

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Mikell R. Scarborough, Master In Equity

Appellate Case No.: 2016-001054

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SC Court of Appeals

HSBC Bank USA, National Association, as Trustee for
The Holders of the Deutsche ALT-A Securities, Inc.
Mortgage Loan Trust, Mortgage Pass-Through
Certificates Series 2007-0A4, assignee of Bank of
America, N.A., successor by merger to BAC Home Loans
Servicing L.P., f/k/a Countrywide Home Loans
Servicing, Inc., Appellant,

-vs.-

Clifford L. Ryba, Beverly Ryba;
Regions Bank; First Federal Savings
And Loan Association of Charleston, Citibank (South
Dakota) N.A., and Carol Garfield Goldberg, Defendants,

Of whom Carol Garfield Goldberg is the Respondent.

RETURN TO PETITION FOR REHEARING

The Court observed and understood the Appellant "... **did not** appeal the merits of the master's order- i.e., finding of fraudulent inducement by the Rybas; finding that Bank was not a bona fide purchaser for value; finding that Bank was not a bona fide purchaser of the note and mortgage without notice; finding that Bank was not entitled to the protections available to a holder in due course; finding that Countrywide was not a bona fide purchaser for value without notice and that Bank

could not therefore benefit from the protections of the shelter rule – they are the law of the case.”¹ (Opinion No. 2019-UP-132, p. 3). The Appellant attempts to now appeal the merits of the Master’s Order in its Petition for Rehearing filed on May 13, 2019. The Respondent files this Return to the Petition to address two arguments made by the Appellant why it should be allowed to now appeal the merits of the Master’s Order. First, the Appellant argues, since constitutional standing is a requirement for subject matter jurisdiction, it should now be allowed to argue the Respondent lacked constitutional standing on rehearing. This argument fails because the Respondent had constitutional standing. Second, the Appellant argues, since the Appellant incorrectly argued the Master’s elimination of agency and recasting in his Rule 59 Order left no other finding of fraud, the Appellant now wants to argue the merits of the Master’s other findings of fraud and constructive notice on rehearing. This argument fails because the Master’s other findings of fraud and constructive notice were neither appealed, included in statement of the issues on appeal, nor argued in its brief or at oral argument before the Court. The Respondent requests that the Petition for Rehearing be denied.

I. The Respondent had constitutional standing because she claimed an interest in the property being foreclosed and a personal stake in the outcome of the action.

The Appellant begins its Petition for Rehearing stating, “In its opinion, the Court gave only cursory review to HSBC’s standing arguments and found the

¹ *Dreher v. S.C. Dep’t of Health & Environmental Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) (“[S]hould the appealing party fail to raise all the grounds upon which a lower court’s decision was based, those unappealed findings – whether correct or not –become the law of the case.”)

standing argument unpreserved. Op. No. 2019-UP-132 at 9.” (Petition for Rehearing, p. 3). In point of fact the only standing argument the Appellant raised was the Respondent lacked statutory standing to assert fraud as a defense under § 36-3-305(a)(1)(iii), *S.C. Code Anno.*, as amended July 1, 2009. The Court ruled statutory standing was neither raised nor ruled on below and, therefore, was not preserved.² The Appellant now wants to expand its statutory standing argument to include constitutional standing. The Appellants argues constitutional standing is a prerequisite for subject matter jurisdiction and, therefore, can be raised at any time.³ This argument fails because the Respondent had constitutional standing under South Carolina case law.

All that is required to have constitutional standing is that a party have an interest in the subject matter and a personal stake in the outcome of the action.⁴ The Respondent lived on the property being foreclosed. She claimed she had been defrauded of her title to the property when she successfully defended an action to evict her in the Magistrate’s Court. (R., p. 30). She claimed she was entitled to get title to her property back when she filed her fraud action and *lis pendens* on August 29, 2008.

² The Respondent also noted § 36-3-305(a)(1)(iii) is not applicable to mortgages entered into before July 1, 2009. The Editor’s Note explains the amendment to the Code did not apply to transactions before July 1, 2009. The mortgage being foreclosed was entered into on May 7, 2007. The Code provision in effect at the time the mortgage was entered provided a holder not in due course took the instrument subject to all valid claims on the part of any person. *See*: § 36-3-306, *S.C. Code Anno.*, 1976.

³ *See*: *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417 – 418, 498 S.E.2d 906, 907 – 908 (1998); *Bardoon Props., NV v. Edilon Corp.*, 326 S.C. 166, 168 – 169, 485 S.E.2d 371, 372 – 373 (1997).

⁴ *Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001); *Furman Univ. v. Livingston*, 244 S. C. 200, 204, 136 S. E. 2d 254, 256 (1964); *Duke Power Co. v. South Carolina Pub. Serv. Comm’n*, 284 S. C. 81, 96, 326 S. E. 2d 395, 404 (1985); 4 S.C. Jur., Action § 23.

(R., pp. 49 – 62). She claimed an interest in the property when she filed her Motion to intervene in the foreclosure on January 21, 2012. (R., pp. 458 – 459). The Appellant acknowledged she claimed an interest in the property when it consented to the Order Allowing Intervention filed on March 7, 2012. (R., pp. 44 – 46).

The cases cited by the Appellant discussing constitutional standing are factually and legally distinguishable. Unlike the plaintiffs in *Lennon*⁵ and *HSBC Mortgage Services*,⁶ the Respondent did not claim to represent the interests of third parties. She claimed she had been defrauded of the property being foreclosed by a transaction Countrywide facilitated, turned a blind eye to, and profited from. Unlike the plaintiff in *Doherty*, the Respondent based her claim to the property on fraud, not contract law.⁷ Unlike the plaintiff in *MidFirst Bank*, the Respondent did not file for bankruptcy and abandon her claim by failing to list her interest in the property as an asset of her bankruptcy estate.⁸ None of these cases are applicable.

Finally, the Appellant suggests a fee simple title is required to meet the threshold for constitutional standing but cites no case supporting such a narrow interpretation of the law. No title at all would not have been required in *Lennon*,

⁵ *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 498 S.E.2d 906 (S.C. App. 1998) (individual who was neither an attorney nor association representing its members lacked constitutional standing to assert the interests of adjacent property owners who could be affected by the development permits).

⁶ *HSBC Mortgage Services, Inc.*, Unpublished Opinion No. 2012-209386, 2014 WL 2949773 (S.C. App. June 25, 2014) (individual plaintiffs not attorneys lacked standing to represent non-existent “living trusts” of persons who had an interest in the property).

⁷ *Doherty v. PNC Mortg.*, No. CA 0:14-4013-TLW, 2015 WL 5012823 (D.S.C. Aug. 21, 2015) *aff’d sub nom. Doherty v. PNC Mortg., A Div. of PNC Bank*, 696 F. App’x d102 (4th Cir. 2017) (based on review of South Carolina law, the Court of Appals affirmed the denial of a motion to dismiss plaintiff’s cause of action for violation of the Fair Debt Collections Act but affirmed the granting of cause of action in contract for lack of privity); *see also: Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998) (lessee could sue condominium association for negligence in absence of privity of contract).

⁸ *MidFirst Bank v. Brooks*, No. 2008-UP-196, 2008 WL 9841165 (S.C. Ct. App. Mar. 20, 2008).

supra., as it is evident the adjacent property owners who owned no interest in the subject lots would have had constitutional standing to challenge the development permits. While pointing out the limitations of a quit claim deed, the Appellant forgot to mention the language in a cited cases that a quit claim deed is a lawful way to convey **an interest in land**.⁹ (*Emphasis added*). South Carolina case law does not require party to have a fee simple title to have constitutional standing.

The Petition for Rehearing on the ground the Respondent lacked constitutional standing should be denied.

II. Having unsuccessfully argued the Master's deletion of agency and recasting left no other findings of fraud, the Appellant should not now be permitted to argue on rehearing the Master's other findings of fraud and constructive notice are not supported by the record.

"Every ground of appeal ought to be so distinctly stated so that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue."¹⁰ The Court discussed the Appellant's arguments regarding fraud:

... [W]e note that Bank **did not** appeal the master's findings of fraud. Instead, Bank maintains the master removed the finding that Bank and the Rybas had an agency relationship that would hold Bank vicariously liable for the Rybas' fraudulent conduct, as well as a finding that Bank had inquiry notice of any illegal recasting scheme perpetrated by the Rybas. Bank contends that because both grounds of fraud were removed from the order, it does not contain any findings of fraud. We disagree. (*Emphasis in original*).

^{9 9} *Milton P. Demetre Family Ltd. P'ship v. Beckman*, 413 S.C. 38, 55, 773 S.E.2d 596, 605 (Ct. App. 2014) (citing *Martin v. Ragsdale*, 71 S.C. 67, 77, 50 S.E. 671, 674 (1905)).

¹⁰ *Jones v. Lott*, *supra*. 692 S.E.2d at 902.

Opinion 2019-UP-132, p. 3. Having unsuccessfully argued the deletion of agency and recasting left the Master's Order with no findings of fraud, the Appellant now wants to a second chance on rehearing to argue the Master's other findings of fraud and constructive notice were unsupported by the record. The Appellant contends this new argument was preserved because it should have been "*reasonably clear*" from the unsuccessful argument it made.¹¹

This argument fails because a review of the Appellant's briefs and arguments before this Court shows the Appellant never argued the Master's findings of fraud and constructive notice were not supported by the record. The purported five "red flags" the Appellant now wants to argue were insufficient were never even mentioned in the Appellant's briefs or arguments. The Petition for Rehearing on the ground it was should have been reasonably clear the Appellant intended to argue the Master's other findings of fraud and constructive notice were not supported by the record should be denied.

CONCLUSION

Without question the Master in Equity courts have subject matter jurisdiction to hear mortgage foreclosure cases.¹² Mortgage foreclosures are actions in equity¹³ and courts of equity protect those of whom undue advantage has been taken,¹⁴ abhor a wrong with a remedy,¹⁵ and will look beneath the rigid rules of law to seek

¹¹ *Herron v. Century BMW*, 395 S.C. 461, 463, 719 S.E.2d 640, 643 (2011).

¹² § 42-11-10, et. seq., *S.C. Code Anno.*, as amended; Rules 53 and 71, S.C.R.C.P.

¹³ *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997).

¹⁴ *Smothers v. U.S. Fidelity and Guar. Co.*, 322 S.C. 207, 470 S.E.2d 858 (S.C. App. 1996).

¹⁵ *State ex rel. Daniel v. Strong*, 185 S.C. 27, 192 S.E. 671 (1937).

substantial justice.¹⁶ The Respondent had constitutional standing because she alleged an interest in the subject property where she lived and a personal stake in the outcome of the foreclosure action. The Appellant's too narrow interpretation of constitutional standing would leave the Respondent who was taken advantage of and defrauded of her property with no remedy.

Before disparaging the Master by declaring his fundamental misunderstanding of the mortgage industry infected his entire analysis of the case, the Appellant would do well to remember the procedural history recited by the Master in his Order. R., pp. 20 – 23. It was the Appellant that relied upon the assignments, not the MERS agreement. It was the Appellant that first relied on the holder in due course rule when it moved for summary judgment but then changed its mind and relied on the shelter rule after the hearing. It was the Appellant that completely changed its mind again and relied on a Pooling and Service Agreement (PSA) at trial. It was the Appellant that forgot to introduce a copy of the PSA into evidence even after the Master bent over backwards to give them every opportunity to do so. It was the Appellant's ever changing theories of its case that caused the Master to comment:

If the trial testimony is to be believed, then the two prior assignments recorded in the RMC Office, referenced in pleadings, and relied upon in arguments before this Court were either the product of incompetence, the result of a total lack of accurate record keeping, or a complete sham. This Court is charged with the difficult task and responsibility of deciding cases affecting the lives of citizens whose homes are being foreclosed. Of necessity, the Court must rely on the accuracy of the documents submitted. The Court emphasizes a mortgage foreclosure is an action in equity and a party seeking to foreclose a mortgage must come before the Court with clean hands. Hayne Fed. Credit Union v.

¹⁶ *Id.*

Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997); Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (2010). The inconsistent testimony causes the Court to have great concern about the accuracy and reliability of the documents the Plaintiff relies upon.

It was the Appellant that caused this Court to note they forgot to appeal the merits of the Master's Order. And now, on rehearing, it is the Appellant that wants to change its theories of the case again, raise new issues, and make new arguments now that its old arguments have come up empty handed.

It is respectfully submitted the Master decided this case based on the issues framed by and the evidence, or lack of evidence, produced by the Appellant. It is the Appellant that fundamentally misunderstands the need to raise issues and have them ruled on below, to separately and concisely state the issues to be decided on appeal, and to argue those issues in the brief and oral arguments allotted under the Appellate Court Rules.

It was unexpected fitting that the string of cases cited by the Appellant led to this quote:

The purpose of a petitioner for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose for the petition for a rehearing to have the case tried in the appellate court a second time."¹⁷

¹⁷ *Herron v. Century BMW*, 395 S.C. 461, 463, 719 S.E.2d 640, 643 (2011) *citing Kennedy v. S.C. Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)).

The Appellant should not now be granted a second hearing to argue points it overlooked or misapprehended at the first hearing. The Petitioner for Rehearing should be denied.

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23rd day of May, 2019.

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Of whom Carol Garfield Goldberg is the Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the Respondent's Return to Petition for Rehearing depositing copies of it in the United States Mail, postage prepaid, on May 23, 2019, addressed the following persons:

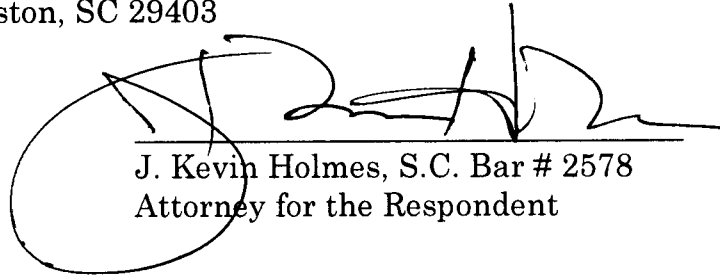
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May 23, 2019

The Honorable Jenny Abbott Kitchings
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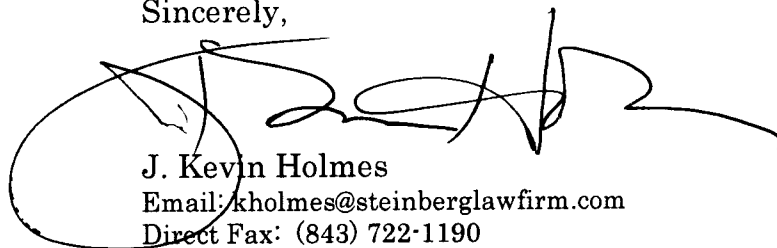
SC Court of Appeals

Re: HSBC Bank of USA, et al. v. Clifford L. Ryba, et al.
Appellate Case No: 2016-001054

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of the Respondent's Return to the Petitioner for Rehearing and a Certificate of Service on opposing counsel.

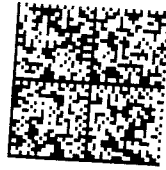
Sincerely,



J. Kevin Holmes
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JKH /jkh
Enclosures

cc: A. Mattison Bogan, Esquire
Erica G. Lybrand, Esquire
B. Lindsay Crawford, Esquire
Nicholas Ray Sanders, Esquire
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