

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

SC Court of Appeals

Hon. Bentley D. Price
Circuit Court Judge

Appellate Case No. 2021-000504

Wilmington Savings Fund Society FSB, not in its individual capacity but solely
As owner trustee for CSMC 2018-RPL6 Trust, Respondent

v.

Rex A. Field, Tracy L. Field, Dulamo Estates Home Owner's Association, Inc., Defendants

Of whom Rex A. Field and Tracy L. Field are the Appellants.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
STATEMENT OF ISSUES ON APPEAL	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS.....	2
STANDARD OF REVIEW.....	4
ARGUMENT	5
I. IT WAS ABUSE OF DISCRETION AND ERROR FOR THE TRIAL COURT TO INFER WAIVER OF JURY TRIAL RIGHT WITHOUT EVALUATING THE SUBSTANCE OF DEFENDANTS' COUNTERCLAIMS AND RULING ON MOTIONS NOT PROPERLY BEFORE THE COURT.....	6
II. THE CIRCUIT COURT ERRED IN STRIKING DEFENDANT'S DEMAND FOR JURY WITHOUT ENGAGING IN LOGICAL RELATIONSHIP TEST ANALYSIS.....	7
CONCLUSION	11

TABLE OF AUTHORITIES

CASES

Broom v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995).....	4,7
Carolina First Bank v. BADD, L.L.C., Op. No. 27486, 414 S.C. 289 (2015)	12
C&S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 350 S.E.2d 191 (1986).....	5
Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997).....	9
First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372 (Ct. App. 1998).....	7
Hayne Fed. Credit Union v. Bailey, S.C. 242, 248, 489 S.E.2d 472, 475 (1997).....	4
Johnson v. S.C. Nat. Bank, 292 S.C. 51, 54-56, 354 S.E.895 (1987).....	5
Keels v. Pierce, 15 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993).....	9
Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997).....	4
N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989)...	1

Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924	4
Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 533 S.E.2d 575 (2000).....	5
South Carolina Community Bank v. Salon Proz, LLC, Columbia Empowerment Zone, Inc. d/b/a The Columbia Empowerment Zone, and Frank Mitchell.....	7
Vernes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010).....	4
Wachovia Bank Nat. Ass'n v. Blackburn, 407 S.C 321, 755 S.E.2d 437 (2014).....	4

RULES OF CIVIL PROCEDURE

Rule 13(a), SCRCP.....	6, 9, 10
Rule 38, SCRCP.....	5,6
Rule 42(b) SCRCP.....	9
Rule 53(b), SCRCP.....	3,6,8

CONSTITUTIONAL PROVISIONS

S.C. Const. Article I, §14	4
----------------------------------	---

STATUTES

S.C. Code Ann. §14-3-330(2).....	3
S.C. Code Ann. § 39-5-10, et. seq.	9

STATEMENT OF ISSUES ON APPEAL

At issue in this appeal is whether the April 15, 2021 ruling of the chief administrative judge striking the jury trial demand of the defendants was abuse of discretion controlled by error of law. Plaintiffs allege the court denied motions not properly before the court on April 15, 2021 and that in error the court struck defendant's jury demand failing to first engage in logical relationship test under the supreme court precedent of N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). Appellants allege error where the court failed to evaluate whether defendants' pending amended counterclaims were compulsory or permissive prior to referring the case to the non-jury status.

STATEMENT OF THE CASE

This is a foreclosure action filed by Respondent Wilmington Savings Fund Society FSB on October 11, 2019. (R. pp. 35-42). Plaintiff brought the action not in its individual capacity. Rather, it brought this action as “*owner trustee*” for a CSMC 2018-RPL6 Trust. Prior to the case properly commencing by filing *and service* (*emphasis), A Rule 53 SCRCP compulsory order of reference was entered by the clerk of court under Wilmington’s motion. (R. p. 5-6). The very day of service, defendants acting pro se file demand for jury trial. (R. p. 44; 47-49). By order of the Beaufort County Master Hon. Marvin Dukes, the Order of Reference is vacated without prejudice. (R. p. 8). Some twenty two months later amended counterclaims by defendants are approved by Judge Robert J. Bond August 12, 2021. But, not before order striking jury demand by Judge Bentley Price on the date of April 20, 2021 (four months earlier). (R. p. 29-34). Judge Price likewise denied Plaintiff’s motions to amend this date. (R. p. 1626 at 11), which action does not appear in the Order. Appellants respectfully assert the rulings affected substantial right and mode of trial they were entitled to as a matter of law and in violation of rights guaranteed to the Fields by the constitution in this state. Broom v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995).

On April 15, 2021 the case is confirmed to be on the jury roster for Judge McCoy. (R. p. 1618 line 24). “Madame clerk, on the online public index it says Court Roster CP Jury, McCoy, May 11, 2011. Does that mean its on her *jury trial roster* ?” (R. p. 1618-1619 lines 1-5). Court clerk, Karen Johnson, responds affirmatively “yes.” “*That’s what that means on there?*” Yes. (R. p. 1619 lines 3-4). So, this is on the docket for May 11th ? “*Correct.*” The court: “For a *jury trial* (*sic). Okay. Mr. Field, I’ll be happy to hear from you as to your motion to dismiss.”. (R. p. 1619 at 8-9). The motion to dismiss is denied by Form-4. (R. p. 14). Wilmington’s motion to strike jury demand is granted, however. (R. p. 14).

STATEMENT OF THE FACTS

The case has appeared on the general roster since November 11, 2019 - the date Master in Equity Judge Dukes vacates the compulsory Order of Reference. (R. p. 8). The last judge to review mode of trial issues, however, is Judge Bentley Price. Judge Price enters an order striking defendant's jury trial demand. (R. p. 14). The court notes the extensive record in the case: "*There's 163 filings in this case.*" (R. p. 1608 line 9.) The Form-4 filed by the chief administrative judge omits any logical relation analysis as to amended counterclaims being compulsory or permissive. "*All right. So this is a foreclosure action correct, from 2019 ? ... All right.*"

And do the fields still reside in the residence ?" (R. p. 1607 at 15). "*When was the last time they made a payment on the home ?"* (R. p. 1608 lines 4-5).

The court strictly construes the case as a debt collection, and nothing more, thus mandating referral to the non-jury roster. This occurs where discovery is not complete, and there are discovery noncompliance issues, including motions for sanctions. (R. p. 1608 at 16-18). However, Wilmington's motion to extend time to answer discovery is granted. "I'll take the plaintiff's motion to extend time under advisement. But, *the first one up* (*sic) is plaintiff's motion to strike defendant's demand for jury trial." (R. p. 1608 at 13-16). The court is advised of the Salon Proz case as to logical relation test affecting note enforceability (R. p. 1609 at 12-14). In reference to counterclaims, plaintiff counsel advises the court "*So, if they are compulsory, then that (sic) the Fields would be entitled to jury trial.*" (Id. at 7-8). "...And I am referring this to the master for foreclosure. All right." (R. p. 1626, lines 11-17). This never occurs.

The case does not return to the master, the next judge to rule on the case is Judge Robert Bonds. (R. p. 29 at 33) The last motions as to discovery compliance and amended counterclaims and third party complaint are heard by Judge Bonds on August 12, 2021. (R. p. 30, at ¶3). Prior to this, on the date of April 15, 2021 defendant's hands are bound, however. Moreover, the case

evidences one circuit judge not permitting amended counterclaims and third party complaint, yet another judge granting them. (R. p. 32 at ¶G). *But, see* (R. p. 32, at ¶G). The case evidences intent to refer the case to the master in equity, who previously *vacated* a compulsory order of reference; the case being on the general roster since that time. The maelstrom ruling on all pending motions by Judge Price is as follows :¹

The Court: All right. The motion to joint the third party defendants is denied. Motion to dismiss the counterclaims is granted. Motion to dismiss the complaint is denied. Motion to enforce sanctions is denied. And motion to strike the jury trial is granted. *And I am referring this to the master for foreclosure.”* (R. p. 1626 at 11-17); *see also* (R.p.1619 at 4-7)

I. WAS IT ABUSE OF DISCRETION FOR THE COURT TO RULE UPON MOTIONS IMPLICATING JURY TRIAL DEMAND WHERE DEFENDANTS OBJECTED AND NO TEN DAY NOTICE OF HEARING ?

Judge Price strikes jury demand of the defendants, despite the Fields having answered the complaint and asserted amended counterclaims and third party complaint with demand for trial by jury. (R. p. 44; see also, R. p. 47). From day one the Fields have knowingly asserted, protected, and in fact (twice) demanded jury trial. (R. p. 61). Appellants now appeal the ruling as affecting mode of trial rights to which defendants are entitled as a matter of right, pursuant to Rule 38 SCRPC and the Constitution of the State of South Carolina. S.C. Const. Article I §14. “Orders affecting the mode of trial affect substantial rights under S.C. Code Ann. §14-3-330(2) (1997) and must, therefore, be appealed immediately. First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998). Appellants respectfully assert it was abuse of discretion and error of law to strike defendant’s demand for jury trial where discovery was yet incomplete, there were pending discovery noncompliance issues including motion for sanctions, and the court

¹ In scheduling e-mail correspondences with the court the Fields contend that they did not waive, and in fact objected to, hearing of the motions being scheduled for April 15, 2021 where they did not receive ten (10) days notice from the court or from Respondents’ counsel.

failed to employ a logical relationship test. “Orders affecting the mode of trial affect substantial rights under S.C. Code Ann. §14-3-330(2) and must, therefore, be appealed immediately. South Carolina Community Bank v. Salon Proz, LLC (quoting First Union Nat. Bank v. Soden, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998)).

STANDARD OF REVIEW

The right to trial by jury shall be preserved inviolate. S.C. Const. Art. I, §14. The right to jury trial is a *substantial* right, and any contended waiver of the right to trial by jury is strictly construed. Broom v. Watts, 319 S.C. 337, 340, 461 S.E.2d 46 (1995). Rule 53, SCRPC, provides that “[a]ny party may request a jury pursuant to Rule 38 on any or all issues triable of right by jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.” Waiver is the voluntary and intentional relinquishment of a known right. Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924, 928 (Ct. App. 1994). Whether a party is entitled to a jury trial is a questions of law. Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). “A mortgage foreclosure is an action in equity.” Wachovia Bank, Nat. Ass’n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 440 (2014) (*quoting Hayne Fed. Credit Union v. Bailey*, S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). However, [w]hether a party is entitled to a jury trial is a question of law.” Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). An appellate court may decide questions of law with no particular deference to the [lower] court. Id. at 15. In appeal from an action in equity tried by a judge, appellate courts may find facts in accord with their own views of the preponderance of the evidence. Blackburn, at 328. An order denying a party a mode of trial to which he is entitled is immediately appealable and must be appealed immediately and cannot be challenged in an appeal from final judgment. Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997).

A counterclaim is compulsory if it arises out of the *same transaction or occurrence that is the subject of Plaintiff's claim* and it does not require that third parties be added as parties to the case. Rule 13(a), SCRPC. Compulsory, at-law counterclaims made by a defendant in an equity case (in which the plaintiff has asserted only causes that sound in equity) must be tried by a jury if a jury demand has been made on the claim. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014); Johnson v. S.C. Nat. Bank, 292 S.C. 51, 54-56, 354 S.E. 895 (1987). A counterclaim is compulsory “*if it arises out of the same transaction or occurrence as the opposing party's claim[,]*”, which is ascertained by determining whether there is “*any logical relationship between the claim and the counterclaim[,]*” N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). An order denying a jury trial is not immediately appealable unless it deprives the party of a mode of trial to which he is entitled as a matter of right. C&S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 350 S.E.2d 191 (1986). The Fields necessarily appeal asserting trial court abuse of discretion under controlling error of law as to mode of trial issues and rights guaranteed by the state constitution. *See, Soden*, 333 S.C. 554 (Ct. App. 1998). “The failure to immediately appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” Id.

ARGUMENT

The majority of cases requiring an immediate appeal involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate. Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 533 S.E.2d 575 (2000). The constitution of this state, Article I §14 provides the right to trial by jury shall be preserved inviolate. The issue of law in the case sub judice is whether the trial court erred by classifying the case as merely a debt collection where the court fails to properly analyze logical

relation and nexxus of filed amended compulsory counterclaims. The court on April 15, 2021 fails to enter any logical relationship analysis. (R. p. 1626 lines 11-15); (*see, also* R. p. 1627 lines 3-25). The court improperly infers waiver by the defendants following two (2) properly filed jury trial demands. *See, Keels*, 315 S.C. at 342, 433 S.E.2d at 904 (“In the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed.”). *Id.* at 342. It is not disputed that the Fields have – twice – asserted valid demand for jury trial. (R. p.44; R.p. 70).

- I. It was abuse of discretion and error for the trial court to infer waiver of jury trial right without evaluating substance of the defendants’ counterclaims and to rule on motions by hearings not properly before the court.

Scheduling communications via e-mail evidence that no notice of hearing has been filed by Wilmington counsel, or entered by the clerk of court. (R. p. 1824 at ¶(15)). The Fields notify court staff that they object given they have not been properly noticed, to no avail. (R. p. 1831). The hearings will go forward at the request of Wilmington, irrespective of not notice of hearing being filed. (R. p. 1626 lines 11-15). Appellants appear for the hearing which strikes their demand for jury trial. Appellants assert it was an abuse of discretion for circuit court judge Price to presume or infer consent or the Field’s waiver of jury trial demand on April 15, 2021. (R.p. 1626). Inexplicably, a foreclosure is somehow appearing on the general roster. (R. p. 1613 at 3-4). Judge Price is advised by the clerk that a 2019 case sounding in equity is on Judge McCoy’s roster. “Madame Clerk, the online public index it says Court Roster CP Jury, McCoy, May 11, 2021. Does that mean it is on *her jury trial* roster ? . “That’s *what that means* on there ?” With an affirmative response from the clerk, the court goes on “for a *jury (*sic)* trial. *Okay.* (Rp. P. 1619 at 4-14). The Fields’ motion to dismiss meets with brevity. (R. p. 1626 at 14-15). Wilmington’s motion to strike jury demand meets with equal haste. (*Id.* at 13); (R. p. 1628 at 18-21). Abuse of discretion and legal error enters here. No logical relationship analysis will enter the trial judge’s

review of the causes of action. Rather, the circuit judge focus on payment history and the length of time the case has been on the general roster. “*When was the last time they made a payment on the home?*” (R. p. 1608 at 4-5); *see also*, (R. p. 1649 at 20-25); *further see*, (R. p. 1597 at 20-22). The court has presumed enforceability of the note and mortgage without evidence to support its ruling, particularly where discovery is yet pending and the Fields (pro se) have had to move for sanctions due to discovery noncompliance.

II. It was error for the trial court to strike the Fields demand for jury without engaging in logical relationship test analysis.

A counterclaims is compulsory “*if it arises out of the same transaction or occurrence as the opposing party’s claim[,]*” which is ascertained by determining whether there is “*any logical relationship between the claim and counterclaim[,]*” DAV, 298 S.C. at 517, 518 (emphasis added). Appellants allege that failure to engage in the logical relationship test was prejudicial error. (R. p. 1626 lines 11-16). It not only disregarded the Field’s constitutional rights, by implication it does away with the very flexibility that was the reason for the Supreme Court’s choice of the logical relationship test where mode of trial issues exist. DAV at 518. Under these circumstances, the strike of jury demand is no different than a clerk entry of compulsory reference, no matter how inadvertent. Inevitably, what occurs is *omission of a merits review* of at-law of counterclaims as either compulsory or permissive. The “return to the circuit court” general roster under Rule 53(b) was automatic and proper on 10/17/2019 (R. p. 8). If a determination were to be made as to counterclaims being permissive vs. compulsory, Appellants respectfully assert the analysis by the trial court would properly need to be under the authority of N.C. Fed. Sav. & Loan Ass’n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). This does not occur, however.

In this case record there appears to the Fields to be non-concurrence between circuit judges. (R. p. 8); *see also* R. p. 1626 at 16; *further, see* R. p. 29-33, at ¶G). It is the very reason for the

defendant's filing of a motion for recusal of Judge Bentley D. Price on June 21, 2021. (R. p. 914). Judge Price denies the recusal motion (R. p. 1633 at 15-24); *see also* (R. p. 20); but not before striking defendant's jury trial demand and referring the case onward to another judge. (R. p. 1626 lines 11-16). "*I am sending this to the master for foreclosure*" (R. p. 1620 at 16). The next judge to review the case is Robert Bonds, not master in equity Dukes who first vacates the compulsory reference. (R. p. 1626). The master in equity had vacated the compulsory reference previously on October 17, 2019. (R. p. 8.) Plaintiff sought no reconsideration of the October 17, 2019 Order of Judge Dukes, despite the Order to vacate reference being without prejudice. (R.p. 8). Plaintiff made no further motions to refer the case prior to motion to strike the defendant's jury demand. The case remains on the general docket from October 17, 2019 through April 15, 2021.

On May 11, 2021 the Fields filed yet another demand for jury trial. (R. p. 695); *see also* (R. p. 44). Under motion for amended counterclaims, the Fields allege nine (9) amended counterclaims and a third party complaint. Judge Price never evaluates the merit or character of the counterclaims before strike of the jury demand. (R. p. 1626 at 11-15). The motion to permit amended counterclaims is granted by Judge Bonds on August 12, 2021 (R. p. 29-33; R. p. 1781 at 12-17). The counterclaims challenge standing (R.p. 1664 at 19-25) and enforceability of the note and mortgage. (R. p. 1663 at 7-13). Defendant's nine counterclaims include (1) Violation of the South Carolina Unfair Trade Practices Act, S.C. Code. Ann. §39-5-10, et. seq. (2) Civil Conspiracy; (3) Fraud and Misrepresentation; (4) Slander of Title; (5) Libel and Slander, (6) violation of the Fair Debt Collection Practices Act; (7) Unjust Enrichment; (8) Quiet Title and (9) Abuse of Process. Of these nine counterclaims, at least four (4) seek recovery of monetary damages. Moreover, four (4) would implicate enforceability of the note and mortgage, if proven true. *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289 (2015). All of these counterclaims are at law. Under the common

law of this state, “[l]egal actions for the recovery of money were triable by a jury.” Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997). Article I §14 of the state constitution preserves the right to a jury trial in an action in which the claimant [here by amended counterclaims] seeks a money judgment. A monetary judgment is what defendant’s counterclaims seek. The trial court has premised its strike of jury demand on out-dated, abrogated law that ignores the adoption of Rule 13(a) SCRPC. As set forth in the supreme court precedent of Keels v. Pierce, 15 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993) “[t]he right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication. In Keels, the court rejected the idea of a harsh waiver rule where the compulsory or permissive nature of a counterclaim is unclear. Id. 315 S.C. at 341-42. Concerned with the idea that a litigant might forego bringing what turned out to be a compulsory counterclaim for fear of losing his right to a jury trial, this court stated that “Rule 13, SCRPC, does not place a pleader in this dilemma. *“If it is uncertain whether a counterclaim is compulsory or permissive, the pleader may simply plead the claim and make a demand for a jury trial on it.”* Keels, 315 S.C. at 341. If the claim(s) is later found to be permissive, this court held, “the court, on its own motion or the motion of the pleader, may order a separate trial of the counterclaim pursuant to Rule 42(b) to avoid prejudice to the pleader’s right to a jury trial. Id. at 341-42. This is not what occurs on April 15, 2021. (R. p. 14). The rule pertaining to waiver of the right to trial by jury *“applies only when it is clear (*emphasis) the counterclaim is permissive[,]”* and if uncertainty exists, the pleader does not waive his right to a jury trial if the court later decides the claim is permissive. Keels, at 342.

The error of law in this case occurs where the trial court failed to employ a logical relationship test prior to strike of jury demand. (R. p. 1626 at 11-15); Moreover, under Rule 13(a) SCRPC the Fields – even as pro se litigants – were *required* to plead any claim arising out of the transaction

or occurrence that was the subject matter of the Plaintiff's claim under Rule 13(a) SCRCF. As the Fields had no choice but to assert a legal counterclaim, (R. p. 1679 at 13-16) they would otherwise have lost the ability to do so forever as *waiver*. Appellants assert that it was prejudicial error for the circuit judge to presume waiver.

Defendants' at-law counterclaims fall squarely within the purview of the constitutional mandate that the right to jury be preserved inviolate. S.C. Const. Art. I §14. What the constitution so provides the trial court should not take away, particularly if it fails to perform a logical relationship test before ruling. N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). This occurs despite the court being advised by Wilmington counsel as to yet un-determined character of counterclaims at-law. (R. p. 1626 at 11-15). Appellants respectfully assert that, in error, the trial judge strikes jury demand where discovery was yet pending, denying mode of trial to defendants irrespective of what discovery may ultimately reveal. Defendants, in fact, allege both standing and that Plaintiff may not be the real party in interest in their affirmative defenses. (R. p. 1607 at 19-24). Discovery was (and at this time remains) pending. At least three (3) of defendant's at-law counterclaims, in particular the legal concept of standing, would implicate enforceability of the note by the plaintiff in its "owner trustee" capacity, if proven true. Judge Bonds grants Defendant's amended complaint, counterclaims and third party complaint. (R. p. 32 at G). But, Judge Price has previously denied the same. (R. p. 1626 at 11-15). Defendants were granted discovery, but behind circuit court Form-4 order strike of their jury trial demand. (R. p. 14). The strike is premature and erroneously *infers waiver* by defendants. No logical relationship test at law was conducted by circuit judge Price before the strike. (R. p. 1626 lines 11-16). Rather, the strike is premature. This is a case where defendants have twice endured compulsory reference by the courts without a circuit judge first passing upon and evaluating *merit*

and nexxus of counterclaims at law, under the logical relationship test set forth in DAV. Appellants assert that it was abuse of discretion and error of law to strike the defendants' demand for jury under these circumstances. The case should respectfully be reversed and remanded to the general roster preserving the Field's right to trial by jury inviolated.

CONCLUSION and PRAYER

Appellants respectfully assert that ruling of the circuit judge is abuse of discretion controlled by error of law, ignoring Supreme Court precedent and the holdings of this court. The abuse of discretion is forcing defendants to defend motions not properly noticed before the court where they did not waive or consent time to prepare. (R. p. 1820). The error of law is failure to engage in the logical relationship test prior to striking a jury demand of at-law counterclaims; (even if the at-law counterclaims were brought in a foreclosure action). (R. p. 1626). In the case at bar this occurs by Form-4 Order, with the trial courts making absolutely no factual findings or conclusions of law. Amended counterclaims filed of record are not addressed under a logical relationship test analysis. It is, after all, a foreclosure. (R. p. 1607 at 12-13); (R. p. 1613 at 3-4). Defendants have not made their payments. (R. p. 1608 at 4-5). It is a bother to engage in the logical relationship test; defendants simply have waived their jury rights. (R. p. 1660 at 10-23). The trial judge refers the case to the non-jury roster and *sua sponte* by strike of the jury demand, tying the hands of defendants. The ruling ultimately disregards defendant's constitutional right to trial by jury, wrongfully. The ruling does so by omitting logical relationship review pursuant to N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). It is controlling error of law and abuse of discretion. Appellants respectfully assert they are entitled to a jury trial on their amended counterclaims. This court should reverse and remand accordingly.

Respectfully submitted,

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RULE 211(b) CERTIFICATION

I hereby certify that the foregoing Brief of the Appellant complies with SCACR 211(b) as identical to the Initial Brief filed of record except for references and cites to the Record and correction of typographical errors.

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