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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

The Honorable James O. Spence, Master-in-Equity

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APPELLATE CASE NO. 2017-000874



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The Bank of New York Mellon, f/k/a The Bank of New York as successor-in-interest to JPMorgan Chase Bank, N.A. as successor in interest by merger to Bank One, N.A. as Trustee for Structured Asset Mortgage Investments, Inc., Mortgage Pass-Through Certificates, Series 2002-AR4 ..... Respondent,

vs.

Cathy C. Lanier, Branch Banking and Trust Company, Regions Bank, ..... Defendants,

Of Whom Cathy C. Lanier is the ..... Appellant.

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**PETITION FOR REHEARING AND REHEARING *EN BANC***

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Pursuant to Rule 219 and Rule 221(a) of the South Carolina Appellant Court Rules, Appellant Cathy C. Lanier hereby files this Petition for Rehearing and for Rehearing *En Banc.* Appellant respectfully submits that rehearing and/or issuance of a new opinion reversing the Trial Court's opinion is warranted on the grounds that the Panel's decision overlooked or misapprehended matters of law and fact.

## INTRODUCTION

In Unpublished Opinion No. 2019-UP-284 filed August 7, 2019, a Panel of this Court affirmed the Lower Court's Order granting Respondent Summary Judgment. Appellant respectfully submits that the Panel overlooked, misapprehended and misapplied matters of law and fact in rendering this Opinion and in affirming the decision of the Lower Court. As a result, this Court should grant rehearing and/or rehearing *en banc* in this matter as to the Panel's Opinion 2019-UP-284.

## ARGUMENT

### I. The Panel's Opinion Misapprehends, Overlooks and Ignores Genuine Issues of Material Fact with Respect to the Ownership of the Note Which Forms the Basis of Respondent's Lawsuit

It is well-settled under South Carolina Law, that the plaintiff in a foreclosure suit should be the real, beneficial owner of the mortgage debt. See, *Bank of America, N.A. v. Todd DRAPER, Mortgage Electronic Registration Systems, Inc., acting as nominee for American Home Mortgage, its successors and assigns, Shawn Kephart, Matthew H. Henrikson, the United States of America, by and through its agency, the Internal Revenue Service, South Carolina Department of Revenue, Branch Banking and Trust Company, and Linkside III Homeowners Association, Inc., 405* S.C. 214, 746 S.E.2d. 478 (2013). Viewing the evidence presented to the lower court in the light most favorable to Appellant, there are concrete factual issues as to whether the Respondent in this case is, in fact, the real owner of the mortgage debt and therefore entitled to pursue this case against Appellant. Considering the evidence in the light most favorable to Appellant, the documentation regarding ownership in this case is vague at best and is certainly not sufficient to entitle Respondent to an Order of the Court granting it Summary Judgment as a Matter of Law.

The Panel overlooked these concrete issues in its Opinion affirming the Lower Court's granting of Summary Judgment to Respondent.

As evidenced by the attachments/exhibits to the Respondent's Complaint, the note and mortgage were originally delivered by the Appellant to SouthStar Funding. (R. pp. 906-1375). The note is to SouthStar. The mortgage is to SouthStar. (R. pp. 906-1375). Despite these documents, Respondent now claims to hold the note and mortgage and claims it is entitled to pursue this case against Appellant. (R. pp. 28-34).

Respondent seeks judgment on the note and seeks to have that judgment foreclosed pursuant to what is alleged to be an assignment. There is nothing in the record to indicate any valid assignment to the Respondent. Respondent claims to hold the note and mortgage. Appellant has throughout this litigation and still disputes factually as to whether Respondent does, in fact, hold the note and mortgage. (R. pp. 35-42: 205-226; 804, l. 15-805, l. 2; 812, l. 5 – 813, l. 12; 822, l. 6 – 823, l. 4).

Appellant presented to the Court an affidavit by a potential expert witness, William McCaffrey. (R. pp. 458-461). Mr. McCaffrey is a consultant for Housing Mortgage Consultants, Inc. He indicated in this affidavit that his experience in the banking industry, "...encompasses over three decades of service for federally insured institutions including ten years with... (his) previous organization, Indy Mac Bank, FSB." (R. pp. 458). Mr. McCaffrey's affidavit raises serious doubts as to the chain under which the Respondent now claims to have received its rights to pursue its action against Appellant. The affidavit of Mr. McCaffrey raises substantial factual issue(s) as to whether or not the alleged assignment to Respondent is valid and whether or not the Respondent has any right to pursue an action against Appellant. This affidavit and its opinions represent the "scintilla"

of evidence necessary to prohibit the Lower Court from granting summary judgment in this case. *Hancock v. Hunter,* 381 S.C. 326, 673 S.E.2d. 801 (2009).

There are outstanding questions regarding whether or not Respondent is the proper party to commence this case against Appellant. The Court's Order granting Summary Judgement on this issue was erroneous in light of these outstanding issues of fact. The Panel overlooked these outstanding issues in issuing its opinion affirming the Order of the Lower Court.

## II. The Panel's Decision overlooks and Misapplies Issues of Material Fact with Respect to the Respondent's standing to bring this Lawsuit against Appellant

Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Powell ex rel. Kelley v. Bank of Am.,* 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct.App.2008). "Standing is ... that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." "It concerns an individual's sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." "Standing is a fundamental requirement for instituting an action." *Brock v. Bennett,* 313 S.C. 513, 519, 443 S.E.2d 409, 412 (Ct.App.1994).

Generally, a party must be a real party in interest to the litigation to have standing. *Hill v. S.C. Dep't of Health & Envtl. Control,* 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (internal quotation marks omitted). "A real party in interest for purposes of standing is a party with a real, material, or substantial interest in the outcome of the litigation." *Id.* (internal quotation marks omitted).

Rule 17(a) of the South Carolina Rules of Civil Procedure requires that every action be prosecuted in the name of the real party in interest. It is ownership of the right sought to

be enforced which qualifies one as a real party in interest, rather than absolute ownership of specific property. 4 S.C. Jur. *Action* § 23 (1991). It is a fundamental principle under South Carolina Law A party seeking to establish standing bears the burden of proving it. *See South Carolina Public Interest Foundation v. South Carolina Trans. Infrastructure Bank,* 403 S.C. 640, 744 S.E.2d 521 (2013); *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.,* 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

Throughout this case the Appellant has attempted to raise this issue before the Court. Respondent has failed to establish that it has standing to maintain this action against Appellant. As set forth above, Respondent has not provided sufficient proof that it is the real party of interest with standing to pursue this action against Appellant. Respondent has not presented any credible evidence that it was authorized by anyone to bring this lawsuit against Appellant. There are significant issues as Respondent's claim to be the real party in interest in this matter and these issues were overlooked and ignored by the Trial Court and the Panel in issuing its opinion in this case.

Appellant has contended throughout this litigation that there appears to be significant factual issues as to who actually has the right or standing to initiate and pursue this action against her. Throughout the litigation, Appellant has raised issues regarding whether this action is being brought and pursued by the servicer of her loan, JPMorgan Chase Bank, N.A. or the Trustee, despite the fact that Respondent, is the named Plaintiff in this lawsuit. (R. pp. 28-42; 205-226). There has been no showing that the Respondent Bank of New York Mellon has, in any way ever authorized this lawsuit. (R. pp. 779-785). These questions were overlooked and ignored by the Lower Court in its Order granting

Respondent's Motion for Summary Judgment and by the Panel in its Opinion affirming the Lower Court's Order.

At the hearing before the Lower Court, Respondent presented to the Court an alleged affidavit of Joseph G. Devine, Jr., an employee of JPMorgan Chase Bank, ND ("Chase") who claims in his affidavit to be an "attorney in fact" for the Respondent. (R. pp. 908-948).

While there is no power of attorney which has been produced indicating Mr. Divine has any authority to speak for anyone, according to the content of his affidavit, the note and mortgage are in possession of Chase. The note and mortgage are not in possession of Respondent. There is nothing to indicate Chase and Respondent are one and the same. If the note belongs to Respondent and if Respondent has the authority to sue on the note, there must be documents somewhere which provide as such. No such documents have been produced to anyone in this case. There is no legitimate explanation as to why Chase holds the note if the note belongs to Respondent. The affidavit of Mr. Devine creates outstanding questions of fact which were ignored by the Trial Court in granting Respondent's Motion for Summary Judgment and in denying the Appellant's Motion for Reconsideration. As set forth above, Respondent has fought Appellant's efforts throughout this litigation to "get to the bottom" of this issue through discovery.

SC Code § 36-3-301 requires proof by a Respondent that it is the holder of a note and mortgage and that it has a right to sue. There simply exists in this case no such proof at this time. At the very least, there is a question of fact as to whether Respondent has complied with discovery and as to whether Respondent is the holder of the note and mortgage. The Panel overlooked and misapprehended this lack of proof and misapplied

this South Carolina Law in issuing its opinion affirming the Lower Court's granting of Summary Judgement in this case.

## III. The Panel's Opinion overlooks and ignores the existence of Genuine Issues of Material Fact with Regards to Appellant's Rights

Respondent claims to be a trust. Appellant has sought to review the trust document. Respondent has never produced the trust document which would show what the Respondent's rights are under the trust. In short, Respondent has not complied with discovery as to the trust document itself. It is unclear that any such trust actually exists. Appellant cannot prove Respondent has no rights under the trust document because Respondent will not produce the trust document which has been requested in discovery.

Appellant points out the fact that Respondent has never demonstrated when or where the note and mortgage were assigned to the trust. Respondent has never produced any document showing where the note or mortgage were assigned to the trust.

Appellant provided the Lower Court with documents from the Securities and Exchange Commission. These documents are all Appellant has been able to secure as to what, if any, rights the Respondent has under the trust documents. The prospectus and the servicing documents have been filed with the SEC. Pursuant to the documents filed with the Securities and Exchange Commission, the trustee is not allowed to bring a foreclosure. The Securities and Exchange Commission documents provide the servicing company is the only party with the authority to bring a foreclosure action. Respondent is not a servicing company. The servicing company is Alliance Mortgage Company. Thus, either Respondent has no right to bring this action or the documents filed with the Securities and Exchange Commission are inaccurate and/or fraudulent.

There exists in this case a legitimate question as to whether or not the Respondent owns the note and mortgage and as to whether the Respondent has a right to commence foreclosure action such as the one at bar. The Panel overlooked and misapprehended this lack of proof in issuing its opinion affirming the Lower Court's granting of Summary Judgement in this case.

The trust apparently claims to have gotten the note and mortgage from EMC Mortgage. EMC Mortgage claims to have gotten the note and mortgage from Southeastern Funding. There is no document which has been presented to the Court to show how Southeastern Funding claims to have gotten the note and mortgage or to have transferred it to EMC. Again, the chain to title is simply questioned and the Appellant has sought proof as to the chain of title from the Respondent. Respondent has not produced the documents in order to establish a chain of title or to establish ownership of a note and mortgage.

The record does reflect the Appellant to have filed significant discovery requests. Appellant has filed a motion to compel. Notwithstanding the attempt by the Appellant to secure discovery, nothing has been produced. Respondent should be required to produce a legitimate chain of title and proof it has a right to foreclose before this matter is ultimately decided. The Panel overlooked and misapprehended this lack of proof in issuing its opinion affirming the Lower Court's granting of Summary Judgement in this case.

## IV. The Panel's Opinion Misapprehends, Misconstrues and Overlooks South Carolina Law in Excluding and Disregarding the Affidavit of the Appellants Proposed Expert William McCaffrey

As set forth above, Appellant presented to the Court an affidavit by a potential expert witness, William McCaffrey. (R. pp. 458-461). Mr. McCaffrey is a consultant for

Housing Mortgage Consultants, Inc. He indicated in this affidavit that his experience in the banking industry, "...encompasses over three decades of service for federally insured institutions including ten years with... (his) previous organization, Indy Mac Bank, FSB." (R. p. 458). The Respondent did not take Mr. McCaffrey's deposition prior to the scheduled hearing.

Mr. McCaffrey's affidavit raises serious doubts as to the chain under which the Respondent now claims to have received its rights to pursue its action against Appellant. The affidavit of Mr. McCaffrey raises substantial factual issue(s) as to whether or not the Respondent has any right to pursue an action against Appellant. It is his opinion based on his review of the pertinent documents that Respondent does not have adequate proof of ownership to commence and pursue this action against Appellant.

Mr. McCaffrey was somewhat at a disadvantage in that he did not have the documents which were requested in discovery. His ability to offer an expert opinion was limited by a lack of cooperation from the Respondent in providing discovery. It is Mr. McCaffrey's opinion based upon what he has seen that the loan is no longer secured by real estate. If such an opinion is true then, of course, Respondent would not be entitled to foreclose on the mortgage.

The Panel erroneously disregarded the affidavit of Mr. McCaffrey. As set forth above, the affidavit was based on the prospectus and pooling agreement obtained by Mr. McCaffrey from the Securities and Exchange Commission's website, in part, due to the Respondent's failure to produce these documents pursuant to discovery in this case. The Panel found and ruled that these attachments/exhibits were hearsay and used this basis to find and rule that Mr. McCaffrey's; affidavit did not create a question of fact because it

was based on hearsay. However, Rule 703 of the South Carolina Rules of Evidence provides that an expert may base his or her opinion on inadmissible evidence. *Ellis v. Oliver,* 323 S.C.121, 473 S.E.2d. 793 (1996); *Hundley ex. Rel. Hundley v. Rite Aid of South Carolina, Inc.,* 339 S.C. 285, 529 S.E.2d. (Ct. App. 1999). Even if the materials relied upon by Mr. McCaffrey were hearsay (which Appellant disputes), the attachments/exhibits do not constitute a basis to disregard his opinion(s) in its entirety.

In addition the Court erroneously disregarded his opinion on the grounds that it contained legal conclusions. Unlike the affidavit at issue in *Dawkins v. Fields,* 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003), Mr. McCaffrey's affidavit does not attempt to usurp the Lower Court by merely setting forth reasons why Summary Judgment should be denied. As argued numerous times in this Brief, the Appellant contends that Respondent is not the proper party to enforce the note and mortgage and therefore has no standing to pursue this action. Mr. McCaffrey's affidavit supports this contention. It is not an effort/attempt to usurp the role of the Trial Judge and is distinguishable from the affidavit at issue in the *Dawkins* case.

Mr. McCaffrey's affidavit (and its attachments) create significant questions of fact. Since there is a question of fact in this regard, summary judgment should not have been granted and the Lower Court erred in granting Respondent Summary Judgment and in denying the Appellant's Motion to Reconsider.

All of the documents in the case tend to indicate Respondent may not be the appropriate Plaintiff. The documents which are alleged to be assignments are not by or to the holder of the note. There is a gap in the chain of title as to the note and mortgage. Neither the allonge nor the mortgage show how the Respondent ever acquired the note and

mortgage which are being sued on. These are outstanding factual issues which were ignored by the Lower Court in his Order granting Summary Judgment and by the Panel in this case in its opinion affirming the decision of the Lower Court.

## V. The Panel's Opinion Misapprehends, Misconstrues and Ignores Genuine Issues of Material Fact Arising out of the Affidavit of Appellant's Expert William McCaffrey

There are outstanding questions of fact regarding the assignment of the Appellant's mortgage. At the hearing before the Lower Court, Respondent's counsel attempted to explain this issue to the Court. (R. pp. 799, l. 25 – 800, l. 23; 814, ll. 17-21).

The documents do contain a gap as set forth above. There is nothing in the documents transferring the note and mortgage to Chase. (R. pp. 28-34). There is nothing in the documents placed into the record transferring the note and mortgage from Chase to the Respondent (R. pp. 28-34). The allonge states SouthStar has transferred to Bank One. The transfer to Bank One is where the transfers stop. There is no allonge or assignment from Bank One to Chase. There is no allonge or assignment from Chase to the Respondent. According to the documents put into the record, the last owner of the note and mortgage is Bank One.

In short, there are serious questions of law and fact regarding the assignments upon which the Respondent bases its rights to pursue its action against Appellant. The Lower Court ignored these issues in granting Summary Judgment to the Respondent and in denying the Appellant's Motion for Reconsideration.

## VI. The Panel's Opinion Misapprehends and Misapplies South Carolina Case Law Regarding Summary Judgment and Disregards the Facts presented before the Lower Court

The Panel's decision affirming the Lower Court's granting of Summary Judgment to Respondent misapprehended and misapplied South Carolina Case Law regarding Summary Judgment and disregarded and ignored facts presented before the Lower Court. Pursuant to South Carolina Law, a trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; *Tupper v. Dorchester County,* 326 S.C. 318, 487 S.E.2d. 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Law v. S.C. Dept. of Corrections,* 368 S.C. 424, 629 S.C.2d. 643 (2006); *Manning v. Quinn,* 294 S.C. 383, 365 S.E. 2d. 24 (1988). A court considering summary judgment does not make factual determinations or consider the merits of competing testimony. *David v. McLeod Regional Medical Center,* 367 S.C. 242, 626 S.E. 2d. 1 (2006).

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Doe ex. rel. Doe v. Batson,* 345 S.C. 316, 548 S.E.2d. 854 (2001) (citing *Baughman v. American Tel. & Tel. Company,* 306 S.C. 101, 410 S.E. 2d. 537 (1991)). "Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Gignilliat v. Gignilliat, Savitz and Bettis,*

*LLP*, 385 S.C. 452, 684 S.E. 2d. 756 (2009). Further, it is well-settled under South Carolina Law that complex issues or novel questions should not be disposed of in summary fashion. *Jackson v Atlantic Soft Drink*, 286 SC 577, 336 S.E.2d 13 (1985).

There are outstanding questions of fact regarding the assignment of the Appellant's mortgage. At the hearing before the Lower Court, Respondent's counsel attempted to explain this issue to the Court. (R. pp. 799, l. 25 – 800, l. 23; 814, ll. 17-21).

The documents do contain a gap as set forth above. There is nothing in the documents transferring the note and mortgage to Chase. (R. pp. 28-34). There is nothing in the documents placed into the record transferring the note and mortgage from Chase to the Respondent (R. pp. 28-34). The allonge states SouthStar has transferred to Bank One. The transfer to Bank One is where the transfers stop. There is no allonge or assignment from Bank One to Chase. There is no allonge or assignment from Chase to the Respondent. According to the documents put into the record, the last owner of the note and mortgage is Bank One.

In short, there are serious questions of law and fact regarding the assignments upon which the Respondent bases its rights to pursue its action against Appellant. The Lower Court ignored these issues in granting Summary Judgment to the Respondent and in denying the Appellant's Motion for Reconsideration. The Panel overlooked and misapprehended these issues in issuing its opinion affirming the Lower Court's granting of Summary Judgement in this case.

## CONCLUSION

Based on the foregoing, Appellant Cathy C Lanier respectfully requests that this Court grant rehearing or rehearing e*n banc* as to the Court's opinion in this matter.

Respectfully submitted,

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August 22, 2019

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

The Honorable James O. Spence, Master-in-Equity

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APPELLATE CASE NO. 2017-000874

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The Bank of New York Mellon, f/k/a The Bank of New York as successor-in-interest to JPMorgan Chase Bank, N.A. as successor in interest by merger to Bank One, N.A. as Trustee for Structured Asset Mortgage Investments, Inc., Mortgage Pass-Through Certificates, Series 2002-AR4 ..... Respondent,

vs.

Cathy C. Lanier, Branch Banking and Trust Company, Regions Bank, ..... Defendants,

Of Whom Cathy C. Lanier is the ..... Appellant.

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**PROOF OF SERVICE**

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I certify that I have served the Petition for Rehearing and Rehearing *En Banc* by U. S. Mail on August 22, 2019, to the following counsel of record addressed as follows:

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Lynn G. Ivey

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August 22, 2019

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August 22, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court of the South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: The Bank of New York Mellon, *et al.* v. Cathy G. Lanier, *et al.*
Appellate Case No. 2017-000874

Dear Ms. Kitchings:

Please find with this letter the original and 3 copies of Appellant's Petition for Rehearing and Rehearing *En Banc* in this matter. Also enclosed is our firm check in the amount of $50 for the filing fee. We would appreciate the return of the extra copies after they are clocked and filed and have enclosed a self-addressed, stamped envelope for your convenience.

Under cover of this letter, I am serving counsel of record with a copy of this petition.

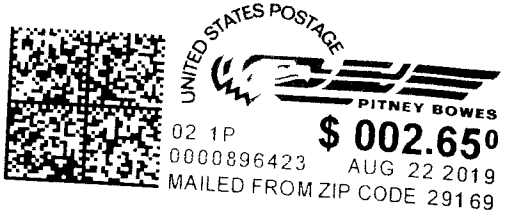
Thank you for your assistance in this matter.

Yours very truly,

Lynn Ivey

Lynn G. Ivey
Assistant to John C. Bradley, Jr.

Enclosure
cc: B. Rush Smith, III, Esquire
Sarah B. Nielson, Esquire

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