saussure v. Bollmann* was based upon an action for specific performance of a contract for the sale of a lot of land. In *De Saussure*, the South Carolina Supreme Court stated that a purchase money mortgage prevailed over a number of rights, including homestead rights and the dower rights of a wife. It stated as follows:

> The rights of dower and homestead stand on much higher grounds relative to the mortgages for the purchase money than a judgment lien, and are therefore more carefully guarded; but time and again has it been decided that a conveyance and a mortgage back by the vendee for the purchase money was too instantaneous a seizin for either of these rights to attach as against the mortgagee.

7 S.C. 329, 335 (1876).

The court stated that, for the purpose of the case at hand, the legal decisions giving priority to a purchase money mortgage over dower and homestead:

> [O]nly go to prove how fixed is the principle laid down in Freeman on Judgments, § 365, in these words: 'Nothing is better settled than this-that if the vendor, at the time of parting with his title, takes a mortgage or a judgment as a part of the same transaction to secure his purchase money, he retains a lien on the estate conveyed, not to be displaced by any other encumbrance.'

Id. at 336.

The Court further stated:

> All of these decisions relative to dower, homestead and judgments are based upon the clearest principle of justice, not of justice only, but of common honesty, - that the creditors of a debtor cannot take the property of another, for which the debtor has not paid, to pay his debts to them. Such a proceeding could and would not be tolerated; for the very terms upon which the debtor held the property was upon the condition that he should pay for it; and, in case he should fail to do so, the property should be primarily liable for the debt. The thing sold must remain as a security for the payment of its own price, for, were it otherwise, all transactions in real estate must necessarily be in cash, and, that being impossible, the change of property from

> hand to hand, which creates its principal value, would be most effectually stopped and its value destroyed.

Id. at 337.

To understand the impact of the statements of the Court in *De Saussure,* it is important to understand the meaning of dower. Inchoate dower is a wife's interest in the lands of her husband during his life, which may become a right of dower upon his death or, in other words, a contingent claim or possibility of acquiring dower by outliving husband and arises, not out of contract, but as an institution of law constituting a mere chose in action incapable of transfer by separate grant but susceptible of extinguishment, which is effected by wife joining with husband in deed, which operates as a release or satisfaction of interest and not as conveyance. BLACK'S LAW DICTIONARY 523 (ab. 6th ed. 1991). Although the statutory protection of dower has been abolished in South Carolina, dower was originally a protection to a wife, giving her a life estate in one-third of all freehold land of which her husband was seised during marriage and which was inheritable by the issue of husband and wife. DUKEMINEIER JESSE & JAMES E. KRIER, PROPERTY 394 (4th ed. 1998). Dower attached at the time of marriage to all land of the husband and all land acquired during the marriage. *Id.* If the wife survived the husband, she was entitled to dower in possession. *Id.* After inchoate dower attached, the husband was powerless to defeat it. *Id.* Any purchaser from, or creditor of, the husband took subject to that dower right, unless the dower right was released by the wife. *Id.*

In comparing the right of dower to the interest of Respondent in the Property, there are many similarities. Dower was a legal, statutory right and interest granted to wives in real property owned by their husbands. Respondent holds legal title to a one-half undivided interest in the Property. Both Respondent's interest and the property interests of a wife through dower are legal

interests in real property, and, normally, no creditor can attach a lien against the property interests of the holder of a legal interest without the express consent of the interest-holder. However, South Carolina courts have carved out an exception with regard to purchase money rights, giving holders of purchase money mortgages priority over, not only other lien-holders and judgment creditors, but *also over the dower rights of wives in property of their husbands*. Courts have explained that this carve-out supports the fundamental fairness and understanding that, but for the purchase money mortgagee, the wife, or in our case, Respondent, would never have had any interest in the real property which is the subject of the purchase money mortgage. *See South Carolina Federal Sav. Bank*, 307 S.C. at 80, 413 S.E.2d at 855 (holding the rationale for granting purchase money mortgages priority over all other liens is that the mortgagor's interest in the property is made possible by the purchase money loan). As indicated by the Restatement (Third) of Property (Mortgages), above, this result is meant to defeat a windfall to the holder of dower and similar interests in real property and is also meant to support a public policy to protect the national real estate economy by protecting the priority rights of lenders in making loans to enable property purchases.

The logical extension of the purchase money protection to lenders supports the Appellant's right to an equitable lien against the interest of Respondent in the Property. The Loan provided financing for the purchase of the Property, without which the Rishers would not have been able to purchase the Property. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 19, l. 6 – 10, R. p. 176). Respondent admits that the Loan from Midland Mortgage Corporation was to purchase the Property. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 19, l. 6 - 10, R. p. 176). Respondent admits further that she and her husband could not have purchased the Property without the Loan

from Midland Mortgage Corporation. (Transcript to Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 19, l. 6 - 10, R. p. 176.) Witness testimony at trial by Ursula Lucas and Ronald Dodson and Plaintiff's Exhibits 11, 18 and 19 to the hearing transcript clearly show that the loan funds were used to pay off prior loans to the Sellers on the Property. (Hearing on May 12, 2011, p. 21, l. 21 – p. 22, l.8; p. 56, l. 25 – p. 57, l. 11; Plaintiff's Ex. 11, 18 and 19, R. pp. 60 – 61; 95 – 96; 131, respectively). Therefore, Respondent could not have obtained any interest in or title to the Property without the loan from Midland Mortgage Corporation. The fact that the Purchase Money Mortgage was executed at the same time the Deed to the Property was delivered and that the Deed and Purchase Money Mortgage were recorded on the same day, is further evidence of the parties' intent to secure the purchase money payments owed to Midland Mortgage Corporation using the entire Property as collateral. As such, no portion of or interest in the Property was conveyed unencumbered by the Mortgage. Respondent's interest in the Property did not intervene between the Property and the mortgagee's rights thereto as security for the Loan.

The circumstances of the closing whereby Respondent took title to a one-half interest in the Property provides further evidence of her implied intent to use the Property as collateral for the Loan. Ordinarily, a tenant in common may not mortgage or encumber more than his or her own interest in the property held in common. 86 C.J.S. *Tenancy in Common* § 145 (West Supp. 2011). Ordinarily, fewer than all of the tenants in common may not bind the other cotenants or subject their interest in the property to a mortgage of more than the mortgagor's undivided share of the common property, unless the others have authorized or ratified the action. *Id.* However, in the absence of any evidence to the contrary, it may be presumed that an act of one cotenant favorable to all was done with the knowledge or assent of all cotenants. 20 AM.JUR.2d *Cotenancy and Joint*

Ownership § 115 (West 2011); 20 AM.JUR.2d *Cotenancy and Joint Ownership* § 95 (West 2011); 20 AM.JUR.2d *Cotenancy and Joint Ownership* § 102 (West 2011).

In the case of *Schwartz v. McQuaid*, 214 Ill. 357, 73 N.E. 582 (1905), a store building was owned by four individuals as tenants in common. One cotenant, Frank H. Haumesser, entered into a lease agreement with a third party lessee, Michael McQuaid. *Id.* at 360, 73 N.E. at 583. The lease was attested by one of the other cotenants, Mil Schmitt. *Id.* The lessee moved into the property. *Id.* The court found that:

> At the time the lease was executed, Haumesser was the owner of only a portion of the premises, but his act of leasing was approved by Schmitt, who was one of the other owners; and there is nothing in the record to show that Haumesser did not act as the agent of the tenants in common, or that the other tenants in common made any objection to the leasing. McQuaid entered and remained in possession for several months after the execution of the lease, paying the rent. In the absence of evidence to the contrary, we will presume that the lease was made with the knowledge and consent of all of the tenants in common.

Id. at 361, 73 N.E. at 584.

In *Home Owners' Loan Corp. v. Cilley*, 125 S.W.2d 313, 316-17 (Tex. App. 1939), the court held that the general rule is that one tenant in common cannot by his sole act sell or encumber more than his portion of the common property unless the other cotenants authorized such action or thereafter ratified it. The court also noted two other exceptions. *Id.* at 317. The first being when the acting tenant in common takes steps to protect the interest of the cotenants. *Id.* (citing *W.C. Belcher Land Mortgage Co. v. Taylor*, 212 S.W. 647 (Tex. Comm'n App. 1919) (a cotenant, in order to protect his interest and the interest of the other cotenants in the property, has the right to extend the time of payment of a debt for purchase money, and is authorized to execute a lien therefore binding his interest and also the interest of the other cotenants)). The other exception is created under the theory of estoppel, where previous authorization or subsequent ratification

would be necessarily implied in a court of equity. *Id.* at 317 (citing *Law v. Lubbock Nat. Bank*, 21 S.W.2d 92 (Tex. App. 1929)).

In the case at hand, Sidney Risher borrowed money from Midland Mortgage Corporation for the benefit of both Sidney Risher and Respondent to purchase the Property. (Settlement Statement, R. p. 131). Sidney Risher and Respondent took title to the Property as tenants in common. (Deed, R. p. 129). Sidney Risher executed a Purchase Money Mortgage in favor of Midland Mortgage Corporation which, on its face, purports to encumber the Property in its entirety. (Purchase Money Mortgage, R. p. 133). Respondent stated in her deposition, "I just wanted the house." (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 20, l. 24, R. p. 176). Respondent knew that Midland Mortgage Corporation was lending the money to purchase the Property. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 14, l. 6 – 7, R. p. 173). Respondent was present at the closing and executed a number of closing documents. (Hearing on May 12, 2011, Plaintiff's Ex. 3, 4, 5, 6, 7, and 8, R. pp. 119, 120, 121, 122, 123 and 124, respectively). Respondent admits that the loan from Midland Mortgage Corporation was to purchase the Property. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 19, l. 6 - 10, R. p. 175). Respondent admits further that she and Sidney Risher could not have purchased the Property without the Loan from Midland Mortgage Corporation. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 19, l. 6 - 10, R. p. 175). Further, Sidney Risher, Respondent and their other family members moved into and furnished the Property, and made payments to the mortgagor beginning at closing on July 7, 2008 until September 1, 2009, in acknowledgment of the debt owed to the mortgagor. (Settlement Statement, R. p. 131; Complaint, R. p. 32).

Applying the standards set forth above, no evidence has been presented that the Mortgage was executed by Sidney Risher without the knowledge and consent of Respondent. To the contrary, evidence has been presented that Respondent was present at the closing and aware of the purchase money transaction and the execution of the Mortgage by Sidney Risher with the intent to encumber the Property in its entirety. Further, the actions of Sidney Risher in obtaining the Loan and executing the Purchase Money Mortgage were for the benefit of both Sidney Risher and Respondent, without which, they would not have obtained title to the Property.

The foregoing evidence shows Respondent's knowledge, consent and authorization of execution of the purchase money Mortgage by Sidney Risher as tenant in common for the benefit of and binding as to Respondent's interest in the entire Property. Respondent's consent is further evidence of her implied intent to use the Property as collateral for the Loan.

Based on the foregoing, Appellant has presented sufficient evidence to establish the third element of an equitable lien, an intent, express or implied, that the Property serve as payment for the obligation owing from Sidney Risher to Appellant.

II. The Master erred in holding that Appellant failed to establish the necessary elements to recover under the South Carolina common law remedy of unjust enrichment.

Unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched at the expense of the plaintiff. *Dema v. Tenet Physician Servs. Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009); *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 256-7, 715 S.E.2d 348, 356 (Ct.App. 2011); *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Ct.App. 1988).

A party may be unjustly enriched when it receives and retains a benefit or money which in justice and equity belong to another. *Dema,* at 123, 678 S.E.2d at 434. Unjust enrichment is an

equitable doctrine that "provides the general theoretical framework for all damages awarded in the context of implied and constructive contracts." 13 S.C.Jur. *Implied Contracts* §6 (2011). The terms "restitution" and "unjust enrichment" are modern designations for the older doctrine of quasi-contracts. *Ellis*, at 473, 366 S.E.2d at 14; *Martin v. Bozeman*, 173 So.3d 382 (La.Ct.App. 1965). "[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *Gignilliat v. Gignilliat, Savitz & Bettis, LLP*, 385 S.C. 452, 466, 684 S.E.2d 756, 764 (2009)(citing *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000)).

The elements to recover for unjust enrichment based on quantum meruit, quasi-contract, or implied by law contract, which are equivalent terms for equitable relief, are: (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. *Gignilliat*, 385 S.C. at 466, 684 S.E.2d at 764 (2009)(citing *Myrtle Beach Hosp., Inc.*, at 8-9, 532 S.E.2d at 872); *Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (Ct.App.1994); *Webb v. First Federal Sav. & Loan Assn. of Anderson*, 300 S.C. 507, 510, 388 S.E.2d 823, 825 (Ct.App. 1989); *Ellis*, 294 S.C. at 474, 366 S.E.2d at 15; 26 WILLISTON ON CONTRACTS § 68:5 (4th ed. 2011); 66 AM.JUR.2d *Restitution and Implied Contracts* § 4 (1973). "In quasi-contracts the obligation arises, not from the consent of the parties as in the case of contracts express or implied in fact, but from the law of natural immutable justice and equity." *Webb*, 300 S.C. at 510, 388 S.E.2d at 825 (citing 66 AM.JUR.2d *Restitution and Implied Contracts* § 2 (1973)). As otherwise stated, "[a] quasi contract, or one implied in law, is no contract at all, but an obligation created by the law in the

absence of any agreement between the parties." *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 435 n.1, 322 S.E.2d 474, 478 n.1 (Ct.App. 1984).

A. The Master erred in holding that Appellant did not confer a benefit upon Cassandra Risher as it did not loan money directly to Cassandra Risher.

The Master held that Midland Mortgage Corporation did not convey a direct benefit on Respondent as Midland Mortgage Corporation did not loan money directly to Respondent. (Order filed Dec. 7, 2011, p. 7, R. p 22). The Master found that Respondent was merely an "indirect beneficiary of what Mr. Risher chose to do with the loan proceeds." (Order filed Dec. 7, 2011, p. 7, R. p. 22). South Carolina law does not require the showing of a direct relationship between the benefactor and the beneficiary, such as that of lender and borrower, only that the beneficiary received a benefit from the benefactor. Respondent realized a direct benefit from the Loan by taking title to a one-half undivided interest in the Property purchased using the Loan proceeds.

Appellant conferred a non-gratuitous benefit upon Respondent by loaning funds to Sidney A. Risher, which funds were used by Sidney Risher and Respondent to purchase the Property. (Settlement Statement, R. p. 131). Appellant expected and intended to be repaid the principal amount of the funds loaned, together with interest thereon at the rate of 6.50% per annum. (Purchase Money Note, R. p. 133). Respondent was present at closing on the Property and had full knowledge of the purchase and Loan transaction. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 13, l. 3 - 4, R. pp. 172). Equities do not favor a cotenant, who was present at closing but who did not execute the Mortgage to protect the purchase money lender, but who did receive the benefit of a one-half undivided interest in the Property. The action of Respondent in not signing the Mortgage at closing creates a windfall to Respondent. This is especially true in a purchase money situation, as we have here, where the lender steps into the vendor's shoes for the purpose of lien

and lien priority. The purpose of the special priority rules for purchase money mortgages is specifically to avoid a windfall or unjust enrichment of claimants to the detriment and loss of the vendor or purchase money lender.

Further, it has been held that equitable liens may be based on the doctrine of unjust enrichment. *See* 51 AM.JUR.2d *Liens* § 38 (West 2011). Equitable liens will be applied particularly to avoid unjust enrichment. 1 The Law of Debtors and Creditors § 9.13 *Equitable Liens* (West 2011).

The original principal sum funded under the Loan was $479,750.00. (Purchase Money Note, R. p. 125). The principal owed Appellant under the Purchase Money Note and Mortgage as of February 2, 2010 is $474,385.05. (Complaint, R. p. 32). Pursuant to the Third Supplemental Inventory and Appraisement filed in the Lexington County Probate Court in connection with the Estate of Sidney Risher, Respondent is the named beneficiary under two life insurance policies totaling $535,000.00. (Third Supplemental Inventory and Appraisement, R. p. 161). Further, the Third Supplemental Inventory and Appraisement shows the value of the Property to be $450,000.00. (Third Supplemental Inventory and Appraisement, R. p. 161). As Respondent holds a one-half undivided interest in the Property, the windfall to Respondent can easily be calculated as $225,000.00. Furthermore, it appears that Respondent has access to funds to pay the regular Mortgage payments or to pay the Loan in full, but has not used those funds for such purposes, resulting in harm to the Appellant.

Based on the foregoing, it is inequitable for Respondent to retain the benefit of her ownership interest in the Property, and to continue to live on the Property rent and mortgage-free, without paying Appellant for the value of her interest therein or without allowing Appellant a lien

against the Property as a whole. Therefore, Appellant is entitled to an equitable lien over Respondent's interest in the Property, or, in the alternative, a judgment against Respondent for the benefit of the value conferred upon her at Closing and the benefit she continues to realize as she lives on the Property without paying the value therefore.

III. The Master erred in holding that Appellant failed to establish the necessary elements to recover under the federal common law theory of unjust enrichment.

The Master's Order filed July 14, 2011, sets forth the elements of the federal common law theory of unjust enrichment developed under federal ERISA case law. (Order filed July 14, 2011, p. 9; R. p. 12). The federal common law theory of unjust enrichment may be proven by a showing of: (1) reasonable expectation of payment; (2) the defendant should have reasonably expected to pay; or (3) that society's reasonable expectation of person and property would be defeated by nonpayment. *Mason v. M.F. Smith & Assoc., Inc.*, 158 F.Supp.2d 673 (D.S.C. 2001).

Except when federal questions are involved, the courts of this state are not controlled by decisions of the federal courts. *Ford v. Atlantic Coast Line R. Co.*, 169 S.C. 41, 168 S.E. 143, 156 (1932); *Key v. Carolina & N.W. Ry. Co.*, 150 S.C. 29, 147 S.E. 625, 626 (1929); *State v. George*, 119 S.C. 120, 111 S.E. 880 (1921). There is no federal question at issue in the current action and, therefore, this Court is not controlled by the decision in *Mason*. However, if the federal common law elements of unjust enrichment applicable under ERISA were the appropriate standard in the within action, Appellant has clearly established those elements:

(1) Appellant purchased the Loan granted by Midland Mortgage Corporation to Sidney A. Risher. Appellant, as the holder of the Purchase Money Note and Mortgage, has a commercially reasonable expectation of repayment of the Loan pursuant to the terms of the

Purchase Money Note and Mortgage. Plaintiff paid valuable consideration for the Loan with the expectation of repayment.

(2) A reasonable person would expect to pay the fair market value or some other negotiated value to purchase the Property. A reasonable person would also expect to repay any monies loaned for the purpose to allow the purchase of the Property.

(3) It is rare in this state that a residential closing takes place where a lender, institutional or otherwise, has not participated in the closing by loaning the funds used to complete the purchase. In South Carolina, closings must be performed under the supervision of an attorney. *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866, 868 (2006); *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773, 777-778 (2002). Although the closing attorney does not necessarily represent the lender, as set forth in the arguments below, the lender does provide closing instructions to the closing attorney, which contain conditions under which the lender will loan funds, and the lender relies on the attorney to close the loan and purchase transaction in accordance with those instructions. When the closing attorney fails to abide by those instructions, the party that is represented by the closing attorney is the proper party to bear the resulting loss. *Motley v. Williams*, 374 S.C. 107, 112, 647 S.E.2d 244, 247 (Ct.App. 2007).

Lenders have an expectation of repayment of monies loaned to individuals to purchase real property. If those monies are not repaid, the lender has an expectation of the availability of a remedy to be made whole. If lenders must bear the risk that an error of the closing attorney, who represents parties to the transaction other than the lender, will result in a loss to the lender of its legal or equitable remedies under law, the liability and cost of doing business increases exponentially for lenders. As a result of increased liability and cost, lenders make fewer loans, or

increase fees, charges and interest rates, making eligibility requirements for loans increasingly more difficult for hopeful buyers, impacting the entire real estate market. The interests of society would be served by allowing lenders an equitable remedy under the facts present in the within action. To hold otherwise would discourage some lenders from doing business in this state, adversely affecting society as a whole and defeating the reasonable expectations of society, including would-be lenders and borrowers.

IV. The Court erred in holding that Appellant is not entitled to any form of equitable relief.

The Court's Order states that "[P]laintiff is not entitled to any form of equitable relief because the [P]laintiff's predecessor in interest, Midland Mortgage Corporation, and the closing attorney, through their own diligence, could have avoided the loss that has been suffered." Midland Mortgage Corporation did not prepare or review the deed conveying the Property to Sidney Risher and Respondent. (Settlement Statement, R. p. 131). Pursuant to South Carolina law, the borrower selects the "legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction." S.C. CODE ANN. § 37-10-102 (2011). The South Carolina Ethics Advisory Committee rendered the opinion that, in a standard real estate closing where a buyer or borrower has chosen and retained an attorney, absent additional facts and circumstances, that attorney does not represent the lender. S.C. Ethics Adv. Comm., Op. 09-07 (2009). The Committee further opined that the mere supplying of closing instructions to an attorney by lender does not, in and of itself, create an attorney-client relationship between the lender and the attorney. *Id.* "A 'standard real estate closing' means a residential real estate closing where Borrower has chosen and retained Lawyer and a sophisticated institutional Lender is providing financing evidenced by a loan package prepared in advance by the Lender and

forwarded to the closing attorney for execution." *Id.* "While the Lawyer has an obligation to explain the documents proffered by Lender to the Borrower, Lender's instructions that Lawyer ensure that its documents be properly executed does not, in and of itself, create an attorney-client relationship between Lender and Lawyer." *Id.*

The closing wherein Sidney Risher and Respondent purchased the Property was a "standard real estate closing." As the record shows in the within action, two closing attorneys participated in the transaction at hand. (Hearing on May 12, 2011, Defendant's Ex. 1 and Plaintiff's Ex. 11, R. pp. 178 and 131, respectively). The closing attorneys did not have an attorney-client relationship with Midland Mortgage Corporation but, instead, represented the purchasers, Sidney A. Risher and Respondent.

South Carolina case law holds, "[a]cts of an attorney are directly attributable to and binding upon the client." *Motley v. Williams*, at 112, 647 S.E.2d at 247; *Hillman v. Pinion*, 347 S.C. 253, 257, 554 S.E.2d 427, 429-430 (Ct.App. 2001); *Greenville Income Partners v. Holman*, 308 S.E. 105, 107, 417 S.E.2d 107, 108 (Ct.App. 1992); *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988). The general rule is that the neglect of the attorney is the neglect of the client, and no mistake attributable to an attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. *Simon v. Flowers*, 231 S.C. 545, 99 S.E.2d 391, (1957); *Hillman*, 347 S.C. at 257, 554 S.E.2d at 429-430; *Mitchell Supply Co.*, 297 S.C. at 163-164, 375 S.E.2d at 323. The acts and omissions of the attorney in such case are those of the client. *Simon*, 231 S.C. at 551, 99 S.E.2d at 394; *Mitchell Supply Co.*, at 163-164, 375 S.E.2d at 323.

The closing took place on July 7, 2008. (Settlement Statement, R. p. 131). Both Sidney Risher and Respondent were present at closing. (*See e.g.* Hearing on May 12, 2011, Plaintiff's Ex. 3, 4, 5, 6 and7, R. pp. 119, 120, 12, 122 and 123, respectively). Respondent admitted at her deposition that she was present at closing to purchase the Property, located at 135 Lochweed Drive in Lexington County, South Carolina. (Hearing on May 12, 2011, Plaintiff's Ex. 20, p. 13, l. 3 - 4, R. p. 172). Respondent further admitted in her deposition that she and Sidney Risher decided to use the closing attorney that the Beagles, the Sellers of the Property, were using in connection with the transaction. (Hearing on May 12, 2011 Plaintiff's Ex. 20, p. 18, l. 4 - 20, R. p. 174). The Rishers had and exercised their right to choose the closing attorney. The Lender had no voice in the selection of the closing attorney.

To the extent error or negligence on the part of the closing attorney(s) resulted in either (1) Respondent's name being erroneously added to the deed or (2) Respondent's name being erroneously omitted from the Mortgage, that error or negligence is attributable directly to Respondent as the act or omission of her legal counsel. As such, the Court is not dealing with two innocent parties, but one innocent party, being the Appellant, and one party, Respondent, who is attributed with the error of her legal counsel at closing resulting in the current legal action. As such, equity favors the Appellant.

In his Order, the Master relies on an equitable doctrine, "where there are two (2) innocent parties who must suffer, the law looks with disfavor upon the party who, through due diligence, could have avoided the loss." The origination of the equitable doctrine to which the Master has cited is the equitable maxim, "[t]here is no doctrine of equity jurisprudence better supported by reason as well as authority than this, that when one of two innocent persons must suffer loss, it

must fall on the party who by incaution or misplaced confidence has occasioned it, or placed it in the power of a third party to perpetrate the fraud by which the loss has happened." *City Council of Charleston v. Ryan*, 22 S.C. 339, 348 (1885) (citing *State Bank of S.C. v. Herman Cox & Co.*, 11 Rich. Eq., 350, 32 S.C.Eq. 344, 372 (1860)).

In the within action, Respondent placed confidence in her closing attorney(s) in connection with the purchase of the Property. Due to the negligence or error of the closing attorney or attorneys for the Rishers, Appellant will suffer a loss should the Court deny it equitable remedies. Even this equitable maxim recognizes that misplaced confidence should not protect a party who has occasioned a loss. As the cause of the potential loss to the Appellant originates with the error of the closing attorney, which error is attributable to Respondent, equity favors protection of the Appellant against loss resulting from that error.

CONCLUSION

For the reasons stated, this Court should reverse the Orders of the Honorable James O. Spence and grant Appellant an equitable lien over Respondent's one-half undivided interest in the Property or, in the alternative, find in favor of Appellant that Respondent was unjustly enriched by receipt of the one-half undivided interest in the Property deeded to her at Closing and the benefit she continues to realize at she resides on the Property without paying value therefore.

Respectfully submitted,

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July 9, 2012
1027.195/Final Brief, Complete

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-In-Equity

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Chase Home Finance, LLC ..... Appellant,

v.

Cassandra S. Risher, individually, as Personal Representative and Legal Heir of the Estate of Sidney Allan Risher, Justin R., a minor, Sydney R., a minor, Ashley R., a minor, Sidney J. Risher, Pierre Risher and Drayton Holmes, as Legal Heirs to the Estate of Sidney Allan Risher and Highland Hills Homeowners Association, Inc. ..... Defendants,

Of whom Cassandra S. Risher is ..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellant and Final Reply Brief of Appellant, Chase Home Finance, LLC, comply with Rule 211(b), SCACR.

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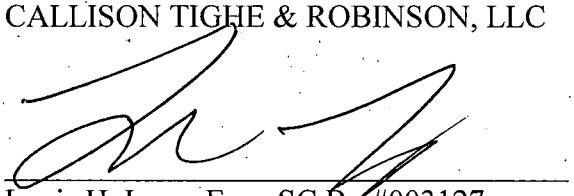

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Of whom Cassandra S. Risher is ..... Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the **Final Brief of Appellant, Chase Home Finance, LLC,** by depositing a copy of it in the United States Mail, postage prepaid, on July 9, 2012, addressed to his attorney of record, at the following address:

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July 9, 2012
Columbia, South Carolina