

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

**APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master in Equity**

Case No: 2010-CP-07-03033

**In the Matter of Estate of Margaret Dever Hover Gurnham A/K/A Margaret D.
Hover:
Beach First National Bank,..... Respondent**

v.

**Estate of Margaret Gurnham,..... Appellant.
a/k/a Margaret D. Hover and /or Brian Hover, Its Personal Representative**

RECORD ON APPEAL

**J. Brent Kiker
Kiker Law Firm, P.A.
Post Office Box 5303
Hilton Head, South Carolina 29938
(843) 842-7300 (phone)
(409) 419-1048 (facsimile)
ATTORNEY FOR APPELLANT**

Other Counsel of Record

**James B. Richardson, Jr. Esquire
1229 Lincoln Street
Columbia, SC 29201
(803) 799-9412 phone
(803) 799-9628 facsimile
Attorney for the Respondent**

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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE PROBATE COURT
CASE NO. 2006ES0700145

2010 MAR -1 PM 4:39
PROBATE COURT
BEAUFORT COUNTY, SC

FILED

IN THE MATTER OF ESTATE OF)
MARGARET DEVER HOVER)
GURNHAM, A/K/A MARGARET D.)
HOVER:)

BEACH FIRST NATIONAL BANK,)
Plaintiff,)

v.)

THE ESTATE OF MARGARET)
GURNHAM A/K/A MARGARET D.)
HOVER AND/OR BRIAN HOVER, ITS)
PERSONAL REPRESENTATIVE,)

Defendants.

**ORDER GRANTING
SUMMARY JUDGMENT**

This matter came before the Court on January 5, 2010, at 10:00 a.m., following proper notice, for a consolidated hearing on the Plaintiff's Amended Motion for Summary Judgment, dated November 25, 2009, and the Defendants' Motion for Summary Judgment, dated November 23, 2009. Present at the hearing were: William Weston J. Newton, Esquire, and James M. Herring, Esquire, representing the Plaintiff; and J. Brent Kiker, Esquire, and Richard B. Allen, Esquire, representing the Defendants.

Upon careful consideration of the pleadings and undisputed facts, the arguments of counsel, and the applicable law, the Defendants' Motion is denied, and the Plaintiff's Amended Motion for Summary Judgment is granted, as provided below. The findings of fact and conclusions of law underlying the Court's judgment are as follows:

Findings of Fact
(Including Relevant Procedural Background)

Margaret Dever Hover Gurnham, also known as Margaret D. Hover ("Decedent"), died on December 8, 2005. Her Last Will and Testament was admitted to probate, and her son, Brian Hover, a Defendant herein, was appointed by this Court as Personal Representative of the Decedent's estate, by orders of this Court entered informally on February 23, 2006. Notice to Creditors, under S.C. Code Section 62-3-801, was published in *The Beaufort Gazette* on March 2, 9, and 16, 2006.

On August 19, 2008, Beach First National Bank ("Plaintiff") filed in this Court a Statement of Creditor's Claim for \$247,168.23 ("as of July 29, 2008"), alleging that the "Decedent's account became past due as of March 29, 2008"; that the "amount of the claim is subject to revision once the foreclosure now pending is concluded"; and that the claim was secured by a second mortgage described in the Statement. Also filed was a Proof of Delivery, executed by the Plaintiff's attorney, stating that a copy of the Statement of Creditor's Claim was mailed to the Personal Representative's attorney of record herein on August 15, 2008.

A Supplemental Statement of Creditor's Claim for \$259,620.63 ("as of December 11, 2008") was filed by the Plaintiff on December 18, 2008, asserting an "Order of Deficiency Judgment filed December 11, 2008, in C/A No. 2008-CP-07-02561...upon Promissory Note referenced in Statement of Creditor's Claim filed Augut [sic] 19, 2008." Accompanying the Supplemental Statement was a contemporaneous Proof of Delivery to the Plaintiff's attorney.

On July 29, 2009, the Personal Representative filed Notice of Disallowance of Claim, stating that "[t]he Claim asserted was not timely filed and is barred under South Carolina Probate Code Sec. 62-3-803." A Proof of Delivery was filed on August 3, 2009, by the Personal

Representative's attorney, stating that a copy of the Notice of Disallowance was mailed to the Plaintiff on July 31, 2009.¹

The Plaintiff filed a Petition for Allowance of Claim on August 24, 2009, and a Summons to accompany the Petition on August 26, 2009. The Petition asserts that the Plaintiff's Creditor's Claim was timely presented under S.C. Code Section 62-3-803(b)(2), and that the above-mentioned Deficiency Judgment is an allowance of the Plaintiff's Claim under Section 62-3-806(c). The Petition also alleges causes of action based on waiver, *res judicata*, estoppel, fraud, constructive fraud, negligent misrepresentation, and breach of contract. Acceptances of Service of the Summons and Petition were executed by counsel for the Defendants on August 31, 2009, and filed herein.

The Defendants' Answer to the Petition was served by mail on October 9, 2009, and subsequently filed herein. The Answer denies certain allegations contained in the Petition, and pleads affirmatively that the Plaintiff's Creditor's Claim was not timely presented and is barred by the applicable statute of limitations.

The Plaintiff's original Notice of Motion and Motion for Summary Judgment was served by mail on September 24, 2009, and filed herein. The Motion asks for summary judgment based on the second cause of action asserted in the Petition, *viz.*, the Circuit Court Order of Deficiency Judgment entered on December 11, 2008, in Civil Action No. 2008-CP-07-02561. Attached to the Motion, as filed, are certified copies of the Order of Deficiency Judgment and the Judgment of Foreclosure and Sale, entered October 9, 2008 in the same civil action, from which the deficiency matter arose.

¹ On August 24, 2009, the Court received from the Personal Representative's attorney a Proof of Delivery stating that he also had mailed a copy of the Notice of Disallowance to the Plaintiff's attorney on July 31, 2009.

By its terms, the Order of Deficiency Judgment awards to the Plaintiff “a personal and deficiency judgment against the Third-Party Defendants, Brian Hover, in his representative capacity as Personal Representative of the Estate of Margaret Gurnham (a/k/a Margaret D. Hover) and The Estate of Margaret Gurnham (a/k/a Margaret D. Hover)” in the “[a]mount of judgment of foreclosure entered by the Equity Court,” \$256,577.73, with interest “from the date of Judgment of foreclosure to ultimate sale date December 3, 2008” in the amount of \$3,042.90, for a “Total Judgment” of \$259,620.63.

The Defendants’ Notice of Motion and Motion for Summary Judgment was served by mail on November 23, 2009, and filed herein. The Defendants’ Motion asks for summary judgment “on all causes of action filed against the Defendant by the Plaintiff,” on the basis “that the Plaintiff submitted its claim outside the applicable statute of limitations period and the period for creditor’s claim.”

With the consent of the Defendants’ counsel, the Plaintiff filed its Amended Notice of Motion and Amended Motion for Summary Judgment on December 1, 2009. The Amended Motion seeks summary judgment based not only on the aforementioned Order of Deficiency Judgment, but also on the following causes of action asserted in its Petition for Allowance of Claim: timely claim presentation under Section 62-3-803(b)(2); waiver; and *res judicata*.

Notice of the consolidated hearing, on January 5, 2010, on the Plaintiff’s Amended Motion for Summary Judgment and the Defendants’ Motion for Summary Judgment, was mailed by the Court on December 2, 2009, to all counsel of record and interested persons not represented by counsel.

The authenticity of the Order of Deficiency Judgment, represented by the certified copy filed herein by the Plaintiff, has not been disputed or challenged by the Defendants herein, and

this Court has not been informed of any appeal of the Order. In oral argument at the hearing, the Defendants' counsel acknowledged that the facts of this case are not in dispute.

Conclusions of Law

This Court has jurisdiction over the subject matter of this action under S.C. Code Section 62-1-302(a)(1); venue is proper under Section 62-3-201(b); and all service and notice requirements of the applicable statutes and rules of court have been satisfied.

There is no genuine issue as to any material fact in this matter. In particular, the validity of the above-described Order of Deficiency Judgment, as a final judgment of the Circuit Court, has not been impeached. It does not appear that the Deficiency Judgment has been appealed, and it is not subject to collateral attack in the Probate Court.

"A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim." *S.C. Code Ann.* Section 62-3-806(c). The Order of Deficiency Judgment is a final judgment of the Circuit Court against the appointed Personal Representative of the Decedent's estate on the claim that is the stated basis for the Plaintiff's Supplemental Statement of Creditor's Claim and Petition for Allowance of Claim in this Court.

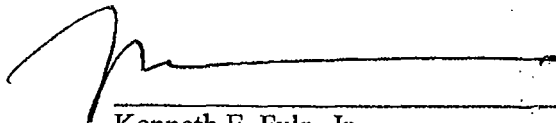
"When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Howell v. United States Fidelity and Guaranty Insurance Company*, 370 S.C. 505, 509, 636 S.E. 2d 626, 628 (2006). Under the clear and unambiguous terms of Code Section 62-3-806(c), the Order of Deficiency Judgment constitutes allowance of the Plaintiff's Claim herein, as a matter of law.

Allowance of the Plaintiff's Claim under Section 62-3-806(c) makes it unnecessary for this Court to address the issues of whether the Claim was timely presented under other provisions of the Probate Code or is barred by statute of limitations. Any defense based on those issues -- whether or not raised by the Defendants in the Circuit Court action -- is mooted by the operation of Section 62-3-806(c) with respect to the Deficiency Judgment of the Circuit Court. As such, the Defendants' Motion for Summary Judgment, based entirely on the timeliness of presentation of the Plaintiff's Claim, is denied.²

Allowance under Section 62-3-806(c) likewise makes it unnecessary to rule on the Plaintiff's assertions of waiver and *res judicata* in its Amended Motion for Summary Judgment.

For the foregoing reasons, the Plaintiff's Amended Motion for Summary Judgment is granted based on S.C. Code Section 62-3-806(c), and summary judgment is entered for the Plaintiff accordingly.

AND IT IS SO ORDERED.



Kenneth E. Fulp, Jr.
Associate Judge
Beaufort County Probate Court

Beaufort, South Carolina

March 1, 2010

² In oral argument at the hearing, the Defendants' counsel relied on three appellate decisions from other jurisdictions, viz., *Harter v. Lenmark*, 443 N.W. 537 (Minn. 1989); *Gilkes v. Beezer*, 4 Wash. App. 761, 484 P. 2d 493 (Wash. App. 1971); and *Gandy v. Citicorp*, 985 So. 2d 371 (Miss. App. 2008). None of those decisions appears based on a statute similar to S.C. Code Section 62-3-806(c), all are distinguishable from the case instant on the facts and law, and none are controlling here.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE PROBATE COURT
CASE NO. 2006ES0700145

2010 MAY -3 PM 3:06
PROBATE COURT
BEAUFORT COUNTY, SC

IN THE MATTER OF ESTATE OF)
MARGARET DEVER HOVER)
GURNHAM, A/K/A MARGARET D.)
HOVER:)

BEACH FIRST NATIONAL BANK,)
Plaintiff,)

v.)

THE ESTATE OF MARGARET)
GURNHAM A/K/A MARGARET D.)
HOVER AND/OR BRIAN HOVER, ITS)
PERSONAL REPRESENTATIVE,)

Defendants.)

**ORDER DENYING
MOTION TO ALTER OR AMEND**

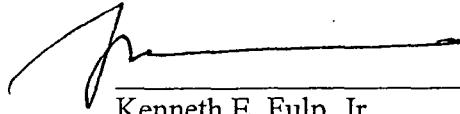
This matter comes before the Court on the Defendants' Motion, dated March 11, 2010, asking this Court to alter and/or amend its Order Granting Summary Judgment to the Plaintiff, entered on March 1, 2010 ("Summary Judgment Order").

Following receipt of the Motion, the Court notified counsel for the respective parties, by letter of March 22, 2010, that it would determine the Motion on briefs, without oral argument, as permitted under Rule 59(f), SCRCP. Briefs were timely submitted.

Having carefully reviewed and considered the Motion, the arguments for and against it, the record, and the applicable law, I find no reason to alter or amend the Summary Judgment Order in any way.

Accordingly, the Defendants' Motion to Alter and/or Amend the Summary Judgment Order is denied, and the Summary Judgment Order for the Plaintiff is affirmed.

AND IT IS SO ORDERED.



Kenneth E. Fulp, Jr.
Associate Judge
Beaufort County Probate Court

Beaufort, South Carolina

May 3, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2010-CP-07-03033

IN THE MATTER OF ESTATE OF)
MARGARET DEVER HOVER GURNHAM,)
A/K/A MARGARET D. HOVER:)

BEACH FIRST NATIONAL BANK,)
PLAINTIFF/RESPONDENT,)

VS.)

THE ESTATE OF MARGARET GURNHAM)
A/K/A MARGARET D. HOVER AND/OR)
BRIAN HOVER, ITS PERSONAL)
REPRESENTATIVE,)

DEFENDANTS/APPELLANTS.)

ORDER

2011 DEC 22 AM 9:09
CLERK OF COURT

This matter is before the Court on Appeal by the Defendant/Appellant Estate of Margaret Gurnham a/k/a Margaret D. Hover and/or Brian Hover, its Personal Representative, from the Probate Court Case No. 2006-ES-07-00145 that resulted in an Order granting Plaintiff/Respondent Summary Judgment filed March 1, 2010; and the Order denying Defendant/Respondent's Rule 59 Motion to Alter or Amend filed May 3, 2010.

The relevant pleadings are Plaintiff/Respondent's Summons and Petition for Allowance of Claim filed August 24, 2009, in the Probate Court; Defendant Estate of Margaret Gurnham a/k/a Margaret D. Hover and/or Brian Hover, its Personal Representative's Answer dated September 29, 2009; Defendant Estate of Margaret Gurnham a/k/a Margaret D. Hover and/or Brian Hover, its Personal Representative's Notice of Motion and Motion for Summary Judgment dated November 23, 2009; Plaintiff's Notice of Motion and Motion for Summary Judgment filed September 25, 2009; Plaintiff's Amended Notice of Motion and Motion and Amended Motion for Summary Judgment filed December 1, 2009; Order Granting Summary Judgment filed March 1, 2010; Defendant Estate of Margaret Gurnham a/k/a Margaret D. Hover and/or Brian Hover, its Personal Representative's

Motion to Alter or Amend Order dated March 11, 2010; Defendant Estate of Margaret Gurnham a/k/a Margaret D. Hover and/or Brian Hover, its Personal Representative's Memorandum in Support of Motion to Alter or Amend Order dated April 22, 2010; Plaintiff's Memorandum in Opposition to Defendant's Motion to Alter or Amend Order of March 1, 2010 filed April 19, 2010; and Probate Court Order Denying Motion to Alter or Amend filed May 3, 2010. The Defendants filed their Notice of Appeal dated May 14, 2010, appealing the Orders of the Honorable Kenneth E. Fulp, Jr., granting summary judgment dated March 1, 2010, and denying the Motion to Alter or Amend Judgment referenced above. The Court had the benefit of Memorandums submitted by both sides and oral arguments were heard on September 8, 2011. Additionally, the Court received a Supplemental Memorandum from the Plaintiff/Respondent on or about September 24, 2011.

I have carefully considered all of the material referenced above, together with the oral arguments of Counsel, and have decided to confirm the Probate Court's March 1, 2010, Order Granting the Plaintiff Summary Judgment and the Probate Court's Rule 59 Order dated May 3, 2010, subject to clarification with regard to any concern that the Personal Representative was found to be individually liable as a result of the Probate Court Orders. Upon review of the Probate Court Orders and noting the assurance of Plaintiff's Counsel that Mr. Hover was not an individual Defendant, I make that as a finding of fact and conclusion of law.

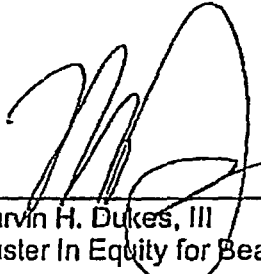
Prior to deciding to affirm the Probate Court Orders Granting Summary Judgment and Denying the Defendant's Rule 59 challenge, I paid particular attention to the Defendants' subject matter jurisdiction argument and concluded that it was not applicable. Accordingly, the Probate Court Orders appealed from are affirmed subject to the one modification clarifying any concern that Brian Hover was in this action an individual Defendant.

ALL OF WHICH IS SO ORDERED.

Date: December 21, 2011

Beaufort, South Carolina

F:\Home\BSP\BNC\Gurnham\Order - December 2011.wpd


Marvin H. Dukes, III
Master In Equity for Beaufort County

10-3033

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Beach First National Bank,

Plaintiff(s),

vs.

The Estate of Margaret Gurnham a/k/a
Margaret D. Hover and/or Brian Hover as
Personal Representative

Defendant(s).

IN THE COURT OF COMMON PLEAS

CASE NO: 2010-CP-07-0303³₀

ORDER DENYING DEFENDANT'S
MOTION TO ALTER OR AMEND
ORDER ENTERED ON DECEMBER
22, 2011

This case came before me May 3, 2012 on Defendant's Motion to Alter or Amend the Order issued on December 22, 2011. Attorney Weston Newton appeared for the Plaintiff and attorney Brent Kiker appeared for the Defendants and both attorneys appeared telephonically. After hearing arguments from both parties I hereby deny the motion.

IT IS SO ORDERED:



Honorable Marvin H. Dukes, III
Master in Equity and Special Circuit Court Judge
for Beaufort County

May 17, 2012
Beaufort, South Carolina

2012 MAY 17 PM 4:37
JESS ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF: BEAUFORT)
)
IN THE MATTER OF: Margaret Gurnham (a/k/a)
Margaret D. Hover))
)

IN THE PROBATE COURT
STATEMENT OF CREDITOR'S CLAIM

CASE NUMBER: 2006ES0700145

Decedent's Date of Death (if known): 12/8/2005

Decedent's Last Mailing Address: 21 Blue Heron Point, Hilton Head Island, SC 29926

Creditor: Beach First National Bank
Address: 3751 Grissom Parkway
Myrtle Beach, South Carolina 29577
Telephone: 843-686-1540

FILED
2008 AUG 19 PM 3:53
PROBATE COURT
BEAUFORT COUNTY, SC

Basis of claim:

Promissory Note dated 3/24/2005; Loan Number 6443; evidenced by the attached Note and Statement of Account.

Amount of claim \$ 247,168.23 (as of July 29, 2008)

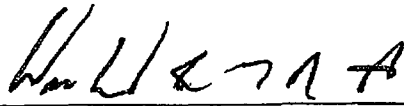
Date claim will become due (if not already due): , 2008, following judicial sale in pending Mortgage Foreclosure Action, C/A No. 2008-CP-07-02561.

Nature of uncertainty as to amount of claim and due date, if any:

The Decedent's account became past due as of March 29, 2008. The amount of the claim is subject to revision once the foreclosure now pending is concluded.

Description of any security as to claim:

Second Mortgage from Brian D. Hover as Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust dated May 22, 2000 recorded in Book 2121 at Page 182 in the Office of the Register of Deeds for Beaufort County, South Carolina.

Signature: 

Title: Attorney for Beach First National Bank

Date: 8/15/08

INSTRUCTIONS: Claims must be filed with the Probate Court of this county and delivered or mailed to the Personal Representative appointed to administer the estate (see section 62-3-803, 62-3-804, and 62-3-806 on next page.)

STATE OF SOUTH CAROLINA)

COUNTY OF: BEAUFORT)

IN THE MATTER OF: Margaret Gurnham (a/k/a)
Margaret D. Hover)

IN THE PROBATE COURT
SUPPLEMENTAL
STATEMENT OF CREDITOR'S CLAIM

CASE NUMBER: 2006ES0700145

Decedent's Date of Death (if known): 12/8/2005

Decedent's Last Mailing Address: 21 Blue Heron Point, Hilton Head Island, SC 29926

FILED
2009 DEC 30 AM 11:12
PROBATE COURT
BEAUFORT COUNTY, SC

Creditor: Beach First National Bank

Address: 3751 Grissom Parkway

Myrtle Beach, South Carolina 29577

Telephone: 843-686-1540

Basis of claim:

Order of Deficiency Judgment filed December 11, 2008, in C/A No. 2008-CP-07-02561 (copy attached) upon Promissory Note referenced in Statement of Creditor's Claim filed August 19, 2008

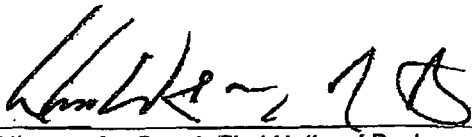
Amount of claim \$ 259,620.63 (as of December 11, 2008)

Date claim will become due (if not already due): , 20

Nature of uncertainty as to amount of claim and due date, if any:

Description of any security as to claim:

Deficiency Judgment in C/A No. 2008-CP-07-02561

Signature: 

Title: Attorney for Beach First National Bank

Date: 12/16/08

INSTRUCTIONS: Claims must be filed with the Probate Court of this county and delivered or mailed to the Personal Representative appointed to administer the estate (see section 62-3-803, 62-3-804, and 62-3-806 on next page.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

VERIFIED STATEMENT OF ACCOUNT

I, PAUL R. WALTER, Vice President of BEACH FIRST NATIONAL BANK, hereby certify that the following is a true and accurate statement of account of MARGARET GURNHAM, Loan No. 6443, as of July 29, 2008:

Principal Balance:	\$238,472.27
Accrued Interest:	\$ 6,711.53
Late Charges Due:	\$ 269.53
Other Charges:	\$ 1,715.00
TOTAL DUE AS OF July 29, 2008	<u>\$247,168.23</u>

PLUS: Per Diem of \$44.10.

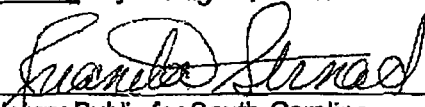
PLUS: Attorney's Fees pursuant to the terms of the Note

BEACH FIRST NATIONAL BANK

By: 
Name: Paul R. Walter
Its: Vice President

Sworn to before me this

15 day of August, 2008.



Notary Public for South Carolina

My Commission Expires: My Commission Expires
January 27, 2018

STATE OF SOUTH CAROLINA

COUNTY OF: BEAUFORT

IN THE MATTER OF: MARGARET D. HOVER

FILED

IN THE PROBATE COURT

2009 JUL 29 AM 10:01 NOTICE OF DISALLOWANCE OF CLAIM

PROBATE COURT CASE NUMBER: 2006ES0700145
BEAUFORT COUNTY, SC

TO:

Name: Beach First National Bank
Address: 3751 Grissom Parkway
Myrtle Beach, South Carolina 29577

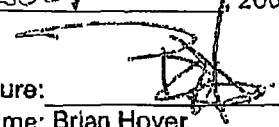
The undersigned, as the Personal Representative(s)/Conservator(s) appointed to administer this estate, disallows all of your claim for \$\$259,620.63 presented on August 19, 2008 for \$247,163.23 and supplemented on December 18, 2008.

Your claim was disallowed for the following reason(s):

The Claim asserted was not timely filed and is barred under South Carolina Probate Code Sec. 62-3-803.

Failure to protest this disallowance of your claim, (that is, failing to file your petition for its allowance (form #373PC) in the Probate Court and failing to commence a proceeding on the claim within thirty days after the mailing of this Notice of Disallowance of Claim), shall result in your claim or the disallowed portion of your claim being forever barred.

Executed this 27th day of JULY, 2009.

Signature: 

Name: Brian Hover

Address: PO Box 6126

Hilton Head Island, SC 29938

E-mail: _____

Telephone (O): _____

(H): 843-689-3302

STATE OF SOUTH CAROLINA)
) IN THE PROBATE COURT
 COUNTY OF BEAUFORT) PETITION FOR ALLOWANCE OF CLAIM
 IN THE MATTER OF THE ESTATE OF)
 MARGARET GURNHAM (A/K/A) CASE NUMBER 2006ES0700145
 MARGARET D. HOVER)
) **Petition of Beach First National Bank**

FILED
 2009 AUG 24 AM 9:30
 PROBATE COURT
 BEAUFORT COUNTY, SC

Petitioner/Plaintiff, Beach First National Bank (hereinafter BFNB), in support of its right to assert its claim against Respondents/Defendants, the Estate of Margaret Gurnham a/k/a Margaret D. Hover (hereinafter "the Estate"), and Brian Hover as Personal Representative of the Estate (hereinafter "Personal Representative"), respectfully shows the Court that:

BY WAY OF GENERAL AVERMENTS

1. Margaret Gurnham a/k/a Margaret D. Hover was (i) the previous owner of the real estate on Blue Heron Point Road, Hilton Head Island, South Carolina, that is referenced in this action, (ii) the Grantor who created the Margaret D. Hover Irrevocable Qualified Residential Trust dated May 22, 2000, after first having acquired title to the property by Deed dated December 14, 1999, and recorded in the Beaufort County Register of Deeds Office in Book 1242 at Page 1732; (iii) conveyed the property to the Trustee Brian Hover on May 22, 2000, by Deed recorded in Book 1294 at Page 304; and (iv) the mother of Brian Hover who is both the Trustee and also the Personal Representative of the Margaret D. Hover (Gurnham) Estate.

2. On March 24, 2005, Mrs. Gurnham/Hover, with the cooperation of her son, Brian Hover, as Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust Under Agreement dated May 22, 2000, obtained a first mortgage * on her Blue Heron Point residence in the face amount of Seven Hundred Fifty Thousand and

no/100 (\$750,000.00) in a mortgage subsequently transferred to Hudson City Savings Bank.

3. Also on March 24, 2005, and also with the cooperation of her son Brian Hover, as Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust Under Agreement dated May 22, 2000, obtained an equity line of credit secured by a second mortgage* on her residence. This was a future advances loan with the principal sum on the Note having a maturity of March 24, 2020. The Note did call for monthly payments of interest as it accrued.

**on both transactions, she signed the Promissory Notes and her son, as Trustee/title holder of the real estate, pledged it as security and collateral for the loans.*

4. On December 8, 2005, Mrs. Gurnham/Hover died testate.

5. On February 23, 2006, her estate was opened in Probate Court with Brian Hover as Personal Representative.

6. On March 2, 2006, the Probate Court Notice to Creditors was published.

7. On November 2, 2006, the usual six (6) month term for creditors to timely file ordinary claims passed.

8. After the death of Mrs. Gurnham/Hover, Brian Hover and/or others carefully kept both the first mortgage and second mortgage accounts current until well after the passage of the usual six (6) months notice for filing of claims had passed.

(a) After the death of Mrs. Gurnham/Hover and while the estate and/or Brian Hover kept the account current, Brian Hover had discussions with Paul R. Walter, Vice President of BFNB, about his mother's equity line account and the house indicating that:

i) they might keep the house and that the payments would
continue; and/or

ii) he (Brian Hover) might sell his own home or the Blue Heron
Point home and occupy the other; and/or

iii) the debt to BFNB would be satisfied.

(b) Brian Hover also has/had other satisfactory banking relationships with
BFNB and was considered by it to be quite credible.

(c) In an official Probate Court action inconsistent with the actions taken
by Hover towards BFNB and the assurances given, the official inventory filed March 7,
2007, did not disclose any debt to BFNB, thus indicating an intent opposite to his
representations to BFNB.

(d) At the time of the inventory the Estate has other assets more than
adequate to pay the BFNB debt.

9. The Personal Representative and/or others defaulted by non-payment on
the real estate Note and Mortgage obligations of Mrs. Gurnham/Hover as follows:

a. As to Hudson City, the date of Default was April 1, 2008.

b. As to BFNB the date of Default was March 29, 2008;

10. As to Hudson City Default, it was:

a. Over two years after her death;

b. Two years after the Notice to Creditors had run;

c. Sixteen (16) months after the normal and ordinary eight (8) months
time limit for creditors to file claims in probate proceedings.

11. As to the BFNB Default, it was:

- a. Over two years after her death;
- b. Two years after the Notice to Creditors had run;
- c. Sixteen (16) months after the normal and ordinary eight (8) months' time limit for creditors to file claims in probate proceedings.

12. It was the March 29, 2008, non-payment Default on the monthly interest payments due BFNB that prompted BFNB to declare a breach of the Note's obligations and accelerate the Note declaring the balance due in full.

13. Even as the default occurred, counsel for the Estate, in messages consistent with what Hover had told and/or was telling BFNB directly, reaffirmed the Personal Representative's view toward the BFNB debt.

14. The April 1, 2008, Default on the Hudson City Savings Bank led to it initiating a first mortgage foreclosure naming BFNB as Defendant because of its second mortgage position.

15. On July 14, 2008, Hudson City commenced the foreclosure of its first mortgage on the residence.

16. BFNB, in its Answer, Counter-Claim, Cross-Claim and Third Party Complaint sought to foreclose its second mortgage. BFNB also sought deficiency judgment against Brian Hover in his Personal Representative capacity and against the Estate.

17. Service of the BFNB pleadings was accomplished on the Personal Representative but he did not respond, plead or defend the BFNB claim.

18. On August 19, 2008, which was within five (5) months of the Default on the BFNB debt and while the Estate was still open in the Probate Court, BFNB filed its Statement of Creditor's Claim with the Probate Court.

19. On December 11, 2008, the Circuit Court issued a Deficiency Judgment Order in favor of BFNB against the Estate and Brian Hover in his Personal Representative capacity.

20. On December 30, 2008, after the Circuit Court Deficiency Judgment Order was filed in the Circuit Court, BFNB filed a Supplemental Claim in the Probate Court.

21. The Personal Representative mailed Beach First a Disallowance of Claim form on July 31, 2009. This was an action inconsistent with his prior assurances to BFNB.

22. As of this date the Estate is still open in the Probate Court.

BY WAY OF FIRST COUNT

23. The Petitioner/Plaintiff realleges each and every allegation set out above.

24. On information and belief, the right of BFNB to assert a claim arose on the Default on the Note payment obligations which occurred on March 29, 2008. BFNB's subsequent presentation of that claim using PC Form #371 PC on August 19, 2008, was timely under S.C. Code 62-3-803(b)(2).

BY WAY OF SECOND COUNT

25. The Petitioner/Plaintiff realleges each and every allegation set out above.

26. The final Circuit Court Order of December 11, 2008, awarding BFNB Judgment for \$259,620.73 plus interest at the statutory rate is by statute law an

allowance, under the Probate Code [62-3-806(c)], of the BFNB Claim regardless of the putative disallowance letter issued by the Personal Representative.

BY WAY OF THIRD COUNT

(Waiver)

27. The Petitioner/Plaintiff realleges each and every allegation set out above.

28. On information and belief, the failure of the Personal Representative and the Estate to defend against the BFNB Deficiency action in the Circuit Court and/or their failure to assert any statute of limitation position believed available to them was a waiver of their right to now invoke that position.

BY WAY OF FOURTH COUNT

(Res Judicata)

29. The Petitioner/Plaintiff realleges each and every allegation set out above.

30. The Personal Representative and the Estate failed to utilize an opportunity to invoke any statute of limitation defenses believed available to them in the BFNB foreclosure, etc.

31. The attempt of these Respondents/Defendants to now invoke those defenses is, on information and belief, barred by the doctrine of *res judicata*.

FOR A FIFTH COUNT

(Estoppel)

32. The Petitioner realleges each and every allegation set out above.

33. Under the circumstances and conduct of the Respondents/Defendants described above, they are estopped to now assert any statute of limitations as defenses to the BFNB claim.

BY WAY OF SIXTH COUNT (as alternative to Counts 1-5 above)
(Fraud)

34. The Petitioner/Plaintiff realleges each and every allegation set out above.

35. Under the circumstances described above, the Respondents/Defendants made representations to BFNB regarding its Margaret Gurnham/Hover account after her death about their intent to pay the debt as part of a then-present intent to avoid BFNB acting to protect its rights, that the representations were false and material, that their falsity was either known or the representation was made with reckless disregard for their truthfulness or falsity, and with the intent that the representation be relied on by BFNB, that BFNB did not know that the representations were either false or recklessly made, that BFNB had a right to rely on them and did rely on them to its substantial detriment with consequent and proximate injury.

BY WAY OF SEVENTH COUNT (as alternative to Counts 1-5 above)
(Constructive Fraud)

36. The Petitioner/Plaintiff realleges each and every allegation set out above.

37. Under the circumstances set out above, the Respondents/Defendants made representations to BFNB about their plan to pay the Margaret Gurnham/Hover account in a fashion that gave comfort and assurance to BFNB, that the representations were false and material, that their falsity was either known to the Respondents/Defendants or made with a reckless disregard for their truthfulness or falsity, that BFNB did not know that the representations were either false or recklessly made, that BFNB had a right to rely on them and did so to its substantial detriment with consequent and proximate injury.

FOR AN EIGHTH COUNT (as alternative to Counts 1-5 above)
(Negligent Misrepresentation)

38. The Petitioner realleges each and every allegation set out above.

39. The Respondents/Defendants made false representations to BFNB under circumstances where they possessed special knowledge of the facts and circumstances which made it reasonable for BFNB to rely on those representations, the Respondents/Defendants had a pecuniary interest in the representations, they owed BFNB a duty of care to communicate truthful information to it, they breached that duty by failing to exercise due care, that BFNB was justified in relying on that representation and as a result suffered a pecuniary loss as a direct and proximate result of its reliance on these representations.

FOR A NINTH COUNT (as alternative to Counts 1-5 above)
(Breach of Contract)

40. The Petitioner realleges each and every allegation set out above.

41. That the representations made by the Respondents/Defendants after the death of Mrs. Gurnham/Hover and the forbearance extended by BFNB gave rise to a contractual agreement which was then breached by the attempted disallowance of the claim, all to BFNB's damage.

WHEREAS, having fully asserted it's positions in favor of the Court overruling the Personal Representative's disallowance of it's claim it prays that the Court, after full inquiry into BFNB's statutory, equitable and/or common law rights and remedies (in the alternative), grant the allowance of it's claim together with all such relief to which it may be entitled together with costs and expenses, along with all other relief to which it might be entitled.

Respectfully submitted.

JONES, SIMPSON & NEWTON

By: 

Wm. Weston J. Newton
11 Arley Way, Ste. 202
Bluffton, SC 29910
P.O. Box 1938
Bluffton, SC 29910
(843) 706-6111

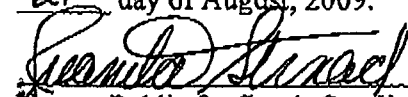
Bluffton, South Carolina
August 21st, 2009

COUNTY OF BEAUFORT)
 STATE OF SOUTH CAROLINA)
 VERIFICATION

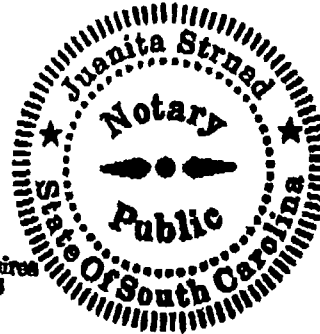
Personally appeared before me Paul R. Walter, who on oath states that he is Vice-President of BFNB, that he has first hand knowledge of the facts involved in this dispute and that the recitals in the above Petition to the Probate Court are on personal knowledge or information and belief true, accurate and correct.


 PAUL R. WALTER
 Vice-President, Beach First National Bank

Sworn to before me this
 21 day of August, 2009.


 Notary Public for South Carolina
 My Commission Expires:

My Commission Expires
 January 27, 2018



STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
IN THE MATTER OF THE ESTATE OF)
MARGARET GURNHAM (A/K/A)
MARHARET D. HOVER,)
BEACH FIRST NATIONAL BANK,)
Plaintiff,)
vs.)
ESTATE OF MARGARET)
GURNHAM a/k/a MARGARET HOVER)
And/or BRIAN HOVER, Its Personal)
Representative)
Defendant.)

IN THE PROBATE COURT
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2006-ES-07-145

ANSWER
(Jury Trial Requested)

FILED
2009 OCT 15 AM 10:10
PROBATE COURT, SC
BEAUFORT COUNTY, SC

TO: WM. WESETON J. NEWTON, ATTORNEY FOR THE PLAINTIFF:

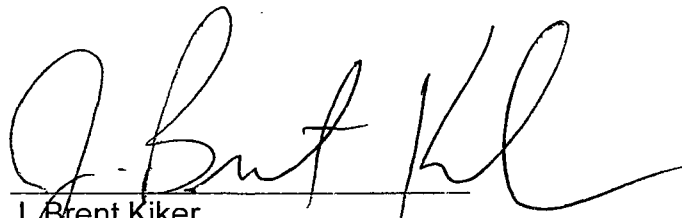
The Defendants, by and through their undersigned attorney, hereby submits their Answer to Plaintiff's Complaint as follows:

1. Each and every allegation contained in the Plaintiff's "Petition for Allowance of Claim" ("Complaint") not specifically addressed herein are denied and strict proof is demanded thereof.
2. Defendant Brian Hover, in his individual capacity, should be dismissed as no claims are stated against him personally and no service of process was accomplished within the applicable statute of limitations.
3. The allegations contained in paragraphs 1, 4, 5, 6, 7, 16, 20, and 22 are admitted.

4. The allegations contained in paragraphs 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 21, 24, 26, 28, 30, 31, 33, 35, 37, 39 and 41 are denied and Defendants demand strict proof thereof.
5. The Defendants are not required to admit or deny the incorporated allegations set forth in paragraphs 23, 25, 27, 29, 32, 34, 36, 38 and 40. However, if such a response is required, Defendants deny the same.
6. The Plaintiff's claims are barred in their entirety because the claim(s) against the estate and its personal representative, and all similar claims, were not filed within the applicable time for the allowance of claims under the South Carolina Probate Code.
7. All of Plaintiff's claims are barred by the applicable statute of limitations and should be dismissed and forever ended.

WHEREFORE, having fully answered the complaint of the Plaintiff, the defendants request that the complaint be dismissed, with costs and disbursements awarded to the Defendants.

By:



J. Brent Kiker
38-A New Orleans Road
P.O. Drawer 7965
Hilton Head Island, SC 29938
(843) 842-7300
(843) 842-6563 (Facsimile)
ATTORNEY FOR THE DEFENDANTS

September 29, 2009.
Hilton Head, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	CASE NUMBER 2006ES0700145
COUNTY OF BEAUFORT	)	
Beach First National Bank,	)	
	)	
Petitioner/Plaintiff,	)	
	)	PETITIONER/PLAINTIFF'S MEMORANDUM IN
vs.	)	SUPPORT OF AMENDED MOTION FOR
	)	SUMMARY JUDGMENT
The Estate of Margaret Gurnham	)	
a/k/a Margaret D. Hover and/or	)	
Brian Hover, its Personal Represen-	)	
tative,	)	
	)	
<u>Respondents/Defendants.</u>	)	

OVERALL EFFORT

Plaintiff/Petitioner seeks to compel the allowance of its claim by virtue of a Circuit Court Judgment against Brian Hover, in his capacity as Personal Representative of the Estate of Margaret Gurnham a/k/a Margaret D. Hover and the Estate of Margaret Gurnham a/k/a Margaret D. Hover. It contends that it is entitled to that result based on various statutory and/or common law positions.*

Defendants/Respondents contest that effort by denials of the positions asserted and in particular certain Probate Court administrative statutes[†] of limitations to justify their refusal to perform the ministerial act of honoring the allowance under the particular circumstances.

CURRENT FOCUS

In support of its November 25, 2009, Amended Motion for Partial Summary Judgment, Petitioner/Plaintiff submits the following:

* S.C. Code 62-3-803(b) (2), 62-3-806(c) and causes of action asserting Waiver, *Res Judicata*, Estoppel, Fraud, Constructive Fraud, Negligent Misrepresentation and Breach of Conduct.

† S.C. Code 62-3-802 and/or 62-3-803 and/or 62-3-804.

ISSUES

Must the Personal Representative and the Estate allow the Beach First National Bank claim confirmed by the Circuit Court Judgment when:

Its claim against the decedent's estate arose after the death of the decedent and was presented within eight months after it arose; and/or

There is a Judgment against the Personal Representative and the Estate in the Circuit Court triggering a statutory obligation to recognize that Judgment as an allowance of the claim, and/or

The Personal Representative consciously waived any right to assert any statute of limitations and/or time barring defense in the Circuit Court, and/or

The doctrine of *res judicata* prevents litigation of any defense that could have been raised in the Circuit Court.

SCRCP RULE 56

Provides that "...Judgment sought shall be rendered forth if 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 matter of law." (Emp. added)

FACTS

1. Probate Court proceedings in the Estate of Margaret Dever Hover Gurnhain were open:
 - a) when the Estate and the Personal Representative first defaulted on the monthly payments due on the Note and Second Mortgage on or about March, 29, 2008[†], thus creating this claim; and
 - b) when the Circuit Court foreclosure action discussed[§] below commenced; and

[†] See paragraph 21 in BFNB Answer, Counter-Claim, Cross-Claim and Third Party Complaint dated August 15, 2008, found in Judgment Roll #2008CP0702561.

c) when service of process was accepted by the attorney for Brian Hover, in his Representative capacity as Personal Representative of the Estate of Margaret Gurnham (a/k/a Margaret D. Hover) and the Attorney for the Estate of Margaret Gurnham (a/k/a Margaret D. Hover) in that action. Those are the two Third-Party Defendants named in the foreclosure action; and (See Tabs #1 and 2)

d) when the BFNB Statement of Creditor's Claim was filed on August 19, 2008, and later supplemented on December 30, 2008, to reflect the Circuit Court Judgment results (See Tab #3 and 4); and when they were denied (disallowed) on July 29, 2009 (See Tab #5)

e) When all the Circuit Court orders attached below were issued.

2. The Estate is still open today.

3. The attached Circuit Court documents were generated:

a) Acceptance of Service by Counsel on behalf of the Estate of Margaret Dever Hover Gurnham dated August 22, 2008 (See Tab #2); and

b) Acceptance of Service by Counsel on behalf of Brian Hover, as Personal Representative of the Estate of Margaret Dever Hover Gurnham dated August 22, 2008 (See Tab #1); and

c) Affidavits of Default dated September 25, 2008 (See Tabs #6 and #7); and

d) Judgment of Foreclosure and Sale (Deficiency Judgment Demanded) dated October 9, 2008 (See Tab #8) which contained Order of Default; and

e) Order of Deficiency Judgment dated December 11, 2008 (See Tab #9).

[§] Hudson City Savings Bank, Plaintiff v. Brian Hover, Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000; Beach First National Bank, Defendants and Beach First National Bank, Plaintiff on Cross-Claim v. Brian Hover, Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust dated May 22, 2000, Defendant on Cross-Claim, and Beach First National Bank, Third-Party Plaintiff v. Brian Hover, in his Representative capacity as Personal Representative of the Estate of Margaret Gurnham (a/k/a Margaret D. Hover) and the Estate of Margaret Gurnham (a/k/a Margaret D. Hover) Third-Party Defendants. CA #08-CP-07-2561 and Judgment Roll #2008CP0702561.

4. In the Circuit Court action both (a) Brian Hover, in his capacity as Personal Representative of the Estate of Margaret Dever Hover Gurnham and (b) the Estate of Margaret Dever Hover Gurnham:

a) Through Counsel accepted service of process of the Third-Party Complaint in the Circuit Court foreclosure proceedings in which a deficiency judgment was expressly sought; and

b) Chose not to challenge or defend against the Plaintiff/Petitioner's claims in any fashion; and/or

c) Did not advance any Probate Court/time limitations bar or statute of limitations defense that might have been raised; and/or

d) Waived any right they might have had to assert that affirmative defense or any defense.

5. The Circuit Court action resulted in the following Orders of Judgment against both (a) Brian Hover, in his capacity as Personal Representative of the Estate of Margaret Dever Hover Gurnham and (b) the Estate of Margaret Dever Hover Gurnham:

a) Judgment of Foreclosure and Sale (Deficiency Judgment Demanded) dated October 9, 2008 (See Tab #8); and

b) Order of Deficiency Judgment dated December 11, 2008 (See Tab #9).

6. The Circuit Court Judgment is now final. It is Judgment Roll #2008CP0702561 in the Beaufort County public records.

7. The Beach First National Bank Statement of Claim was filed August 19, 2008, and amended December 30, 2008 (See Tabs #3 and #4).

8. The Respondent Estate disallowed the Beach First National Bank claim of August 19, 2008, as amended December 30, 2008, by serving a copy of its Notice of Disallowance filed July 29, 2009. (Copy attached. See Tabs #3, #4, and #5)

9. Both:

(a) The Circuit Court filing of Plaintiff's Cross-Claim against the Personal Representative of the Estate and the Estate, and/or

(b) the filing of Plaintiff's claim in the Probate Court

occurred within eight months after the claim/right arose and while the Estate was still open.

APPLICABLE STATUTES

10. The relevant portions of the South Carolina Code (Probate Code) read, with emphasis added:

§62-3-104. Claims against decedent; necessity of administration.

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed in this article [§§62-3-101 et seq.] (Emp. added).

11. The relevant portion of Section 62-3-803(b)(2) reads as follows:

§62-3-803. Limitations on presentation of Claims.

(b) All claims against a decedent's estate which arise at or after the death of a decedent, ..., are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(2) ...within the later of eight months after it arises,.... (emp. added)

12. Section 62-3-806 (c) of the South Carolina Code (Probate Code) reads:

§62-3-806. Allowance of Claims.

(c) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

Reporter's Comments.

The relevant portion of the Reporter's Comments to 62-3-806 reads:

A judgment in a proceeding in another court to enforce a claim constitutes an allowance of a claim.

13. Sections 62-3-104, 62-3-803(b)(2), and 62-3-806(c) are within the same Article (III) of the Probate Code.

LEGISLATIVE HISTORY

The statutes relied on by Petitioner/Plaintiff are §62-3-803(b)(2) and §62-3-806(c). It is believed that the Respondents will rely on portions of 62-3-802, and/or 62-3-803, and/or 62-3-804, despite their having failed to timely invoke those affirmative defenses in the Circuit Court action.

All of the code sections referenced were enacted or re-enacted simultaneously as part of 1986 South Carolina Acts and Joint Resolutions #539.

With particular reference to 62-3-803(b)(2) and 62-3-806(c), they are both taken from the nationally recommended Uniform Probate Code. See Tab #10. Our Legislature's simultaneous adoption of those provisions with the previously existing code indicates a conscious intent to provide BFNB the right and relief sought.

ARGUMENTS

A. Under 62-3-803(b)(2) a claim that first arises after the death of the decedent and is presented within eight months after it arose is exempt from the general limitations.

This is one of several statutory exemptions to the usual Probate Court time limitations for filing claims. Since the Beach First National Bank facts fall within this statute, the filing was timely and the disallowance is appropriate. The claim should be allowed.

B. Under 62-3-806(c) the Defendants/Respondents are required to recognize the Circuit Court Judgment as an allowance of the claim.

A proceeding in another court as recognized in 62-3-806 (c) is not subject to the Probate Court statute of limitations or claims barring statute.

A shortened statute of limitations on filing claims in Probate Court is a valid expression of general desire for prompt processing of Probate Administration. However, those statutes do not apply to a proceeding in Circuit Court which 62-3-806 (c) recognizes as another proceeding contemplated within the Probate Code.

In the Circuit Court the general statutes of limitations would apply unless a Defendant attempted to assert the Probate statute of limitation as a possible defense.

Nothing in the Probate Code section dealing with shorter statute of limitations or claims barring statutes in the probate proceedings indicates any intent to force those time limits on other courts.

The statute** clearly mandates that the Judgment be recognized as an allowance. The Defendants/Respondents are subject to that obligation.

Additionally, the enactment of 62-3-806 (c) is merely a codification of the common law doctrine of *res judicata*.

** (c) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

In addition, under the facts in this record either/both the doctrine of waiver and/or *res judicata* bar them from now raising any affirmative defense such as the Probate Court Administrative Statute of Limitations. [Please see Argument C and D below.]

C. There was a waiver of any right to assert a statute of limitations or claims barring statute defense by the Defendants/Respondents.

The Defendants/Respondents, while at all times represented by Counsel, made no appearance in the Circuit Court action. That conscious decision to not appear and to not defend that action when they should have raised any and all defenses needed, including any Probate Court statute of limitation protections they thought applicable, deprives them of that right to now advance that concept. That was a waiver.

A waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be implied from circumstances indicating an intent to waive. Waiver may be expressed or implied from a party's conduct. An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable. Acts that are inconsistent with the assertion of a right may give rise to a waiver. See Parker v. Parker, 313 S.C. 482 (1994), 443 S.E. 2d 388.

Any statute of limitations or claims barring defense is an affirmative defense and is waived if not asserted. See SCRCF Rule 8 (c) and also SCRCF 12 (b), also see Madren v. Bradford, (S.C. App. 2008) 377 S.C. 613, 661 S.E. 2d 130 and Plyer v. Burns (S.C. 2007) 373 S.C. 637, 547 S.E.2d 188.

The failure of the Defendant to assert the claimed benefits of §62-3-802, §62-3-803 or §62-3-804 in the Circuit Court was a waiver of those defenses.

They are barred under the statutory provisions under §62-3-806(c) along with both waiver and *res judicata* doctrines from now for the first time asserting any State Probate Court Statute of Limitations to these issues.

D. *Res Judicata* denies the Defendants the opportunity to now assert any statute of limitations defense.

After Beach First National Bank obtained a final valid Judgment against the Personal Representative and the Estate in the Circuit Court action the Defendants/Respondents refused to recognize and allow that Judgment as a claim triggering this second action. The parties are the same and Defendants/Respondents now seek for the first time to invoke statute of limitations issues that were required to be asserted (or deemed waived) in the Circuit Court. The doctrine of *res judicata* bars this effort to re-litigate the Judgment.

When claims arising out of a particular transaction or occurrence are adjudicated, *res judicata* bars the parties to that suit from bringing subsequent actions^{††} on either the adjudicated issues or issues that might have been raised in the first suit. See Judy v. Judy, 677 S.E. 2d 213 (S.C. App. 2009).

CONCLUSION

Plaintiff/Petitioner is entitled to Summary Judgment in its favor on any, each and/or all of its four stated grounds.^{††} The Court should strike the Defendants'/Respondents' attempt to plead any statute of limitations or claims barring

^{††} This also applies to affirmative defenses not raised which are deemed waived.

^{††} (1) Claim arising after death of decedent and asserted within eight months after it arose as permitted by 62-3-803(b)(2), and/or;

(2) Judgment against both the estate and the Personal Representative in another court which is an allowance under 62-3-806(c); and/or

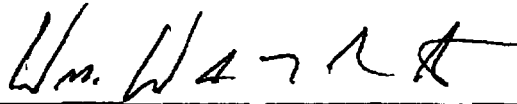
(3) Waiver of any statute of limitations defense in the earlier action; and/or

(4) *Res Judicata* based on the previous adverse result in litigation in which any statute of limitations issue could have (but was not) asserted.

defense as a bar and compel them to honor and allow the judgment as a claim together with all such other and further relief as may be appropriate.

Respectfully submitted,

JONES SIMPSON & NEWTON, P.A.

A handwritten signature in black ink, appearing to read "Wm. Weston J. Newton", written over a horizontal line.

WM. WESTON J. NEWTON
Attorney for Plaintiff/Petitioner
JONES SIMPSON & NEWTON
11 Arley Way, Suite 202
Post Office Box 1938
Bluffton, South Carolina 29910

December 23, 2009
Bluffton, SC 29910

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2006ES0700145
	)	
IN THE MATTER OF ESTATE	)	
OF MARGARET D. HOVER	)	
GURNHAM, A/K/A MARGARET	)	
D. HOVER:	)	
	)	
BNC BANK, as Successor to BEACH	)	
FIRST NATIONAL BANK,	)	MEMORANDUM IN OPPOSITION
	)	TO DEFENDANTS' MOTION TO
Plaintiff,	)	ALTER OR AMEND ORDER OF
	)	MARCH 1, 2010
vs.	)	
	)	
THE ESTATE OF MARGARET	)	
GURNHAM A/K/A MARGARET	)	
D. HOVER AND/OR BRIAN HOVER	)	
ITS PERSONAL REPRESENTATIVE,	)	
	)	
Defendants.	)	
	)	

TO: THE HONORABLE KENNETH E. FULP, JR., Associate Judge and J. BRENT KIKER,
Esquire, Attorney for the Defendants:

PROCEDURAL BACKGROUND

The Defendants moved, under S.C. Rules of Civil Procedure Rule 59, on March 11, 2010, for the alteration or amendment of an Order dated March 1, 2010, and received by them on March 4, 2010.

RESPONSE TO DEFENDANTS' GROUNDS 1-8

1. The Order does not hold Brian Hover personally and/or individually liable. He is named in the action only in his Representative Capacity as Personal Representative of the Estate of Margaret Gurnham a/k/a Margaret D. Hover.

The Court, after considering Defendants' arguments and issues, then ruled that "any such defense³, whether or not raised in the circuit court, is mooted by the operation of 62-3-806(c) with respect to the deficiency judgment of the circuit court."

The Plaintiff notes that at the Hearing on December 5, 2010:

a) The Defendants conceded at oral argument that the rejected claim, based on a default in Note and Mortgage payments, was actually presented within eight (8) months of the initial default which confirms Plaintiff's contention that the claim was timely filed, and

b) Plaintiff's Waiver contention which was based on the undisputed conscious failure of the Defendants to raise any time barred or statute of limitation defense in the Circuit Court, and

c) The Doctrine of *Res Judicata* depriving the Defendants of any right to now raise issues that were not raised in the Circuit Court action.

Further, Plaintiff notes that, in addition to the concession about the claim being timely filed, given when the Note default occurred, the Defendants offered no argument or defense on the Waiver and *Res Judicata* issues in writing or at the December 5, 2009 hearing.

NO FACTUAL DISPUTE

Finally, it notes that the facts as presented were acknowledged to be without dispute.

RELATIONSHIP OF §62-3-803(B)(2), §62-3-804 AND §62-3-806©

All of the code sections referenced were enacted or re-enacted simultaneously as part of 1986 South Carolina Acts and Joint Resolution #539.

³Obvious reference to Defendants' position that claim was not timely presented and is also barred by statute of limitations.

PRINCIPLES APPLICABLE TO STATUTORY CONSTRUCTION

It is well recognized that:

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole. Statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.

See Howell v. United States Fidelity & Guaranty Insurance Company, 370 S.C. 505, 636 S.E.2d 626 (S.C. 2006) and cases cited therein.⁴

ADDITIONAL SUSTAINING GROUNDS

In the unlikely event that the current Order is reversed, the Plaintiff is then entitled to a full ruling on its three other issues presented as additional sustaining grounds⁵ in its original Motion.

CONCLUSION

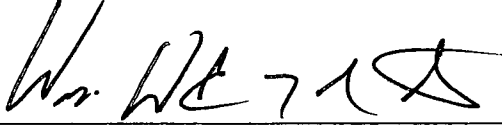
The Court clearly and carefully considered and correctly ruled on all of the Defendants' positions, issues and arguments. Any inferred error of law contention is without foundation. The Defendants' SCRCP 59(e) Motion should be denied.

⁴See Paragraph 4 on Page 5 of the March 1, 2010, Order.

⁵See the instructions as to when a party who prevailed on some issues, with others deferred, in the trial court can and should raise the un-decided points as additional sustaining grounds. I'ON, LLC v. Town of Mt. Pleasant, 526 S.E.2d 716 at 721-724 (S.C. 2000), 338 S.C. 406 at 409-410.

Respectfully submitted,

JONES, SIMPSON & NEWTON

By: 

Wm. Weston J. Newton
Attorneys for BNC Bank, as Successor
to Beach First National Bank

Bluffton, South Carolina

April 16, 2010

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2006ES0700145
	)	
IN THE MATTER OF ESTATE	)	
OF MARGARET D. HOVER	)	
GURNHAM, A/K/A MARGARET	)	
D. HOVER:	)	
	)	
BEACH FIRST NATIONAL BANK,	)	
	)	MEMORANDUM IN SUPPORT OF
Plaintiffs,	)	MOTION TO ALTER OR
	)	AMEND ORDER
	)	
vs.	)	
	)	
THE ESTATE OF MARGARET	)	
GURNHAM A/K/A MARGARET	)	
D. HOVER AND/OR BRIAN HOVER	)	
ITS PERSONAL REPRESENTATIVE,	)	
	)	
Defendants.	)	
	)	

TO: THE HONORABLE KENNETH E. FULP, JR.
WILLIAM W. NEWTON, ATTORNEY FOR THE PLAINTIFF
JAMES M. HERRING, ATTORNEY FOR THE PLAINTIFF

This memorandum is in support of Defendants' motion, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, to alter or amend this Court's "Order Granting Summary Judgment" filed on March 1, 2010.

I. Facts

The decedent, Margaret Gurnham executed a promissory note and mortgage in favor of Beach First National Bank ("the Bank") on or around March 24, 2005. She died on December 8, 2005. Her estate was opened on February 23, 2006 (hereafter "the Estate"). The Bank received payments on its promissory note from the decedent's son, Brian Hover through March, 2008. Thereafter no payments were made.

The Bank instituted foreclosure proceedings against the Estate on July 14, 2008 and filed a Statement of Creditor Claim against the Estate on August 19, 2008 for the amount then due under the note. Subsequently, the Bank obtained an unchallenged Order of Foreclosure and Deficiency on

December 11, 2008 in the Beaufort County Court of Common Pleas. It then filed a Supplemental Statement of Creditor Claim on December 18, 2008 to reflect the amount of the judgment it obtained. The Estate gave timely notice of disallowance of both creditor claims asserted by the Bank.

The Bank filed a Petition for Allowance of Claim with this Court and the Defendant(s) assert that any claim for a deficiency is time-barred. Both parties moved for summary judgment which was granted to the Bank on March 1, 2010 by Order wherein this Court held, essentially, that a judgment against the Estate, that is regular on its face, acts as an allowance of claim pursuant to S.C.Code Section 62-3-806(c). Respectfully, this ruling was error and it was the Estate, not the Bank, which was entitled to summary judgment for the reasons set forth below.

II. Introduction

A. Position of The Bank

The Bank contends that the South Carolina Probate Code (“SCPC”) claims-barring process does not apply to it if it chooses to ignore it. Despite its failure to present a timely claim against the Estate of Margaret Dever Hover Gurnham (“Estate”), the Bank chose to subsequently pursue a foreclosure action in the circuit court, where it purportedly obtained a deficiency judgment against the Estate. The Bank then returned to the probate court, where it seeks to enforce its judgment. The Bank contends that SCPC section 3-806(c) requires the probate court to treat the putative judgment obtained in the circuit court as a valid claim against the Estate.

B. The Bank’s position thwarts public policy and moots legislative intent

To allow the Bank to prevail on its theory would thwart the public policy underlying the claims-barring process and would moot the entire claims-barring process established by the South Carolina General Assembly.

1. The purpose of the claims-barring process is to allow a speedy and efficient estate administration

The underlying purpose of the claims-barring process is to promote the speedy and efficient administration of an estate — a legitimate state purpose.¹ If claims are not barred by a certain date, then a decedent's property would remain unmarketable because no buyer would pay fair value for the property if the buyer knew that a creditor could successfully assert a claim against the property at any time. By creating a date certain by which all creditors' claims have to be resolved, the claims-barring statute assures the determination of ownership within a reasonable time so that the decedent's property becomes marketable. The Bank wants this Court to open a Pandora's Box, the result of which would effectively prevent the orderly and timely closing of an estate.

2. The position of the Bank, and this Court, defeats legislative intent

The statutory claims-barring process would not work if a creditor were allowed to circumvent the claims-barring statute by pursuing its claim in the circuit court, despite having missed the deadline for pursuing a claim under the claims-barring statute. Allowing a creditor that has failed to meet the deadline for properly presenting a claim under the claims-barring process to nevertheless pursue the claim in the circuit court would be a circumvention of legislative intent: The claims-barring process would be rendered meaningless. The Bank could have avoided the need to ask for the Court to thwart public policy and moot legislative intent by protecting its position and filing a claim within the requisite time period under the claims-barring statute. Instead, the Bank asks the Court to effectively eviscerate the statutory claims-barring process to save the Bank from its own failure to follow the procedure.

The protection afforded subsequent purchasers by the claims-barring process is based on the same policy as the South Carolina recording act, section 30-7-10, which protects subsequent purchasers from prior purchasers and lienholders who fail to protect their interests by failing to

¹ See, e.g., Poleson v. Wills, 998 P.2d 469 (Colo. App.). (For applicability as precedent of decisions from other jurisdictions when dealing with statutes derived from the Uniform Probate Code, see text accompanying footnote 3).

perform the simple act of recording their interests in the real estate.² This is the very policy that the Bank would insist on upholding — and relied upon in its foreclosure action in circuit court — as to its lien against the real estate. Yet when it comes to the Bank’s failure to protect its option to pursue a deficiency judgment against the Estate, the Bank wants this Court to ignore the process instituted by the legislature.

The Bank was obviously aware of the requirement to file its claim in the probate court in order to pursue its deficiency judgment because it did exactly that — file a claim in the probate court — on August 19, 2008. Unfortunately for the Bank, it filed its claim too late and is bound by the rules imposed by the legislature.

C. Uniformity of application of the Uniform Probate Code

The SCPC claims-barring process is based on — and virtually verbatim with — the Uniform Probate Code (“UPC”). According to section 62-3-102, a fundamental purpose of the SCPC is “to make uniform the law among the various jurisdictions.” Thus, the Court should apply the SCPC consistent with the intent of the South Carolina legislature and look to other UPC-based states for consistency. For the Bank to prevail, the Court would not only contravene the intent of the South Carolina legislature but would cause the application of the UPC-based claims barring process to deviate from that in other UPC states. In construing the SCPC, the court is guided by decisions from other UPC jurisdictions as well as the comments from the UPC.³

² See, e.g., Slack v. James, 589 S.E.2d 772 (S.C.App. 2003).

³ See, e.g., Marchant v. Hamilton, 309 S.E.2d 781 S.C.App.1983; Orr v. Clyburn, 290 S.E.2d 804 (S.C.1982); Rish v. Theo Bros. Const. Co., Inc., 237 S.E.2d 61(S.C.1977); Yamaha Motor Corp., U.S.A. v. Tri-City Motors and Sports, Inc., 429 N.W.2d 871 (Mich.App.1988); House of Stainless, Inc. v. Marshall and Ilsley Bank, 249 N.W.2d 561 (Wis.1977); Piatt v. Medford Highlands, LLC, 22 P.3d 767 (Or. App.2001), review denied 34 P.3d 1176; Excel Bank v. National Bank of Kansas City, 290 S.W.3d 801(Mo. App. W. Dist. 2009); Sandvick v. LaCrosse, 747 N.W.2d 519 (N.D.2008); Hunt Club Condominiums, Inc. v. Mac-Gray Services, Inc., 721 N.W.2d 117 (Wis.App. 2006); Coleman v. DaimlerChrysler Services of North America, LLC, 623 S.E.2d 189 (Ga.App. 2005); Carl J. Herzog Foundation, Inc. v. University of Bridgeport, 677 A.2d 1378 (Conn.App.1996); In re Vigil Bros. Const., Inc., 193 B.R. 513 (BAP.9.Ariz.1996);

III. The Circuit Court Lacked Subject Matter Jurisdiction

The circuit court did not have jurisdiction to hear the deficiency judgment action brought by the Bank. “Compliance with the time limits for presentation of a claim against an estate is jurisdictional.”⁴ No tolling provisions apply to the claims-barring deadline even if other statutes might be tolled.⁵ Thus, because the Bank failed to timely present its claim under the claims-barring statute, the circuit court lacked subject matter jurisdiction to hear the Bank’s claim for a deficiency judgment.

Consequently, even if the Bank were correct — which it is not, as discussed below — in its assertion that this Court must unquestionably allow its claim because it obtained a judgment in another court under SCPC section 62-3-803(c), the putative judgment obtained in the circuit court is invalid because that court lacked subject matter jurisdiction. Of course, a party may raise the issue of subject matter jurisdiction at any time; it cannot be waived.⁶

IV. The Bank Failed to Comply with the Claims-Barring Statute

A. The SCPC Claims Procedure

SCPC section 62-3-803 imposes the time limits for presenting a claim against a decedent’s estate. Claims not timely presented are forever barred. Id.

State ex rel. Dept. of Public Safety, State Police Div. v. One 1990 Chevrolet Pickup, Model Z-71, Four Wheel Drive, White, Bearing Texas License No. 3003VR, VIN: IGCDK14K62204458, 857 P.2d 44 (N.M.App.1993); McKee Const. Co. v. Stanley Plumbing & Heating Co., 828 S.W.2d 700 (Mo.App.S.Dist.1992).

⁴ Poleson v. Wills, 998 P.2d 469 (Colo. App.); See also Wishbone, Inc. v. Eppinger, 829 P.2d 434 (Colo.App.1991), certiorari denied 113 S.Ct. 198, 506 U.S. 869; Strong Bros. Enterprises, Inc. v. Estate of Strong, 666 P.2d 1109 (Colo.App.1983); Lutheran Broth. Legal Reserve Fraternal Ben. Soc. v. Estate of Petz, 744 So.2d 596 (Fla.App. 2 Dist.1999);

⁵ Matter of Daigle's Estate, 634 P.2d 71 (Colo.1981).

⁶ The subject matter jurisdiction of a court derives from either the constitution or the laws of the state and it cannot be conferred by consent. American Agric. Chem. Co. v. Thomas 34 S. E. 2d 592 (1945). Lack of subject matter jurisdiction cannot be waived. Therefore, a party may object to the court's lack of subject matter jurisdiction at any time. Id.; State v. Grim, 341 S.C. 63, 533 S.E.2d 329 (2000).

1. Time to Present a Claim

The time to present a claim depends on when the claim arises.

(a) Claims Arising Before a Decedent's Death

For claims arising before a decedent's death, the SCPC requires a creditor to present a claim by no later than one year from the decedent's death. Ms. Gurnham died on December 8, 2005. The Bank first attempted to present its claim in the probate court on August 19, 2008, which was beyond the one year time limit. The Bank first attempted to bring its action in the circuit court on July 14, 2008, which was beyond the one year time limit. Consequently, because the Bank's claim arose at or before Ms. Gurnham's death, as discussed in more detail below, the claim was not timely presented.

(b) Claims Arising at Or After a Decedent's Death

For these claims, the SCPC requires a claim based on a contract with a *personal representative* to be presented within 8 months after the time for performance by the personal representative is due. For other claims — i.e., tort claims⁷ — the time to present a claim is no later than one year from date of death or 8 months after the claim arises, whichever time period runs later.

Although the Bank contends that this time limit applies to its claim because, according to the Bank, its claim arose after the decedent's death, the Bank's claim does not fall into this category. As noted above, the only two claims that can arise at or after the decedent's death are (1) claims based on a contract with the personal representative and (2) tort claims. The Bank's claim for a deficiency judgment is neither. A claim for a deficiency judgment is based on the

⁷ See comment to UPC section 3-803: "The original text failed to describe a satisfactory non-claim period for claims arising at or after the decedent's death other than claims based on contract. The four months "after [any other claim] arises" period worked unjustly as to tort claims stemming from accidents causing the decedent's death by snuffing out claims too quickly, sometimes before an estate had been opened. The language added by the 1989 amendment assures such claimants against any bar working prior to the later of one year after death or four months from the time the claim arises."

personal obligation under a note. A deficiency judgment is a personal judgment. One cannot obtain a personal judgment if there is no underlying personal liability. Although by signing the note (a contract) Ms. Gurnham may have had personal liability, the Estate did not. The personal representative did not enter into any contract with the Bank, so there was no “contract with the personal representative” that would follow within the statutory definition of a “claim arising at or after the decedent’s death.” Nor is it a tort to fail to pay a note payment. Thus, the Bank’s claim cannot be one that arose at or after the decedent’s death. Consequently, it failed to timely present its claim.

(c) Applicable Precedent Provides That the Bank’s Claim Was Untimely

The case of Harter v. Lenmark⁸ is directly on point and should be dispositive. (In construing the SCPC, the court is guided by decisions from other UPC jurisdictions as well as the comments from the UPC.)⁹ In reviewing the Minnesota version of UPC section 3-803, the state Supreme Court examined a situation where a lender attempted to obtain a deficiency judgment for a default that occurred *after the decedent’s death*. Although the court allowed the lender to foreclose on the secured real estate, it construed the state version of UPC section 3-803 to *require the lender to present a claim for the deficiency judgment within the time limits for claims arising before a decedent’s death*.

This is exactly the situation confronting this Court. Because the Harter case is applicable precedent construing UPC section 3-803, its rationale and result should apply here.¹⁰ The Court should find that (1) the Bank’s claim was one arising under section 62-3-803(a); (2) the Bank should have asserted its claim no later than one year after Ms. Gurnham’s death; (3) the Bank

⁸ 443 N.W.2d 537 (Minn. 1989).

⁹ See footnote 3 for citations.

¹⁰ For similar applicable precedent, see Gandy v. Citicorp, 985 So.2d 371 (Miss. App. 2008) (when default occurred after borrower’s death, court allowed foreclosure but recognized that any deficiency judgment would have to be timely filed under probate claims process).

failed to do so, in any court; and (4) because the Bank filed its circuit court action more than one year after Ms. Gurnham's death, the circuit court lacked subject matter jurisdiction to issue the deficiency judgment.

2. Method of Presenting a Claim

SCPC section 62-3-806 recognizes two methods for presenting claims — essentially a two-step process or a one-step process.

(a) Two-Step Process

The two-step process involves timely presenting a claim under section 62-3-803 and, if disallowed, timely contesting the claim under sections 62-3-806 and 62-3-804 — i.e., within 30 days of notice of disallowance. As discussed above, the Bank attempted to present a claim in the probate court under this two-step process but failed because it was not presented within one year from the decedent's death.

(b) One-Step Process

The one-step process involves filing a lawsuit against the decedent's estate rather than presenting a claim for determination by the personal representative, as in the two-step process. Nevertheless, the lawsuit must be commenced within the same time limit to present a claim under section 62-3-803 — no later than one year from date of death. Although the Bank also attempted to assert its claim by bringing a lawsuit in the circuit court, this attempt was also untimely because it was brought more than one year after the date of Ms. Gurnham's death.

Section 62-3-806(c) does provide that “a judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.” However, that subsection cannot be read in isolation, or in a vacuum. Basic rules of statutory construction require reading statutory language consistently when possible and giving meaning to all language of a statute when possible. The Bank's proposed construction of section 62-3-803(c) violates both of these rules. Nothing in that subsection provides that it is to override the claims-barring process. Rather, a consistent reading of the claims-barring statute construes

that subsection to mean merely what it says in context: a judgment obtained in an action in another court *if timely commenced* is an allowance of the claim. If that subsection allowed a creditor that has not timely commenced a claim to circumvent the claims-barring process simply by applying to the circuit court, then the legislatively-created claims-barring process would be meaningless. As noted above, if the Bank's position prevails, no subsequent purchaser from a personal representative or a distributee could be comfortable that the property was free from claims even though the statutory claims-barring period had run. This would wreak havoc on the probate process and defeat the purpose of the claims-barring process.

In other words, the legislature clearly did not intend for section 62-3-803(c) to override the entire claims-barring process.

In a case such as this, S.C. Code section 62-2-804(2) clearly requires compliance with the nonclaims period rules: "*The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim*" (emphasis added).

Moreover, the comment to SCPC section 62-3-104, requiring all claims to be enforced in accordance with the claims-barring process, provides: "A secured creditor is not affected by this section except as to any deficiency judgment sought. A secured creditor is not required to assert his claim against the personal representative of the deceased debtor; however, the secured creditor who wishes to enforce a claim for deficiency, even if unliquidated or only potential, is required to comply with the claims provisions of this section and Part 8 of this article."¹¹

3. Contingent Claims

¹¹ See also, e.g., Harter v. Lenmark, 443 N.W.2d 537 (Minn. 1989) (defective claim against the estate is equivalent to no claim – a deficiency judgment may not be allowed without a timely claim lodged against the estate); Gilkes v. Beezer, 484 P.2d 493 (Wash.App. 1971) (similar); S.C. Code Section 62-3-802(c): "For purposes of any statute of limitations, the proper presentation of a claim under Section 62-3-804 is equivalent to commencement of a proceeding on the claim." (emphasis added).

The SCPC recognizes that a creditor may have a contingent or unliquidated claim or one not yet due. For such claims, SCPC section 62-3-803 does not make an exception for the time limits of the claims-barring process. Rather, creditors with such claims must timely present their claims, as with all other creditors.¹² At Ms. Gurnham's death, the Bank had just such a contingent claim: there was the possibility that there would be a default on the note in the future. As with all other contingent creditors, the Bank simply had to file its claim in time, which it did not do. This policy is recognized by SCPC section 62-3-810 as it affects guarantees¹³. For the same reason as for possible future claims to a deficiency judgment, obligations of guarantors may not be due or liquidated at the time of their deaths. Yet creditors who may one day want to pursue the guaranty must timely present a claim under the claims-barring statute per section 62-3-803. Otherwise, subsequent purchasers of estate property would never be certain that they could acquire good title.

4. Exceptions to the Claims-Barring Statute

Section 62-3-803(c) creates exceptions to the claims-barring time limits of section 62-3-803. The applicable exception for the Bank in this case would be the one in section 62-3-803(c)(1): "any proceeding to enforce a mortgage." However, as discussed above, that exception applies only to the extent of the Bank's ability to enforce its lien against the mortgaged real estate. It does not apply to a deficiency judgment. To the extent a mortgage holder wants to assert a claim for a deficiency judgment, it must timely file a claim against the estate.¹⁴ The Bank failed to timely present its claim against the Estate.

¹² See, e.g., Poleson v. Wills, 998 P.2d 469, (Colo. App.2000); Security Savings & Loan Ass'n v. Estate of Kite, Colo. App. 1992); Spohr v. Berryman, 589 So. 2d 225 (Fla. App. 1991).

¹³ See also, e.g., Security Savings & Loan Ass'n v. Estate of Kite, Colo. App. 1992).

¹⁴

See comment to SCPC section 62-3-104, requiring all claims to be enforced in accordance with the claims-barring process, provides: "A secured creditor is not affected by this section except as to any deficiency judgment sought. A secured creditor is not required to assert his claim against the personal representative of the deceased debtor; however, the secured creditor who wishes to enforce a claim for deficiency, even if unliquidated or only potential, is required to comply with

the claims provisions of this section and Part 8 of this article.” See also, e.g., Ocean Nat. Bank v. Spang, 675 A.2d 983 (Me.1996).

V. The Estate was Entitled to Summary Judgment

The court erred in denying the defendants’ motion for summary judgment in that the undisputed evidence in the record reveals that the plaintiff did not timely file a claim against the estate in accordance with S.C.Code Section 62-3-803 and 3-804. The evidence reveals that the creditor claims that were commenced against the estate, through the probate court or otherwise, were lodged well after the claims barring statute had run. As a nonclaim statute, Section 62-3-803 may not be defeated by waiver, estoppel or other means, including the operation of Section 62-3-806(c). In other words, the timely presentment of a claim against the estate is a precondition to the right itself; the operation of the claims barring statute is not merely a defense that can be waived or otherwise defeated. Instead, the statutory terms concerning time limitations are mandatory.

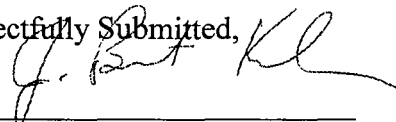
VI. The Order Should Be Modified to Clarify that Brian Hover, Individually, Is Not a Party to This Action.

The court erred in finding as a fact that Brian Hover is a defendant in this action. (Page 2, Order). Hover was not named personally in the action, nor was he served with pleadings in the matter other than in his representative capacity.

CONCLUSION

For all of the foregoing reasons, because the Bank failed to timely present its claim against the Estate, the Estate, not the Bank, should have been granted summary judgment. This Court’s Order should be altered or amended to so conclude.

Respectfully Submitted,



J. Brent Kiker
KIKER LAW FIRM, P.A.

38-A New Orleans Road
Post Office Drawer 7965
Hilton Head, South Carolina 29901
(843) 842-7300 (Phone)
(843) 842-6563 (Facsimile)

April 22, 2010

BEAUFORT COUNTY
In the Court of Common Pleas

APPEAL FROM BEAUFORT COUNTY
Probate Court
Kenneth E. Fulp, Jr., Probate Court Judge

Case No: 2006-ES-07-00145

Beach First National Bank,..... Plaintiff

v.

Estate of Margaret Gurnham,..... Defendant.
a/k/a Margaret D. Hover and /or Brian Hover, Its Personal Representative

NOTICE OF APPEAL

The Defendant(s) appeals the following Orders of the Honorable Kenneth E. Fulp, Jr. along with any judgment entered or to be entered thereon:

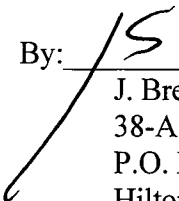
- (1) Order dated March 1, 2010; and
- (2) Order Denying Motion to Alter or Amend Judgment.

The Defendant(s) timely filed and served a Motion to Alter or Amend Judgment.

Thereafter, Defendant(s) Motions were considered and were denied. Defendant(s) received written notice of the Order Denying Motion to Alter or Amend Judgment on May 5, 2010. Copies of the appealed Orders are attached.

May 14, 2010

KIKER LAW FIRM, P.A.

By:  _____

J. Brent Kiker
38-A New Orleans Road
P.O. Drawer 7965
Hilton Head, SC 29938
(843) 842-7300
(843) 842-6563 fax

Other Counsel of Record:

Wm. Weston Newton, Esquire
Jones, Simpson & Newton, P.A.
P.O. Box 1938
Bluffton, SC 29910
(843) 706-6111
(843) 686-1219 fax
Attorney for Beach First National Bank

BEAUFORT COUNTY
In the Probate Court

FILED

2010 JUN 18 PM 1:23

APPEAL FROM BEAUFORT COUNTY
Probate Court
Kenneth E. Fulp, Jr., Probate Court Judge

PROBATE COURT
BEAUFORT COUNTY, SC

Case No: 2006-ES-07-00145

Beach First National Bank,..... Plaintiff

v.

Estate of Margaret Gurnham,..... Defendant.
a/k/a Margaret D. Hover and /or Brian Hover, Its Personal Representative

GROUND FOR APPEAL IN RE: ESTATE OF MARGARET GURNHAM

In accordance with S.C. Code Section 62-1-308, Estate of Margaret Gurnham appeals the Order dated March 1, 2010 and the Order Denying Motion to Alter or Amend Judgment based on the following grounds:

1. The court erred in finding as a fact that Brian Hover is a defendant in this action. (Page 2, Order). Hover was not named personally in the action, nor was he served with pleadings in the matter other than in his representative capacity.
2. The court erred in finding that S.C. Code Section 62-3-806(c) mandates the allowance of a deficiency judgment against the estate without the proper and timely filing of the requisite creditor claim pursuant to S.C. Code Section 62-3-803.-- the error being that, while admittedly the Plaintiff may claim against the collateral at issue pursuant to S.C. Code Section 62-3-803(1), the imposition of a deficiency judgment for money damages (hence an unsecured claim) must be preceded by a timely filed claim against the estate. In a case such as this, S.C. Code section 62-2-804(2) clearly requires compliance with the nonclaims period rules: "The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but *the commencement of the proceeding must occur within the time limited for presenting the claim*" (emphasis added). See also comment to S.C. Code Section 62-3-104: "A secured creditor

is not affected by this section except as to any deficiency judgment sought. A secured creditor is not required to assert his claim against the personal representative of the deceased debtor; however, the secured creditor who wishes to enforce a claim for deficiency, even if unliquidated or only potential, is required to comply with the claims provisions of this section and Part 8 of this article.” *See also, e.g., Harter v. Lenmark*, 443 N.W.2d 537 (Minn. 1989) (defective claim against the estate is equivalent to no claim – a deficiency judgment may not be allowed without a timely claim lodged against the estate); S.C. Code Section 62-3-802(c): “For purposes of any statute of limitations, the *proper* presentation of a claim under Section 62-3-804 is equivalent to commencement of a proceeding on the claim.” (emphasis added).

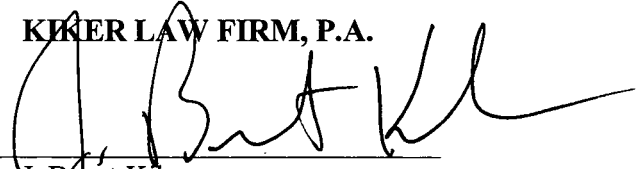
3. The court erred in denying the defendants’ motion for summary judgment in that the undisputed evidence in the record reveals that the plaintiff did not timely file a claim against the estate in accordance with S.C.Code Section 62-3-803 and 3-804. The evidence reveals that the creditor claims that were commenced against the estate, through the probate court or otherwise, were lodged well after the claims barring statute had run. As a nonclaim statute, Section 62-3-803 may not be defeated by waiver, estoppel or other means, including the operation of Section 62-3-806(c). In other words, the timely presentment of a claim against the estate is a precondition to the right itself; the operation of the claims barring statute is not merely a defense that can be waived or otherwise defeated. Instead, the statutory terms concerning time limitations are mandatory.
4. The court erred in failing to apply Section 62-3-806(c) in proper context and in light of provisions mandating the timely presentment and manner of presenting claims. The court applied the section as if the lawsuit filing nor the presentment of the underlying claim had to be accomplished within the mandatory time limits. This result does not effectuate the orderly administration of estates (which is the public policy being advanced by the probate code); it defeats it.
5. The court erred in allowing the claim against the estate because its application of S.C.Code Section 62-3-806(c) in this case violates South Carolina public policy. Specifically, in permitting a creditor like the plaintiff to succeed in making a valid claim against the estate outside of the creditor claims period, it defeats the rights and expectations of other creditors, as well as the beneficiaries thereto. The court’s reasoning would allow most any creditor against the estate who failed to file a claim against an estate to simply try their hand in another court and attempt to reduce it to judgment. This is an absurd result. Estates do not need to, and should not be required, to defend themselves in other jurisdictions against claims that are stale and time-barred. This is exactly the result permitted in the case at hand and was, respectfully, error. Moreover, this would nullify the purpose of the nonclaims statute, which is founded on the legitimate state interests of a speedy and efficient administration of the estate to determine certainty of title within a reasonable period of time.
6. The Court erred by reading and applying S.C.Code Section 62-3-806(c) out of context. Section 62-3-806(c) does not by itself override the nonclaims procedure imposed by the

South Carolina legislature. To apply that section as the Court did in its Order would be to negate the remaining provisions of the applicable statutes that impose a nonclaims period, effectively reading section 62-3-806(c) in a vacuum.

7. The Court erred by reading and applying S.C.Code Section 62-3-806(c) to apply even if a creditor fails to comply with the nonclaims provisions of the statutes. Because Plaintiff failed to comply with the applicable nonclaims provisions, the circuit court lacked subject matter jurisdiction to grant the deficiency judgment.
8. The Court's Order apparently and implicitly considers the nonclaims statute to have begun running on the date of default on the loan. To the extent the Court's order did so, it is in error. The nonclaims statute began running on the date of the decedent's death; the "estate" was not liable and was not a contracting party under the applicable note and mortgage.

June 18, 2010

KIKER LAW FIRM, P.A.

By: 

J. Brent Kiker
38-A New Orleans Road
P.O. Drawer 7965
Hilton Head, SC 29938
(843) 842-7300
(843) 842-6563 fax

Other Counsel of Record:

Wm. Weston Newton, Esquire
Jones, Simpson & Newton, P.A.
P.O. Box 1938
Bluffton, SC 29910
(843) 706-6111
(843) 686-1219 fax
Attorney for Beach First National Bank

BEAUFORT COUNTY
In the Probate Court

APPEAL FROM BEAUFORT COUNTY
Probate Court
Kenneth E. Fulp, Jr., Probate Court Judge

Case No: 2006-ES-07-00145

Beach First National Bank,..... Plaintiff

v.

Estate of Margaret Gurnham,..... Defendant.
a/k/a Margaret D. Hover and /or Brian Hover, Its Personal Representative

MEMORANDUM IN SUPPORT OF APPEAL

TO: THE HONORABLE MARVIN DUKES, MASTER IN EQUITY
WILLIAM W. NEWTON, ATTORNEY FOR THE PLAINTIFF
JAMES M. HERRING, ATTORNEY FOR THE PLAINTIFF

This memorandum is in support of Defendants' appeal of the Orders of the Probate Court which, collectively, (1) deny the defendants' motion for summary judgment, (2) grant summary judgment to the plaintiff, and (3) deny the defendants' motion to alter or amend its order(s).

I. Facts

The decedent, Margaret Gurnham executed a promissory note and mortgage in favor of Beach First National Bank ("the Bank") on or around March 24, 2005. She died on December 8, 2005. Her estate was opened on February 23, 2006 (hereafter "the Estate"). The Bank received payments on its promissory note from the decedent's son, Brian Hover through March, 2008. Thereafter no payments were made.

The Bank instituted foreclosure proceedings against the Estate on July 14, 2008 and filed a Statement of Creditor Claim against the Estate on August 19, 2008 for the amount then due under the note. Subsequently, the Bank obtained an unchallenged Order of Foreclosure and Deficiency on December 11, 2008 in the Beaufort County Court of Common Pleas. It then filed a Supplemental

Statement of Creditor Claim on December 18, 2008 to reflect the amount of the judgment it obtained.

The Estate gave timely notice of disallowance of both creditor claims asserted by the Bank.

The Bank filed a Petition for Allowance of Claim with this Court and the Defendant(s) assert that any claim for a deficiency is time-barred. Both parties moved for summary judgment which was granted to the Bank on March 1, 2010 by Order wherein the lower court held, essentially, that a judgment against the Estate, that is regular on its face; acts as an allowance of claim pursuant to S.C.Code Section 62-3-806(c). Respectfully, this ruling was error and it was the Estate, not the Bank, which was entitled to summary judgment for the reasons set forth below.

II. Introduction

A. Position of The Bank

The Bank contends that the South Carolina Probate Code (“SCPC”) claims-barring process does not apply to it if it chooses to ignore it. Despite its failure to present a timely claim against the Estate of Margaret Dever Hover Gurnham (“Estate”), the Bank chose to subsequently pursue a foreclosure action in the circuit court, where it purportedly obtained a deficiency judgment against the Estate. The Bank then returned to the probate court, where it sought to enforce its judgment. The Bank contends that SCPC section 3-806(c) requires the probate court to treat the putative judgment obtained in the circuit court as a valid claim against the Estate.

B. The Bank’s position thwarts public policy and moots legislative intent

To allow the Bank to prevail on its theory would thwart the public policy underlying the claims-barring process and would moot the entire claims-barring process established by the South Carolina General Assembly.

1. The purpose of the claims-barring process is to allow a speedy and efficient estate administration

The underlying purpose of the claims-barring process is to promote the speedy and efficient administration of an estate — a legitimate state purpose.¹ If claims are not barred by a certain date, then a decedent's property would remain unmarketable because no buyer would pay fair value for the property if the buyer knew that a creditor could successfully assert a claim against the property at any time. By creating a date certain by which all creditors' claims have to be resolved, the claims-barring statute assures the determination of ownership within a reasonable time so that the decedent's property becomes marketable. The Bank wants this Court to open a Pandora's Box, the result of which would effectively prevent the orderly and timely closing of an estate.

2. The position of the Bank, and the Probate Court, defeats legislative intent

The statutory claims-barring process would not work if a creditor were allowed to circumvent the claims-barring statute by pursuing its claim in the circuit court, despite having missed the deadline for pursuing a claim under the claims-barring statute. Allowing a creditor that has failed to meet the deadline for properly presenting a claim under the claims-barring process to nevertheless pursue the claim in the circuit court would be a circumvention of legislative intent: The claims-barring process would be rendered meaningless. The Bank could have avoided the need to ask for the Court to thwart public policy and moot legislative intent by protecting its position and filing a claim within the requisite time period under the claims-barring statute. Instead, the Bank asks the Court to effectively eviscerate the statutory claims-barring process to save the Bank from its own failure to follow the procedure.

The protection afforded subsequent purchasers by the claims-barring process is based on the same policy as the South Carolina recording act, section 30-7-10, which protects subsequent purchasers from prior purchasers and lienholders who fail to protect their interests by failing to

¹ See, e.g., Poleson v. Wills, 998 P.2d 469 (Colo. App.). (For applicability as precedent of decisions from other jurisdictions when dealing with statutes derived from the Uniform Probate Code, see text accompanying footnote 3).

perform the simple act of recording their interests in the real estate.² This is the very policy that the Bank would insist on upholding — and relied upon in its foreclosure action in circuit court — as to its lien against the real estate. Yet when it comes to the Bank's failure to protect its option to pursue a deficiency judgment against the Estate, the Bank wants this Court to ignore the process instituted by the legislature.

The Bank was obviously aware of the requirement to file its claim in the probate court in order to pursue its deficiency judgment because it did exactly that — file a claim in the probate court — on August 19, 2008. Unfortunately for the Bank, it filed its claim too late and is bound by the rules imposed by the legislature.

C. Uniformity of application of the Uniform Probate Code

The SCPC claims-barring process is based on — and virtually verbatim with — the Uniform Probate Code (“UPC”). According to section 62-3-102, a fundamental purpose of the SCPC is “to make uniform the law among the various jurisdictions.” Thus, the Court should apply the SCPC consistent with the intent of the South Carolina legislature and look to other UPC-based states for consistency. For the Bank to prevail, the Court would not only contravene the intent of the South Carolina legislature but would cause the application of the UPC-based claims barring process to deviate from that in other UPC states. In construing the SCPC, the court is guided by decisions from other UPC jurisdictions as well as the comments from the UPC.³

² See, e.g., Slack v. James, 589 S.E.2d 772 (S.C.App. 2003).

³ See, e.g., Marchant v. Hamilton, 309 S.E.2d 781 S.C.App.1983; Orr v. Clyburn, 290 S.E.2d 804 (S.C.1982); Rish v. Theo Bros. Const. Co., Inc., 237 S.E.2d 61(S.C.1977); Yamaha Motor Corp., U.S.A. v. Tri-City Motors and Sports, Inc., 429 N.W.2d 871 (Mich.App.1988); House of Stainless, Inc. v. Marshall and Ilsley Bank, 249 N.W.2d 561 (Wis.1977); Piatt v. Medford Highlands, LLC, 22 P.3d 767 (Or. App.2001), review denied 34 P.3d 1176; Excel Bank v. National Bank of Kansas City, 290 S.W.3d 801(Mo. App. W. Dist. 2009); Sandvick v. LaCrosse, 747 N.W.2d 519 (N.D.2008); Hunt Club Condominiums, Inc. v. Mac-Gray Services, Inc., 721 N.W.2d 117 (Wis.App. 2006); Coleman v. DaimlerChrysler Services of North America, LLC, 623 S.E.2d 189 (Ga.App. 2005); Carl J. Herzog Foundation, Inc. v. University of Bridgeport, 677 A.2d 1378 (Conn.App.1996); In re Vigil Bros. Const., Inc., 193 B.R. 513 (BAP.9.Ariz.1996);

III. The Circuit Court Lacked Subject Matter Jurisdiction to Order a Deficiency

The circuit court did not have jurisdiction to hear the deficiency judgment action brought by the Bank. “Compliance with the time limits for presentation of a claim against an estate is jurisdictional.”⁴ No tolling provisions apply to the claims-barring deadline even if other statutes might be tolled.⁵ Thus, because the Bank failed to timely present its claim under the claims-barring statute, the circuit court lacked subject matter jurisdiction to hear the Bank’s claim for a deficiency judgment.

Consequently, even if the Bank were correct — which it is not, as discussed below — in its assertion that this Court must unquestionably allow its claim because it obtained a judgment in another court under SCPC section 62-3-803(c), the putative judgment obtained in the circuit court is invalid because that court lacked subject matter jurisdiction. Of course, a party may raise the issue of subject matter jurisdiction at any time; it cannot be waived.⁶

IV. The Bank Failed to Comply with the Claims-Barring Statute

A. The SCPC Claims Procedure

SCPC section 62-3-803 imposes the time limits for presenting a claim against a decedent’s estate. Claims not timely presented are forever barred. Id.

State ex rel. Dept. of Public Safety, State Police Div. v. One 1990 Chevrolet Pickup, Model Z-71, Four Wheel Drive, White, Bearing Texas License No. 3003VR, VIN: IGCDK14K62204458, 857 P.2d 44 (N.M.App.1993); McKee Const. Co. v. Stanley Plumbing & Heating Co., 828 S.W.2d 700 (Mo.App.S.Dist.1992).

⁴ Poleson v. Wills, 998 P.2d 469 (Colo. App.); See also Wishbone, Inc. v. Eppinger, 829 P.2d 434 (Colo.App.1991), certiorari denied 113 S.Ct. 198, 506 U.S. 869; Strong Bros. Enterprises, Inc. v. Estate of Strong, 666 P.2d 1109 (Colo.App.1983); Lutheran Broth. Legal Reserve Fraternal Ben. Soc. v. Estate of Petz, 744 So.2d 596 (Fla.App. 2 Dist.1999);

⁵ Matter of Daigle's Estate, 634 P.2d 71 (Colo.1981).

⁶ The subject matter jurisdiction of a court derives from either the constitution or the laws of the state and it cannot be conferred by consent. American Agric. Chem. Co. v. Thomas 34 S. E. 2d 592 (1945). Lack of subject matter jurisdiction cannot be waived. Therefore, a party may object to the court's lack of subject matter jurisdiction at any time. Id.; State v. Grim, 341 S.C. 63, 533 S.E.2d 329 (2000).

1. Time to Present a Claim

The time to present a claim depends on when the claim arises.

(a) Claims Arising Before a Decedent's Death

For claims arising before a decedent's death, the SCPC requires a creditor to present a claim by no later than one year from the decedent's death. Ms. Gurnham died on December 8, 2005. The Bank first attempted to present its claim in the probate court on August 19, 2008, which was beyond the one year time limit. The Bank first attempted to bring its action in the circuit court on July 14, 2008, which was beyond the one year time limit. Consequently, because the Bank's claim arose at or before Ms. Gurnham's death, as discussed in more detail below, the claim was not timely presented.

(b) Claims Arising at Or After a Decedent's Death

For these claims, the SCPC requires a claim based on a contract with a *personal representative* to be presented within 8 months after the time for performance by the personal representative is due. For other claims — i.e., tort claims⁷ — the time to present a claim is no later than one year from date of death or 8 months after the claim arises, whichever time period runs later.

Although the Bank contends that this time limit applies to its claim because, according to the Bank, its claim arose after the decedent's death, the Bank's claim does not fall into this category. As noted above, the only two claims that can arise at or after the decedent's death are (1) claims based on a contract with the personal representative and (2) tort claims. The Bank's claim for a deficiency judgment is neither. A claim for a deficiency judgment is based on the

⁷ See comment to UPC section 3-803: "The original text failed to describe a satisfactory non-claim period for claims arising at or after the decedent's death other than claims based on contract. The four months "after [any other claim] arises" period worked unjustly as to tort claims stemming from accidents causing the decedent's death by snuffing out claims too quickly, sometimes before an estate had been opened. The language added by the 1989 amendment assures such claimants against any bar working prior to the later of one year after death or four months from the time the claim arises."

personal obligation under a note. A deficiency judgment is a personal judgment. One cannot obtain a personal judgment if there is no underlying personal liability. Although by signing the note (a contract) Ms. Gurnham may have had personal liability, the Estate did not. The personal representative did not enter into any contract with the Bank, so there was no “contract with the personal representative” that would follow within the statutory definition of a “claim arising at or after the decedent’s death.” Nor is it a tort to fail to pay a note payment. Thus, the Bank’s claim cannot be one that arose at or after the decedent’s death. Consequently, it failed to timely present its claim.

(c) Applicable Precedent Provides That the Bank's Claim Was Untimely

The case of Harter v. Lenmark⁸ is directly on point and should be dispositive. (In construing the SCPC, the court is guided by decisions from other UPC jurisdictions as well as the comments from the UPC.)⁹ In reviewing the Minnesota version of UPC section 3-803, the state Supreme Court examined a situation where a lender attempted to obtain a deficiency judgment for a default that occurred *after the decedent's death*. Although the court allowed the lender to foreclose on the secured real estate, it construed the state version of UPC section 3-803 to *require the lender to present a claim for the deficiency judgment within the time limits for claims arising before a decedent's death*.

This is exactly the situation confronting this Court. Because the Harter case is applicable precedent construing UPC section 3-803, its rationale and result should apply here.¹⁰ The Court should find that (1) the Bank's claim was one arising under section 62-3-803(a); (2) the Bank should have asserted its claim no later than one year after Ms. Gurnham's death; (3) the Bank failed to do so, in any court; and (4) because the Bank filed its circuit court action more than one year after Ms. Gurnham's death, the circuit court lacked subject matter jurisdiction to issue the deficiency judgment.

2. Method of Presenting a Claim

SCPC section 62-3-806 recognizes two methods for presenting claims — essentially a two-step process or a one-step process.

⁸ 443 N.W.2d 537 (Minn. 1989).

⁹ See footnote 3 for citations.

¹⁰ For similar applicable precedent, see *Gandy v. Citicorp*, 985 So.2d 371 (Miss. App. 2008) (when default occurred after borrower's death, court allowed foreclosure but recognized that any deficiency judgment would have to be timely filed under probate claims process).

(a) Two-Step Process

The two-step process involves timely presenting a claim under section 62-3-803 and, if disallowed, timely contesting the claim under sections 62-3-806 and 62-3-804 — i.e., within 30 days of notice of disallowance. As discussed above, the Bank attempted to present a claim in the probate court under this two-step process but failed because it was not presented within one year from the decedent's death.

(b) One-Step Process

The one-step process involves filing a lawsuit against the decedent's estate rather than presenting a claim for determination by the personal representative, as in the two-step process. Nevertheless, the lawsuit must be commenced within the same time limit to present a claim under section 62-3-803 — no later than one year from date of death. Although the Bank also attempted to assert its claim by bringing a lawsuit in the circuit court, this attempt was also untimely because it was brought more than one year after the date of Ms. Gurnham's death.

Section 62-3-806(c) does provide that "a judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim." However, that subsection cannot be read in isolation, or in a vacuum. Basic rules of statutory construction require reading statutory language consistently when possible and giving meaning to all language of a statute when possible. The Bank's proposed construction of section 62-3-803(c) violates both of these rules. Nothing in that subsection provides that it is to override the claims-barring process. Rather, a consistent reading of the claims-barring statute construes that subsection to mean merely what it says in context: a judgment obtained in an action in another court *if timely commenced* is an allowance of the claim. If that subsection allowed a creditor that has not timely commenced a claim to circumvent the claims-barring process simply by applying to the circuit court, then the legislatively-created claims-barring process would be meaningless. As noted above, if the Bank's position prevails, no subsequent purchaser from a

personal representative or a distributee could be comfortable that the property was free from claims even though the statutory claims-barring period had run. This would wreak havoc on the probate process and defeat the purpose of the claims-barring process.

In other words, the legislature clearly did not intend for section 62-3-803(c) to override the entire claims-barring process.

In a case such as this, S.C. Code section 62-2-804(2) clearly requires compliance with the nonclaims period rules: “*The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim*” (emphasis added).

Moreover, the comment to SCPC section 62-3-104, requiring all claims to be enforced in accordance with the claims-barring process, provides: “A secured creditor is not affected by this section except as to any deficiency judgment sought. A secured creditor is not required to assert his claim against the personal representative of the deceased debtor; however, the secured creditor who wishes to enforce a claim for deficiency, even if unliquidated or only potential, is required to comply with the claims provisions of this section and Part 8 of this article.”¹¹

3. *Contingent Claims*

The SCPC recognizes that a creditor may have a contingent or unliquidated claim or one not yet due. For such claims, SCPC section 62-3-803 does not make an exception for the time limits of the claims-barring process. Rather, creditors with such claims must timely present their claims, as with all other creditors.¹² At Ms. Gurnham’s death, the Bank had just such a

¹¹ See also, e.g., Harter v. Lenmark, 443 N.W.2d 537 (Minn. 1989) (defective claim against the estate is equivalent to no claim – a deficiency judgment may not be allowed without a timely claim lodged against the estate); Gilkes v. Beezer, 484 P.2d 493 (Wash.App. 1971) (similar); S.C. Code Section 62-3-802(c): “For purposes of any statute of limitations, the proper presentation of a claim under Section 62-3-804 is equivalent to commencement of a proceeding on the claim.” (emphasis added).

¹² See, e.g., Poleson v. Wills, 998 P.2d 469, (Colo. App.2000); Security Savings & Loan Ass’n v. Estate of Kite, Colo. App. 1992); Spohr v. Berryman, 589 So. 2d 225 (Fla. App. 1991).

contingent claim: there was the possibility that there would be a default on the note in the future. As with all other contingent creditors, the Bank simply had to file its claim in time, which it did not do. This policy is recognized by SCPC section 62-3-810 as it affects guarantees¹³. For the same reason as for possible future claims to a deficiency judgment, obligations of guarantors may not be due or liquidated at the time of their deaths. Yet creditors who may one day want to pursue the guaranty must timely present a claim under the claims-barring statute per section 62-3-803. Otherwise, subsequent purchasers of estate property would never be certain that they could acquire good title.

4. Exceptions to the Claims-Barring Statute

Section 62-3-803(c) creates exceptions to the claims-barring time limits of section 62-3-803. The applicable exception for the Bank in this case would be the one in section 62-3-803(c)(1): “any proceeding to enforce a mortgage.” However, as discussed above, that exception applies only to the extent of the Bank’s ability to enforce its lien against the mortgaged real estate. It does not apply to a deficiency judgment. To the extent a mortgage holder wants to assert a claim for a deficiency judgment, it must timely file a claim against the estate.¹⁴ The Bank failed to timely present its claim against the Estate.

¹³ See also, e.g., Security Savings & Loan Ass’n v. Estate of Kite, Colo. App. 1992).

¹⁴

See comment to SCPC section 62-3-104, requiring all claims to be enforced in accordance with the claims-barring process, provides: “A secured creditor is not affected by this section except as to any deficiency judgment sought. A secured creditor is not required to assert his claim against the personal representative of the deceased debtor; however, the secured creditor who wishes to enforce a claim for deficiency, even if unliquidated or only potential, is required to comply with the claims provisions of this section and Part 8 of this article.” See also, e.g., Ocean Nat. Bank v. Spang, 675 A.2d 983 (Me.1996).

V. The Estate was Entitled to Summary Judgment

The court erred in denying the defendants' motion for summary judgment in that the undisputed evidence in the record reveals that the plaintiff did not timely file a claim against the estate in accordance with S.C.Code Section 62-3-803 and 3-804. The evidence reveals that the creditor claims that were commenced against the estate, through the probate court or otherwise, were lodged well after the claims barring statute had run. As a nonclaim statute, Section 62-3-803 may not be defeated by waiver, estoppel or other means, including the operation of Section 62-3-806(c). In other words, the timely presentment of a claim against the estate is a precondition to the right itself; the operation of the claims barring statute is not merely a defense that can be waived or otherwise defeated. Instead, the statutory terms concerning time limitations are mandatory.

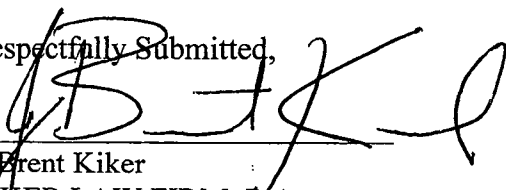
VI. The Probate Court Order Suggests that Brian Hover, Individually, Is a Party to This Action. He is Not and Any Reference to His Personal Liability is Error

The lower court erred in finding as a fact that Brian Hover is a defendant in this action. (Page 2, Order). Hover was not named personally in the action, nor was he served with pleadings in the matter other than in his representative capacity.

CONCLUSION

For all of the foregoing reasons, because the Bank failed to timely present its claim against the Estate, the Estate, not the Bank, should have been granted summary judgment. This Court should so hold.

Respectfully Submitted,


J. Brent Kiker
KIKER LAW FIRM, P.A.
Post Office Drawer 5303
Hilton Head, South Carolina 29901
(843) 842-7300 (Phone)
(843) 842-6563 (Facsimile)

September 7, 2011

COPY

MEMORANDUM IN SUPPORT OF
PLAINTIFF/RESPONDENT'S REQUEST
TO (a) DENY THE APPEAL AND CONFIRM
THE SUMMARY JUDGMENT ON THE
GROUNDS STATED IN IT, AND/OR (b)
TO CONFIRM THE SUMMARY JUDGMENT
ON ANY OF THE ADDITIONAL
SUSTAINING GROUNDS RAISED
BUT NOT DECIDED

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(b) After waiving the right to raise possible defenses in the Circuit Court foreclosure and suffering default deficiency final judgment, can Defendants/Appellants now collaterally attack the consequences of their inaction in the Circuit Court and prevent the application of S.C. Code 62-3-806(c) by the Probate Court? and/or

(c) Can application of 62-3-806(c) be challenged when Defendants/Appellants:

- (1) First consciously failed to raised possible Statue of Limitations issues in the Circuit Court foreclosure, and
- (2) Suffered a default deficiency final judgment in that Court?

FACTUAL BASIS OF PLAINTIFF/RESPONDENT POSITION

Plaintiff/Respondent held an equity line second mortgage on the decedent's home.

After her death, the Plaintiff contends that the family opened her estate in probate and Brian Hover, as its Personal Representative continued to keep the payments current while assuring Plaintiff's officers that the loan would be paid off.

Plaintiff also contends that after the routine statutory limit for filing claims in the Probate Court had passed, the Estate ceased payment on both the first and second mortgages. Foreclosure then followed.

In the Circuit Court foreclosure Plaintiff asserted a cross-claim (Beaufort County Judgment #2008-CP-07-02561) seeking deficiency judgment against the Estate and its Personal Representative in his official capacity. Neither the estate nor the Personal Representative defended the cross-claim. They suffered a deficiency judgment by default.

Thereafter, Plaintiff/Respondent submitted its Circuit Court Judgment to the Probate Court for allowance in the Probate Court proceeding. The Defendants/Respondents denied it claiming it to be beyond the routine statutory limit for filing claims which is usually eight (8) months from the trigger date.

In this action Plaintiff/Respondent, relies on S.C. Code 62-3-806(c) which requires the Probate Court to treat the Circuit Court foreclosure default Defendant Deficiency Judgment as an allowance of Plaintiff's claim, together with many other contractual, tort and equity counts seeking compulsory allowance of its claim.

After a full hearing on Cross Motions for Summary Judgment, the Probate Court ordered allowance of the Plaintiff's claim citing S.C. Code 62-3-806(c)¹ as the basis. The Court deferred ruling on three (3) additional sustaining grounds raised.

This appeal by the Defendants/Appellants followed.

RECENT PROCEDURAL HISTORY

Defendants appeal from the Probate Court order dated March 1, 2010, which granted the Plaintiff/Respondent's Summary Judgment on one of its four grounds² advanced leaving the other three unaddressed. Afterwards Defendants/Appellants' SCRCP Rule 59 Motion to Alter or Amend was denied by Order dated May 3, 2010.

The Notice of Appeal was dated May 14, 2010 and Defendants/Appellant's grounds for Appeal were filed June 18, 2010.

The Probate Court filed its Certificate of Return (with the record) on July 8, 2010.

¹(c) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

²S.C. Code 62-3-806(C) which states that "a judgment in another court to enforce a claim against a decedent's estate is an allowance of the claim" (Emp. Added) and the three (3) additional sustaining grounds presented and listed in Paragraph 5 on Page 4 below.

EARLIER PROCEDURAL HISTORY

1. This action began in the Probate Court with a petition using Probate Court Form #373, dated August 24, 2009 seeking to compel the Appellants to allow Plaintiff's Circuit Court Judgment against the estate in the Probate Court.³

2. The Defendant/Appellant's Answer was dated September 29, 2009. It raised as defenses:

- (a) a contention that Mr. Hover should be dismissed in his individual complaint because "no claims are asserted against him personally, and/or
- (b) no service of process was accomplished with the applicable Statute of Limitation", and/or
- (c) the Plaintiff's claims were not filed within the applicable time for the allowance of claims under the South Carolina Probate Code, and/or
- (d) "that all of Plaintiffs' claims are barred by the applicable Statute of Limitation....".

3. Defendants/Appellants filed a Motion for Summary Judgment dated November 23, 2009, relying only on the contention that "the Plaintiff submitted its claim outside the applicable Statute of Limitations perceived and the period for creditor's claims".

4. Plaintiff/Respondent filed its initial Motion for Summary Judgment dated September 24, 2009 on September 25, 2009.

5. With consent of Defendants/Respondents, Plaintiff/Respondent filed its amended Motion for Summary Judgment dated November 25, 2009, on December 1, 2009, citing §62-3-803, §62-3-806(c), Waiver and *res judicata* as grounds in the alternative.

³This raised causes of action based on statutes, contract, waiver, *res judicata*, estoppel, fraud, constructive fraud and negligent misrepresentation issues.

6. On December 23, 2009, Plaintiff/Respondent submitted its Memorandum in Support of its Amended Motion with Exhibits to the Court and opposing counsel.

7. Defendants/Appellants did not file any memorandum or brief.

8. Hearing and oral arguments were held January 5, 2010.

9. The Probate Court Order granting Summary Judgment⁴ was dated and filed March 1, 2010.

10. Defendants/Respondents filed their Motion to Alter or Amend Order dated March 11, 2010.

11. The brief of Plaintiff/Respondent in Opposition to Motion to Amend dated April 19, 2010 was filed.

12. Brief of Defendant/Appellant in Support of their Motion to Amend dated April 22, 2010 was filed. This raised new arguments not contained in pleadings or previously presented at the Summary Judgment Motion hearing.

13. Probate Court Order dated May 3, 2010, was issued denying Motion to Alter or Amend Summary Judgment Order.

14. Defendants/Appellants Notice of Appeal was dated May 14, 2010.

15. Defendants/Appellants Grounds for Appeal was dated and filed June 18, 2010.

16. Probate Court Certificate of Return to Appellate Court was dated July 8, 2010.

FACTUAL BACKGROUND

The Plaintiff in argument and in its memorandum invoked the general averments in its Probate Court Petition for Allowance of Claim filed August 24, 2009. The Defendants/Appellant's filed neither an Affidavit nor a Memorandum in Opposition to the Summary Judgment Motion.

⁴Citing 62-3-806 which reads, "(c) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim."

The Probate Court Order made findings of fact based on the Plaintiff's factual representations and noted that Defendant's counsel acknowledged that the facts are not in dispute. Since both sets of litigants filed Summary Judgment Notices, they agreed that there were no questions of fact.

The Defendants, in their responsive pleadings and in oral argument relied only on S.C. Code 62-3-803 which greatly limits the time for filing claims against an estate in the Probate Court.

In their Rule 59 Motion to amend or Alter the Trial court's March 1, 2010 Order, Defendants/Appellants raised new arguments and contentions for the first time.

ISSUES IN PLEADINGS OF PLAINTIFF

Petitioner/Plaintiff raised nine (9) counts in its Probate Court Petition/Pleading in support of its effort to have filed its claim allowed by the Defendant estate and/or its personal representative.

1. Its claim was timely filed under S.C. Code 62-3-803(b)(2)⁵
2. In the alternative, its Circuit Court judgment is entitled to be allowed under S.C. Code 62-3-806(c)⁶ regardless of the disallowance by the Personal Representative.
3. The waiver of any right of the Defendants to assert any Statute of Limitation issue after their failure to assert that position in the Circuit Court prior to that judgment being rendered.
4. The doctrine of *res judicata* based on the failure of the Defendants to raise any Statute of Limitation issues in the earlier proceeding in the Circuit Court.

⁵Based on its claim being submitted in Probate Court within eight (8) months after the decedent's note first became delinquent.

⁶Based on the Defendant's deficiency judgment in the Circuit Court foreclosure action CA #2008-CP-07-02561.

5. Estoppel based on the failure of the Defendants to raise any Statute of Limitations in the Circuit Court proceeding.
6. Fraud based on an affirmative mis-representation by the Defendant that misled the Plaintiff to its detriment and the defendant's benefit.
7. Constructive Fraud.
8. Negligent misrepresentation
9. Breach of Contract

ISSUES RAISED IN DEFENDANTS' ANSWER

They rely only on the contention in Paragraph 6 of their Answer to the effect that the Plaintiffs Judgment shall not be allowed as a claim in the Probate Court because it

"was not filed within the applicable time for the allowance of claim under the South Carolina Probate Code" and that

"Plaintiff's claims are barred by the applicable Statute of Limitations and should be dismissed and forever ended".

ISSUES IN DEFENDANTS' SUMMARY JUDGMENT MOTION

It is based solely on the ground that the Plaintiff's claim for allowance of its Circuit Court Judgment as a claim in the Probate Court was submitted "outside the applicable Statute of Limitations period and the period for creditors claims."

ISSUES IN PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

Its claim based on the Default Deficiency Foreclosure Circuit Court Judgment was entitled to be allowed because:

- (a) it was timely submitted within 8 months after it arose⁷, under SC Code 62-3-803(b)(2), and/or

⁷Less than eight (8) months after the estate ceased payments on the Note, thus causing the delinquency

- (b) it must be recognized under SC Code 62-3-806(c) which mandates that “a judgment is a proceeding in another court against a personal representative to enforce a claim against a decedent’s estate is an allowance of the claim”. (Emp. Added) and/or
- (c) the conscious failure fo the Defendants/appellants to defend and to raise any applicable Statute of Limitations issue was a waiver of that position, and/or
- (d) under these circumstances the Defendants/Appellants are barred by the doctrine of *res judicata* which denies them the right to now litigate Statute of Limitations issues.

ISSUES BRIEFED BY PLAINTIFF

Its Memorandum in Support of its Amended Motion for Summary Judgment, Plaintiff submitted the following:

ISSUES

Must the Personal Representative and the Estate allow the Beach First National Bank claim as confirmed by the Circuit Court default Deficiency Foreclosure Judgment when:

Its claim against the decedent’s estate arose after the death of the decedent and was presented within eight months after it arose; and/or

There is a Circuit Court Judgment against the Personal Representative and the Estate triggering a statutory obligation to recognize that Judgment as an allowance of the claim, and/or

The Personal Representative consciously waived any right to assert any statute of limitations defense in the Circuit Court, and/or

The doctrine of *res judicata* prevents litigation of any defense that could have been raised in the Circuit Court.

Plaintiff/Respondent briefed both the factual basis and legal authority in support of its motion on all four (4) counts.

NO ISSUES BRIEFED BY DEFENDANTS/APPELLANTS

The Defendants/Appellants filed neither brief or memorandum to support their position.

Probate Court Order of March 1, 2010, as confirmed on May 3, 2010, held:

1. Defendants Motion for Summary Judgment is denied, and
2. Plaintiff's Amended Motion for Summary Judgment is granted.

After a detailed recital of undisputed relevant facts and procedural background, the Probate Court held that S.C. Code Ann. Sec. 62-3-806(c) reading that,

"a judgment in a proceeding in another Court against a Personal Representative to enforce a claim against a decedent's estate is an allowance of the claim"

was controlling and that the Circuit Court Order was/is an allowance of the Petitioner's claim, as a matter of law. The Order deferred ruling on Plaintiff's additional sustaining grounds as unnecessary.

That Order noted that the Defendant's Motion for Summary Judgment

"based entirely on the timelessness of presentation of the Plaintiff's claim, is denied." (see page 6 of March 1, 2010 Order)

Later, after consideration of briefs and the Motion to Amend or Alter the March 1, 2010 Order, the Court denied that Motion by an Order dated May 3, 2010.

QUESTIONS PRESENTED

How can this appellate court refuse to recognize and apply:

- (a) the statutory proviso cited by the Probate Court as mandating allowance of the Circuit Court judgment, and/or

- (b) The undisputed fact that the initial Probate Court claim was submitted less than eight (8) months after the Note payments became delinquent. See S.C. Code 62-3-803(b)(2), and/or
- (c) the undisputed waiver of Statute of Limitations issues by Defendants/appellants, and/or
- (d) the impact of the doctrine of *res judicata*.

ARGUMENTS

The Summary Judgment granted by the lower court was/is fully supported by all undisputed facts and S.C. Code §62-3-806(c) which it found controlling.

This appeal presents two contrasting arguments as to which statute applies under the undisputed circumstances.

For purposes of sustaining the Summary Judgment Order it is factually undisputed that:

- (a) Plaintiff/Respondent did not present its claim prior to the end of the usual eight (8) month term for timely submitting such claim, and/or
- (b) Plaintiff/Respondent did obtain a Circuit Court Default Deficiency Foreclosure Judgment against the Estate and the Personal Representative in his official capacity and submit it to the Probate Court while the Estate was and is open.

The Probate Court carefully considered the competing positions raised by the parties as follows:

- (a) Plaintiff's contention that it is eligible for an allowance of its claim based on the Circuit Court Judgment citing 62-3-806(c) and its three (3) other grounds while Defendants/Appellants argued only:

- (b) the inability of Plaintiffs to present their claim within eight (8) months after statutory notice was given is an absolute bar.

STATUTORY HISTORY

The Code Section which the Plaintiff/appellant and the Probate Court relied is Section 62-3-806(c) of the South Carolina Code (Probate Code) which reads:

§62-3-806. Allowance of Claims.

“A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent’s estate is an allowance of the claim.”

REPORTER’S COMMENTS

The relevant portion of the Reporter’s comments to 62-3-806 reads:

“A judgment in a proceeding in another court to enforce a claim constitutes an allowance of a claim.”

The Code Section [(62-3-806(c))] relied on by the Probate Court was first enacted by our legislature in 1986 as/is that which is relied on by Defendants/Appellants.⁸

PRINCIPLES APPLICABLE TO STATUTORY CONSTRUCTION

It is well recognized that:

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature . In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole. Statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.

See Howell v. United States Fidelity & Guaranty Insurance Company, 370 S.C. 505, 636 S.E.2d 626 (S.C. 2006) and cases cited therein.

All statutory provision cited by both parties are within the same Article III of the code. They are each applicable when factually appropriate. Neither is exclusionary against any others.

⁸1986 Act #539 §1.

The simultaneous adoptions of these two code Sections is an express indication that each is to be applied with when facts support it.

62-3-806(c) is a statutory alternative to the usual Probate Court time limitations for filing claims.

Under 62-3-806(c) the Defendants/Respondents are required to recognize the Circuit Court Judgment as an allowance of the claim.

A proceeding in another court as recognized in 62-3-806 (c) is not subject to the Probate Court statute of limitations on claims unless presented there for consideration.

A shortened statute of limitations on filing claims in Probate Court is a valid expression of general desire for prompt processing of Probate Administration. However, those statutes do not automatically apply to a proceeding in Circuit Court which 62-3-806 (c) recognizes as another proceeding contemplated within the Probate Code.

In the Circuit Court the general civil action statutes of limitations would apply unless a Defendant had attempted to assert the Probate Code Statute of Limitation as a possible defense. Having waived that opportunity in violation of SCRCP Rule 8(c), it can not be asserted now years later.

Nothing in the Probate Code section dealing with shorter statute of limitations in the probate proceedings indicates any intent to force those time limits on other courts.

The statute⁹ clearly mandates that the Judgment be recognized as an allowance. The Defendants/Respondents are subject to that obligation.

Additionally, the enactment of 62-3-806(c) is merely a codification of the common law doctrine of *res judicata*.

The additional sustaining grounds advanced would also each separately require the Summary Judgment Order granted be sustained.

⁹62-3-806(c): A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

- (1) Plaintiff, citing S.C. Code 62-3-803(b)(2), argues that its claim was timely filed in the Probate Court because it was filed eight (8) months after the Personal Representative first defaulted on the monthly mortgage obligations, and/or
- (2) Plaintiffs submit that the doctrine of *res judicata* based on the failure of the Defendants/Appellants to raise any Statute of Limitations issues in the initial Circuit Court proceeding, and/or
- (3) Plaintiffs argue waiver based on the conscious failure of the Defendants/Respondents to assert any Statute of Limitations defense in the Circuit Court.

All three additional sustaining grounds are supported in depth earlier in this memorandum.

Our appellate rules and common law allow that:

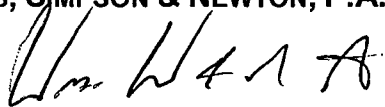
“...(r)espondent’s brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c), (SCACR).” Rule 208(b)(2), SCACR. Rule 220(c), in turn, provides that ‘(t)he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.’ ” (*I’on, LLC v. Town of Mt. Pleasant*, 526 S.E. 2nd 716(S.C. 2000) 338 S.C. 406).

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CONCLUSION

The Probate Court Summary Judgment grant relying on the applicable facts and §62-3-806(c) and the Rule 59 Motion were each carefully considered and should be affirmed. Further, any and all of the additional sustaining grounds raised in the Plaintiffs' Summary Judgment Motion but deferred should be relied upon to confirm the lower court ruling.

JONES, SIMPSON & NEWTON, P.A.

By: 

Wm. Weston J. Newton
P.O. Box 1938
Bluffton, SC 29910
(843) 706-6111
Attorneys for the Defendant and
Cross-Claim Plaintiff, Beach First
National Bank

September 8, 2011

Bluffton, SC

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IN THE PROBATE COURT
THE STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

BEACH FIRST NATIONAL BANK,

Plaintiff,

vs.

CASE NUMBER
2006-ES0700445

THE ESTATE OF MARGARET GURNHAM a/k/a MARGARET
HOVER and BRIAN HOVER, Its Personal
Representative,

Defendant,

-----/

COPY

The Motion For Summary Judgement

Hearing, which was held on January 5, 2010, in
the, Beaufort County Probate Court, Beaufort,
South Carolina The Honorable Kenneth E. Fulp,
presiding, was transcribed from audio tapes
provided by The Law Offices of J. Brent Kiker,
in the above referenced matter by Kyle Saniga,
Certified Court Reporter.

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APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

WILLIAM WESTON J. NEWTON, ESQUIRE
JAMES EDWIN HERRING, ESQUIRE
Jones, Simpson & Newton, P.A.
7 Plantation Park Drive
Suite 3
Bluffton, South Carolina 29910

FOR THE DEFENDANT:

J. BRENT KIKER, ESQUIRE
Kiker Law Firm
2 Corpus Christi Place
Suite 200
Post Office Drawer 5303
Hilton Head, South Carolina 29928
brentkiker@gmail.com

AND

RICHARD D. ALLEN, EQUIRE
Fraser & Allen
10 Palmetto Business Park
Suite 101
Hilton Head, South Carolina 29928

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MOTION HEARING

3

THE COURT: Good morning, everyone
have a seat.

MR. NEWTON: Good morning.

MR. KIKER: Good morning, Your
Honor.

THE CLERK: Beaufort County
Probate Court is now in session. The
Honorable Kenneth E. Fulp, Junior,
presiding.

Let the record show that the date
is Tuesday, January 5th, 2010 and the
time is approximately 10:00 a.m.

The matter before The Court is in
reference to Probate Court Case Number
2006 ES0700445, Estate of Margaret
Dever Hover Gurnham, Beach First
National Bank, plaintiff, versus Estate
of Margaret Gurnham, et. Al, defendants
to-wit; Motions For Summary Judgement.

Present before The Court are
William Weston Newton, Esquire and
James Edwin Herring, Esquire, counsel
for the plaintiff. J. Brent Kiker,
Esquire and Richard D. Allen, Esquire,

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MOTION HEARING

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counsel for the defendants.

THE COURT: Okay. First, Happy
New Year to everyone.

MR. KIKER: Happy New Year.

MR. NEWTON: Happy New Year,
Judge.

THE COURT: This is the -- we have
the plaintiff's amended Motion For
Summary Judgement. First I'll hear
arguments.

I think the best thing is when
each of you argue, perhaps present all
of your arguing; we got an amended
summary judgement motion and we got the
defendant's Motion For Summary
Judgement. I would suggest that we
just hear your arguments with respect
to both of those at the same time, so
-- since it is a consolidated hearing,
and I'll allow a lot of leeway for
rebuttal and whatnot so, first, the
plaintiff, Mr. Newton. Is it Mr.
Newton or Mr. Herring?

MR. NEWTON: Looks like Mr.

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MOTION HEARING

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Newton, Judge.

Good morning, Judge. How are you
this morning? Nice to see you.

Your Honor, as noted in our moving
papers we have asserted four, we
believe, equally and independent
grounds for which summary judgement is
appropriate in this matter.

First, the two statutory grounds,
62-3-803B2, that our claim was
presented within eight months from the
default under the bank's loan
documents, the default arise -- first
arising in March of 2008.

The second is the statutory
allowance of the claim under 6-3-806,
specifically the action in Circuit
Court and the resulting final order of
the Circuit Court and judgement being
an allowance of the claim.

Third, the common law concept of
waiver and/or the common law concept of
res judicata.

Let me just take a moment and go

1 MOTION HEARING

6

2 through each of those four items and
3 point to various documents that have
4 been included in our submittals,
5 but we do believe that summary
6 judgement in favor of the plaintiff on
7 each or any of those four grounds is
8 appropriate and warranted in these
9 circumstances.

10 The Probate proceedings were open
11 when the estate first failed to
12 continue keeping this account current
13 with Beach First National Bank first
14 creating the default in March of 2008.

15 Subsequent to that point in time,
16 while the estate was still open, the
17 Hudson City Savings commenced a
18 foreclosure action to which Beach First
19 National Bank filed appropriate
20 cross-claims seeking a deficiency
21 judgement in August of 2008.

22 The estate was open when Beach
23 First National Bank filed its first
24 statement of creditors claim on August
25 19th of 2008. The estate is still

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1 MOTION HEARING

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2 open, today.

3 In the Circuit Court proceedings
4 and the documents that we have included
5 in our memorandum in support are the
6 acceptance of service by counsel on
7 behalf of the estate of Ms. Gurnham,
8 which is tab two, acceptance of service
9 by counsel on behalf of Brian Hover as
10 the personal representative. This is
11 all in the Circuit Court proceedings,
12 the foreclosure action for which the
13 deficiency judgement was sought.

14 Affidavits of default were filed
15 and a resulting judgement of
16 foreclosure and sale with the
17 deficiency judgement demanded being
18 issued on October the 9th.

19 An order of deficiency judgement
20 was dated and issued December 11th 2008
21 in the Circuit Court action against
22 both Brian Hover in his capacity as
23 personal representative of the estate
24 and the estate.

25 In that Circuit Court action the

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MOTION HEARING

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estate and the personal representative,
through counsel, both accepted service
of process and chose not to challenge
or defend the bank's claims in any
fashion. They did not advance any
Probate Court time limitations,
time-barring statute or statute of
limitations that might have been
raised.

We believed and contend that they
have waived any right, now, to first
assert an affirmative defense having
the matter litigated and a resulting
final judgement having been issued by
the Circuit Court.

Beach First National Bank filed
its original statement of claim in this
court on August the 19th and then
amended that by supplemental
presentation of claim dated
December 30th 2008 and that was after
the judicial sale and the issuance of
The Court's final deficiency judgement.

Again, those filings within

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MOTION HEARING

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eight months of the original default
under the terms of the promissory note
and mortgage.

We believe that the statutes
collectively have to be read together;
that it was the legislative intent of
our General Assembly to adopt all of
the statutes collectively, which
includes Section 806, which is the
allowance -- specifically, which is the
allowance of a claim, a judgement -- in
a proceeding in another court
specifically constituting an allowance
of a claim, that's highlighted by the
reporter's comments.

And then finally, the tab that we
have included is from the Uniform
Probate Code locator indicating that
806 is not just a South Carolina
statute, it is part of the Uniform
Probate Code, as well, that South
Carolina adopted collectively with the
other statutes.

In reading the statutes together

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1 MOTION HEARING

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2 we believe that it is clear that the
3 judgement from the Circuit Court is an
4 allowance of the claim in this court
5 based on the statutory provision, 806.

6 However, we do believe that there
7 was a timely filing of the claim under
8 803B2 and then also the common law
9 principals of res judicata and waiver.

10 Your Honor, obviously with regard
11 to Mr. Kiker's Motion For Summary
12 Judgement it is predicated on the
13 statutory time frame set forth in the
14 Probate Code. We believe, clearly,
15 that that motion for summary judgement
16 is inappropriate for the reasons that
17 we have advanced, as well as the
18 various other causes of action, common
19 law causes of action, including tort,
20 that have been advanced in our petition
21 for the allowance of the claim but are
22 not asserted in our motion for summary
23 judgement.

24 THE COURT: Mr. Kiker?

25 MR. KIKER: Thank you. May it

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please the Court, Your Honor.

This is an interesting kind of scenario. The facts are not really, at all, in dispute. Everything Mr. Newton said as far as the facts are concerned we agree with. We didn't file any responsive affidavits because they're unnecessary.

What I will say, I'll take it step by step. In response to the plaintiff's motion for summary judgement Mr. Newton advanced four grounds for that motion, the first one predicated under 62-3-803B2, the text of that code section, Your Honor, does indicate a claim within eight months after it arises but it also goes onto say; 'or the time specified in Subsection A1, which is one year after the decedent's death.' The one year after the decedent's death had expired long, long ago.

The judgement that was entered in the Circuit Court was predicated on a

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MOTION HEARING

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lawsuit that was filed after the creditor claims period had already lapsed, that was when the summons and complaint was filed. There was no obligation on plaintiff of the estate to even defend it because there was no claim set forth in Probate Court.

There are three courts that have addressed -- that I could find, three courts that have addressed a similar case where this situation has arisen before.

Minnesota Superior Court of Harder versus Vogt, 443 Northwest Second 537 and opposing counsel has copies of these cases. This is an identical case where a Circuit Court judgement was entered on a foreclosure case and subsequent action was brought to enforce a deficiency judgement against the estate.

The Court, in that case, held, it says; 'while we agree that by operation of statute a mortgagee may proceed

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MOTION HEARING

against property of the estate
encumbered by a mortgage without the
necessity of filing a claim.' There is
no statutory provision authorizing the
entry of a deficiency judgement on a
debt in the absence of a requisite
claim in the Probate Court.

Just give this to Your Honor for
your consideration.

Also attached to that is a
Minnesota statute, which you'll see is
identical to South Carolina,
word-for-word with South Carolina's
Probate Code.

And, similarly, in the case of
Gilkes versus Beezer, that's a
Wisconsin case, 484P Second 493 and
Gandy versus City Corp, that's a
Mississippi case which is a 2008 case,
I will give these to Your Honor, also.
They simply set forth the same
propositions.

The bottom line, Judge, I agree
with Mr. Newton that the Probate Code

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MOTION HEARING

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has to be read, not each paragraph in isolation, but taken as a whole, and these courts have done that and decided that the provision at issue that Mr. Newton is raising regarding a judgement acting as an allowance the that claim applies only to the property that's secured by the mortgage. That if you are seeking a deficiency judgement against the estate you have the additional duty of filing a claim with the Probate Court or with the personal representative, that was not done here.

Lastly, with respect to waiver and res judicata, the claims-barring statute in South Carolina is a non-claims statute, it's not a statute of limitations, it's a non-claims statute. It's essentially jurisdictional in nature, in that if you miss it you do not have a right to file a claim. It cannot be defeated by waiver, res judicata equitable estoppel or any of those traditional methods of

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MOTION HEARING

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avoiding a statute of limitations.

I will cite to Your Honor, the case of Decker versus -- hold on one second -- Decker versus Farm Credit Services of Mid America. This is an Indiana case and I have to go to Indiana because in South Carolina the only non-claim statute is the Probate Court.

MR. NEWTON: We haven't seen that one.

MR. KIKER: Excuse me. The only non-claim statute in South Carolina is this statute. In other states there are several that are non-claim statutes to avoid suits against counties and municipalities.

In this case The Court held that it is not subject to equitable tolling, waiver and the time limits prescribed are clear and mandatory.

And Your Honor, that's what we believe is the case here. It's a very simple process. You have a fixed

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MOTION HEARING

period of time to make a claim against the estate. The plaintiff did not make the claim in the appropriate time period and we are entitled to summary judgement on that grounds.

THE COURT: Okay. It sounds like both parties time for rebuttal. I'm going to not only let Mr. Newton rebut but then I'll come back to you, Mr. Kiker.

MR. NEWTON: Thank you, Your Honor.

Judge, the -- a couple of things. We'd be pleased to have the opportunity to distinguish those cases, if need be. We have seen a couple of those cases cited by counsel. I have not seen the Decker case, the Indiana case, but let me start sort of in order.

803B2 specifically provides that it's within the latter of eight months after the claim arises or the time specified in A1, which is the date of death that was referenced by counsel

for the defendant.

Clearly, the statute itself says the later of or within that time provision. And then the cases cited and the statute for the claims-barring statute, the exception is 806, which is a judgement in another court. To allow a judgement in another court to be issued and be found but to then determine that there is an exclusion under the Probate Code essentially allows a second bite at the apple. It means that we no longer have to assert affirmative defenses or we lose them. Effectively the argument repudiates the common law in Probate Court, which we believe in 806 is a statutory expression of res judicata, but then also the common law principal of res judicata.

Lastly, the Probate Court, itself, makes exceptions for the statutory claims-barring statute for conduct of the estate and many of those both be --

1 MOTION HEARING

18

2 whether they be fraud, constructive
3 fraud, misrepresentation, all of which
4 are asserted in our petition for the
5 allowance of the claim clearly are
6 contemplated within the scope of the
7 Probate Code. However, we don't
8 believe it's necessary to get to that
9 juncture.

10 We do believe that a final order
11 issued by the Circuit Court when
12 jurisdiction was appropriate, when the
13 parties were before The Court and
14 failed to raise the affirmative
15 defenses, whether they would have
16 prevailed on those affirmative defenses
17 or not is something we may not ever
18 know because they weren't, but they
19 were properly before The Court at the
20 appropriate time and we do believe that
21 we fit into not the normal rule of
22 one year of the date of death or
23 eight months, but we believe that we
24 fall into the either of or both of the
25 exceptions, that being 803B2 and 806C.

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MOTION HEARING

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MR. KIKER: Your Honor, just for the record the -- to adopt the plaintiff's argument would allow any secured creditor to -- I mean they could file an action in the Circuit Court long after the creditor's claim period has expired, try and get a judgement against the estate, seek a deficiency judgement far after the claims-barring statute has applied. The other creditors of the estate are disadvantaged by that.

The Probate Code cannot -- if you read it collectively, it cannot have that result and it's for this very reason; in this particular state what you've got is a bank who's now seeking to enforce a \$250,000 deficiency judgement. What about the other creditors who complied with the claims-barring statute who raised the claims? They have a right to rely on the fact that there is an absolute deadline for creditors to come into the

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MOTION HEARING

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Probate Court and seek compensation from the estate. They have a right to believe that the estate can be distributed at some point in time. The allowance of the claim that -- the argument that the judgement acts as an allowance of the claim it does, in some way, as those cases that I gave to you hold, it is an allowance of the claim to the extent of the property that it is -- the mortgage secures, that is what every court that I have found that considered the question has held. That's what I ask Your Honor to hold.

And again, I say this is a different animal than a statute of limitations. This is not something where you waive it, you toll it or you can be defeated or it can be defeated by principals of res judicata or equitable concepts. This is a non-claims statute that is mandatory and it's -- and it's an important rule to follow otherwise there would be no

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MOTION HEARING

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way to orderly administer estates in
South Carolina because actions like
this could come up all the time.

We hope -- we ask Your Honor to
hold that the claims-barring statute is
mandatory and that the estate is
entitled to summary judgement based on
that.

MR. NEWTON: Your Honor, please.

THE COURT: Yes, sir.

MR. NEWTON: A little more
rebuttal. I don't want to get into a
back-and-forth all day but clearly the
legislative intent is not limited. The
allowance of a claim in 806 is included
in the Probate Code.

The idea of the effective
administration of the estate is not
hampered by 806, which our legislature
specifically included 806C. This
estate was open. Had the estate been
closed, in order for the Circuit Court
action to have proceeded the estate
would have had to have been reopened

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1 but this estate was open. The personal
2 representative's lawyer was served, the
3 estates lawyer was served and if there
4 was a defense to be raised, based on
5 the passage of time, the opportunity
6 existed in the Circuit Court.
7

8 Our General Assembly specifically
9 included 806C, the allowance of a claim
10 from a judgement in another -- in
11 another court.

12 We clearly believe that summary
13 judgement for the defense is
14 inappropriate but we equally believe
15 that there are four independent grounds
16 that summary judgement is appropriate.

17 A creditor is lulled into
18 believing that they're going to
19 continue to get paid and then one day
20 they stop getting paid, long past the
21 initial one-year period but the account
22 is kept current for more than two years
23 after the death with discussion about
24 the possibility of somebody moving into
25 the house and then only when the -- it

first goes into default two and-a-half years after the death, while the estate is still open is the action brought and the deficiency sought not limited to this, the value of this property.

There's no legislative expression, at all, with regard to 806C that that judgement is limited. There is a separate an independent provision in the Probate Code that talks about proceeding with the foreclosure of a property outside the claim-barring statute or time -- statute of limitations with regard to that property. That is a completely separate section than 806C which simply as our legislature has said a judgement in another court, a proper judgement in another court is an allowance of a claim and we believe, quite simply, it's that simple. Jurisdiction was appropriate. The estate was open. We received a judgement from the Circuit Court. There is no indication that

that was limited to any particular assets and that we believe that is a statutory allowance of the claim as intended by our general assembly in passing the Probate Code.

Thank you, Your Honor.

THE COURT: Okay. Anything furtherer, Mr. Kiker?

MR. KIKER: Very briefly, Your Honor. If you have a chance to look at the cases that I gave you, it appears, from my reading of them that this provision that Mr. Newton keeps harping on about a judgement being an allowance of a claim it does seem to be utilized in cases where there is a judgement that was already out there and you do not have to file a subsequent claim with the Probate Court to enforce that judgement.

With respect to the very situation that we have here, the identical situation we have here, I believe it was the Harder case that I passed out

1 to Your Honor, that is a thorough
2 analysis of how to implement the
3 statutes, they have an identical
4 Probate Code and that's -- I gave to,
5 Your Honor, the -- I believe it was a
6 Minnesota Probate Code provision so
7 you'll see it's word-for-word. That is
8 how the Supreme Court addressed it and
9 that's the only case where it's
10 literally 'on all fours 'as they said
11 back in law school with the present
12 situation that we have here.

14 What The Court ultimately held was
15 that it -- the judgement was
16 enforceable. You did not have to file
17 a claim to the extent of the property
18 that was foreclosed.

19 The personal judgement, the
20 deficiency judgement required an
21 additional act and that's a very simple
22 process that the bank here could have
23 used which is just fill out a one-page
24 form and serve it on Brian Hover,
25 that's all that needed to happen. They

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MOTION HEARING

failed to do that and we believe that because of that they did not perfect the claim against the estate.

THE COURT: A couple of questions for Mr. Kiker. Other than the Harder case, the other two cases that you submitted, were they -- did those states have the equivalent UBC statute?

MR. KIKER: They did, Your Honor.

THE COURT: They did?

MR. KIKER: They did. The one that I gave to you -- I included the code with the one on the Harder case. I don't believe I included the code on the others but if -- in the cases, themselves, it cites the language of the statute and what I was focusing on was the argument -- actually when I researched it I typed --

THE COURT: Excuse me, I'm having a very hard time hearing this. Y'all can whisper if you --

MR. KIKER: I believe that those cases were found by typing

word-for-word a portion of South
Carolina's Probate Court see other
states that address the issue.

The one case, as I said, that was
directly on point I did present to The
Court the Probate Court's code so you
would see that it's identical.

THE COURT: Okay. A couple of
other -- another question here.

You initially seem to hinge your
argument on a claim not having been
presented within the time allowed by
803B2 and your interpretation of that
statute was that it would have to be
presented within one year after the
date of death.

I'm inclined to agree with Mr.
Newton's interpretation of that statute
that calls for the claim to be
presented within the latter or the
later of those two.

MR. KIKER: I saw that, Your
Honor, and that is correct.

The claim against the estate arose

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MOTION HEARING

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when the decedent passed away and the bank was notified of that. They knew -- the bank has known and it's in their filings with The Court that they were accepting payments just from the son.

There was no -- the estate had -- the obligation was being fulfilled by the son and I believe that a claim would arise at the point when the bank would know or should have known that the actual debtor on the loan was no longer the one performing on the loan and it had been going on for two years.

THE COURT: Well, under B we're dealing with claims that arise after the date of death.

Now, if, as alleged, the claim was based on a default on the loan agreement, the note secured by the mortgage that was ultimately foreclosed, doesn't a cause of action arise at the time -- at the time that the breach occurs?

MR. KIKER: Well, it certainly --

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it certainly could.

Our position would be, Your Honor, that once the bank is informed of the debt and their debtor, the person that they contracted to have the loan with is no longer responsible for it, that is the time that it -- that they ought to assert their claim.

It's almost like it might as well be me that steps up to the plate and starts paying for a house.

THE COURT: Well, you conceded that Mr. Newton's initial recertation of facts was correct. Did that include the note was not default until March 29th of 2008?

MR. KIKER: I don't think -- I don't believe there's any dispute as to the date of the default.

THE COURT: Any dispute as to the date of the initial filing of the creditors, statement of creditor's claim, the initial presentation of claim in this case in August of 2008?

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MOTION HEARING

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MR. KIKER: The initial creditor claim was August of 2008, yes, Your Honor.

THE COURT: Is there any dispute that that was within eight months after the date of default on the note?

MR. KIKER: May I have a moment, Your Honor?

THE COURT: Certainly. While you're doing that I'm going to peruse these cases.

MR. KIKER: Okay.

THE COURT: Yes, sir.

MR. KIKER: I was just going to appreciate The Court's indulgence to give me some time to address when the mortgage was actually in default.

I checked with Wes Newton and I verified my records. The time that the first payment was missed was within eight months from the first filing of the creditor claim; however, I reiterate to The Court that once the person that you have given the loan to

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2 is deceased, the bank is on notice, at
3 that moment, that they have a claim
4 against the estate because the person
5 that they lent the money to and over
6 which they have a contractual right to
7 enforce, is now deceased, that, to
8 me -- I mean this -- this is a
9 different situation, in my view, Your
10 Honor, than, you know, some other type
11 of contractual claim.

12 The -- as The Court's -- the
13 Harder case in particular, this is the
14 identical scenario and it's difficult
15 for me to get my arms around it but --

16 THE COURT: Okay. Let me ask you
17 this because you've mentioned -- you've
18 mentioned the Harder case and I kind of
19 want to move along with this because I
20 understand what you're saying.

21 The Harder case is based on the
22 presentation statute, which is 3-803,
23 it doesn't even mention 806.

24 That's -- now 3-803 carves out a
25 limitation, which is discussed here for

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MOTION HEARING

32

the presentment of claims that arise before or after death but Subsection C of that section allows -- provides that the limitation of it doesn't apply to the commencement of mortgage foreclosure actions and others, now that certainly would have to do with the commencement of a mortgage foreclosure proceeding, had a defense been raised in the foreclosure proceeding that it wasn't commenced within the applicable time limits, because after all these time limits apply not only to action of the Probate Court but presumably other actions, as well, then, of course, the defense could have been raised that limitation on presentment doesn't apply to a mortgage foreclosure action.

Here, however, we're not talking -- we're not dealing the presentment issue, we're dealing with whether 806C provides that a -- that a judgement against a personal representative by

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2 another court on a claim amounts to
3 allowance of the claim, that's
4 essentially what 806C provides and I
5 don't see that that's even -- that even
6 came up.

7 More over, factually I can
8 distinguish Harder on the basis of the
9 fact that there was a second promissory
10 note that was executed not by the
11 decedent but by the decedent's husband
12 after the decedent's death, that, in
13 fact, appears to have been part of
14 the -- part of the deal here.

15 But in any event I -- I have read
16 the Harder case now and I have to --
17 you can have a seat. I think I've
18 heard enough argument from both sides
19 on this.

20 806C is clear and unambiguous on
21 its face. I -- where a statute under
22 South Carolina law is clear and
23 unambiguous The Court is not free to
24 try to impose any construction on it
25 that varies from its terms.

1 MOTION HEARING

34

2 I don't believe that -- I believe
3 the Harder case that you've mentioned,
4 not only is it a Minnesota case but I
5 believe it's distinguishable and
6 doesn't deal specifically with the
7 statute involved.

8 I don't believe I have to get to
9 any of the other grounds for summary
10 judgement other than 62-3-806C. It
11 appears that a deficiency judgement,
12 I'm looking at a certified copy of it,
13 was entered by the Circuit Court on
14 December 11th. By its terms it
15 provided that it was a -- that the --
16 that Beach First National Bank was
17 entitled to have a personal and
18 deficiency judgement against the third
19 party defendants, Brian Hover, in his
20 capacity as personal representative of
21 the estate and the estate of Margaret
22 Gurnham and it goes forth to -- forward
23 to say; state what the amount of that
24 deficiency judgement is.

25 I -- I don't think -- I think 806C

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1 is clear. Here you had a judgement
2 entered against a personal
3 representative on a claim that had been
4 asserted in the foreclosure action. If
5 there were any -- if there were any
6 collateral on that -- if there were any
7 attacks to be made on that judgement it
8 would had to have been made directly.
9 Certainly that judgement can't been
10 collaterally attacked in Probate Court.
11

12 I believe that summary
13 judgement -- I think the plaintiff is
14 entitled to summary judgement on the
15 basis of 806C and I don't have to get
16 to the other grounds.

17 However, I do -- since it was
18 raised, by way of argument, there was
19 a -- the whole foreclosure action
20 appears to have been based on a default
21 under the note secured by the mortgage,
22 the note and it's undisputed, was
23 executed -- well it was made personally
24 by the decedent, secured by a mortgage
25 that was foreclosed, the two mortgages

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MOTION HEARING

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foreclosed, both notes were executed by the decedent, apparently, and that's undisputed.

The default was made March 29th. The claim was presented within eight months after default. That would have been the time under 803B2 that that claim arose so I think that strengthens the ultimate conclusion but the ultimate conclusion is not necessary for the ultimate conclusion because I believe 806C is sufficient on its face where we have a judgement against the personal representative in Circuit Court that apparently has not been challenge by appeal or otherwise directly then I believe that is allowance of the claims and I'd ask Mr. Newton to prepare an order, a judgement order to that effect and I do deny the defendant's motion for summary judgement because I believe the plaintiff's claim has been allowed by the Circuit Court. Basically my

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MOTION HEARING

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judgement simply confirms that the
Circuit Court judgement amounts to
allowance of claim under the applicable
statute. Any questions?

MR. NEWTON: None, Your Honor.

MR. KIKER: I don't have any, Your
Honor.

THE COURT: Okay. Then we stand
adjourned.

(Whereupon, the taped ended at this
point)

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C E R T I F I C A T E

STATE OF GEORGIA:

CHATHAM COUNTY:

I, Kyle J. Saniga, Court Reporter and
Notary Public in and for the above county and
state, do hereby certify that the foregoing
testimony was taken before me at the time and
place herein-before set forth; that the witness
was by me first duly sworn to testify to the
truth, the whole truth, and nothing but the
truth, that thereupon the foregoing testimony
was later reduced by computer transcription; and
I certify that this is a true and correct
transcript of my stenographic notes so taken.

I further certify that I am not of
counsel to either party, nor interested in the
event of this cause.

Kyle J. Saniga, CCR

Notary Public, B-2038

Savannah, Georgia

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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE PROBATE COURT
CASE NUMBER 2006ES0700145



Beach First National Bank,)
Petitioner/Plaintiff,)

vs.)

The Estate of Margaret Gurnham)
a/k/a Margaret D. Hover and/or)
Brian Hover, its Personal Represen-)
tative,)

____ Respondents/Defendants.)

**PETITIONER/PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR SUMMARY JUDGMENT**

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through its undersigned counsel, will move on the 10th day after service hereof, or as soon thereafter as counsel may be heard, before the Beaufort County Probate Court, pursuant to Rule 56(b) of the South Carolina Rules of Civil Procedure, for an order granting Plaintiff Summary Judgment on its Second Count/Cause of Action in its Petition to have its claim against the Estate recognized in this Court.

The basis of this motion is that the Respondents/Defendants are bound by the law set out in SC Code §62-3-806(c) which reads:

§62-3-806. Allowance of Claims.

(c) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

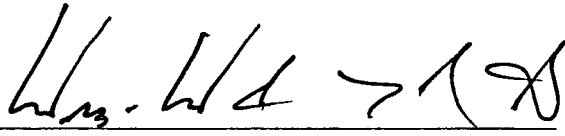
and the fact that they are bound by the Circuit Court Judgment against them in CA# 2008-CP-07-02561 (certified copies attached) which under the law constitutes an allowance of the Plaintiff's claim against the estate.

There being no genuine issue of material fact on this cause of action that entitles Plaintiff to Summary Judgment in its favor as a matter of law.

This Motion for Summary Judgment is supported by the pleadings, the certified copies of the Common Pleas Judgment attached, and such other documents and evidence as may be allowed under the South Carolina Rules of Civil Procedure.

PETITIONER/PLAINTIFF SO MOVES.

JONES, SIMPSON & NEWTON, P.A.

By: 

Wm. Weston J. Newton

P. O. Box 1938

Bluffton, SC 29910

(843) 706-6111

Attorneys for the Petitioner/Plaintiff

Beach First National Bank

Bluffton, South Carolina

September 24, 2009

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STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
BEACH FIRST NATIONAL BANK,)
)
Plaintiff,)
)
vs.)
)
ESTATE OF MARGARET)
GURNHAM a/k/a MARGARET HOVER)
And/or BRIAN HOVER, Its Personal)
Representative)
)
Defendant.)
_____)

IN THE PROBATE COURT
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2006-ES-07-145

**NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT**

TO: WM. WESETON J. NEWTON, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, by and through its undersigned counsel, will and hereby does move before the presiding judge of the Beaufort County Court of Common Pleas, for an order granting summary judgment on all causes of action filed against the Defendant by the Plaintiff. The basis for this motion is that the Plaintiff submitted its claim outside the applicable statute of limitations period and the period for creditor's claim. This motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

The undersigned has made no consultation prior to filing this motion, as such consultation is not required by Rule 11 of the South Carolina Rules of Civil Procedure.

By:

KIKER LAW FIRM, P.A.

J. Brent Kiker
38-A New Orleans Road
P.O. Drawer 7965
(843) 842-7300 (Telephone)
(843) 842-6563 (Facsimile)

Hilton Head, South Carolina
November 23, 2009

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	CASE NUMBER 2006ES0700145
COUNTY OF BEAUFORT	)	
Beach First National Bank,	)	
	)	
Petitioner/Plaintiff,	)	
	)	PETITIONER/PLAINTIFF'S AMENDED NOTICE
vs.	)	OF MOTION AND AMENDED MOTION FOR
	)	SUMMARY JUDGMENT
The Estate of Margaret Gurnham	)	
a/k/a Margaret D. Hover and/or	)	
Brian Hover, its Personal Represen-	)	
tative,	)	
	)	
<u>Respondents/Defendants.</u>	)	

ORIGINAL

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, by and through its undersigned counsel, will move on the 10th day after service hereof, or as soon thereafter as counsel may be heard, before the Beaufort County Probate Court, pursuant to Rule 56(b) of the South Carolina Rules of Civil Procedure, for an order granting Plaintiff Summary Judgment on its First, Second, Third or Fourth Counts/Causes of Action, in the alternative, in its Petition to have its claim against the Estate recognized in this Court.

The basis of this motion is that the Respondents/Defendants are bound by the law set out as follows:

In South Carolina Code 62-3-803(b) (2) which reads:

§62-3-803. Limitations on presentation of claims.

(b) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(2) any other claim, within the later of eight months after it arises, or the time specified in subsection (a)(1).

and/or in South Carolina Code 62-3-806(c) which reads:

§62-3-806. Allowance of Claims.

(c) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

and/or THE COMMON LAW CONCEPT OF WAIVER

and/or THE COMMON LAW CONCEPT OF *RES JUDICATA*

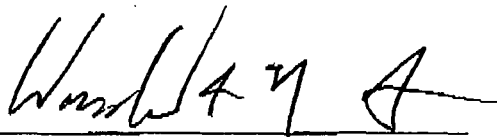
and the fact that they are bound by the Circuit Court Judgment against them in CA# 2008-CP-07-02561 (certified copies attached) which under the law constitutes an allowance of the Plaintiff's claim against the estate.

There being no genuine issue of material fact on these causes of action, the Plaintiff is entitled to Summary Judgment in its favor as a matter of law.

This Motion for Summary Judgment is supported by the pleadings, the certified copies of the Common Pleas Judgment attached, and such other documents and evidence as may be allowed under the South Carolina Rules of Civil Procedure.

PETITIONER/PLAINTIFF SO MOVES.

JONES, SIMPSON & NEWTON, P.A.

By: 

Wm. Weston J. Newton
P.O. Box 1938
Bluffton, SC 29910
(843) 706-6111
Attorneys for Petitioner/Plaintiff
Beach First National Bank

Bluffton, South Carolina

November 25, 2009

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STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2006ES0700145
	)	
IN THE MATTER OF ESTATE	)	
OF MARGARET D. HOVER	)	
GURNHAM, A/K/A MARGARET	)	
D. HOVER:	)	
	)	
BEACH FIRST NATIONAL BANK,	)	
	)	
Plaintiffs,	)	MOTION TO ALTER OR
	)	AMEND ORDER
	)	
vs.	)	
	)	
THE ESTATE OF MARGARET	)	
GURNHAM A/K/A MARGARET	)	
D. HOVER AND/OR BRIAN HOVER	)	
ITS PERSONAL REPRESENTATIVE,	)	
	)	
Defendants.	)	
	)	

TO: THE HONORABLE KENNETH E. FULP, JR.
WILLIAM W. NEWTON, ATTORNEY FOR THE PLAINTIFF
JAMES M. HERRING, ATTORNEY FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendants, by and through undersigned counsel, will and hereby do move for an order altering and/or amending the order of the Honorable Kenneth E. Fulp, Jr. entered on March 1, 2010.

The defendant(s) received email notice of the entry of Order on March 1, 2010 and written notice of the entry of the order on March 4, 2010. This motion is made pursuant to Rule 59 of the South Carolina Rules of Civil Procedure and is based on the following grounds:

1. The court erred in finding as a fact that Brian Hover is a defendant in this action. (Page 2, Order). Hover was not named personally in the action, nor was he served with pleadings in the matter other than in his representative capacity.
2. The court erred in finding that S.C.Code Section 62-3-806(c) mandates the allowance of a deficiency judgment against the estate without the proper and timely filing of the requisite creditor claim pursuant to S.C. Code Section 62-3-803.-- the error being that, while admittedly the Plaintiff may claim against the collateral at issue pursuant to S.C.Code Section 62-3-803(1), the imposition of a deficiency judgment for money damages (hence an unsecured claim) must be preceded by a timely filed claim against the estate. In a case such as this, S.C. Code section 62-2-804(2) clearly requires compliance with the nonclaims period rules: "The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but *the commencement of the proceeding must occur within the time limited for presenting the claim*" (emphasis added). See also comment to S.C.Code Section 62-3-104: "A secured creditor is not affected by this section except as to any deficiency judgment sought. A secured creditor is not required to assert his claim against the personal representative of the deceased debtor; however, the secured creditor who wishes to enforce a claim for deficiency, even if unliquidated or only potential, is required to comply with the claims provisions of this section and Part 8 of this article." See also, e.g., *Harter v. Lenmark*, 443 N.W.2d 537 (Minn. 1989) (defective claim against the estate is equivalent to no claim – a deficiency judgment may not be allowed without a timely claim lodged against the estate); S.C. Code Section 62-3-802(c): "For purposes of any statute of limitations, the *proper* presentation of a claim under Section 62-3-804 is equivalent to commencement of a proceeding on the claim." (emphasis added).
3. The court erred in denying the defendants' motion for summary judgment in that the undisputed evidence in the record reveals that the plaintiff did not timely file a claim against the estate in accordance with S.C.Code Section 62-3-803 and 3-804. The evidence reveals that the creditor claims that were commenced against the estate, through the probate court or otherwise, were lodged well after the claims barring statute had run. As a nonclaim statute, Section 62-3-803 may not be defeated by waiver, estoppel or other means, including the operation of Section 62-3-806(c). In other words, the timely presentment of a claim against the estate is a precondition to the right itself; the operation of the claims barring statute is not merely a defense that can be waived or otherwise defeated. Instead, the statutory terms concerning time limitations are mandatory.

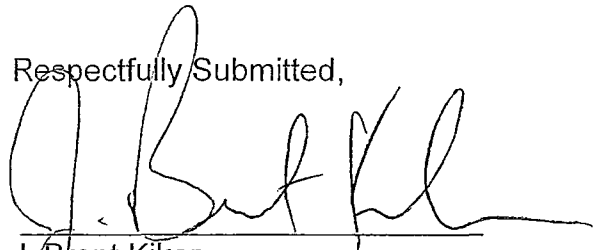
4. The court erred in failing to apply Section 62-3-806(c) in proper context and in light of provisions mandating the timely presentment and manner of presenting claims. The court applied the section as if the lawsuit filing nor the presentment of the underlying claim had to be accomplished within the mandatory time limits. This result does not effectuate the orderly administration of estates (which is the public policy being advanced by the probate code); it defeats it.
5. The court erred in allowing the claim against the estate because its application of S.C.Code Section 62-3-806(c) in this case violates South Carolina public policy. Specifically, in permitting a creditor like the plaintiff to succeed in making a valid claim against the estate outside of the creditor claims period, it defeats the rights and expectations of other creditors, as well as the beneficiaries thereto. The court's reasoning would allow most any creditor against the estate who failed to file a claim against an estate to simply try their hand in another court and attempt to reduce it to judgment. This is an absurd result. Estates do not need to, and should not be required, to defend themselves in other jurisdictions against claims that are stale and time-barred. This is exactly the result permitted in the case at hand and was, respectfully, error. Moreover, this would nullify the purpose of the nonclaims statute, which is founded on the legitimate state interests of a speedy and efficient administration of the estate to determine certainty of title within a reasonable period of time.
6. The Court erred by reading and applying S.C.Code Section 62-3-806(c) out of context. Section 62-3-806(c) does not by itself override the nonclaims procedure imposed by the South Carolina legislature. To apply that section as the Court did in its Order would be to negate the remaining provisions of the applicable statutes that impose a nonclaims period, effectively reading section 62-3-806(c) in a vacuum.
7. The Court erred by reading and applying S.C.Code Section 62-3-806(c) to apply even if a creditor fails to comply with the nonclaims provisions of the statutes. Because Plaintiff failed to comply with the applicable nonclaims provisions, the circuit court lacked subject matter jurisdiction to grant the deficiency judgment.
8. The Court's Order apparently and implicitly considers the nonclaims statute to have begun running on the date of default on the loan. To the extent the Court's order did so, it is in error. The nonclaims statute began running on the date of the decedent's death; the "estate" was not liable and was not a contracting party under the applicable note and mortgage. This motion is based on the South Carolina Rules of Civil Procedure, the

South Carolina Probate Code, all statutory and common law of the State of South Carolina, as well as a memorandum in support which shall be filed and served hereafter.

For all of the foregoing reasons, the defendants respectfully request that the court reconsider its prior order, alter and/or amend same to deny the relief being sought by the plaintiff, and to grant summary judgment to the defendant(s) for the reasons set forth herein.

The defendant(s) request(s) a hearing on this motion if the court will allow.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "J. Brent Kiker", written over a horizontal line.

J. Brent Kiker
KIKER LAW FIRM, P.A.
38-A New Orleans Road
Post Office Drawer 7965
Hilton Head, South Carolina 29901
(843) 842-7300 (Phone)
(843) 842-6563 (Facsimile)

March 11, 2010

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE MATTER OF ESTATE
OF MARGARET D. HOVER
GURNHAM, A/K/A MARGARET
D. HOVER:

BEACH FIRST NATIONAL BANK,

Plaintiffs,

vs.

THE ESTATE OF MARGARET
GURNHAM A/K/A MARGARET
D. HOVER AND/OR BRIAN HOVER
ITS PERSONAL REPRESENTATIVE,

Defendants.

) IN THE COURT OF COMMON PLEAS

)

CASE NO.: 2010-CP-07-03033

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**MOTION TO ALTER OR
AMEND ORDER**

BEAUFORT COUNTY
CLERK OF COURT
JAN -5 PM 3:25
S.C.

TO: THE HONORABLE MARVIN H. DUKES, III
WILLIAM W. NEWTON, ATTORNEY FOR THE PLAINTIFF
JAMES M. HERRING, ATTORNEY FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendants, by and through undersigned counsel, will and hereby do move for an order altering and/or amending the order of the Honorable Marvin H. Dukes, III entered on December 22, 2011.

The defendant(s) received written notice of the entry of the order on December 27, 2011. This motion is made pursuant to Rule 59 of the South Carolina Rules of Civil Procedure and is based on the following grounds:

1. The court, in agreeing with the reasoning of the Probate Court, erred in finding that S.C.Code Section 62-3-806(c) mandates the allowance of a deficiency judgment against the estate without the proper and timely filing of the requisite

creditor claim pursuant to S.C. Code Section 62-3-803.-- the error being that, while admittedly the Plaintiff may claim against the collateral at issue pursuant to S.C.Code Section 62-3-803(1), the imposition of a deficiency judgment for money damages (hence an unsecured claim) must be preceded by a timely filed claim against the estate. In a case such as this, S.C. Code section 62-2-804(2) clearly requires compliance with the nonclaims period rules: “The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but *the commencement of the proceeding must occur within the time limited for presenting the claim*” (emphasis added). See also comment to S.C.Code Section 62-3-104: “A secured creditor is not affected by this section except as to any deficiency judgment sought. A secured creditor is not required to assert his claim against the personal representative of the deceased debtor; however, the secured creditor who wishes to enforce a claim for deficiency, even if unliquidated or only potential, is required to comply with the claims provisions of this section and Part 8 of this article.” See also, e.g., *Harter v. Lenmark*, 443 N.W.2d 537 (Minn. 1989) (defective claim against the estate is equivalent to no claim – a deficiency judgment may not be allowed without a timely claim lodged against the estate); S.C. Code Section 62-3-802(c): “For purposes of any statute of limitations, the *proper* presentation of a claim under Section 62-3-804 is equivalent to commencement of a proceeding on the claim.” (emphasis added).

2. The court erred in denying the defendants’ motion for summary judgment in that the undisputed evidence in the record reveals that the plaintiff did not timely file a claim against the estate in accordance with S.C.Code Section 62-3-803 and 3-804. The evidence reveals that the creditor claims that were commenced against the estate, through the probate court or otherwise, were lodged well after the claims barring statute had run. As a nonclaim statute, Section 62-3-803 may not be defeated by waiver, estoppel or other means, including the operation of Section 62-3-806(c). In other words, the timely presentment of a claim against the estate is a precondition to the right itself; the operation of the claims barring statute is not merely a defense that can be waived or otherwise defeated. Instead, the statutory terms concerning time limitations are mandatory.
3. The court erred in failing to apply Section 62-3-806(c) in proper context and in light of provisions mandating the timely presentment and manner of presenting claims. The court applied the section as if the lawsuit filing nor the presentment of the underlying claim had to be accomplished within the mandatory time limits. This result does not effectuate the orderly administration of estates (which is the public policy being advanced by the probate code); it defeats it.
4. The court erred in allowing the claim against the estate because its application of S.C.Code Section 62-3-806(c) in this case violates South Carolina public policy.

Specifically, in permitting a creditor like the plaintiff to succeed in making a valid claim against the estate outside of the creditor claims period, it defeats the rights and expectations of other creditors, as well as the beneficiaries thereto. The court's reasoning would allow most any creditor against the estate who failed to file a claim against an estate to simply try their hand in another court and attempt to reduce it to judgment. This is an absurd result. Estates do not need to, and should not be required, to defend themselves in other jurisdictions against claims that are stale and time-barred. This is exactly the result permitted in the case at hand and was, respectfully, error. Moreover, this would nullify the purpose of the nonclaims statute, which is founded on the legitimate state interests of a speedy and efficient administration of the estate to determine certainty of title within a reasonable period of time.

5. The Court erred by reading and applying S.C.Code Section 62-3-806(c) out of context. Section 62-3-806(c) does not by itself override the nonclaims procedure imposed by the South Carolina legislature. To apply that section as the Court did in its Order would be to negate the remaining provisions of the applicable statutes that impose a nonclaims period, effectively reading section 62-3-806(c) in a vacuum.
6. The Court erred by reading and applying S.C.Code Section 62-3-806(c) to apply even if a creditor fails to comply with the nonclaims provisions of the statutes. Because Plaintiff failed to comply with the applicable nonclaims provisions, the circuit court lacked subject matter jurisdiction to grant the deficiency judgment. Accordingly, the Probate Court, and this Court, erred in enforcing it.
7. The Court's Order apparently and implicitly considers the nonclaims statute to have begun running on the date of default on the loan. To the extent the Court's order did so, it is in error. The nonclaims statute began running on the date of the decedent's death; the "estate" was not liable and was not a contracting party under the applicable note and mortgage.
8. The Court's Order fails to clarify with specificity that Brian Hover was not served with this action and bears no personal responsibility for any estate obligations.
9. The Court's Order fails to make specific findings of fact and/or conclusions of law which set forth how an estate creditor such as the Plaintiff can assert and maintain a claim outside of the absolute bar of the nonclaims statute.
10. The Court erred in finding that subject matter jurisdiction existed in the ordering of the deficiency judgment in this case. Clearly, any such claim like that of the Plaintiff in this case against an estate must be commenced within the applicable claims-barring period. In the absence of such a claim, none exists and the court lacks jurisdiction to consider it.

11. The Court's Order should be altered and amended to grant summary judgment to the defendants for the failure of the Plaintiff to comply the mandatory claims-barring statute(s) of the SCPC, and it should be altered or amended to deny all relief sought by the plaintiff in this matter.

This motion is based on the South Carolina Rules of Civil Procedure, the South Carolina Probate Code, as well as the statutory and common law of the State of South Carolina.

For all of the foregoing reasons, the defendants respectfully request that the court reconsider its prior order, alter and/or amend same to deny the relief being sought by the plaintiff, and to grant summary judgment to the defendant(s) for the reasons set forth herein.

The defendant(s) request(s) a hearing on this motion if the court will allow.

Respectfully Submitted,



J. Brent Kiker
KIKER LAW FIRM, P.A.
2 Corpus Christie Pl., Ste 200
Post Office Box 5303
Hilton Head, South Carolina 29928
(843) 842-7300 (Phone)
(409) 419-1048 (Facsimile)

January 2, 2012

INTEREST FIRST ADJUSTABLE RATE NOTE
5/6 (LIBOR Index-Rate Caps)

TRUE & CERTIFIED COPY

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST
RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST
CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

Loan Number
3/24/2005 HILTON HEAD ISLAND South Carolina
[Date] [City] [State]
28 BLUE HERON POINT 29926
[Property Address]

011984-07000

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S.
\$750,000.00 (this amount is called 'Principal'), plus interest, to the
order of the Lender.
The Lender is Taylor, Bean & Whitaker Mortgage Corp.
I will make all payments under this Note in the form of cash, check or money
order. I understand that the Lender may transfer this Note. The Lender or
anyone
who takes this Note by transfer and who is entitled to receive payments under
this
Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid Principal until the full amount of
Principal
has been paid. I will pay interest at a yearly rate of 6.375 %. The
interest rate I will pay may change in accordance with Section 4 of this
Note.
The interest rate required by this Section 2 and Section 4 of this Note is the
rate I will pay both before and after any default described in Section 7(B) of
this Note.

3. PAYMENTS

(A) Time and Place of Payments

I make a payment on the first day of every month, beginning on May,
2005. Before the First Principal and Interest Payment Due Date as described
in Section
4 of this Note, my payment will consist of only the interest due on the unpaid
Principal balance of this Note. Thereafter, I will pay Principal and interest
by making a payment every month as provided below.
I will make my monthly payments of Principal and interest beginning on the
First Principal and Interest Due Date as described in Section 4 of this Note.
I will
make these payments every month until I have paid all of the Principal and
interest and any other charges described below that I may owe under this Note.
Each monthly payment will be applied as of its scheduled due date, and if the
payment includes both Principal and interest, it will be applied to interest
before Principal. If on April, 2005 I still owe amounts under this
Note. I will pay those amounts in full on that date, which is called the
"Maturity Date." I will make my monthly payments at
Taylor, Bean & Whitaker Mortgage Corp., 1417 North Magnolia Ave, Ocala, FL 34475
or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

For the first 60 months, my monthly payment will be in the amount of U.S.
\$3,984.38. My interest payments will change on the 61st payment and every
six months thereafter. On the First Principal and Interest Payment Due Date,
and thereafter my payments will be in an amount sufficient to repay the
Principal and interest at the installments by the Maturity Date. The Note
Holder will notify me prior to the date of
change in monthly payments.

C0409L1

(C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid Principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 or 5 of this Note.

4. ADJUSTABLE INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The interest rate will remain the same for the first 60 months and may change on the first day of the 61st month and on that day every sixth month thereafter. Each date on which my interest rate could change is called a "Change Date."

(B) The Index

My interest rate will be based on an Index. The "Index" is the average of interbank offered rates for six-month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in The Wall Street Journal. The most recent Index figure available as of the first business day of the month immediately preceding the month in which the Change Date occurs is called the "Current Index".

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding Three percentage points (3.000 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid Principal that I am expected to owe at the Change Date in Full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest

The interest rate I am required to pay at the first Change Date will not be greater 11.375 % or less than 3.000 %. Thereafter, my adjustable interest rate will never be increased or decreased on any single Change Date by more than 1.000 percentage points from the rate of interest I have been paying for the preceding 6 months. My interest rate will never be greater than 11.375 %.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

Before the effective Change Date, the Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment. The notice will include information required by law to be given to me and also the title and telephone number of the person who will answer any questions I may have regarding the notice.

(G) DATE OF FIRST PRINCIPAL AND INTEREST PAYMENT

The date of the first payment consisting of both Principal and interest on this Note (the "First Principal and Interest Payment Due Date") shall be my 61st scheduled monthly payment due date.

C0409L2

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment". When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note. I may make a full Prepayment or partial Prepayment without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date of my monthly payment unless the Note Holder agrees in writing to those changes. If the partial Prepayment is made during the period when my monthly payments consist of only interest, the amount of the monthly payment will decrease for the remainder of the term when my payments consist only of interest. If the partial prepayment is made during the period when my payments consist of Principal and interest, my partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit and (b) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.0000% of my overdue payment of interest, during the period when my payment is interest only, and of Principal and interest thereafter. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver by Note Holder

Even if at a time I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

C0409L3

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address. Any notice that must be given to the Note Holder under this Note will be, given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or a different address if I am given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against one of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

10. WAIVERS

I and any other person who has obligations under this Note waive the right of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed or ("Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest transferred in a bond or deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

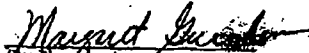
To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and

C0409L4

in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the right to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days after which the notice is given in accordance with Section 15 within which Borrower shall pay all sums secured by this Security Instrument. If Borrower fails to pay the sums prior to the expiration of his period, Lender may invoke the remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.


(Seal) MARGARET GURNHAM

(Seal) _____

(Seal) _____

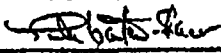
(Seal) _____

(Seal) _____

(Seal) _____

Without recourse, pay to the order of

By: Taylor, Bean & Whitaker
Mortgage Corp.


Eria Carter-Shaw, E.V.P.

C0409L5

3/22/03

15 85
21
NEXSEN
9229

2121/167

BEAUFORT COUNTY SC - ROD
BK 02121 PGS 0167-0181
FILE NUM 2008023273
03/30/2008 09:35:24 AM
REC'D BY S FBMTH ROPTE 319188
RECORDING FEES 21.00

After Recording Return To:
NEXSEN, PRUET, JACOBS, POLLARD &
ROBINSON, LLC
400 MAIN STREET, STE 100-A
HILTON HEAD ISLAND, SC
29928

(Space Above This Line For Recording Data)

MORTGAGE

MIN: 100029800067445889

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated **March 24, 2005**, together with all Riders to this document.

(B) "Borrower" is **MARGARET GURNHAM**

BRIAN HOVER, Trustee of the **Margaret D. Hover Irrevocable Qualified Personal Residence Trust**, dated **May 22, 2000**
is the mortgagor under this Security Instrument.

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(D) "Lender" is **Taylor, Bean & Whitaker Mortgage Corp.**

Lender is a Florida Corporation
the laws of FL

organized and existing under
Lender's address is

1417 North Magnolia Ave, Ocala, FL 34475

(E) "Note" means the promissory note signed by Borrower and dated **March 24, 2005**. The Note states that Borrower owes Lender **Seven Hundred Fifty Thousand and no/100**

Dollars (U.S. \$ 750,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **April 01, 2035**

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

SOUTH CAROLINA—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

ITEM TEMPL1 (0011)—MERS

(Page 1 of 12 pages)

Form 3041 1/01

GREATLAND

To Order Call: 1-800-320-9275 ☐ Fax: 818-781-1115



074098744588

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- ☒ Adjustable Rate Rider ☐ Condominium Rider ☐ Second Home Rider
☐ Balloon Rider ☐ Planned Unit Development Rider ☐ Other(s) [specify]
☐ 1-4 Family Rider ☐ Biweekly Payment Rider

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

SOUTH CAROLINA—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

ITEM TWENTY (2011)—MERS

(Page 2 of 12 pages)

Form 3041 1/01

GREATLAND

To Order Call 1-800-650-6100 or Fax: 810-791-1151

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS the following described property located in the **County** of **BEAUFORT** (Type of Recording Jurisdiction) (Name of Recording Jurisdiction)

See Attached Exhibit A.

which currently has the address of

28 BLUE HERON POINT

(Street)

HILTON HEAD ISLAND
(City)

, South Carolina

29926
(Zip Code)

("Property Address"):

TO HAVE AND TO HOLD this property unto MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

I. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or

SOUTH CAROLINA—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

ITEM TRSRLS (0011)—MERS

(Page 3 of 12 pages)

Form 3041 1/01

GREATLANDS

To Order Call 1-800-333-8783 or Fax 818-751-1181

partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. **Application of Payments or Proceeds.** Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. **Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest

or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration

SOUTH CAROLINA—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

ITEM TEMPLATES (0011)

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ORFATLAND 0

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period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

SOUTH CAROLINA—Single Family—Female Mae/Tredde Mae UNIFORM INSTRUMENT

ITEM TBA221a (0011)—WERS

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ORLANDO

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Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has—if any—with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the

restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to Section 22 of this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note

as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. **Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. **Hazardous Substances.** As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge; (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

SOUTH CAROLINA—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

ITEM T8402110 (5011)—446P9

(Page 10 of 12 pages)

Form 3041 1/01

GREATLAND #

16 Order Call 1-800-390-8336 Fax 614-791-1111

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

23. Release. Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Homestead Waiver. Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

25. Waiver of Appraisal Rights. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE EXTENT PERMITTED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY. This waiver shall not apply so long as the Property is used as a dwelling place as defined in §12-37-250 of the South Carolina Code of Laws.

26. Future Advances. The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to 150% of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in pages 1 through 12 of this Security Instrument and in any Rider executed by Borrower and recorded with it.

MARGARET GURNHAM

(Seal)
-Borrower

(Seal)
-Borrower

Brian Brown Trustee by Margaret Gurnham Attorney in Fact

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

Signed, sealed and delivered in the presence of:

Quinn (S. D. Eason)

Margaret B. Buckley

State of South Carolina
County of Beaufort

I the undersigned Notary Public for South Carolina (name and title), do hereby certify that
personally appeared
before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal (where required by law) this the 24th day of March, 2005

Margaret B. Buckley
Notary Public for South Carolina

My commission expires: 3/09/08

SOUTH CAROLINA—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

ITEM T2002.12 (0011)—MHPB

(Page 12 of 12 pages)

Form 3041 1/01

ORLANDO FL

To Order Call: 1-800-333-6333 Fax: 314-797-1131

Loan Number:

ADJUSTABLE RATE RIDER

(LIBOR Six-Month Index As Published in *The Wall Street Journal*)
 - Rate Caps Accrued Interest Only for Fixed Rate Period -

THIS ADJUSTABLE RATE RIDER is made this day on 3/24/2006
 and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed
 (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Adjustable
 Rate Note (the "Note") to Taylor, Bean & Whitaker Mortgage Corp.
 ("Lender") of the same date and covering the property described in the Security Instrument and located at:

28 BLUE HERON POINT, HILTON HEAD ISLAND, SC 29926

(Property Address)

THE NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES
 IN THE INTEREST RATE AND THE MONTHLY PAYMENT. THE
 NOTE LIMITS THE AMOUNT BORROWER'S INTEREST RATE CAN
 CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE
 BORROWER MUST PAY.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument,
 Borrower and Lender further covenant and agree as follows:

A. INTEREST RATE AND MONTHLY PAYMENT CHANGES

The Note provides for an initial interest rate of 6.375 %. The Note provides for changes in the interest
 rate and the monthly payments, as follows:

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES**(A) Change Dates**

The interest rate I will pay may change on the 1st day of April 2010, and on that day every 6th
 month thereafter. Each date on which my interest rate could change is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the average of
 interbank offered rates for six month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published
 in *The Wall Street Journal*. The most recent index figure available as of the first business day of the month immediately
 preceding the month in which the Change Date occurs is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable
 information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my interest rate by adding Three
 percentage points (3.000 %) to the Current Index. The Note Holder will then round the result of this addition to
 the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded
 amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the
 unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in
 substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 11.375%, less
 than 3.000 %. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more
 than 1.000 percentage points (%) from the rate of interest I have been paying for the preceding 6 months. My
 interest rate will never be greater than 11.375 %.

C0137L1

(page 1 of 2)

(E) Effective Date of Change

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER
Uniform Covenant 18 of the Security Instrument is amended to read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider.

_____(Seal) _____(Seal)
MARGARET GURNHAM
Margaret Gurnham _____(Seal) *Attorney in Fact* _____(Seal)
_____(Seal) _____(Seal)

EXHIBIT "A"

ALL that certain piece, parcel or lot of land situate, lying and being in Hilton Head Island Township, Beaufort County, South Carolina, designated as **LOT NUMBER FIVE (5) BLUE HERON POINT** and being more particularly shown and described on the plat thereof prepared by Fred C. Hack, SC RLS #1377, dated June, 1959, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 12 at Page 22. Said property being bounded on the North by Blue Heron Point Road and measuring thereon 125.96 feet; on the East by Lot 3 Blue Heron Point and measuring thereon for a distance of 140.0 feet; on the South by the mean high water line of Skull Creek and measuring thereon for a distance of 125.0 feet; and on the West by Lot 7 Blue Heron Point and measuring thereon for a distance of 148.0 feet.

This being the same property conveyed to Mortgagor herein by Deed from Margaret D. Hover, dated May 22, 2000, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 1294 at Page 304.

This Mortgage was prepared by Edward M. Hughes, Nexsen Pruet, LLC, P. O. Box 23526, Hilton Head Island, SC 29925.

6/24/08
Rogers
6526

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

ASSIGNMENT OF MORTGAGE
Mortgage Book 2121 at Page 167

FOR VALUE RECEIVED, we hereby set over, transfer and assign unto Hudson City Savings Bank, Wells Fargo Home Mortgage, 3476 Stateview Boulevard MAC X7801-02R, Fort Mill, SC29715, its successors and assigns, all its rights, title and interest in and to a certain Mortgage, together with the Note executed by Brian Hover, Trustee for the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000 to Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Taylor, Bean & Whitaker Mortgage Corp. (MIN #100029500007445889) dated March 24, 2005, and duly recorded in the public records of Beaufort County, State of South Carolina, on March 30, 2005, in Mortgage Book 2121 at Page 167.

IN WITNESS WHEREOF, Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Taylor, Bean & Whitaker Mortgage Corp. (MIN #100029500007445889) has caused this instrument to be executed in its corporate name and behalf by Samuel C. Waters, of the firm of Rogers Townsend & Thomas, PC, duly authorized, on this 29th day of July, 2008.

Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Taylor, Bean & Whitaker Mortgage Corp. (MIN #100029500007445889)

By [Signature]
Of Rogers Townsend & Thomas, PC:
Attorney-in-Fact by the Agreement for
Signing Authority filed herein

Nicole Jameson

Witness No. 1

Deborah Williams

Witness No. 2

STATE OF SOUTH CAROLINA

COUNTY OF Richland

ACKNOWLEDGMENT

S.C. Code § 30-5-30
(Effective January 1, 1995)

I, the undersigned, Notary Public for the State of South Carolina, do hereby certify that Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Taylor, Bean & Whitaker Mortgage Corp. (MIN #100029500007445889) by Samuel C. Waters, its Certifying Officer, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand this 29th day of July, 2008.

[Signature]
NOTARY PUBLIC FOR South Carolina
My Commission Expires: 4-30-2012

RETURN TO:
Rogers, Townsend & Thomas, P.C.
Post Office Box 100200
Columbia, South Carolina 29202
(011784-07000)

BEAUFORT COUNTY SC- ROD
BK 02752 PG 2597
DATE: 08/05/2008 11:24:05 AM
INST # 2008049806 RCPT# 555347

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE MATTER OF MARGARET DEVER HOVER GURNHAM AKA MARGARET D. HOVER

CASE NUMBER 2006ES0700145

RECEIVED
BEAUFORT COUNTY
PROBATE COURT
06 MAR 20 PM 12:40

NOTICE TO CREDITORS

*NOTICE TO CREDITORS OF ESTATES

All persons having claims against the following estates are required to deliver or mail their claims to the indicated Personal Representatives (PR), appointed to administer these estates, AND to file their claims on Form #371PC with the Probate Court for BEAUFORT COUNTY at 102 RIBAUT ROAD, BEAUFORT, SC 29902 on or before the date that is 8 months after the date of the first publication of this Notice to Creditors (unless barred by operation of Section 62-3-803), or such persons shall be forever barred as to their claims. All claims are required to be presented in written statements, indicating the name and address of claimant, basis of the claim, amount claimed, date when the claim will become due, nature of any uncertainty as to the amount claimed and date when due, and description of any security as to the claim.

Estate: MARGARET DEVER HOVER GURNHAM AKA MARGARET D. HOVER

Case Number: 2006ES0700145

Personal Representative: BRIAN HOVER

Address: PO BOX 6128

HILTON HEAD ISLAND, SC 29938

Attorney, if applicable: RICHARD B. ALLEN, ESQ.

Address: c/o PO BOX 5098

HILTON HEAD ISLAND, SC 29938

Date of Death: 12/08/2006

INSTRUCTIONS: Publication to be in THE BEAUFORT GAZETTE a newspaper of general circulation in BEAUFORT COUNTY. Publish only this (*) portion of this form. Notices may be combined by listing individualized statements of the information concerning each of the estates under one heading consisting of the notice text. Publish once a week for three successive weeks.

File a copy of this form with proof of its publications with Probate Court.

CERTIFICATE OF PUBLICATION

I hereby certify that on these dates 03/02/2006, 03/09/2006, and 03/16/2006, I did publish the Notice to Creditors in THE BEAUFORT GAZETTE, a newspaper of general circulation in BEAUFORT COUNTY in accordance with law.

SWORN to before me this 16th day of March, 2006.

Dwight G. Mayfield
Notary Public for South Carolina

My commission expires: 26 Oct 2006

Signature: *Alan V. Jenkins*

Name: _____

Address: _____

Post Office Box 399

Beaufort, SC 29901

Telephone (O): (843) 524-3183

Telephone (H): _____

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2008-CP-07-02561

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

2008 AUG 18 PM 2:15

Hudson City Savings Bank,)
Plaintiff,)

vs.)

Brian Hover, Trustee of the Margaret D.)
Hover Irrevocable Qualified Personal)
Residence Trust, dated May 22, 2002; and)
Beach First National Bank;)

Defendants.)

**SUMMONS AS TO CROSS-CLAIM AND
THIRD-PARTY COMPLAINT**

Beach First National Bank,)
Plaintiff on Cross-Claim,)

vs.)

Brian Hover, Trustee of the Margaret D.)
Hover Irrevocable Qualified Personal)
Residence Trust, dated May 22, 2000,)

Defendant on Cross-Claim.)

Beach First National Bank,)
Third-Party Plaintiff,)

vs.)

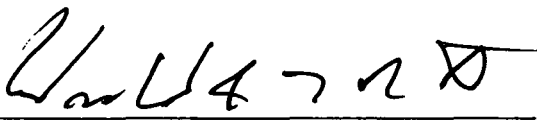
Brian Hover, in his representative capacity)
as Personal Representative of the Estate)
of Margaret Gurnham (a/k/a Margaret)
D. Hover) and The Estate of Margaret)
Gurnham, (a/k/a Margaret D. Hover),)

Third-Party Defendants.)

TO: THE DEFENDANT ON CROSS-CLAIM, BRIAN HOVER, TRUSTEE OF THE MARGARET D. HOVER IRREVOCABLE QUALIFIED PERSONAL RESIDENCE TRUST, DATED MAY 22, 2000 AND DEFENDANT ON THIRD-PARTY COMPLAINT, BRIAN HOVER, IN HIS REPRESENTATIVE CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARGARET GURNHAM (A/K/A MARGARET D. HOVER), AND THE ESTATE OF MARGARET GURNHAM (A/K/A MARGARET D. HOVER):

YOU ARE HEREBY SUMMONED and required to answer the Cross-Claim and Third-Party Complaint in this action, a copy of which is herewith served upon you and to serve a copy of your Answer to the said Cross-Claim and Third-Party Complaint upon the subscribers hereunder at their offices at P.O. Box 1938, Bluffton, South Carolina 29910, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Cross-Claim and Third-Party Complaint within the time aforesaid, the Cross-Claimant/Third-Party Plaintiff will apply to the Court for the relief demanded in the Cross-Claim and Third-Party Complaint.

JONES, PATTERSON, SIMPSON & NEWTON, P.A.

By: 

Wm. Weston J. Newton

P. O. Box 1938

Bluffton, SC 29910

(843) 706-6111

Attorneys for the Defendant and Cross-Claim
Plaintiff, Beach First National Bank

Bluffton, South Carolina

August 15, 2008

F:\Home\BSP\Beach First\Gurnham\Summons to CrossClaim.wpd

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2008-CP-07-02561

Hudson City Savings Bank,)
Plaintiff,)

vs.)

Brian Hover, Trustee of the Margaret D.)
Hover Irrevocable Qualified Personal)
Residence Trust, dated May 22, 2002; and)
Beach First National Bank;)

Defendants.)

Beach First National Bank,)
Plaintiff on Cross-Claim,)

vs.)

Brian Hover, Trustee of the Margaret D.)
Hover Irrevocable Qualified Personal)
Residence Trust, dated May 22, 2000,)

Defendant on Cross-Claim.)

Beach First National Bank,)
Third-Party Plaintiff,)

vs.)

Brian Hover, in his representative capacity)
as Personal Representative of the Estate)
of Margaret Gurnham (a/k/a Margaret)
D. Hover) and The Estate of Margaret)
Gurnham, (a/k/a Margaret D. Hover),)

Third-Party Defendants.)

**ANSWER, COUNTERCLAIM, CROSS-CLAIM
AND THIRD-PARTY COMPLAINT**
(Non-Jury)

**FORECLOSURE OF REAL ESTATE
MORTGAGE**

(Deficiency Judgment Requested)

2008 AUG 18 PM 2:17
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

The Defendant, Beach First National Bank (hereinafter "Beach First"), answering the Complaint of the Plaintiff and asserting its Counterclaim, Cross-Claim against Brian Hover, Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust dated May 22, 2000, and

Third-Party Complaint against Brian Hover, in his representative capacity as Personal Representative of the Estate of Margaret Gurnham (a/k/a Margaret D. Hover) and The Estate of Margaret Gurnham, (a/k/a Margaret D. Hover), respectfully alleges and shows this Honorable Court that:

BY WAY OF A FIRST DEFENSE
(General Denial)

1. This Defendant denies each and every allegation of the Complaint not hereinafter specifically admitted or qualified and demands strict proof thereof.

BY WAY OF A SECOND DEFENSE
(Limited General Denial)

2. This Defendant realleges each and every allegation set forth above.

3. This Defendant on information and belief admits the allegations of Paragraphs 1 and 2 of the Plaintiff's Complaint.

4. This Defendant is without sufficient information to either admit or deny the allegations of Paragraphs 3, 6, 7, 8, 9, 10, 11, 13, and 14 of the Plaintiff's Complaint and would accordingly deny the same and demand strict proof thereof.

5. This Defendant admits the allegations contained in Paragraphs 4 and 5 of the Plaintiff's Complaint.

6. This Defendant believes no response is necessary to Paragraphs 12 and 15 of the Plaintiff's Complaint.

7. This Defendant admits the allegations contained in Paragraph 16 of the Complaint which alleges that it has a recorded mortgage on the property at issue in this action, the same being recorded in the property records for Beaufort County, South Carolina, in Book 2121 at Page 182.

BY WAY OF COUNTERCLAIM, CROSS-CLAIM, AND
THIRD-PARTY COMPLAINT

8. Defendant, Plaintiff on Cross-Claim and Third-Party Plaintiff, Beach First National Bank, is a national banking organization doing business in the State of South Carolina.

9. That Beach First National Bank is the owner and holder of a Note and Mortgage, covering the real property (which is the subject of this action) located in the County of Beaufort and State of South Carolina.

10. Plaintiff, Defendant on Cross-Claim, and Third-Party Defendants, as named herein have or may have an interest in the real property that is the subject of this action and are subject to the jurisdiction of this Court.

11. On information and belief, Margaret Gurnham (a/k/a Margaret D. Hover) died on or about December 8, 2005. The duly appointed and serving Personal Representative is Brian Hover.

12. That probate proceedings in the matter of Margaret Gurnham (a/k/a Margaret D. Hover) are open and pending in the Probate Court of Beaufort County bearing Action No. 2006ES0700145.

13. The real property hereinafter described, that is the subject of this action, is situated in the County of Beaufort, State of South Carolina and this Court has proper jurisdiction over the subject matter and the parties to this action.

14. On March 24, 2005, Margaret Gurnham (a/k/a Margaret D. Hover) made, executed and delivered to Beach First National Bank a Promissory Note (hereinafter "Note") wherein and whereby Margaret Gurnham promised to pay Beach First National Bank so much of the credit limit advanced pursuant to the Note plus interest at a variable rate based on the Prime Rate (as defined therein) on the outstanding balance; said interest being due and payable monthly. A copy of said Note is attached hereto as Exhibit "A" and incorporated herein by reference.

15. To better secure the payment of the said Note and debt, in accordance with the terms and conditions thereof, Brian D. Hover as Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000, made, executed and delivered to Beach First National Bank a certain Mortgage covering the real property which is the subject of this action, the same being more fully described as:

All that certain piece, parcel or lot of land situate, lying and being in the Hilton Head Township, Beaufort County, South Carolina, and designated as Lot No. 5 of Blue Heron Point on a plat of said Subdivision recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Book 12 of Page 22; said lot is bounded on the north by Blue Heron Point Road, and measuring thereon 125.96 feet; On the East by Lot No. 3 of said subdivision, and measuring thereon for a distance of 140.0 feet; on the South by the mean high water line of Skull Creek, and measuring thereon for a distance of 125.00 feet; more or less, and on the West by Lot No. 7 of said subdivision and measuring thereon for a distance of 148.0 feet.

This being the same property conveyed to Margaret D. Hover by Deed of Robert E. Frank and Tawnee Frank a/k/a Tawnee A. Frank, dated December 14, 1999 and recorded December 17, 1999 in Book 1242 at Page 1732. Subsequently, Margaret D. Hover conveyed the property to Brian Hover, as Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust dated May 22, 2000, by Deed dated May 2, 2000 and recorded May 23, 2000 in Book 1294 at Page 304, in the Office of the Register of Deeds for Beaufort County.

Property Address: 28 Blue Heron Point, Hilton Head Island, South Carolina
TMS No.: R501-006-000-0008-0000

16. Said Mortgage was recorded in Book 2121 at Page 182 on March 30, 2005, in the Office of the Register of Deeds for Beaufort County, South Carolina. A copy of the Mortgage is attached hereto as Exhibit "B" and incorporated herein by reference.

17. The Mortgage evidences and secures the repayment of money advanced by Beach First National Bank on behalf of Margaret Gurnham and constitutes a valid second lien on the mortgaged premises.

18. Any notice required by the terms of the Mortgage or by applicable state or federal law, if any, has been given to the Defendant on Cross-Claim and/or Third-Party Defendant prior to the commencement of this claim.

19. According to the terms and conditions of the said Note and Mortgage, it is provided that in the event of default of any payment when due, the entire outstanding balance including accrued interest shall at once become due and payable and collectible by foreclosure; and further if the Note and Mortgage should be placed in the hands of an attorney for collection, all costs of collection, including a reasonable attorney's fee, would be secured by the said Mortgage as part of the debt secured thereby.

20. According to the terms and conditions of the said Note and Mortgage, it is provided that in the event the Mortgagee pays sums for taxes and insurance and other costs for securing, inspecting and protecting the property, such sums should be added to the amount of the debt.

21. The minimum payments from and after March 29, 2008, have not been paid although demand for payment thereof has been made and the Plaintiff on Cross-Claim/Third-Party Plaintiff as the holder of the said Note and Mortgage has and does declare the entire balance of the said indebtedness due and payable. There is due on the said Note and Mortgage as of July 29, 2008, the sum of \$245,453.23, consisting of the principal balance of \$238,472.27, accrued interest of \$6,711.53 and late fees of \$269.43, plus interest thereon from that date forward and also the costs of disbursement of this action, including attorney's fees.

22. Upon information and belief, said information having been obtained from the records of Beaufort County, South Carolina, Plaintiff has or may claim to have some interest in or lien upon the subject premises by virtue of mortgage given by Defendant, Brian D. Hover as Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000, in the original principal amount of \$750,000.00, which mortgage is dated March 24, 2005, and was recorded in said Register of Deeds Office on March 30, 2005, in Mortgage Book 2121 at Page 167, which Mortgage was assigned to Plaintiff. Said mortgage is senior to the mortgage of Beach First National Bank.

23. Beach First National Bank is entitled to and hereby requests a deficiency judgment against Brian Hover, in his representative capacity as Personal Representative of the Estate of Margaret Gurnham (a/k/a Margaret D. Hover), and The Estate of Margaret Gurnham (a/k/a Margaret D. Hover), in the event that the sale of the real estate herein being foreclosed does not yield a sum sufficient to satisfy all indebtedness due to it, including costs and attorney's fees.

24. Pursuant to the terms of its Mortgage and applicable law, Plaintiff on Cross-Claim/Third-Party Plaintiff, Beach First National Bank, requests that its Mortgage be foreclosed and that the property be sold at public auction in accordance with the law.

WHEREFORE, having fully answered the Plaintiff's Complaint and set forth its Counterclaim, Cross-Claim against Brian D. Hover as Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000, and its Third-Party Complaint against Brian Hover, in his representative capacity as Personal Representative of the Estate of Margaret Gurnham (a/k/a Margaret D. Hover), and The Estate of Margaret Gurnham (a/k/a Margaret D. Hover), Beach First National Bank prays that this Honorable Court inquire into the matters set forth herein and:

1. That amount due upon the said Note and Mortgage held by Beach First National Bank, together with its costs of securing the property, attorney's fees and costs of this action, be ascertained and determined under the direction of this Court.

2. That the Court inquire into the matters herein alleged and determine the validity and priority of all claimants against the subject property.

3. That in the event the subject property is not sold in satisfaction of the Plaintiff's mortgage lien, that the Plaintiff on Cross-Claim/Third-Party Plaintiff have judgment of foreclosure for the amount found to be due, together with an allowance for future costs, expenses and disbursements.

4. That the mortgaged premises be sold under the direction of this Court, the equity of redemption be barred and the proceeds of the sale applied as follows:

First, to costs and expenses of the within action.

Second, to the payment and discharge of any amounts due senior lienholders.

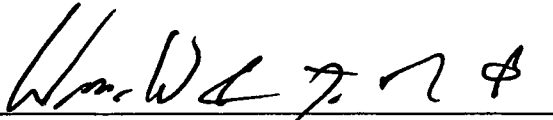
Third, to the payment and discharge of the amount due Plaintiff on Cross-Claim/Third Party Plaintiff's Note and Mortgage, together with attorney's fees, costs and expenses as aforesaid, then to the establishment of a deficiency judgment, if appropriate, under the circumstances.

Fourth, the surplus, if any, be distributed according to law.

5. That an Order be entered directing and empowering the Sheriff of Beaufort County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property hereinabove described, if the same should become necessary.

6. For such other and further relief as may be just and proper.

JONES, PATTERSON, SIMPSON & NEWTON, P.A.

By: 

Wm. Weston J. Newton

P. O. Box 1938

Bluffton, SC 29910

(843) 706-6111

Attorneys for the Defendant and Cross-Claim
Plaintiff, Beach First National Bank

Bluffton, South Carolina

August 15th, 2008

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Hudson City Savings Bank,

Plaintiff,

v.

Brian Hover, Trustee of the Margaret D. Hover
Irrevocable Qualified Personal Residence Trust,
dated May 22, 2000; Beach First National Bank;

Defendant(s).

Beach First National Bank,

Plaintiff on Cross-Claim,

v.

Brian Hover, Trustee of the Margaret D. Hover
Irrevocable Qualified Personal Residence Trust,
dated May 22, 2000,

Defendant on Cross-Claim.

Beach First National Bank,

Third-Party Plaintiff,

v.

Brian Hover, in his representative capacity as
Personal Representative of the Estate of Margaret
Gurnham (a/k/a Margaret D. Hover) and The
Estate of Margaret Gurnham (a/k/a Margaret D.
Hover),

Third-Party Defendants.

(011784-07000)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-07-2561

JUDGMENT OF FORECLOSURE AND SALE
Deficiency Judgment Demanded

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

2008 OCT -9 PM 4:47

Samuel C. Waters, Esquire
Attorney for the Plaintiff

Weston J. Newton, Esquire
Attorney for Beach First National Bank

A hearing was held September 26, 2008 at 10:00 AM. The testimony was taken, which is reported herewith, and from the testimony and evidence, I find and conclude as follows:

**FINDINGS OF FACT:
As To Plaintiff's Claim**

1. The Lis Pendens was filed on July 15, 2008.
2. The Summons and Complaint were filed on July 15, 2008.
3. Service was made upon the Defendant(s) named in this report as shown by the proof(s) of service filed herein.
4. The Defendant(s) Brian Hover, Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000 is in default as shown by affidavit or order filed herein.
5. Beach First National Bank filed an answer through their attorney/guardian, Weston J. Newton, Esquire.
6. The Defendant(s) and/or all attorneys of record were notified of the time, date, and place of the hearing in this matter.
7. According to the affidavit filed herein, the Defendant(s) Brian Hover, Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000 is in default and that the Defendant(s) Brian Hover is not in the Military Service of the United States of America, as contemplated under The Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. Seq.
8. For value received, Margaret Gurnham made, executed and delivered a(n) Adjustable Rate Note dated March 24, 2005 promising thereby to pay the sum of \$750,000.00 with interest at 6.375% per annum. Other terms and conditions are stated in the Adjustable Rate Note, which is of record herein.
9. To better secure the payment of the Adjustable Rate Note described above Brian Hover, Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000 made, executed, and delivered to Mortgage Electronic Registration Systems, Inc., acting solely as nominee for Taylor, Bean & Whitaker Mortgage Corp. (MIN #100029500007445889) a certain real estate first Mortgage in writing, dated March 24, 2005 covering real property in Beaufort County, which is the

same as that described in the Complaint. The first Mortgage was filed on March 30, 2005, and is of record in the Office of RMC/ROD in Book 2121 at Page 167. This mortgage was assigned unto the plaintiff herein dated July 29, 2008 and recorded August 5, 2008 in Book 2752 at Page 2597.

10. This first Mortgage constitutes a first mortgage lien on the subject property, subject only to ad valorem or other liens/taxes given priority by statute.

11. The Plaintiff in this action is the owner and holder or nominee for the owner and holder of the Adjustable Rate Note and first Mortgage it is seeking to foreclose.

12. Any notice required by the terms of the first mortgage or by state or federal statutes has been given to the applicable defendant(s) prior to the commencement of this action.

13. Payment due on the Adjustable Rate Note has not been made as provided for therein, and the Plaintiff, as the holder or nominee for the holder thereof, has elected to require immediate payment of the entire amount due thereon and has placed the Adjustable Rate Note and first Mortgage in the hands of the attorney herein for collection by foreclosure.

14. The sum of \$3,500.00 is a reasonable fee to allow as attorney fees for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Adjustable Rate Note and first Mortgage. These sums are likewise reasonable based on the time necessarily devoted to representation of the Plaintiff during the several month course of these proceedings. The services of counsel performed for the Plaintiff, including the number and types of pleadings and documents prepared, the incumbent liabilities, and the difficulties involved in this particular case also support the amount awarded. The fees are also reasonable given the professional standing of the Plaintiff's counsel and their experience in handling foreclosure matters. The fees awarded herein are also reasonable in light of the fees customarily awarded by this court for similar services in this locality. Moreover, the efforts of Plaintiff's counsel have had the beneficial result of a prompt foreclosure of the mortgage. Services anticipated to be performed until final adjudication contemplates completion of this matter within a reasonable time and does not include exceptional circumstances delaying conclusion beyond the normal time.

15. After all payments received by the Plaintiff have been credited to the subject loan, the amount due and owing on the Adjustable Rate Note, with interest at the rate provided in the Adjustable Rate Note, and other costs and expenses of the within action, including an attorney's fee, secured by the Adjustable Rate Note and first Mortgage, is as follows:

- (a) Principal due April 1, 2008 \$746,015.62
- (b) Interest from March 1, 2008 through
September 26, 2008 at 6.375% per annum..... \$27,362.50

- (c) Advances (Escrow advances, corporate charges and other charges) \$110.00
- (d) Costs of collection prior to hearing (service, filing, etc.)..... \$545.00
- (e) Title Abstract Search..... \$350.00
- (f) Late Charges..... \$990.80
- (g) Attorney's Fee..... \$3,500.00

TOTAL debt secured by Adjustable Rate Note and first Mortgage, including interest to date shown \$778,873.92

Interest for the period from the date shown in (b) above through the date of this judgment at above stated rate to be added to the above stated "Total Debt" to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the rate of 6.375% per annum (pursuant to the terms of the Adjustable Rate Note and first Mortgage) on the judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the first Mortgage through the date to which such interest is computed.

16. Plaintiff is seeking the usual foreclosure of the first mortgage and has in the Complaint (or subsequently thereto in writing) expressly waived the right to a personal or deficiency judgment.

17. The Defendant, Beach First National Bank's claim of lien upon or legal interest in the subject property is junior and subordinate to Plaintiff's mortgage. The said Defendant's claim or lien is as follows:

a. Beach First National Bank, by virtue of a mortgage given by Brian Hover, Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000 in the amount of \$260,000, dated March 24, 2005, and recorded March 30, 2005 in Book 2121 at Page 182.

As To Plaintiff on Cross-Claim and Third Party Plaintiff, Beach First National Bank

18. Beach First National Bank ("BF") filed its Answer, Counterclaim, Cross-Claim and Third-Party Summons and Complaint and Lis Pendens on August 18, 2008.

19. Service was made upon the Defendant on Cross-Claim and Third-Party Defendants named in this Order as shown by the affidavits and certificates of service filed with the Court.

20. The Defendant on Cross-Claim, Brian D. Hover as Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000, and Third-Party Defendants, Brian Hover, in his representative capacity as Personal Representative of the Estate of Margaret Gurnham (a/k/a Margaret D. Hover) and The Estate of Margaret Gurnham (a/k/a Margaret D. Hover) are in default

as shown by affidavit of default filed with the Court. According to the affidavit filed herein, no Defendant in default is in the military service of the United States of America, as contemplated under the Servicemembers' Civil Relief Act, 50 U.S.C. App. §501, *et seq.* and any amendments thereto.

21. All parties were notified of the time, date, and place of the hearing in this matter.

22. For value received, on March 24, 2005, Margaret Gurnham (a/k/a Margaret D. Hover) made, executed and delivered to Beach First National Bank a Promissory Note (hereinafter "Beach First Note") wherein and whereby Margaret Gurnham promised to pay Beach First National Bank so much of the credit limit advanced pursuant to the Beach First Note plus interest at a variable rate based on the Prime Rate (as defined therein) on the outstanding balance; said interest being due and payable monthly. Other terms and conditions are stated in the Beach First Note, which is of record.

23. To better secure the payment of the Note described above, Brian Hover as Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000, made, executed and delivered to Beach First National Bank a certain Mortgage covering the real property which is the subject of this action. Said Mortgage was recorded in Book 2121 at Page 182 on March 30, 2005 in the Office of the Register of Deeds for Beaufort County, South Carolina.

24. The Mortgage of Beach First National Bank is a valid second mortgage lien on the subject property subordinate and junior only to the Plaintiff's Mortgage.

25. Beach First National Bank is the owner and holder of the Beach First Note and mortgage.

26. Any notice required by the terms of said Mortgage or by state or federal statute has been given to the applicable defendants prior to the commencement of this action.

27. Payment due on the Beach First Note has not been made as provided in the Beach First Note, and Beach First National Bank has elected to require immediate payment of the entire amount due thereon and has placed the Beach First Note and mortgage in the hands of the attorneys of record herein for collection by foreclosure.

28. Margaret Gurnham (a/k/a Margaret D. Hover) died on December 8, 2005. The duly appointed and serving Personal Representative is Brian Hover.

29. That probate proceedings in the matter of Margaret Gurnham (a/k/a Margaret D. Hover) are open and pending in the Probate Court of Beaufort County bearing Case No. 2006ES0700145.

30. The sum of \$7,992.09 is a reasonable fee to allow as attorney fees and costs for Beach First National Bank's attorneys for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Beach First Note and mortgage. This sum is likewise reasonable based on the time necessarily devoted to the representation of Beach First National Bank during the several month course of these proceedings and the probate proceedings. The services of

counsel performed for Beach First, including the number and types of pleadings, documents prepared, the incumbent liabilities, and the difficulties involved in this particular case also support the amount awarded. The fees are also reasonable given the professional standing of Beach First's counsel and their experience in handling foreclosure matters. The fees awarded hereof are also reasonable in light of the fees customarily awarded by this Court for similar services in this locality. Moreover the efforts of Beach First's counsel have had the beneficial result of prompt foreclosure of its mortgage. Services anticipated to be performed until final adjudication contemplates completion of this matter within a reasonable time and does not include exceptional circumstances delaying conclusion beyond the normal time.

31. The amount due and owing on the Beach First Note, with interest at the rate provided in the Beach First Note, and other costs and expenses of the within action, including an attorney's fee, secured by the Beach First Note and mortgage, is as follows:

(a)	Principal due as of September 26, 2008	\$238,472.27
(b)	Interest through September 26, 2008	\$ 9,313.48
(c)	Late Fees	\$ 403.94
(d)	Other Charges/Fees	\$ 395.95
(e)	Attorney's fee and Costs	\$ 7,992.09
	TOTAL debt secured by Note and mortgage including interest to September 26, 2008	<u>\$256,577.73</u>

Interest for the period from the date shown in (b) above through the date of this judgment at rate of 6.75% to be added to the above stated Total Debt to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the rate stated above (pursuant to the terms of the Beach First Note and mortgage) on the judgment debt shall be added to such judgment debt to comprise the amount of Beach First National Bank's debt secured by the mortgage through the date to which such interest is computed.

33. Beach First National Bank is seeking the usual foreclosure of the mortgage and has expressly reserved its right to a deficiency judgment against the Third-Party Defendants, Brian Hover, in his representative capacity as Personal Representative of the Estate of Margaret Gurnham (a/k/a Margaret D. Hover) and The Estate of Margaret Gurnham (a/k/a Margaret D. Hover), pursuant to Rule 71(b) SCRCF, should the proceeds of sale not be sufficient to satisfy the judgment debt.

CONCLUSIONS OF LAW

I, therefore, conclude as follows:

1. Any Finding of Fact that should be more properly designated as a Conclusion of Law is so relabeled and any Conclusion of Law that might need to be a Finding of Fact is so amended in order to allow for the efficient implementation of these results.

AS TO PLAINTIFF'S CLAIMS

2. The Plaintiff should have judgment of foreclosure of its mortgage; and the mortgaged property should be ordered sold at public auction after due advertisement.

3. There is due on the Adjustable Rate Note and first Mortgage set forth in the Complaint the sum of \$778,873.92 as set out in the Findings of Fact *supra*, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

4. The amount due in the preceding paragraph (the "Final Total Debt" as set out in the Findings of Fact *supra*) shall accrue interest at the rate of the respective note rate(s) per annum and together with such interest shall constitute the total judgment debt due the Plaintiff.

AS TO PLAINTIFF ON CROSS-CLAIM AND THIRD-PARTY PLAINTIFF, BEACH FIRST NATIONAL BANK'S CLAIMS

5. Beach First should have judgment of foreclosure of its second Mortgage; and the mortgaged property should be ordered sold at public auction after due advertisement in a sale consolidated with the First Mortgagee's Sale.

6. That there is due to Beach First on its Note and Mortgage the sum of \$256,577.73 representing the Total Debt due to the Beach First as set out in the Findings of Fact *supra*, as of September 26, 2008, together with interest thereon at the rate of 6.75% on the balance of principal from the date aforesaid to the date hereof.

7. That the amount due in the preceding paragraph and later accrued interest and costs shall constitute the total judgment debt due to Beach First and shall bear interest hereafter at the rate of 6.75% per annum.

IT IS THEREFORE ORDERED:

1 The amount of the judgments shall be subject to increase to permit the Plaintiff or Third-Party Plaintiff, Beach First, to recover additional costs, commissions and expenses not included in the minimum deposit previously made in compliance with S.C. Code Ann. §14-11-310 (1976). It may also increase to include supplemental compensation for attorney's services not contemplated by the initial fee award. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs and/or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the court without further hearing.

2. The Defendant(s) liable for the aforesaid judgment debts including interest at the rates provided herein per annum, shall on or before the date of sale of the property hereinafter described, pay to the Plaintiff, or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action and pay to Third Party Plaintiff, Beach First, or its attorney the amount of Beach First's debt as aforesaid.

3. On default of payment at or before the time herein indicated, the mortgaged premises described in the Complaint, as hereinafter set forth, shall be sold by the Master in Equity at public auction, at the Beaufort County Courthouse, in the City of Beaufort, County and State aforesaid on November 3, 2008, at 11:00 AM, or on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on the next business day succeeding such holiday), on the following terms, that is to say:

a. For cash: The Master in Equity will require a deposit of 5% on the amount of the bid (in cash or equivalent) same to be applied to purchase price if compliance is made, but in the event compliance is not made, the deposit may be forfeited without further hearing and applied first to costs of the action and then to Plaintiff's debt. Should the successful bidder at the regularly conducted sale fail or refuse to either make the required deposit at time of bid or comply with the other terms of the bid within 30 days, then the property may be re-sold on the same terms and conditions on the same or some subsequent Sales Day, but at the risk of the defaulting bidder(s).

b. Interest on the balance of the bid shall be paid through the day of compliance at the rate of 6.375% to the extent of the debt due Plaintiff and to the extent applicable at the rate of 6.75% on the debt due Beach First.

c. The sale shall be subject to taxes and assessments, existing easements and restrictions and easements and restrictions of record, and any other senior encumbrances.

d. Purchaser to pay for any statutory commission on sale from the proceeds of the final bid amount.

e. Purchaser to pay for deed preparation, costs of recording the deed and satisfaction

of mortgage, and transfer taxes on the deed.

f. Purchaser shall be entitled to possession of the premises only after Purchaser fully complies with the bid amount and a deed is issued by the Court.

4. That a personal or deficiency judgment being demanded by Beach First National Bank, the bidding will remain open for thirty (30) days pursuant to South Carolina Code Ann. Section 15-39-760 (1972) after the date of sale, with the sale being final on that date.

5. Plaintiff and Third-Party Plaintiff, Beach First National Bank, may waive any of its rights, including its right to a deficiency judgment in accordance with Rule 71, South Carolina Rules of Civil Procedure, prior to sale.

6. The Master in Equity will, by advertisement according to law, give notice of the time and place of such sale and the terms thereof and will execute to the purchaser, or purchasers, a deed to the premises sold. The Plaintiff, or any other party to this action, may become a purchaser at such sale, and if, upon such sale being made, the purchaser, or purchasers, should fail to comply with the terms thereof within 30 days after date of sale, then the Master in Equity may advertise the said premises for sale on the next or some other subsequent sales day at the risk of the highest bidder and so from time to time thereafter until a full compliance shall be secured.

7. In the event an agent of Plaintiff and Third-Party Plaintiff does not appear at the time of sale, the within property shall be withdrawn from sale and sold at the next available sales date upon the same terms and conditions as set forth in this Judgment of Foreclosure and Sale or such terms as may be set forth in a supplemental order.

8. If Plaintiff be the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness of Plaintiff in full, Plaintiff may pay to the Master in Equity only the amount of the costs and expenses crediting the balance of the bid on Plaintiff's indebtedness.

9. If Beach First is the successful bidder at said sale, for a sum not exceeding the amount of costs and expenses plus the amount due Plaintiff and the amount due Beach First, Beach First may pay to the undersigned only the cost and expenses and the amount due to Plaintiff, crediting the balance of the bid on Beach First's indebtedness.

10. The Master in Equity will apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action, including any Guardian Ad Litem fee or fees of attorneys appointed under Order of Court;

NEXT: To the payment to the Plaintiff or Plaintiff's attorney of the amount of Plaintiff's debt and interest (including attorney fees) or so much thereof as the purchase money will pay on the same;

NEXT: To the payment of the amount to the Plaintiff on Cross-Claim, Beach First or its attorney of record, of the amount of Beach First's debt and interest (including attorney fees) or so much thereof as the purchase money will pay on the same;

NEXT: Any proceeds remaining will be held pending further Order of this Court pursuant to Rule 71(c) SCRCF.

11. In the event the successful bidder is other than the Defendant(s) in possession herein, the Sheriff of Beaufort County is ordered and directed to eject and remove from the premises the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet, and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

12. In the event the successful bidder is other than the Defendants in possession herein and the occupants have voluntarily vacated the premises or have been ejected from the premises leaving furnishings, fixtures and items not subject to the Plaintiff's or Beach First's Mortgage in said premises, the Purchaser is authorized to remove therefrom all furnishings, fixtures and items not subject to the lien of the Plaintiff's or Beach First's Mortgage, which personal property, being deemed abandoned, shall be removed by the Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

13. The Defendant(s) and Third-Party Defendants named herein, and all persons whosoever claiming under Defendant(s) or Third-Party Defendants, are forever barred and foreclosed of all right, title, interest, equity of redemption or lien in the said mortgaged premises so sold, or any part thereof.

14. In accordance with Rule 77(d), SCRCF, the Clerk of Court shall serve a notice of entry of this Judgment of Foreclosure upon all parties not in default for failure to appear herein.

15. The deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the first-named Defendant(s), and the Defendant(s) who was/were the titleholder(s) of the mortgaged property at the time of the filing of the notice of pendency of the within action, and the name of the grantee; and the Register of Deeds/Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

16. The undersigned will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

17. The following is a description of the premises herein ordered to be sold:

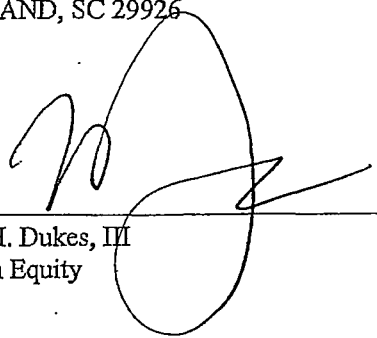
All that certain piece, parcel or lot of land situate, lying and being in Hilton Head Island Township, Beaufort County, South Carolina, designated as Lot Number Five (5) Blue Heron Point and being more particularly shown and described on the plat thereof prepared by Fred C. Hack, SC RLS #1377, dated June, 1959, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 12 at Page 22. Said property being bounded on the North by Blue Heron Point Road and measuring

thereon 125.96 feet; on the East by Lot 3 Blue Heron Point and measuring thereon for a distance of 140.0 feet; on the South by the mean high water line of Skull Creek and measuring thereon for a distance of 125.0 feet; and on the West by Lot 7 Blue Heron Point and measuring thereon for a distance of 148.0 feet.

This being the same property conveyed to Margaret D. Hover by Deed of Robert E. Frank and Tawnee Frank a/k/a Tawnee A. Frank, dated December 14, 1999 and recorded December 17, 1999 in Book 1242 at Page 1732 subsequently, Margaret D. Hover conveyed the property to Brian Hover, as Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust dated May 22, 2000, by Deed dated May 22, 2000 and recorded May 23, 2000 in Book 1294 at Page 304, in the Office of the Register of Deeds for Beaufort County.

Property Address: 28 BLUE HERON PT
HILTON HEAD ISLAND, SC 29926

TMS# R501 006 000 0008 0000



Marvin H. Dukes, III
Master in Equity

10-9-08, 2008
Beaufort, South Carolina

NOTICE OF SALE

BY VIRTUE of a decree heretofore granted in the case of: Hudson City Savings Bank vs. Brian Hover, Trustee of the Margaret D. Hover Irrevocable Qualified Personal Residence Trust, dated May 22, 2000; Beach First National Bank; C/A No. 08-CP-07-2561, The following property will be sold on November 3, 2008, at 11:00 AM at the Beaufort County Courthouse to the highest bidder:

All that certain piece, parcel or lot of land situate, lying and being in Hilton Head Island Township, Beaufort County, South Carolina, designated as Lot Number Five (5) Blue Heron Point and being more particularly shown and described on the plat thereof prepared by Fred C. Hack, SC RLS #1377, dated June, 1959, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 12 at Page 22. Said property being bounded on the North by Blue Heron Point Road and measuring thereon 125.96 feet; on the East by Lot 3 Blue Heron Point and measuring thereon for a distance of 140.0 feet; on the South by the mean high water line of Skull Creek and measuring thereon for a distance of 125.0 feet; and on the West by Lot 7 Blue Heron Point and measuring thereon for a distance of 148.0 feet.

Derivation: Book 1294 at Page 304

28 BLUE HERON PT, HILTON HEAD ISLAND, SC 29926

R501 006 000 0008 0000

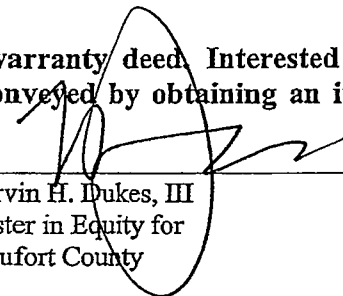
SUBJECT TO ASSESSMENTS, BEAUFORT AD VALOREM TAXES, EASEMENTS AND/OR, RESTRICTIONS OF RECORD, AND OTHER SENIOR ENCUMBRANCES.

TERMS OF SALE: The successful bidder, other than the Plaintiff, will deposit with the Master in Equity, at conclusion of the bidding, five percent (5%) of his bid, in cash or equivalent, as evidence of good faith, same to be applied to the purchase price in case of compliance, but to be forfeited and applied first to costs and then to the Plaintiff's debt in the case of non-compliance. Should the last and highest bidder fail to comply with the other terms of the bid within thirty (30) days, then the Master In Equity may re-sell the property on the same terms and conditions on some subsequent Sales Day (at the risk of the said highest bidder). A deficiency judgment being demanded, the bidding will not be closed on the day of sale but will remain open for a period of thirty (30) days as provided by law. Purchaser to pay for documentary stamps on the Deed. The successful bidder will be required to pay interest on the amount of the bid from date of sale to date of compliance with the bid at the rate of 6.375% per annum to the extent of the debt due the Plaintiff and to the extent applicable at the rate of 6.75% on the debt due to Beach First National Bank. The sale shall be subject to taxes and assessments, existing easements and restrictions, easements and restrictions of record and any other senior encumbrances. Plaintiff on Cross-Claim/Third-Party Plaintiff, Beach First, is demanding a deficiency; the Plaintiff and Beach First both may waive any of its rights, including their right to a deficiency judgment, prior to sale.

In the event any agent of Plaintiff and Plaintiff on Cross-Claim/Third-Party Plaintiff, Beach First, does not appear at the time of sale, the within property shall be withdrawn from sale and sold at the next available sales date upon the terms and conditions as set forth in the Judgment of Foreclosure and Sale or such terms as may be set forth in a supplemental order.

NOTICE: The foreclosure deed is not a warranty deed. Interested bidders should satisfy themselves as to the quality of title to be conveyed by obtaining an independent title search prior to the foreclosure sale date.

Samuel C. Waters, Esq.
Attorney for Plaintiff
P.O. Box 100200
Columbia, SC 29202-3200
(803) 744-4444
011784-07000


Marvin H. Dukes, III
Master in Equity for
Beaufort County

BEAUFORT COUNTY
CLERK OF COURT
2008 OCT 9 PM 4:47

Website: www.rtt-law.com (see link to Resources/Foreclosure Sales)

NOTICE TO PRINTER: Please insert:

____ Once during week commencing _____
____ Once during week commencing _____
____ Once during week commencing _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2008-CP-07-02561

Hudson City Savings Bank,

Plaintiff,

vs.

Brian Hover, Trustee of the Margaret D.
Hover Irrevocable Qualified Personal
Residence Trust, dated May 22, 2000; and
Beach First National Bank;

Defendants.

Beach First National Bank,

Plaintiff on Cross-Claim,

vs.

Brian Hover, Trustee of the Margaret D.
Hover Irrevocable Qualified Personal
Residence Trust, dated May 22, 2000,

Defendant on Cross-Claim.

Beach First National Bank,

Third-Party Plaintiff,

vs.

Brian Hover, in his representative capacity
as Personal Representative of the Estate
of Margaret Gurnham (a/k/a Margaret
D. Hover) and The Estate of Margaret
Gurnham (a/k/a Margaret D. Hover),

Third-Party Defendants.

ORDER OF DEFICIENCY JUDGMENT

2008 DEC 11 AM 10:01
ELIZABETH W. SMITH
BEAUFORT COUNTY S.C.
CLERK OF COURT

Pursuant to the Judgment of the Master-in-Equity given on October 9, 2008 and filed with
the Clerk of Court, Beach First National Bank, is entitled to have a personal and deficiency

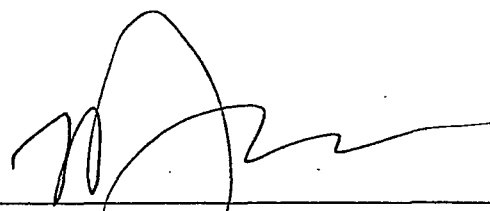
judgment against the Third-Party Defendants, Brian Hover, in his representative capacity as Personal Representative of the Estate of Margaret Gurnham (a/k/a Margaret D. Hover) and The Estate of Margaret Gurnham (a/k/a Margaret D. Hover) as follows:

Amount of judgment of foreclosure entered by the Equity Court	\$256,577.73
PLUS: Interest at 6.75% from date of Judgment of foreclosure to ultimate sale date December 3, 2008 (Per Diem \$ \$44.10)	\$ 3,042.90
Total Judgment	\$259,620.63
LESS: Amount of Bid available to credit against Beach First National Bank's Mortgage	-0-
DEFICIENCY JUDGMENT ENTERED AGAINST BRIAN HOVER, IN HIS REPRESENTATIVE CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARGARET GURNHAM (A/K/A MARGARET D. HOVER) AND THE ESTATE OF MARGARET GURNHAM (A/K/A MARGARET D. HOVER)	\$259,620.63

IT IS SO ORDERED.

Date: December 11, 2008

Beaufort, South Carolina



Marvin H. Dukes, III
Master In Equity for Beaufort County

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master in Equity

Case No: 2010-CP-07-03033

Beach First National Bank,..... Respondent

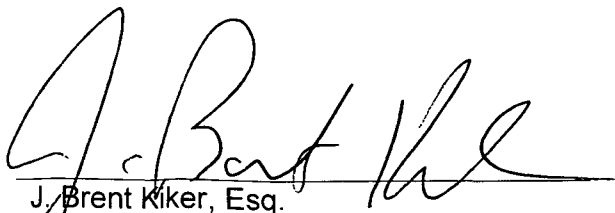
v.

Estate of Margaret Gurnham,..... Appellant.
a/k/a Margaret D. Hover and /or Brian Hover, Its Personal Representative

PROOF OF SERVICE

I certify that I have served the Record on Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on November 5, 2012 addressed to its attorneys of record Wm. Weston Newton, Post Office Box 1938, Bluffton, South Carolina 29910 and James B. Richardson, Jr., 1229 Lincoln Street, Columbia, South Carolina 29201.

IKER LAW FIRM, P.A.


J. Brent Kiker, Esq.
Post Office Box 5303
Hilton Head Island, South Carolina 29938
(843) 842-7300 (Phone)
(409) 419-1048 (Facsimile)
Attorney for the Appellant

Hilton Head, South Carolina
November 5, 2012

RECEIVED

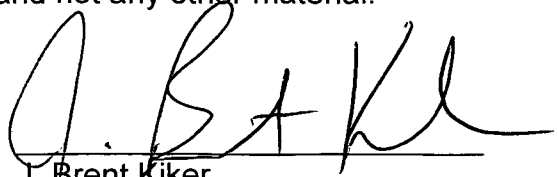
NOV 07 2012

SC Court of Appeals

Certificate of Counsel

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 5, 2012

A handwritten signature in black ink, appearing to read "J. Brent Kiker", written over a horizontal line.

J. Brent Kiker
Kiker Law Firm, P.A.
Post Office Box 5303
Beaufort, South Carolina 29901
(843) 842-7300 (telephone)
(409) 419-1048 (facsimile)
Attorney for the Appellant