

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

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

S.C. SUPREME COURT

APPELLATE CASE NO. 2017-000874
Opinion No. 2019-UP-284 filed November 15, 2019

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 Petitioner.

APPENDIX

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The South Carolina Court of Appeals

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,

v.

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

Of Whom Cathy C. Lanier is the Appellant.

Appellate Case No. 2017-000874

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. B. De J.

John C. Justice J.

D. Han J.

Columbia, South Carolina

FILED

November 15, 2019

cc:

S. Jahue Moore, Esquire

Benjamin Rush Smith, III, Esquire

John Calvin Bradley, Jr., Esquire

Nicholas Andrew Charles, Esquire

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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,

v.

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

Of Whom Cathy C. Lanier is the Appellant.

Appellate Case No. 2017-000874

Appeal From Lexington County
James O. Spence, Master-in-Equity

Unpublished Opinion No. 2019-UP-284
Submitted June 3, 2019 – Filed August 7, 2019

AFFIRMED

S. Jahue Moore and John Calvin Bradley, Jr., both of
Moore Taylor Law Firm, P.A., of West Columbia, for
Appellant.

Benjamin Rush Smith, III and Nicholas Andrew Charles,
both of Nelson Mullins Riley & Scarborough, LLP, of
Columbia, for Respondent.

PER CURIAM: In this mortgage foreclosure action, Appellant Cathy C. Lanier challenges the order of the master-in-equity granting summary judgment to the Bank of New York Mellon ("Bank") on the issue of standing. Lanier argues the master erred in excluding her expert's affidavit, finding there were no genuine issues of material fact concerning Bank's standing to foreclose, and granting summary judgment when discovery was incomplete. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. The master properly excluded Lanier's expert's affidavit. *See State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014) ("The admission or exclusion of evidence is [] subject to an abuse of discretion standard of review."); *Judy v. Judy*, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009) ("The [master's] ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law."). On appeal, Lanier does not challenge the master's finding that the documents relied upon by Lanier's expert and attached to his affidavit were not authenticated, and Lanier only offers a conclusory parenthetical to dispute the finding that the documents constituted hearsay. *See Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) ("Failure to argue is an abandonment of the issue and precludes consideration on appeal."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Because these issues were abandoned, the master's finding that the documents were inadmissible is the law of the case. *See Atl. Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."). Accordingly, the master did not err in excluding the documents or the affidavit to the extent it directly referenced inadmissible information from the documents. *See* Rule 56(e), SCRCR ("Supporting and opposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be *admissible in evidence*" (emphasis added)); *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those [that] would be admissible in evidence."); Rule 703, SCRE ("If of a type reasonably relied upon by experts in the particular field in forming opinions or

inferences upon the subject, the facts or data need not be admissible in evidence."); *Allegro, Inc. v. Scully*, 400 S.C. 33, 46–47, 733 S.E.2d 114, 122 (Ct. App. 2012) ("However, Rule 703 *does not allow the admission of hearsay evidence* simply because an expert used it in forming his opinion; the rule only provides the expert can give an opinion based on facts or data that were not admitted into evidence." (emphasis added)).

Additionally, we find the master properly excluded the expert affidavit on the ground that it contained improper legal conclusions, as the affidavit mainly provided reasons why summary judgment should be granted in favor of Lanier as a matter of law. *See* Rule 702, SCRE ("If . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) ("In general, expert testimony **on issues of law** is inadmissible."); *id.* at 66–67, 580 S.E.2d at 437 ("Although [the expert] arguably offered some helpful, factual information, the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied. For that reason, we hold the [circuit] court correctly refused to consider it . . .").

2. The master properly granted Bank's motion for summary judgment on standing, as there were no genuine issues of material fact concerning Bank's standing to foreclose. *See Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011) ("When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP."); Rule 56(c), SCRCP (providing that summary judgment shall be granted 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 a judgment as a matter of law"); *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below."); *see also Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) ("Standing refers to[] '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" (second alteration in original) (quoting Black's Law Dictionary 1413 (7th ed. 1999))); *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) ("Generally, a party must be a real party in interest to the litigation to have standing." (quoting

Hill v. S.C. Dep't of Health & Env'tl. Control, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010)); *Patton v. Miller*, 420 S.C. 471, 479, 804 S.E.2d 252, 256 (2017) ("A real party in interest is 'the party who, by the substantive law, has the right sought to be enforced.'" (quoting *Draper*, 405 S.C. at 220, 746 S.E.2d at 481)); *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 67 n.7, 773 S.E.2d 607, 612 n.7 (Ct. App. 2015) ("[A] promissory note secured by a real estate mortgage' is 'a negotiable instrument.'" (quoting *Swindler v. Swindler*, 355 S.C. 245, 247, 250, 584 S.E.2d 438, 439, 440 (Ct. App. 2003))); S.C. Code Ann. § 36-3-102(a) (Supp. 2018) ("This chapter applies to negotiable instruments."); S.C. Code Ann. § 36-3-301 (Supp. 2018) ("Person entitled to enforce' an instrument means (i) the holder of the instrument"); S.C. Code Ann. § 36-1-201(20) (2003)¹ (stating that a holder is "a person who is in possession of a document of title or an instrument or a certificated investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank"); *Draper*, 405 S.C. at 221, 746 S.E.2d at 481 ("Under South Carolina law one finds the general proposition that the plaintiff in a foreclosure suit should be the real, beneficial owner of the mortgage debt." (quoting *In re Woodberry*, 383 B.R. 373, 379 (Bankr. D.S.C. 2008)); *U.S. Bank Tr. Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009) ("A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action.").

As the party moving for summary judgment, the initial burden was on Bank to prove standing. *See Peterson v. W. Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999) ("Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact."). In support of its motion for summary judgment, Bank submitted copies of the original note and mortgage, copies of allonges² to the note and assignments³ of the mortgage, and the affidavit of Joseph G. Devine, Jr., an

¹ Section 36-1-201 was amended in 2014. However, because the foreclosure action was filed in 2013, we refer to the previous version of the statute.

² An allonge is "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." *Allonge*, Black's Law Dictionary (11th ed. 2019).

³ Lanier argues the assignments are invalid because Bank cannot produce a complete chain of title for the mortgage. However, South Carolina law does not require the assignment of a mortgage to be recorded, and Lanier does not cite any authority in support of her argument. *See BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (2012) ("[T]he assignment of a

authorized signer with JPMorgan Chase ("Chase"). Devine indicated that Chase was the mortgage servicer and attorney-in-fact⁴ for Bank and that Chase was in possession of the original note, mortgage, and allonges. Accordingly, we find Bank established that it is a holder of the note and mortgage and, as a result, met its initial burden of demonstrating standing.

Because Bank met its initial burden, Lanier was required to submit at least a scintilla of evidence to withstand summary judgment. *See Fowler v. Hunter*, 380 S.C. 121, 125, 668 S.E.2d 803, 805 (Ct. App. 2008) ("[T]he non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial."); *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). However, Lanier did not present any evidence to the master tending to show that Bank was not the holder of the note and mortgage. Rather, Lanier simply asserted in her pleadings, motions, and arguments⁵ that the assignments and allonges were fraudulently produced and that Bank was not in possession of her note and mortgage. *See Fowler*, 380 S.C. at 125, 668 S.E.2d at 805 ("[W]hen a party has moved for summary judgment[,] the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it."); *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) ("Where the [opposing party] relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion

mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee."); *see also Glasscock*, 348 S.C. at 81, 557 S.E.2d at 691 ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

⁴ "[An attorney-in-fact] steps into the shoes of the grantor and is basically the alter ego of the grantor." *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

⁵ Lanier also submitted her own affidavit indicating she believed Bank's loan documents were forged because she was only provided with copies of the note and mortgage in lieu of the originals. However, we do not find Lanier's affidavit created a genuine issue of material fact. *See, e.g., Draper*, 405 S.C. at 224, 746 S.E.2d at 483 (affirming summary judgment when the foreclosing bank produced a copy of the note containing an indorsement).

for summary judgment, the lower court is *required* under Rule 56[] to grant summary judgment[] if, under the facts presented by the [moving party], he was entitled to judgment as a matter of law." (emphasis added)). Moreover, on appeal, Lanier cites only to the complaint, the answer, her motion for and memo in support of summary judgment, her motion to reconsider, and her arguments during the summary judgment hearing. *See West v. Gladney*, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct. App. 2000) ("[T]his court ordinarily will not consider statements of fact presented only in an attorney's argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment."). Therefore, we find the master did not err in granting summary judgment to Bank as Lanier has not presented any evidence creating a genuine issue of material fact.

3. Lanier's argument that summary judgment was premature because she did not have enough time for discovery is not preserved for appellate review. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [master] to be preserved for appellate review."); Rule 56(f), SCRCP ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Rule 56(f) *requires* the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery." (emphasis added)); *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009) ("A party claiming summary judgment is premature because [it has] not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case[] and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact."). Lanier did not argue that summary judgment was premature because she did not have enough time for discovery while the case was before the master nor did she submit a Rule 56(f) affidavit. As such, Lanier did not advance a good reason why the time for discovery was insufficient and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact. Therefore, Lanier has not preserved this argument for appeal.

AFFIRMED.⁶

WILLIAMS, GEATHERS, and HILL, JJ., concur.

⁶ We decide this case without oral argument pursuant to Rule 215, SCACR.

96657

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

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

APPELLATE CASE NO. 2017-000874

RECEIVED

AUG 23 2019

SC Court of Appeals

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.

PETITION FOR REHEARING AND REHEARING *EN BANC*

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).

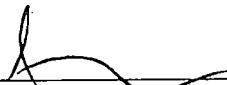
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In short, there are serious questions of law and fact regarding the assignments upon which the Respondent bases its rights to pursue its action against Appellant. The Lower Court ignored these issues in granting Summary Judgment to the Respondent and 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 *en banc* as to the Court's opinion in this matter.

Respectfully submitted,



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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

APPELLATE CASE NO. 2017-000874

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SC Court of Appeals

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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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE LOWER COURT IGNORE GENUINE ISSUES OF MATERIAL FACT REGARDING THE OWNERSHIP OF THE MORTGAGE/NOTE IN QUESTION IN THIS CASE?
- II. DID THE LOWER COURT IGNORE GENUINE ISSUES OF MATERIAL FACT IN DETERMINING THAT RESPONDENT HAS STANDING TO MAINTAIN THIS ACTION AGAINST APPELLANT?
- III. DID THE TRIAL COURT IGNORE GENUINE ISSUES OF MATERIAL FACT REGARDING RESPONDENT'S RIGHTS UNDER THE NOTE AND MORTGAGE WHICH FORM THE BASIS OF RESPONDENT'S COMPLAINT AGAINST APPELLANT?
- IV. DID THE TRIAL COURT ERR IN DISREGARDING THE GENUINE ISSUES OF MATERIAL FACT CREATED BY THE AFFIDAVIT OF WILL McCaffrey?

STATEMENT OF THE CASE

Respondent 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”) initiated a foreclosure action against Appellant Cathy C. Lanier in 2013 (“Appellant”). (R. pp. 28-34). Appellant answered the Respondent’s complaint pro se. (R. pp. 35-42). On January 16, 2014, the Honorable Thomas A. Russo, Presiding Judge of the Eleventh Judicial Circuit entered an Order referring this case to the Master in Equity for Lexington County. (R. pp. 3-5).

Appellant filed a Motion for Summary Judgment. (R. pp. 205-207). Respondent subsequently filed its own Motion for Summary Judgment. (R. pp. 227-299). A hearing was held before the Honorable James O. Spence, Master-in-Equity for Lexington County on October 29, 2015. In an order dated November 4, 2015, Judge Spence granted partial summary judgment against Appellant ruling among other things that Respondent had standing to enforce the note and mortgage pursuant to South Carolina Code Sections 36-3-301 and 36-3-205 (1976 as Amended). (R. pp. 14-15).

The Court’s Order allowed additional briefing on the remaining issues in the case. (R. pp. 14-15). Both parties filed and served submissions pursuant to the Court’s instructions/Order. (R. pp. 327-416; 421-748; 760-778).

On December 18, 2015, the Lower Court issued a Supplemental Order on Cross Motions for Summary Judgment. In its Order, the court reiterated and expanded on its grant of partial summary judgment against Appellant on the issue of standing. (R. pp. 16-21). The Court’s Order held that, “...there is no genuine issue of material fact that Plaintiff

(Respondent) is the real party in interest and has standing to pursue this foreclosure action.” (R. p. 17). The Court denied both parties’ motions on the issue of the amount of debt finding that there were genuine issues of disputed fact with respect to the correct debt amount. (R. pp. 16-21).

Appellant timely filed a motion to reconsider on January 13, 2016. (R. pp. 779-785). After filing the motion, Appellant retained undersigned counsel to represent her going forward in this case. (R. p. 903). The parties appeared before the Lower Court to argue the motion for reconsideration. A court reporter had not been provided and the parties agreed to submit the matter to the Court by way of proposed orders. Each side presented Orders to the Court.

On March 22, 2017, the Court issued its Order, denying Appellant’s motion to reconsider. (R. pp. 22-23). Appellant received written notice of this Order on March 30, 2017 and timely filed and served her Appeal. (R. p. 905). Subsequent to the filing of the Notice of Appeal, Respondent moved to dismiss the appeal. Pursuant to its Order dated August 4, 2017 this Court held that while Judge Spence’s Orders may have reiterated prior rulings on the issue of standing, the December 15, 2017 Order “constituted the lower court’s final order granting summary judgment” and that the Appellant’s appeal could proceed. (R. pp. 24-25).

STANDARD OF REVIEW

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRPC. *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct.App.1999). Summary judgment is only appropriate when there is no genuine issue of material fact such that the moving party

must prevail as a matter of law. Rule 56(c), SCRPC. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997).

DISCUSSION OF LAW

The Court erred in granting summary judgment to the Respondent as to liability. The issues before the Lower Court were hotly contested and the Lower Court ignored and overlooked significant genuine issues and questions of material fact as to the ownership of the note and mortgage and as to the Respondent's rights or standing to bring and pursue this action against Appellant enforcing the note and mortgage. The Lower Court erred in granting Respondent's Motion for Summary Judgment and in denying Appellant's Motion for Reconsideration. (R. pp. 14-23). The Lower Court's Orders should be reversed and this matter should be remanded for further proceedings, including a resolution of the factual issues of whether or not Respondent is the proper party with standing to commence and pursue this action against Appellant.

Summary judgment is only appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). 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).

A. THE TRIAL COURT'S ORDER IGNORED GENUINE ISSUES OF MATERIAL FACT WITH RESPECT TO THE OWNERSHIP OF THE NOTE AND MORTGAGE WHICH FORM THE BASIS OF THIS 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.

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). 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 alleged assignment to Respondent is valid and whether or not the Respondent has any right to pursue an action against Appellant.

In his Order granting Respondent's Motion for Summary Judgment, the Court appeared to simply accept the assertions and representations of counsel for the Respondent to the effect that the Respondent has or has obtained the right to commence and pursue an action against Appellant without proof. The Court did so despite Respondent's efforts to take depositions in this case which were resisted by the Respondent. (R. pp. 117-118; 179-199).

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 Judgment on this issue was erroneous in light of these outstanding issues of fact and the

Court erred in granting Respondent's Motion for Summary Judgment and in denying Appellant's Motion for Summary Judgment.

B. THE TRIAL COURT'S ORDER IGNORED GENUINE ISSUES OF MATERIAL FACT WITH RESPECT TO RESPONDENT'S STANDING TO PURSUE THIS ACTION 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 in its Orders granting Respondent Summary Judgment and in its Order denying Appellant's Motion for Reconsideration.

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 and in denying Appellant's Motion for Reconsideration.

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. Divine 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 Trial Court erred in granting Respondent a judgment as a matter of law and in denying Appellant's Motion for Reconsideration.

C. THE COURT'S ORDER IGNORES GENUINE ISSUES OF MATERIAL FACT REGARDING RESPONDENT'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 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.

D. THE TRIAL COURT ERRED IN FINDING AND RULING THAT THE AFFIDAVIT OF WILLIAM MCAFFREY FAILS TO CREATE GENUINE ISSUES OF MATERIAL FACT

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 Court 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 Court 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. 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 Respondent's Summary Judgment and in Denying Appellant's Motion for Reconsideration.

E. THE COURT'S ORDER IGNORES GENUINE ISSUES OF MATERIAL FACT REGARDING THE ASSIGNMENT OF APPELLANT'S MORTGAGE

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.

F. THE COURT ERRED IN GRANTING OF RESPONDENT SUMMARY JUDGMENT AS SUMMARY JUDGMENT IN THIS CASE WAS PREMATURE

The Appellant has sought discovery from Respondent. Respondent has not provided any valid assignment. Respondent has also not provided any form of merger documentation which would show Respondent as the holder of the note and mortgage in question in this case.

Respondent has made every effort through discovery in order to obtain the documents to prove Respondent is the holder of the note and mortgage. There simply has been nothing produced through discovery and there is nothing before the Court to indicate how Respondent claims to have become the holder of the note and mortgage.

Since it is a drastic remedy, summary judgment “should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.” *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C.1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d. 537 (1991).

Further, additional discovery in this matter will uncover additional evidence relevant to the issues before the Court, particularly, any rights that the Respondent has to enforce the note and mortgage against Appellant. Further discovery is necessary to address the issues of standing which were raised throughout this case by Appellant. There is nothing to suggest that the Appellant is merely engaged in a “fishing expedition. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d. 537 (1991). The Lower Court’s granting of Summary Judgment in this case was premature and the Lower Court’s Order(s) granting Summary Judgement and the Lower Court’s Order denying Appellant’s Motion for Reconsideration should be reversed by this Court.

CONCLUSION

For the reasons set forth above, there are genuine questions and issues of material fact. The Lower Court erred in granting the Respondent’s Motion for Summary Judgment and in subsequently denying the Appellant’s Motion to Reconsider. The Lower Court’s Order should be reversed and this matter should be remanded to the Lower Court for further proceedings.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-In-Equity

Appellate Case No. 2017-000874

RECEIVED

APR 06 2018

SC Court of Appeals

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,

v.

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

Of Whom Cathy C. Lanier is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief complies with Rule 211(b).


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April 6, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

The Honorable James O. Spence

Civil Action No. 2013-CP-32-01709

Appellate Case No. 2017-000874

RECEIVED
MAR 27 2018
SC Court of Appeals

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,

v.

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

Defendants,

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

Appellant.

Final Brief of Respondent.

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Statement of Issues on Appeal

- I. This Court should affirm because Lanier cannot establish a genuine issue of material fact on the issue of the Bank's standing to foreclose.**
- II. The master properly excluded the McCaffrey affidavit on multiple grounds, and Lanier failed to appeal each ruling.**
- III. This Court should affirm the grant of summary judgment because Lanier's argument regarding the need for a recorded assignment to the Bank prior to initiating foreclosure contradicts South Carolina law.**

Statement of the Case

Respondent 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 (hereinafter the “Bank”) initiated this foreclosure action against Appellant Cathy C. Lanier (“Lanier”) in 2013. {Complaint, R. 28}. The Bank owns the note and mortgage executed by Lanier. {Supplemental Order dated December 15, 2015 p. 1, R. 16}. JPMorgan Chase Bank, N.A. (hereinafter, “Chase”), services the loan of Lanier, which is at issue in the foreclosure action, and acts as attorney-in-fact for the Bank. {Affidavit of Joseph G. Devine, Jr., at ¶ 1, R. 229}. Chase, as the Bank’s servicer and attorney-in-fact, holds the original note and mortgage at issue. {Affidavit of Joseph G. Devine, Jr., at ¶ 12, R. 231}. The sole issue in this appeal is whether the master-in-equity properly found that the Bank had standing to initiate this foreclosure action against Lanier.

In her answer, Lanier challenged the Bank’s ability to initiate the foreclosure action based on an unsupported claim that the Bank lacked standing. {Answer dated June 20, 2013 at ¶ 16, R. 40}. Lanier also filed a motion to dismiss the foreclosure based on this alleged lack of standing. {Motion to Dismiss, R. 108}. The Bank moved to strike the affirmative defenses and refer the matter to the master. {Motion to Strike, R. 47}. The circuit court addressed Lanier’s motion to dismiss and Respondent’s motion to strike. The court granted the motion to strike, denied the motion to dismiss, and referred the matter to the master. {Order dated January 17, 2014. R. 3}.

Lanier did not appeal the grant of the motion to strike her affirmative defenses, including that of standing. Rather, Lanier continued to pursue the litigation and her standing arguments to

the lower courts. Lanier filed a motion for summary judgment that again argued Respondent lacked standing to initiate the foreclosure. {Lanier Motion for Summary Judgment, R. 205}.

The Bank also filed a motion for summary judgment and argued that it had standing to initiate the foreclosure action. {Motion for Summary Judgment dated October 19, 2015, R. 227 (“Plaintiff has standing to foreclose the subject mortgage in this case and the loan is in default. Defendant has not produced any evidence to contradict Plaintiff’s standing”); Memorandum in Support of Motion for Summary Judgment p. 2 (“The indisputable facts further demonstrate that Plaintiff is the current holder of the Mortgage and entitled to foreclose”)} . The master granted the Bank summary judgment on the standing issue, finding that:

First, there is no genuine issue of material fact that Plaintiff has possession of the original subject note and mortgage, had possession at the time the foreclosure action was filed, and the note is made payable to Plaintiff through an allonge. Thus, Plaintiff has standing to enforce the note and mortgage. S.C. Code Ann. §§ 36-3-301, 36-3-205. Plaintiff’s Motion is granted on this issue, and Defendant’s Motion is denied.

{Order on Cross Motions for Summary Judgment dated November 5, 2015 at p. 1, R. 14}. Lanier did not appeal this ruling granting Respondent summary judgment on standing.

Instead, when the master allowed additional briefing on other issues in the case, Lanier again raised the standing issue. In addressing the remaining issues for which the master sought briefing, the master reiterated that it had ruled on and rejected the standing argument in the November 5th order. The master ruled that:

Following the hearing, the Court issued an Order on Cross Motions for Summary Judgment . . . in which the Court ruled that Plaintiff had possession of the original note and mortgage, and had standing to enforce the notice and mortgage.

{Supplemental Order dated December 15, 2015 p. 1, R. 16}.

Lanier then filed a motion to reconsider that again raised the standing of Respondent to foreclose. {Motion to Reconsider dated January 13, 2016, R. 779}. The master denied the motion. {Order dated March 22, 2017, R. 22}. Lanier appealed that order to this Court. {Notice of Appeal, R. 905}.

Statement of the Facts

The Bank initiated this foreclosure action against Appellant Cathy C. Lanier (“Lanier”) in 2013. {Complaint, R. 28}. In her motion to dismiss, affirmative defenses, and summary judgment motion, Lanier claimed, without support, that the Bank lacked the standing to initiate the foreclosure. {Answer dated June 20, 2013 at ¶ 16, R. 40; {Motion to Dismiss, R. 108}. The only¹ admissible evidence presented to the master-in-equity unequivocally established that the Bank had standing to initiate the foreclosure action.

In response to Lanier’s claim, the Bank filed and served an affidavit from the loan’s servicer and the Bank’s attorney-in-fact for the loan. {Affidavit of Joseph G. Devine, Jr., with all exhibits, R. 229}. JPMorgan Chase Bank, N.A., services the loan of Lanier. {Affidavit of Joseph G. Devine, Jr., at ¶ 1, R. 229}. Chase, as the Bank’s servicer and attorney-in-fact, holds the original note and mortgage at issue. {Affidavit of Joseph G. Devine, Jr., at ¶ 12, R. 231}. Moreover, the Bank presented the original note and original mortgage to the master at a hearing on this standing issue. {Transcript dated October 29, 2015 p. 10-11, R. 796-97}. The Bank further presented the allonge to the note that established that:

[The] Chain of custody of the Note, the [Bank} has had, through it’s[sic] servicer Chase, has had possession of the Note since it became owner of the loan.

{Trans. dated October 29, 2015 p. 20, R. 806; Allonge, R. 238}.

¹ Lanier failed to provide any admissible evidence to support her claim.

Thus, the master found that the Bank had standing to foreclose under settled South Carolina law. {Order on Cross Motions for Summary Judgment dated November 5, 2015 at p. 1, R. 14; Supplemental Order dated December 15, 2015 p. 1, R. 16}. The master found specifically that:

First, there is no genuine issue of material fact that [the Bank] has possession of the original subject note and mortgage, had possession at the time the foreclosure action was filed, and the note is made payable to [the Bank] through an allonge. Thus, [the Bank] has standing to enforce the note and mortgage. S.C. Code Ann. §§ 36-3-301, 36-3-205. Plaintiff's Motion is granted on this issue, and Defendant's Motion is denied.

{Order on Cross Motions for Summary Judgment dated November 5, 2015 at p. 1, R. 14}.

To support her standing argument, Lanier relied solely on an inadmissible and improper affidavit from a purported expert witness, William McCaffrey. {Supplemental Order dated December 15, 2015 p. 2, R. 17}. Mr. McCaffrey, however, lacked any knowledge of the facts relating to the origination and servicing of the loan at issue. Rather, he claimed to have performed "extensive research" of "major banking databases" to come to his legal conclusions as to the ownership of the loan at issue. The master properly excluded the affidavit on numerous grounds. First, the master found the affidavit and its attachments constituted inadmissible hearsay. {Supplemental Order dated December 15, 2015 p. 2, R. 17}. Second, Lanier failed to properly authenticate the documents relied upon in the affidavit, and, therefore, the documents were inadmissible. {Id., R. 17}. Third, the master excluded the affidavit on the grounds that the affidavit based its statements on impermissible legal conclusions. {Supplemental Order dated December 15, 2015 p. 3, R. 18}. Fourth, the master noted the affidavit was inconsistent with South Carolina law because South Carolina law does not require a mortgage assignment to be recorded in order for a note or mortgage to be transferred to a servicer or other lender or to establish possession of the note or mortgage. {Id., R. 18}. The master, therefore, concluded that:

The Court will not consider Mr. McCaffrey's affidavit or [the supporting documents]. The testimony and exhibits are inadmissible and do not create any issue of fact that [the Bank] is the current owner and holder of the subject note and mortgage, and has standing to foreclose.

{Supplemental Order dated December 15, 2015 p. 4, R. 19}.²

Argument

I. This Court should affirm because Lanier cannot establish a genuine issue of material fact on the issue of the Bank's standing to foreclose.

On appeal, Lanier claims an issue of fact exists as to the issue of standing based on three arguments. Each argument is meritless.

First, Lanier claims that she "contended throughout this litigation that there appear to be significant factual issues as to who has the right or standing to initiate . . ." this foreclosure. See Br. App., Section B, p. 8-9. Despite this assertion, Lanier fails to cite any evidence to support this claim. The citations in her brief are to her answer, her motion for summary judgment arguments, her memorandum in support of her summary judgment arguments, and her motion to reconsider.

Such citations are not evidence and cannot be used to withstand summary judgment. Once the Bank presented its evidence³ of standing, namely an affidavit from the loan's servicer and the Bank's attorney-in-fact for the loan, and presented the original note and original mortgage to the master, Lanier had the obligation to present evidence sufficient to create a genuine issue of

² In her brief Lanier does not appeal each of these independent grounds upon which the master excluded the affidavit. Rather, Lanier only challenged the master's hearsay and legal conclusion rulings. See Br. of App. p. 12-13. As noted above, however, the master provided two additional grounds to exclude the affidavit. Thus, the two-issue rule precludes Lanier from challenging the exclusion of the affidavit as more fully set forth in Section II herein.

³ {Affidavit of Joseph G. Devine, Jr., with all exhibits, R. 229; Affidavit of Joseph G. Devine, Jr., at ¶ 1, R. 229; Affidavit of Joseph G. Devine, Jr., at ¶ 12, R. 231; Transcript dated October 29, 2015 p. 10-11, R. 796-97, Trans. dated October 29, 2015 p. 20, R. 806}.

material fact. Rule 56(e), SCRCPP; Fowler v. Hunter, 380 S.C. 121, 125, 668 S.E.2d 803, 805 (Ct. App. 2008) (“However, when a party has moved for summary judgment the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it”). “Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial.” Id. Thus, Lanier cannot rest on pleadings or argument of counsel. See, e.g., West v. Gladney, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct.App.2000) (holding that “this court ordinarily will not consider statements of fact presented only in an attorney’s argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment”); Humana Hospital–Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) (“Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law”). Thus, Lanier’s first argument lacks merit.

Second, Lanier further represents to this Court that “the note and mortgage are not in the possession of [the Bank],” and, thus, summary judgment was improper. See Br. App. p. 10. This is a material misrepresentation to this Court. The Bank presented the original note and original mortgage to the master at a hearing on this standing issue. {Transcript dated October 29, 2015 p. 10-11, R. 796-97}. Moreover, the master found that “there is no genuine issue of material fact that [the Bank] has possession of the original subject note and mortgage, had possession at the time the foreclosure action was filed, and the note is made payable to [the Bank] through an allonge.” {Order on Cross Motions for Summary Judgment dated November 5, 2015 at p. 1, R. 14}. In this case, “ownership [was] transferred from South Star Funding Bank to Bank One; and then it was transferred by Chase, which was the successor to Bank One by merger,” to “the Bank

of New York Mellon.” {Transcript dated October 29, 2015 p. 14, R. 800}. The “[mortgage] assignments of record completely follow the chain of the allonge as well.” {Id.} Thus, the court properly ruled that “Plaintiff has standing to enforce the note and mortgage.” {Order on Cross Motions for Summary Judgment dated November 5, 2015 at p. 1, R. 14} As a result, the record plainly refutes Lanier’s second argument.

Third, Lanier challenges the grant of summary judgment as premature on the basis that discovery was necessary with respect to the Bank’s status as a trust (Br. App., Section C, p. 10-12) and the assignment of the mortgage to the Bank (Br. App., Section F, p. 15-16). That argument fails. As an initial matter, Lanier did not raise this issue to the master, and the master did not rule on any such argument. It is well settled that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved. See generally Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000); Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000). Thus, the issue is not preserved for appellate review.

Moreover, Lanier did not file the required Rule 56(f), SCRPC, affidavit with the master. If the party opposing summary judgment asserts he or she cannot present by affidavit facts justifying opposition, he must set forth this belief and the reasons for this belief in an affidavit for the trial court’s review. Rule 56(f), SCRPC. Specifically, Rule 56(f) states the following:

Should it appear **from the affidavits** of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(emphasis added). In other words, to obtain the benefit of Rule 56(f), a party must file an affidavit setting forth the reasons that he is unable to “present by affidavit facts essential to justify his opposition.” See Doe ex rel. Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) (“Rule

56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery”). Lanier failed to do so and cannot, therefore, oppose summary judgment on that basis.

Finally, even if the issue was properly raised and the required Rule 56(f) affidavit was filed, Lanier lacks standing to challenge the transfer or assignment under the trust agreement. South Carolina law is clear that “a third person not in privity of contract with the contracting parties has not right to enforce a contract.” Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997). Numerous courts in South Carolina and other jurisdictions have rejected the argument that Lanier advances concerning the trust agreement. The Honorable Michelle Childs of the United States District Court for the District of South Carolina recently affirmed a bankruptcy court decision finding that “[a] majority of courts addressing the issue have determined that, where the matter concerns a negotiable instrument payable upon presentation by the holder in possession, the third-party debtor who is not a beneficiary of the pooling and servicing agreement lacks standing to challenge holders’ rights to enforce the negotiable instrument due to an alleged invalidity in or noncompliance with the pooling and servicing agreement.” In re Kain, C/A No. 7:12-cv-02031, 2013 U.S. Dist. LEXIS 36845, at *5–6 (D.S.C. Mar. 18, 2013); see also Ginn v. CitiMortgage, Inc., 465 B.R. 84, 95 n.42 (Bankr. D.S.C. 2012) (“It is also noteworthy that courts have recently held that debtors, who are not a party to or third party beneficiary of a pooling and servicing agreement, lack standing to challenge a mortgage’s chain of title based on the terms of the pooling and servicing agreement.”); Junger v. Bank of Am., N.A., No. 11-10419, 2012 U.S. Dist. LEXIS 23917, at *7 (C.D. Cal. Feb. 24, 2012); Correia v. Deutsche Bank Nat’l Trust Co., 452 B.R. 319, 324 (1st Cir. 2011) (“[T]he bankruptcy court concluded that the Debtors lacked standing to challenge the mortgage’s chain of title under

the PSA. Again, we agree.”); Paatalo v. J.P. Morgan Chase Bank, N.A., No. 10-119, 2012 U.S. Dist. LEXIS 90101, at *18 (D. Mont. June 28, 2012). Because Lanier is not a party to the trust agreement, she cannot challenge the assignment of the loan to the trust based on the trust documents.

II. The master properly excluded the McCaffrey affidavit on multiple grounds, and Lanier failed to appeal each ruling.

Lanier argues in her brief to this Court that a genuine issue of fact exists on the standing claim based on the McCaffrey affidavit. See Br. of App. p. 7, 12-14. The master, however, excluded the McCaffrey affidavit on four grounds. Lanier did not appeal each ruling. Thus, the two-issue rule requires affirmance of the McCaffrey affidavit. As a result, no genuine issue of material fact existed, and the master correctly granted summary judgment to the Bank. This Court should affirm.

As noted above, the master excluded the McCaffrey affidavit on four grounds. First, the master found the affidavit and its attachments constituted inadmissible hearsay. {Supplemental Order dated December 15, 2015 p. 2, R. 17}. Second, the master found Lanier failed to properly authenticate the documents relied upon in the affidavit, and, therefore, the documents were inadmissible. {Id., R. 17}. Third, the master excluded the affidavit on the grounds that the affidavit based its statements on impermissible legal conclusions. {Supplemental Order dated December 15, 2015 p. 3, R. 18}. Fourth, the master noted the affidavit did not reflect South Carolina law because South Carolina law does not require a mortgage assignment to be recorded in order for a note or mortgage to be transferred to a servicer or other lender or to establish possession of the note or mortgage. {Id., R. 18}.

On appeal, Lanier only challenges two of those findings. Lanier first claims that the affidavit and its attachments did not constitute inadmissible hearsay. See Br. App. p. 13 (second

full indented paragraph). Lanier then alleges that the master improperly concluded that McCaffrey's opinions "contained legal conclusions." See App. Br. p. 13-14.

Lanier did not appeal the ruling (1) that Lanier failed to properly authenticate the documents relied upon in the affidavit or (2) that the affidavit did not reflect South Carolina law because South Carolina law does not require a mortgage assignment to be recorded in order for a note or mortgage to be transferred to a servicer or other lender or to establish possession of the note or mortgage. As a result, those rulings are not before this Court. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (holding that an unappealed ruling is law of the case).

Thus, our rules bar Lanier from challenging the exclusion of the McCaffrey affidavit on appeal. Under the two-issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420 n. 1, 472 S.E.2d 253, 255 n. 1 (1996) (holding that the two-issue rule "is applicable under other circumstances on appeal, including affirmance of orders of trial courts"); Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996); Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding that an "unappealed ruling, right or wrong, is the law of the case" and precludes reversal when the party fails to challenge both findings by the trial court). As a result, this Court should affirm the master's exclusion of the McCaffrey affidavit and grant of summary judgment to the Bank.⁴

⁴ The McCaffrey affidavit is also irrelevant to this matter. As fully set forth in Section III, *infra*, a recorded assignment of a mortgage is not required to transfer a mortgage, and our law does not even require an assignment to be recorded to establish ownership of the loan by the party seeking to foreclose. See BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (2012) (holding that "the assignment of a mortgage does not need to be recorded, and failure

III. This Court should affirm the grant of summary judgment because Lanier's argument regarding the need for a recorded assignment to the Bank prior to initiating foreclosure contradicts South Carolina law.

Lanier also alleges that a genuine issue of material fact exists regarding whether the loan was assigned to the Bank prior to initiating the foreclosure. See Br. App., Section E, p. 14-15). Lanier specifically claims no assignment exists from Bank One to Chase and then Chase to Respondent. Lanier's argument simply misapprehends settled South Carolina law regarding assignments.

First, Lanier's argument that no assignment exists from Bank One to Chase is a red-herring and meaningless. The only evidence in the record reflects that the loan originator assigned the note to Bank One National Association. {Affidavit of Joseph G. Devine, Jr., at ¶ 5 and Exhibit B thereto, R. 230, 237}. As is plainly evident from the caption in this litigation, and supported by the Affidavit of Joseph G. Devine, Jr., Bank One National Association then merged with Chase. {Affidavit of Joseph G. Devine, Jr., at ¶ 6 and Exhibit C thereto, R. 230, 238}. The Bank of New York Mellon, f/k/a, The Bank of New York, was successor in interest to Chase's interest in the loan via an allonge. {Id., R. 238; Trans. dated October 29, 2015 p. 14, R. 800}. Thus, the master correctly found that "the note is made payable to [the Bank] through an allonge." Lanier's argument lacks any support.

Moreover, Lanier's argument that a recorded assignment is required prior to initiating the foreclosure in order to close the "gap" in the assignment chain contradicts settled South Carolina law. South Carolina law is clear. A recorded assignment of a mortgage is not required to transfer a mortgage, and our law does not even require an assignment to be recorded to establish ownership

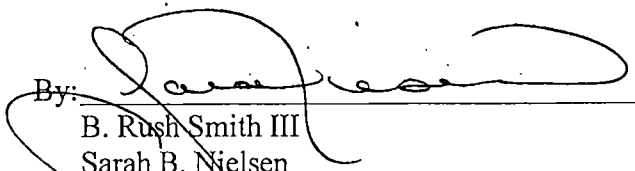
to do so has no effect on the rights of the assignee Therefore the date of recordation of the assignment has no effect on the transfer of Systems' rights to BAC"); In re Woodberry, 383 B.R. 373, 377 (Bankr. D.S.C. 2008).

of the loan by the party seeking to foreclose. See BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (2012) (holding that “the assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee Therefore the date of recordation of the assignment has no effect on the transfer of Systems’ rights to BAC”); In re Woodberry, 383 B.R. 373, 377 (Bankr. D.S.C. 2008). This Court should, therefore, reject Lanier’s argument because it lacks support under South Carolina law. In fact, Lanier offers no citation or authority to support her position. Thus, the argument has been abandoned on appeal. See, e.g., Bennett v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (holding that the appellant abandons the issue on appeal when an appellant fails to cite any supporting authority for a position and makes conclusory arguments).

Conclusion

Based on the foregoing, this Court should affirm the master-in-equity and return this matter to proceed with the foreclosure action.

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March 27, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

The Honorable James O. Spence

Civil Action No. 2013-CP-32-01709

Appellate Case No. 2017-000874

RECEIVED

MAR 27 2018

SC Court of Appeals

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,

v.

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

Defendants,

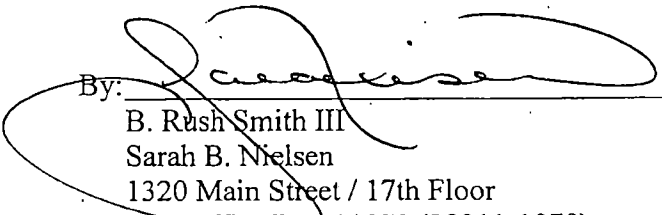
Of Whom Cathy C. Lanier is the Appellant,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule
211(b), SCACR.

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March ____, 2018