THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Honorable Steven C. Kirven, Master-In-Equity

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SC Court of Appeals

Case No. 2011-CP-37-1056

Appellate Case No. 2017-000886

Federal National Mortgage Association..RESPONDENT

v.

John D. Dalen, Julie A. Dalen and Wawtockace Hills Property Owners Association..DEFENDANTS

Of whom John D. Dalen and Julie A. Dalen are...APPELLANTS

And

John D. Dalen and Julie A. Dalen ....APPELLANTS

v.

Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P...RESPONDENT

RESPONDENT BANK OF AMERICA, N.A.'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

Pursuant to the Court's order of July 16, 2019, Appellee Bank of America, N.A. ("BANA") hereby objects to the Petition for Rehearing filed by Appellants John D. Dalen and Julie A. Dalen (collectively, "the Dalens or "Appellants"). The Petition for Rehearing is nothing more than an attempt to argue their unsuccessful appellate arguments a second time. Nothing raised in Petition shows that the Court overlooked or misapprehended the record for the Foreclosure Action or application of South Carolina law to the issues on appeal. Accordingly, for the following reasons, the Petition should be denied because the Court properly affirmed the Trial Court foreclosure judgment in favor of Federal National Mortgage Association ("FNMA" or "Fannie Mae"):

ARGUMENT

I. BECAUSE APPELLANTS' NEVER ARTICULATED ANY GROUNDS TO APPEAL THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO BANA FOR APPELLANTS' COUNTERCLAIMS, APPELLANTS ARE NOT ENTITLED TO ANY REHEARING ON SUCH ISSUES THAT WERE NEVER PROPERLY RAISED IN THEIR BRIEF.

As stated previously in BANA's Final Respondent's Brief, Appellants have abandoned the issue of whether the Trial Court erred in Granting BANA's Renewed Motion for Summary Judgment ("Motion") as they have failed to provide *any* argument in their Brief as to *how* the Trial Court erred in granting the Motion. Beyond the conclusory assertions in their Final Appellant's Brief "that [BANA] rehashed previous arguments, presented no new issues or evidence," and that the Dalens' "brought up Judge Macaulay's denial of [BANA's] first motion for summary judgment" as the reason the Renewed Motion for Summary Judgment should have been denied, Appellants provide no argument as to *how* the Trial Court erred in granting BANA's Motion. (Appellant's In. Br. p. 7.) Appellants have also failed to cite to *any* legal authority to demonstrate how the granting of BANA's Motion was error. (*Id.*) As such, Appellant has failed to preserve the issue for review. *See Jinks v. Richland Cty.*, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3

(2003) (concluding that an issue raised in appellant's brief was abandoned when appellant provided no argument on the issue); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority."); *Jones v. SC Dep't of Health & Envtl. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2009) (argument abandoned where appellant failed to explain *how* the trial court erred); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (concluding that appellant's one-sentence argument was too conclusory to preserve an issue for appellate review).[1] Accordingly, Appellants' Petition for Rehearing should be denied to the extent it is attempting to raise waived arguments concerning the Trial Court's grant of summary judgment in favor of BANA.

II. THE TRIAL COURT PROPERLY REFERRED SUBJECT MATTER JURISDICTION OVER THE FORECLOSURE ACTION TO THE MASTER-IN-EQUITY FOR FINAL ADJUDICATION.

This Court properly concluded that the Master-In-Equity had subject matter jurisdiction over the Foreclosure Action pursuant to an order of reference that Appellants never timely appealed.

Under South Carolina law, "[s]ubject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." *Watson v.*

[1] Because Appellants failed to make any argument in their Brief as to *how* the Trial Court erred in granting BANA's Renewed Motion for Summary Judgment, they improperly articulate such an argument in their *Reply Brief.* The Court should not consider these improperly raised arguments. *See Fields v. Melrose Ltd. P'ship*, , 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) ("[A]n appellant may not use the reply brief to argue issues not argued in his brief in chief[.]"); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (holding that even if an argument is raised in an initial brief, if the argument is conclusory and unsupported by authority, the argument is not preserved for review and the appellant is precluded from more fully addressing the issue in a reply brief).

Watson, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995) (internal quotations omitted). The Master–in–Equity is considered a division of the circuit court and obtains jurisdiction through an order of reference from the circuit court. *See* S.C.Code Ann. § 14–11–15 (2006); S.C. R. Civ. P. 53. A master would then have subject matter jurisdiction over a properly referred foreclosure action. *See, e.g., Wachovia Bank of South Carolina, N.A. v. Player,* 341 S.C. 424, 427, 535 S.E.2d 128, 129 (2000) (holding that master in equity had subject matter jurisdiction to address post-judgment motions pursuant to order of reference).

On November 17, 2014, BANA filed a Motion to Strike Jury Trial Demand and Refer to the Master-in-Equity ("Motion for Order of Reference"), and, on the same day, the Dalens filed a Motion for Summary Judgment arguing that the 2011 Assignment to BANA was void and BANA therefore lacked standing to foreclose. [R. pp. 185–86, 187–88.] Following a hearing on both motions, the Trial Court rendered its rulings in a Form 4 order, entered on January 28, 2015, denying the Dalen's Motion for Summary Judgment and granting BANA's Motion for Order of Reference; a formal order was entered on February 25, 2015 ("Order of Mandatory Reference"). [R. pp. 9–10, 11–14.] In the Order, the Trial Court denied the Dalen's Motion for Summary Judgment concluding, *inter alia*, that because BANA was the undisputed servicer of the loan when the Complaint was filed, BANA was a real party in interest with standing to foreclose. [*Id.*] The Dalens did not appeal the Order of Mandatory Reference, which was entered by a Circuit Court Judge and authorized the Master-In-Equity "to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP." [*Id.* at 13-14.]

Because the Trial Court properly entered the Order of Mandatory Reference after conducting a merits hearing for BANA's Motion for Order or Reference [*Id.* at 11], this Court

property concluded that the Master-In-Equity had subject matter jurisdiction to adjudicate all claims and issues arising the Foreclosure Action.

III. FANNIE MAE HAD STANDING TO PROSECUTE THE FORECLOSURE ACTION UNDER SOUTH CAROLINA LAW AS THE HOLDER OF THE NOTE FOR APPELLANTS' LOAN.

This Court properly concluded that the transfer of the Appellants' Loan to Fannie Mae was not fraudulent and that Fannie Mae had standing to prosecute the Foreclosure Action.

South Carolina law recognizes that standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. *Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013). Mortgage loan servicers, such as BANA, have standing to foreclose a mortgage loan because of their pecuniary interests in collecting payments made under a mortgage loan or the servicer's contractual duty to collect payments and foreclose mortgages in the event of default. *Id.* at 222, 405 S.E.2d at 482 (quoting *In re Woodberry*, 383 B.R. 373, 379 (Bankr. D.S.C. 2008) and *In re Neals*, 459 B.R. 612, 617 (D.S.C. 2011)). Further, the holder of a mortgage note, such as Fannie Mae, can have standing to foreclose upon proof that it is in physical possession of a properly indorsed note. *See id.* at 223-24, 405 S.E.2d at 482-83 (citing S.C. Code Ann. §§ 36-1-201(20) & 36-3-602(a)).

The record for the Foreclosure Action reflects that in the Order of Mandatory Reference, the Trial Court properly concluded that BANA had standing to file the Foreclosure Action as the servicer of the Appellants' Loan. [R. pp. 12.] Next, in the Trial Court's Order Substituting Plaintiff, the Trial Court concluded that Appellants' Loan was transferred to Fannie Mae after conducting a hearing for BANA's Motion to Substitute Plaintiff and considering the record developed at the hearing. [R. pp. 19.] At the trial for the Foreclosure Action, Fannie Mae presented the testimony of William Rankin ("Rankin"), a litigating officer with Seterus, Inc.

("Seterus"), the servicer of the Loan. [R. pp. 387:1–388:5.] Rankin testified that he had personal knowledge of the business records maintained by Seterus in connection with the Loan. [R. pp. 388:1–16.] Rankin identified the Note, executed by Appellant John D. Dalen, and the Mortgage, executed jointly by the Dalens, and he testified that the Mortgage constituted a first mortgage lien on the Dalen's property. [R. pp. 388:17–390:12.] Rankin testified that Seterus was in possession of the Note through FNMA's counsel and that the Note was endorsed in blank and present in the courtroom during Trial. [R. p. 389:14–21.]

Here, the record shows that the evidence that Fannie Mae presented at trial, proved that Fannie Mae had standing to foreclose the Loan because Fannie Mae was in possession of the Note that was signed by Appellant John D. Dalen and was also indorsed in blank. Accordingly, upon proof of possession of the Note with a blank indorsement, the Trial Court properly recognized that Fannie Mae—as the holder of the Note—had standing to prosecute the Foreclosure Action.

IV. THE APPELLANTS ARE PRECLUDED FROM RAISING MODE OF TRIAL ISSUES ON APPEAL BECAUSE THEY WAIVED THE RIGHT TO DO SO BY FAILING TO APPEAL TIMELY THE TRIAL COURT'S ORDER OF MANDATORY REFERENCE.

This Court properly concluded that Appellants failed to preserve any mode of trial issues for this appeal.

Following the entry of the Order of Mandatory Reference on February 15, 2015, Appellants did not appeal from the order. As the South Carolina Supreme Court has explained, "[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable. The failure to timely appeal the interlocutory order of the trial court effects a waiver of appeal rights." *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) (internal citations omitted) (dismissing the appellant's argument regarding mode of trial because the issue was not preserved for appellate review); *see also First Union Nat'l*

Bank of S.C. v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372, 377–78 (Ct. App. 1998) (holding that the appellant's failure to appeal the denial of a motion for a jury trial precluded the Court of Appeals from addressing the issue).[2]

While Appellants contend that the Order of Mandatory Reference denied their right to a trial by jury, they did not appeal from the order. That failure to appeal is fatal to Appellants' appeal now. Even assuming *arguendo* that they had any right to a jury trial for the Foreclosure Action, Appellants' failure to appeal from the Order of Mandatory Reference established the order as the law of the case and precludes therr present challenge the non-jury mode of trial completed by the Master-In-Equity.

The South Carolina Supreme Court has left no doubt of this result. In *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985), that court recognized that the appellant was correct that he had a right to a jury trial instead of having the case decided by a master. But the appellant "failed to appeal" the order of reference. *Id.* at 542–43, 331 S.E.2d at 352. That order, the supreme court explained, "should have been appealed immediately because it affected the mode of trial, a substantial right." *Id.* at 543, 331 S.E.2d at 352. Because the appellant did not appeal, that order "became the law of the case." *Id.*; *see also Soden*, 333 S.C. at 566, 511 S.E.2d at 378 ("Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, *right or wrong*, is the law of the case and requires affirmance." (emphasis added)). Here, the result is the same. Regardless of whether Appellants had a right to a jury trial,

[2] The Court's ruling in *South Carolina Community Bank v. Salon Proz, LLC,* 420 S.C. 89, 800 S.E.3d 488 (Ct. App. 2017) is inapposite. Unlike *Salon Proz*, a Circuit Court Judge entered the Order of Mandatory Reference after conducting a merits hearing for BANA's Motion for Order of Reference [R. pp. 9–10, 11–14] rather and a clerk of court without any merits hearing.

when they failed to appeal the Order of Mandatory Reference, that order became the law of the case. Accordingly, Appellants did not preserve mode of trial issues for this appeal.

V. APPELLANTS ALSO WAIVED APPEAL OF MODE OF TRIAL ISSUES BY LITIGATING THE MERITS OF VARIOUS MOTIONS BEFORE THE MASTER-IN-EQUITY.

In addition to this appeal being barred by the law of the case doctrine, Appellants also waived any objection to the Order of Mandatory Reference they may have had by their participation in proceedings before the Master-in-Equity. Participating in these proceedings is acquiescence to the Master-in-Equity's authority to decide the merits of the case, so Appellants cannot now challenge the Master's appointment on appeal.

As this Court has established, when a party participates in proceedings before the Master-in-Equity without objection to his appointment, that party waives its right to contest the order of reference on appeal. In *Karl Sitte Plumbing Co., Inc. v. Darby Development Co. of Columbia, Inc.*, 295 S.C. 70, 72, 367 S.E.2d 162, 164 (Ct. App. 1988), this Court held that although the trial court erred in entering an order of reference, when the appellant "participated in the reference proceedings without objecting or excepting to the order of reference or to the master's appointment, authority, or jurisdiction," the appellant "waived any objection it might have had to the action being referred."

That rule controls the outcome of this case. Here, following the entry of the order of Mandatory Reference, Appellants not only failed to appeal from the order, but they also actively participated in proceedings before the Master-in-Equity *without* objecting to the appointment of the Master-In-Equity to adjudicate the Foreclosure Action. In fact, Appellants did more than simply participate: they proactively sought an adjudication of the merits of the case from the Master-in-Equity by filing a Motion to Compel Discovery and Motion to Compel Mediation [R.

pp. 189–90], a Motion for Reconsideration of the Master-In-Equity's summary judgment award to BANA [R. pp. 233-46], two Motions to Dismiss for Lack of Subject Matter Jurisdiction [R. pp. 225-32, 247-60], and a Motion for New Trial [R. pp. 283-97]. Critically, the Appellants never made a targeted objection to the Master-In-Equity's appointment and authority under the Order of Mandatory Reference.

Because Appellants filed various motions that were adjudicated by the Master-In-Equity and participated in hearings for these filings before the Master-in-Equity without objecting to his appointment or his authority to rule on the merits of the case—and indeed, affirming his authority to do so, *see Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson*, 395 S.C. 25, 36, 716 S.E.2d 337, 343 (Ct. App. 2011) (noting that a motion for summary judgment before a Master-in-Equity seeks an adjudication on the merits of the claims)—Appellants have waived their objection and ability to appeal the Order of Mandatory Reference, *see Karl Sitte Plumbing*, 295 S.C. at 73, 367 S.E.2d at 164. Accordingly, any objection that Appellants have to the Foreclosure Action being referred to the Master-in-Equity must fail.

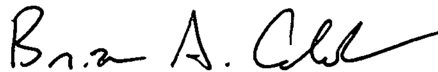
CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Rehearing.

This the 24th day of July, 2019.

Respectfully submitted,

MCGUIREWOODS LLP



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CERTIFICATE OF SERVICE

The undersigned attorney for the Respondent Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P. certifies that its *Return to Appellant's Petition for Rehearing* was served on the parties to this action by depositing a copy thereof in the United States Mail, first class, postage prepaid, on July 24, 2019, to the following:

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Dear Sir or Madam

Enclosed for filing please find one (1) original and six (6) copies of Respondent Bank of America, N.A.'s Return to Appellant's Petition for Hearing. Once file-stamped, please return a copy in the enclosed self-addressed, stamped envelope provided for your convenience.

Thank you for your assistance to this matter, and should you have any questions, please do not hesitate to contact me.

Very truly yours,

McGuireWoods LLP

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Enclosures

cc: John D. Dalen
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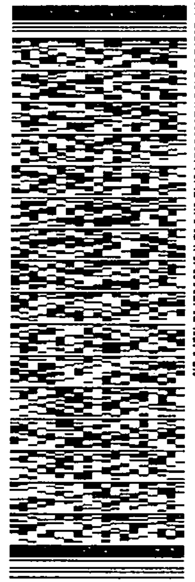

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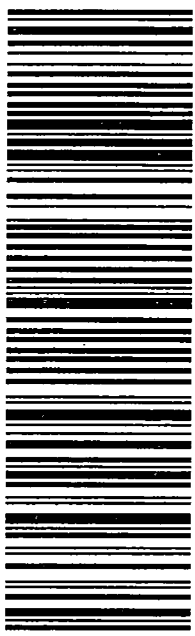

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