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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Opinion No. 2022-UP-334 (S.C. Ct. App. filed Aug. 10, 2022)

Pinnacle Bank, as successor in interest to
Bank of North Carolina, previous successor in interest
to Harbor National Bank, Plaintiff,

v.

Anthony Whitfield and Cindy Whitfield, Defendants.

AND

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant,

Of whom Anthony Whitfield is the Petitioner and David Swanson is the Respondent

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APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Appellate Case No. 2020-000162

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff

v.

Anthony Whitfield and Cindy Whitfield, Defendants

Anthony Whitfield, Counterclaimant

v.

David Swanson, Counterclaim Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE COUNTERCLAIMANT WAS NOT ENTITLED TO A JURY TRIAL ON HIS CIVIL CONSPIRACY COUNTERCLAIM AGAINST THE COUNTERCLAIM DEFENDANT WHEN BOTH PARTIES HAD PREVIOUSLY DEMANDED A JURY TRIAL ON THE CLAIM.

2. WHETHER THE TRIAL COURT ERRED IN FINIDING THAT THE CIVIL CONSPIRACY COUNTERCLAIM WAS MERELY PERMISSIVE AND NOT COMPULSORY WHERE THE COUNTERCLAIM, IF ESTABLISHED, WOULD HAVE AFFECTED THE FORECLOSURE ACTION BROUGHT BY THE PLAINTIFF.

3. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE COUNTERCLAIMANT WAS NOT ENTITLED TO A JURY TRIAL AS A MATTER OF RIGHT ON HIS CIVIL CONSPIRACY COUNTERCLAIM.

4. WHETHER THE TRIAL COURT ERRED IN BIFURCATING MR. WHITFIELD'S CIVIL CONSPIRACY FROM THE REST OF THE CASE.

STATEMENT OF THE CASE

This appeal is about whether a counterclaim defendant may unilaterally seek to strike and/or withdraw a jury trial demand on a civil conspiracy counterclaim where (1) both the counterclaimant and counterclaim defendant had demanded a jury trial on the claim, (2) the opposing party does not consent, and (3) neither party is in default. This appeal is also about whether a civil conspiracy counterclaim against a counterclaim defendant can be deemed as merely permissive when, if established, the counterclaim would serve as a bar to Plaintiff's underlying foreclosure action. Lastly, this appeal is about whether it was proper for the lower court to bifurcate the counterclaim for civil conspiracy against the counterclaim defendant from the rest of the case and refer it to the Master in Equity for a bench trial.

On September 7, 2012, Harbor National Bank, Plaintiff Pinnacle Bank's predecessor-in-interest, brought the present residential foreclosure action against Anthony M. Whitfield and his ex-wife, Cindy Whitfield. (Complaint, R. pp. 19-48). The action involved a residential property located in Charleston County, commonly referred to in the pleadings as the "Black Rush Property".

The action was one of five (5) foreclosure lawsuits brought by Harbor National Bank against Mr. Whitfield in 2012 for loans made to him in 2007 and 2008, covering eight (8) residential properties located throughout Berkeley, Dorchester, and Charleston Counties. In March of 2014, Harbor National Bank also brought a sixth foreclosure lawsuit against Mr. Whitfield in Dorchester County covering a ninth residential property.

In response to each of the lawsuits—including the present one—Mr. Whitfield filed counterclaims, alleging, *inter alia*, that Plaintiff Harbor National Bank had agreed to renew the loans being foreclosed upon for an additional five-year term, breached that agreement, and

caused him damages. (Defendant's Answer, R. pp. 49-61). Specifically, Mr. Whitfield's Answer and Counterclaim alleged (1) that he met with the president of Harbor National Bank on June 21, 2012, wherein an agreement was made to renew all nine of the loans for an additional five-year term at a reduced interest rate of 4.75%; (2) that a closing was scheduled for the following week on June 28, 2012 and attended by both Mr. Whitfield and a Harbor National Bank representative; and (3) that Harbor National Bank refused to close on any of the nine loan renewals at the closing. (Defendant's Answer, R. pp. 52-60).

As justification and defense for not closing on the loan renewals, Harbor National Bank contended during litigation, and after the foreclosure suit was filed, that it had sought and relied upon the advice of its counsel, David Swanson, Esq., in deciding not to close on any of Mr. Whitfield's loan renewals. (Pl's Memo in Support of Motion for Sum. Judgment, R. at p. 198). Specifically, Harbor National Bank, through its employee Scott Warren, claimed that in reliance upon Mr. Swanson's advice, Harbor National Bank had refused to renew the loan for the Black Rush Property without a title endorsement or co-signature from Cindy Whitfield.[1] (Scott Warren Depo. Tr., R. p. 700, line 16 - p. 701, line 3; p. 709, lines 1-9; p. 729, lines 17-21).

Both Scott Warren and Mr. Swanson testified at their respective depositions that Mr. Warren had a telephone conversation with Mr. Swanson prior to the scheduled closing on June 28, 2020 and that Mr. Swanson had advised Mr. Warren that "under this set of facts" the Bank

[1] Mark Weeks, Esq., the closing attorney for the loan renewal transaction, however, testified that a title endorsement was **not necessary or required** for renewing the loan on the Black Rush Property and that he could have renewed any of the loans without a title endorsement or Ms. Cindy Whitfield's permission and/or authorization to renew the loans. (Memo in Opp. to Motion for Summ. Judgment, R. pp. 253-286). Moreover, according to affidavits on file, he had no knowledge of Mr. Swanson be involved in the transaction or that the bank based its decision in not closing on Mr. Swanson's alleged advice. (R. pp. 317-320)

should get an endorsement from the title company. (Scott Warren Dep. Tr., R. p. 523, line 21 – p. 526, line 5; p. 527, lines 2-18; David Swanson Dep. Tr., R. p. 617, line 18 - p. 624, line 2; p. 641, line 23-p. 642, line 2; p. 644, lines 9-25; p. 766, line 20 - p. 767, line 3; p. 779, line 17 - p. 780, line 13). However, Mr. Swanson testified that he had not reviewed any documents or performed any legal research in rendering this advice and that he had not even been aware of the bank customer's name during the call despite a general policy of conducting conflict checks for incoming cases. (R. p. 617, lines 18- p. 619, line 2; p. 660, lines 1-13; p. 625, lines 8-11; p. 653, lines 1-6; p. 759, lines 11-13; p. 765, lines 6-10; p. 765, line 23-p.766, line 2; p. 767, lines 4- 10; p. 772, lines 11-15; p. 779, line 17 - p. 780, line 13.). Mr. Swanson also testified that he did not send any bills, record any time, or otherwise keep record of his phone call with Mr. Warren. (R. at Id.).

Subpoenaed telephone records reflected the absence of any calls from Mr. Warren's cell phone and/or office number to Mr. Swanson's cell phone and/or office number at the time and place claimed. (R. pp. 381-420).

On January 8, 2016, as a result of discovery conducted in this case, including the depositions of Mr. Scott Warren, Mr. David Swanson, Mr. Mark Weeks, and multiple bank employees, Mr. Whitfield filed Defendant's Fifth Amended Answer, Affirmative Defenses, Crossclaim and Counterclaims ("Fifth Amended Answer"), in which he asserted counterclaims for Civil Conspiracy and Abuse of Process against both Mr. Swanson and the Plaintiff. (Fifth Amended Answer, R. pp. 153-175). The Civil Conspiracy counterclaim against Mr. Swanson alleged, *inter alia*, that both Mr. Swanson and the Plaintiff, through its employee Scott Warren, had provided false testimony that a call had occurred between the two of them prior to the closing; that phone records and other evidence produced during discovery demonstrate that no

such call occurred; and that the sworn testimony provided by Mr. Swanson and Mr. Warren—in which they purport that Mr. Swanson advised the bank to procure a title endorsement in order to close on the loan—was given for the ulterior purpose of fabricating a defense as to the bank's failure to renew the loan in accordance with its contractual obligation. (R. pp. 170-171).

As with all previous pleadings filed by Mr. Whitfield, the Fifth Amended Answer demanded a jury trial. (R. pp. 153 and 174). Like the Fourth Amended Answer before it, the Fifth Amended Answer also asserted a cross-claim for Equitable Indemnity against Co-Defendant Cindy Whitfield. (R. pp. 172-173).

On February 18, 2016, David Swanson filed Third Party Defendant David Swanson's Answer to the Fifth Amended Answer. (R. pp. 189-194). Mr. Swanson's Answer made a demand for a jury trial. (R. p. 189).

On July 28, 2017, Mr. Swanson filed a Motion for Summary Judgment on the Abuse of Process and Civil Conspiracy claims made against him by Mr. Whitfield.

On November 8, 2017, The Honorable J.C. Nicholson, Jr. entered an Order granting Mr. Swanson's Motion for Summary Judgment as to the Abuse of Process claim, but denying the Motion as to the Civil Conspiracy, finding that a genuine issue of material fact exists as to the claim. (R. pp. 5-8).

On March 8, 2019, David Swanson filed a Motion to Bifurcate the Claims Against Mr. Swanson, Strike Mr. Whitfield's Jury Trial Demand, and to Refer the Civil Conspiracy Claim to the Master-In-Equity for a Bench Trial. (R. pp. 321-373). On October 7, 2019, a hearing on Mr. Swanson's motion was heard before the Honorable Diane S. Goodstein. (R. pp. 1166-1202). An Order granting Mr. Swanson's Motion was entered on October 16, 2019. (R. pp. 9-16). The Order found, *inter alia*, that (1) the civil conspiracy counterclaim is permissive, not compulsory

(2) that the counterclaim will not affect the enforceability of the note and mortgage, (3) that Mr. Whitfield is not entitled to a jury trial as of right on the civil conspiracy claim, (4) that no logical relationship exists between Mr. Whitfield's civil conspiracy counterclaim and the foreclosure action or Mr. Whitfield's other counterclaims, and (5) that bifurcation of the civil conspiracy claim is prudent.

On October 18, 2019, Mr. Whitfield filed Defendant Anthony Whitfield's Rule 52(b) Motion to Amend Finding and Rule 59 (e) Motion to Alter or Amend Order. (R. pp. 381-420). An Order denying Mr. Whitfield's Motion to Alter or Amend was entered in January 6, 2020. (R. pp. 17-18). On February 3, 2020, Mr. Whitfield filed his Notice of Appeal. This Appeal follows.

For purposes of this Appeal, it is also important to note that on June 9, 2020, Plaintiff Pinnacle Bank and Defendant Anthony Whitfield filed a Stipulation of Voluntary Dismissal with Prejudice as to their respective claims against each other. (R. p. 477). The Stipulation does not end the case. The claims against Mr. Swanson and Co-Defendant Cindy Whitfield remain.

STANDARD OF REVIEW

Jury Trials

"[W]hether a party is entitled to a jury trial is a question of law." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437, 441 (2014), citing *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "Appellate courts may decide questions of law with no particular deference to the circuit court's findings." *Id*.

Right to Jury Trials for Compulsory Counterclaims

"If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." Id. 407 S.C. at 330, 755 S.E.2d at 441.

"A mortgage foreclosure is an action in equity." Id. 407 S.C. at 328, 755 S.E.2d at 440, quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). "An action for civil conspiracy is an action at law." *Mcmillan v. Oconee Memorial Hosp., Inc*., 626 S.E.2d 884, 886, 367 S.C. 559 (2006).

"By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First-Citizens Bank & Trust Co. of S.C. v. Hucks,* 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991), citing Rule 13(a), SCRCP.

Determining Compulsory Counterclaims in Foreclosure Actions

The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In a foreclosure action, the "logical relationship" test is performed by determining whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994), aff'd in part, vacated in part, 320 S.C. 532, 466 S.E.2d 367 (1996).

The Effect of Demanding a Jury Trial in Litigation

The method for demanding a jury trial is set forth in Rule 38(b), SCRCP:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. **Such demand may be endorsed upon a pleading of the party**. [Emphasis added]
>
> See also, *Shaw v. Atlantic Coast Life Ins. Co.*, 470 S.E.2d 382, 384, 322 S.C. 139 141 (Ct. App. 1996), which applies the rule.

Pursuant to Rule 38(d), SCRCP, once a demand for jury trial has been made, it may not be withdrawn without the consent of the parties, except where an opposing party is in default:

> (d) **Waiver**. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. **A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a).** [Emphasis added]

Bifurcation

Rule 42(b), SCRCP, sets forth the Rule as to ordering separate trials. Specifically, Rule 42(b) states:

> (b) **Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, **always preserving inviolate the right of trial by jury** as declared by the Constitution or as given by a statute of the State. [Emphasis Added].

Where a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant **have a right to have a jury trial** on the issues raised by the compulsory legal counterclaim. *Gardner v. Travis*, 316 S.C. 316, 317-318, 450 S.E.2d 54, 56 (Ct. App. 1994). If there are factual issues common to both the legal and equitable claims, the legal claim, "absent the most imperative circumstances," must be tried, that is disposed of first *Id.* In determining whether to order separate trials or a single proceeding, "caution should be taken" by the trial court "to assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full jury trial of legal issues." *Id*.

ARGUMENTS

I. BECAUSE BOTH COUNTERCLAIMANT ANTHONY WHITFIELD AND COUNTERCLAIM DEFENDANT DAVID SWANSON DEMANDED A JURY TRIAL ON MR. WHITFIELD'S CIVIL CONSPIRACY COUNTERCLAIM AGAINST MR. SWANSON, THE COURT ERRED IN STRIKING THE JURY DEMANDS AND FINDING THAT MR. WHITFIELD IS NOT ENTITLED TO A JURY TRIAL.

In the present action, both Counterclaimant Anthony Whitfield and Counterclaim Defendant David Swanson asked for a jury trial on the Civil Conspiracy counterclaim. Specifically, both parties placed jury demand endorsements upon their respective pleadings as permitted by Rule 38(b), SCRCP. (Defendants' Fifth Amended Answer, R. pp. 153 and 174; Third Party Defendant David Swanson's Answer to Defendant's Fifth Amended Answer, R. p. 189). Pursuant to Rule 38(d), SCRCP, "A demand for trial by jury made as herein provided **may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a).**" [Emphasis Added]. Mr. Whitfield did not consent to either party withdrawing their jury demand. (Transcript, Motion to Strike Jury Demand, R. pp. 1166-1201; Motion to Alter or Amend, R. pp. 381-404). In addition, neither party is in default under Rule 55(a), SCRCP. Accordingly, pursuant to Rule 38(d), it was an error of law to strike the jury demand. The Circuit Court's Order should be reversed.

II. BECAUSE ANTHONY WHITFIELD'S COUNTERCLAIM FOR CIVIL CONSPIRACY AGAINST DAVID SWANSON, IF ESTABLISHED, WOULD HAVE AFFECTED THE FORECLOSURE ACTION BROUGHT BY PLAINTIFF PINNACLE BANK, THE COURT ERRED IN FINDING THAT THE CIVIL CONSPIRACY COUNTERCLAIM WAS MERELY PERMISSIVE AND NOT COMPULSORY.

During this litigation, Plaintiff Harbor National Bank asserted that it had refused to close on the agreed-upon loan renewal for the Black Rush Property on the advise of its counsel. (Plaintiff's Memo in Support of Motion for Sum. Judgment, R. at p. 198; Scott Warren Depo. Tr., R. p. 700, line 16 - p. 701, line 3; p. 709, lines 1-9; p. 729, lines 17-21). Specifically, Plaintiff Bank asserted that on the advice of its counsel, David Swanson, it would not close on the loan renewal for the Black Rush Property without a title endorsement or co-signature from Cindy Whitfield. (R. at Id.)

The Civil Conspiracy counterclaim made against Mr. Swanson alleges, *inter alia*, that

Mr. Swanson and Harbor National Bank employee Scott Warren never actually had a conversation regarding the loan renewal for the Black Rush Property; and that Mr. Swanson and Mr. Warren had conspired with each other in an effort to manufacture a defense as to Harbor National Bank's failure to renew the loan in accordance with its obligation. (Defendant's Fifth Answer, R. pp. 170-171).

As noted above, the test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In a foreclosure action, the "logical relationship" test is performed by determining whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994), aff'd in part, vacated in part, 320 S.C. 532, 466 S.E.2d 367 (1996).

In the present case, a finding that Mr. Swanson conspired with Plaintiff Bank to manufacture a defense in order to avoid closing on the agreed-upon loan renewals would clearly affect the bank's ability to enforce the note and foreclose on the mortgage. Such a finding would eviscerate Plaintiff Bank's reasoning for reneging on its agreement to close on the loan renewals at the June 28, 2012 closing. Had the closing occurred as planned, the terms of the loans would have been modified and Plaintiff Bank would have lacked any conceivable basis for proceeding with a foreclosure action. If Mr. Whitfield were to prevail in establishing his civil conspiracy claim, the subject foreclosure claim would be completely preempted. Accordingly, the Civil Conspiracy counterclaim is a compulsory counterclaim.

Additionally, *North Carolina Federal Sav. and Loan Ass'n v. DAV Corp*., 268 S.C. 514, 381 SE.2d 903 (1989), provides us with a similar set of facts from which to view the present

case. In *North Carolina Federal*, the South Carolina Supreme Court held that a Defendant's counterclaim in a mortgage foreclosure action was **compulsory** where the Defendant had alleged that the Plaintiff Bank breached an oral agreement to modify the terms of the original loan and provide additional financing. In the present case, Mr. Whitfield's Civil Conspiracy counterclaim, in effect, alleges that Plaintiff Bank and Mr. Swanson conspired to manufacture a bogus defense in an effort to avoid modification of the loan terms and to provide a semblance of legitimacy to Plaintiff's Bank's failure to close on the agreed upon loan renewals. (R.__) As the Supreme Court explicitly held, "Clearly, there is a **logical relationship** between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." [Emphasis added] *Id.* at 268 S.C. 518.

Based on the foregoing, it is clear that a logical relationship exists between Mr. Whitfield's Civil Conspiracy counterclaim and Plaintiff Bank's ability to foreclose on the mortgage. The counterclaim is compulsory. "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). Accordingly, the Circuit Court's finding that Mr. Whitfield is not entitled to a trial by jury as a matter of right should be reversed.

III. BECAUSE ANTHONY WHITFIELD'S COUNTERCLAIM AGAINST DAVID SWANSON WAS A COMPULSORY COUNTERCLAIM AFFECTING THE OUTCOME OF PLAINTIFF'S FORECLOSURE ACTION AND OTHER CROSS-CLAIMS, THE COURT ERRED IN BIFURCATING THE CLAIM FROM THE REST OF THE CASE AND REFERRING IT TO THE MASTER IN EQUITY FOR A BENCH TRIAL.

In the present case, there does not exist "the most imperative circumstances" to warrant

separate trials: nearly all of Mr. Whitfield's claims are grounded in the bank's failure to renew the loans. See *Gardner v. Travis*, 316 S.C. 316, 317-318, 450 S.E.2d 54, 56 (Ct. App. 1994). Mr. Swanson's alleged advice is the only reason that Plaintiff Bank did not close on Mr. Whitfield's loan renewals. This decision to not close on the loan renewals served as a catalyst for the alleged default, the ensuing foreclosure action, Mr. Whitfield's counterclaim against Mr. Swanson, and also Mr. Whitfield's crossclaim for contractual indemnification against Cindy Whitfield.

As set forth above, if Mr. Whitfield were to prevail in his civil conspiracy claim against Mr. Swanson, all other claims in this action would be affected and, in effect, likely subsumed and rendered moot. There would be no foreclosure action at all. Accordingly, it was a legal error to bifurcate Mr. Whitfield's compulsory counterclaim from the rest of the case. In addition, because Mr. Whitfield's claim for civil conspiracy is a compulsory claim, it was error to refer this case to the Master in Equity for a bench trial. "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). Further, because a bench trial on a compulsory counterclaim does not preserve inviolate Mr. Whitfield right of trial by jury, as required under Rule 42(b), SCRCP, the Order should be reversed.

CONCLUSION

For each of the foregoing reasons, it was error for the Circuit Court to grant Mr. Swanson's Motion to Bifurcate the Civil Conspiracy Counterclaim, Strike the Jury Demand, and Refer the Bifurcated Trial to the Master in Equity for a Bench Trial. It was error for the Court to strike Mr. Whitfield's jury demand because 1) Both Mr. Whitfield and Mr. Swanson demanded a

jury trial as to the Mr. Whitfield's counterclaim in their respective pleadings; 2) the Parties did not meet the pre-requisites set forth under Rule 38(d), SCRCP, for withdrawing a demand for trial by jury: Mr. Whitfield did not consent to withdrawal of his jury demand and neither party was in default under Rule 55(a), SCRCP; 3) Mr. Whitfield's counterclaim for civil conspiracy is compulsory counterclaim, which affords him the right to a jury trial; 4) Mr. Whitfield's counterclaim for civil conspiracy, if established, would have affected the Plaintiff Bank's ability to enforce the note and foreclose on the mortgage; 5) A logical relationship exist between Mr. Whitfield's Civil Conspiracy Counterclaim and Plaintiff Bank's ability to foreclose on the mortgage.

In addition, it was error for the Circuit Court to bifurcate Mr. Whitfield's claim from the rest of the case and refer it to the Master in Equity for a bench trial, because 1) a Defendant in an equitable action who asserts a compulsory counterclaim has a right to a jury trial; 2) The reference to the Master in Equity for a bench trial will deprive Mr. Whitfield of his right to a full jury trial of the legal issues in this case; and 3) There are factual issues and witnesses that are common to all the claims set forth in this action, which would render separate trials inconvenient to the Parties and work counter to principles of judicial economy. For these reasons, the Circuit Court's Order should be reversed.

[Signature on Following Page]

Respectfully submitted,

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December 15 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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The Honorable Diane S. Goodstein
Circuit Court Judge

Case No. 2012-CP-10-02758
Appellate Case No. 2020-000162

Pinnacle Bank, as successor in interest to
Bank of North Carolina, previous successor in
interest to Harbor National Bank, Plaintiff

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v.

Anthony Whitfield and Cindy Whitfield,
Defendants

Anthony Whitfield, Counterclaimant

v.

David Swanson, Counterclaim Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

APPELLANT'S RULE 211 CERTIFICATION

The undersigned certifies that the *Final Brief of Appellant* and *Final Reply Brief of Appellant*

comply with Rule 211(b), SCACR.

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FINAL BRIEF OF RESPONDENT

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CASES

RULES

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court correctly ruled that Appellant was not entitled to a jury trial on his permissive counterclaim for civil conspiracy asserted in a foreclosure action.

2. Whether the trial court's order bifurcating Appellant's civil conspiracy claim was rendered moot by the dismissal with prejudice of all claims between Appellant and Pinnacle Bank.

3. Whether the trial court properly exercised its discretion in bifurcating Appellant's civil conspiracy claim against Respondent from the foreclosure-related claims and counterclaims between Appellant and Pinnacle Bank.

STATEMENT OF THE CASE

Appellant Anthony Whitfield appeals the trial court's orders granting Respondent David Swanson's motion to strike the jury demand and bifurcate the civil conspiracy counterclaim, and denying Appellant's motion to reconsider the same.

This action was commenced in the Charleston County Court of Common Pleas on September 7, 2012 as a foreclosure action filed by Harbor National Bank against Anthony M. Whitfield and Cindy Whitfield. (R. pp. 19-48). The Bank asserted a claim against Whitfield to collect on the Bank's April 23, 2007 note for $325,000 that matured on May 3, 2012, and a claim against Whitfield and Cindy Whitfield to foreclose on the mortgage securing the note. (R. pp. 19-48).

On April 1, 2013, Whitfield filed the first of five responsive pleadings. In his initial answer and first three amended answers filed on September 20, 2012, April 24, 2014 and August 27, 2014, Whitfield asserted counterclaims against the Bank. In his fourth amended answer filed on November 11, 2015, Whitfield added a crossclaim against Cindy Whitfield for equitable indemnity. In his fifth amended answer filed on January 8, 2016, Whitfield added claims for abuse of process and civil conspiracy against David Swanson as an additional counterclaim defendant. (R. pp. 153-175). Whitfield's fifth amended answer is the operative pleading for purposes of this appeal. Swanson answered the counterclaims on February 18, 2016. (R. pp. 189-194).

Whitfield's claims against Swanson were premised on allegations that Swanson and Bank employee Scott Warren conspired to provide false deposition testimony in this litigation for the purpose of manufacturing a defense to Whitfield's counterclaims against the Bank. (R. pp. 168-171). Specifically, the claims arose out of deposition testimony from Warren and Swanson about a phone call in which Swanson recommended that the Bank obtain a title endorsement before

proceeding with a scheduled closing to renew Whitfield's loan. Although the call was documented in a contemporaneous email that Warren sent to the closing attorney and was supported by sworn testimony from Swanson and Warren, (R. pp. 334-361), Whitfield alleged that the call never happened and that Swanson and Warren conspired after-the-fact to testify falsely in their depositions to manufacture a defense to Whitfield's counterclaims against the Bank. (R. pp. 153-175; R. pp. 362-373).

The trial court granted summary judgment for Swanson on Whitfield's abuse of process claim by order entered on November 8, 2017, leaving the civil conspiracy claim as Whitfield's sole claim against Swanson. (R. pp. 4-8). On March 8, 2019, Swanson moved to strike the jury demand, bifurcate the trial of the civil conspiracy counterclaim and refer the bifurcated civil conspiracy trial to the master in equity. (R. pp. 321-373). The motion was brought on grounds that Whitfield waived his right to a jury trial on the civil conspiracy counterclaim by asserting it as a permissive counterclaim in the foreclosure action, and that bifurcating the trial of the conspiracy claim from the complex and lengthy trial of the foreclosure claims and counterclaims would avoid prejudice and further the interests of convenience, expedience and judicial economy. (R. pp. 321-373).

Swanson's motion was heard by the Honorable Diane S. Goodstein on October 7, 2019. (R. pp. 1166-1201). At that time, the case was scheduled for a two-week date certain trial set to begin on October 21, 2019. (R. pp. 1166-1201). On October 16, 2019, Judge Goodstein entered an order granting Swanson's motion. (R. pp. 9-16). Judge Goodstein found that Whitfield waived his right to a jury trial on the civil conspiracy counterclaim by asserting it as a permissive counterclaim, and that bifurcation was appropriate under Rule 42(b), SCRCP. Judge Goodstein

ordered the civil conspiracy claim to proceed in a non-jury trial, but declined to refer the bifurcated claim to the master in equity. (R. pp. 9-16).

Whitfield filed a motion to reconsider on October 18, 2019. (R. pp. 381-420). Swanson filed a memorandum in opposition on November 9, 2019. (R. pp. 421-476.). Whitfield's motion to reconsider was denied by order entered on January 6, 2020. (R. pp. 17-18). Whitfield served a notice of appeal on February 3, 2020.

INTRODUCTION

The foreclosure action filed against Anthony M. Whitfield arose out of a loan that Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, ("Bank") extended to Whitfield in 2007. The loan was secured by real property located in Charleston County, South Carolina, referred by the parties as the "Black Rush Property." (R. pp. 19-48).

When the loans were originated in 2007, Whitfield owned the Black Rush Property by himself in fee simple. (R. pp. 19-48). As the 5-year balloon note began maturing in 2012, Whitfield and the Bank negotiated renewal terms, and a closing was scheduled to take place on June 28, 2012. (R. pp. 153-175.). Scott Warren was the Bank's primary point of contact for the Whitfield loans.

Two days prior to closing, Whitfield's closing attorney brought to the attention of the Bank that subsequent to the origination of the loan in 2007, Whitfield had deeded a one-half interest in the Black Rush Property to his ex-wife, Cindy Whitfield. (R. pp. 334-361). The closing attorney's office initially indicated that Cindy Whitfield would need to sign the mortgage on the Black Rush Property, and then asked if the Bank was okay with keeping the existing lender's title insurance policy in place rather than issuing a new policy. (R. 334-361).

Thereafter, the Bank investigated whether the transfer of interest in the Black Rush Property would impact its collateral in the Black Rush Property. Warren contacted the Bank's counsel, David Swanson, who recommended that the Bank secure a title endorsement to protect its security interest. (R. pp. 523-526; R. pp. 619-626). On June 27, 2012, the Bank's representative, Scott Warren, sent an email to the closing attorney's office stating "I called bank council [sic] to get some advice on how to handle it. (a) we need a title endorsement on Black Rush only...We can rely on your title opinion and existing policies for the others." (R. pp. 334-361).

As a result of Cindy Whitfield's fifty percent ownership interest in the Black Rush Property, and to ensure protection of its security interest in the entirety of the Black Rush Property, the Bank sought either a title endorsement from the title insurer or Cindy Whitfield's signature on the mortgage as a condition of renewing the loan. Neither a title endorsement nor Cindy Whitfield's signature was obtained, and ultimately, the loan was not renewed. (R. pp. 79-88).

Subsequently, the Bank initiated foreclosure proceedings against Whitfield. (R. pp. 19-48). In response, Whitfield counterclaimed against the Bank for various causes of action sounding in fraud and unfair trade practices. As it relates to those allegations relevant to this Appeal, Whitfield alleged in his third amended answer and counterclaims, filed on August 27, 2014:

> 32. In reliance upon Mr. Warren's June 26, 2012 commitment letter, Mr. Whitfield attended a scheduled closing at attorney Mark Weeks' law office. At the closing, Mr. Warren informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for the Black Rush Property, the home that Cindy Whitfield resided in. At a certain point, Mr. Whitfield was informed by the closing attorney that the endorsement could not be procured, that Mrs. Whitfield was refusing to sign the mortgage to the Black Rush Property, and Mr. Warren proposed that it would only be possible to close two of the subject properties...but that if the Black Rush Property ultimately couldn't be closed, all properties...would have to be foreclosed

upon.

> 33. Despite Harbor National Bank's representations that a title endorsement was required to renew the Black Rush Property, Mr. Whitfield has subsequently learned that no such endorsement was required from the title company. Moreover, Harbor National Bank failed to renew any of the loans listed in the June 26, 2012 commitment letter despite agreeing to do so, willfully breaching their agreements.

(R. pp. 68-69).

In response to these allegations in the Third Amended Answer and Counterclaims, the Bank stated:

> 14. Plaintiff admits the Plaintiff attended a scheduled closing at the office of attorney Mark Weeks, that it was discovered that Defendant had transferred an interest in the Black Rush property to his ex-wife, Cindy Whitfield, and that it was required as a condition of the closing either that Mrs. Whitfield sign the new mortgage or that a title endorsement be obtained.

(R. pp. 82).

On November 13, 2013, Scott Warren was deposed and was questioned about the email he sent prior to closing in which he informed the closing attorney's office that he "called bank council [sic] to get some advice on how to handle it. . . We need a title endorsement . . . ." (R. pp. 348-349). Warren identified David Swanson as the bank counsel he was referring to in the email and testified that Swanson recommended that the Bank obtain a title endorsement on the Black Rush Property. (R. pp. 348-349).

Whitfield subsequently deposed David Swanson, who testified that he received the call from Scott Warren and recommended that the Bank obtain a title endorsement. (R. pp. 619-526). Swanson testified that "[Mr. Warren] asked me my advice as to whether he should do [the loan renewal] without—with or without [an endorsement], I told him he should get a title endorsement." (R. p. 623).

Following David Swanson's deposition, Whitfield decided that he did not believe the telephone conversation between Swanson and Warren actually occurred, and that Swanson and Warren must have conspired to give false deposition testimony about the existence of the call to justify the Bank's demand for a title endorsement, *i.e.* to create an "advice of counsel" defense. (R. pp. 168-171.).

Whitfield then amended his pleadings a fifth time to allege that Swanson and the Bank engaged in a civil conspiracy by providing false deposition testimony about the existence of the subject phone call[1]. In particular, Whitfield alleged:

> 66. Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement to renew the loan for the Black Rush Property.
>
> 67. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing to occur on June 28, 2012.
>
> 68. Despite providing such **sworn testimony** by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is **no evidence of any such phone call** as the phone records from Mr. David Swanson's cell phone and his office line show no records of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.
>
> 69. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact evidence shows it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.

(R.p. 168) (emphasis in original pleading).

[1] Although the merits of this counterclaim are not the subject of this appeal, it is Respondent's position that South Carolina does not recognize a civil cause of action for alleged conspiracy to suborn perjury.

At his deposition, Whitfield detailed his allegations against Swanson. Whitfield testified that Swanson was "a fool" and he believed Swanson rendered negligent advice to the Bank[2]. Whitfield further testified:

> The bank - - Harbor National Bank - - claimed the reason for backing out of the deal a year later, in the lawsuit (Warren depo 11/13/13), to close my nine loan renewals on 6/28/12 was because of advice it got—the bank got—from a "mystery lawyer," who never appeared in the pleadings or on a witness list until that time.

(R. p. 869).

Further clarifying his position, Whitfield testified:

> Q: Your position is that the phone call between Scott Warren and David Swanson never occurred
>
> A: Correct

(R. p. 881).

> Q: And you believe that they concocted this notion that the phone call occurred after the closing didn't go forward?
>
> A: Oh. Yeah. When Harbor National Bank got real concerned, then they had to bring in some other guns, they had to convince somebody to lie for the bank to get them out of the hole they were in, and Mr. Swanson volunteered.

(R. p. 881).

> Q: And is it your testimony as well that Mr. Swanson and the bank conspired sometime after June 28, 2012?
>
> A: Yeah, I guess that would be a good way to define it.

(R. p. 1061).

---

[2] Whitfield cannot pursue a claim against Swanson for providing the alleged "bad advice" to the Bank because there was no attorney-client relationship between Whitfield and Swanson. Whitfield's counsel has acknowledged on the record that they cannot hold Swanson liable for the failure of the loan renewal. (R. pp. 1149-1152).

As alleged throughout Whitfield's pleadings and described in his deposition testimony, Whitfield's claim against Swanson for civil conspiracy is based on Swanson's deposition testimony that corroborated the testimony of Scott Warren—testimony that occurred *after* the Bank initiated the foreclosure proceeding. Whitfield alleges that the testimony was false, that Swanson conspired with the Bank to offer the false testimony, and that offering the false testimony amounted to a civil conspiracy.

Prior to trial, Swanson filed a motion to strike Whitfield's jury demand on the civil conspiracy counterclaim and to bifurcate the civil conspiracy counterclaim, arguing that the counterclaim was permissive under Rule 13(b), SCRCP, and therefore the claim was not entitled to a jury trial as of right. (R. pp. 321-373).

A hearing was held on Swanson's motion on October 7, 2019, at which counsel for Whitfield conceded that "we don't believe it [the civil conspiracy counterclaim] relates to the foreclosure action." (R. pp. 1177).

The trial court entered an order on October 16, 2019 granting Swanson's motion. In the order, the court held:

> Here, the civil conspiracy counterclaim has no logical relationship to Pinnacle Bank's right to enforce the note and foreclose on the mortgage. The alleged facts supporting the civil conspiracy counterclaim—that Swanson and Harbor National Bank conspired to give false testimony for the purpose of providing an *after-the-fact* justification for Harbor National Bank's request for a title endorsement—relate to activity that occurred after Mr. Whitfield's loans were not renewed. Accordingly, the outcome of the civil conspiracy counterclaim will not affect the enforceability of the note and mortgage, will not affect whether Harbor National Bank had an obligation to renew Mr. Whitfield's [] loans, and will not affect Whitfield's other counterclaims alleging improper acts against the bank with respect to the original loans the failed alleged loan renewals.

(R. pp. 9-16).

The trial court also found that "bifurcation of the civil conspiracy will simplify the evidence and issues presented before the jury [of the primary trial], will avoid the inconvenience of forcing those witnesses and parties only material to the civil conspiracy claim to attend a length trial regarding the other counterclaims asserted by Whitfield, and will aid in avoiding jury confusion over which facts are relevant to the claims that are to be decided by the jury rather than by the Court." (R.pp. 9-16).

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey,* 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). Whether 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). Appellate courts may decide questions of law with no particular deference to the circuit court's findings. *Id.* at 15, 772–73.

A motion seeking bifurcation under Rule 42(b), SCRCP is addressed to the sound discretion of the trial court. *Senter v. Piggly Wiggly Carolina Co., Inc.*, 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000). Thus, an appellate court will review a trial judge's order on a motion to bifurcate under an abuse of discretion standard. *Creighton v. Coligny Plaza Ltd. Partnership,* 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998).

ARGUMENT

I. The trial court correctly struck the jury demand for Whitfield's civil conspiracy counterclaim.

a. The trial court had authority to strike the jury demand.

Whitfield leads with the argument that Judge Goodstein had no authority to strike the jury demand on the civil conspiracy claim because both he and Swanson demanded jury trials in their

initial pleadings. According to Whitfield, the analysis stops at Rule 38(d), SCRCP because Whitfield did not consent to withdrawal of the jury demand. Stated differently, Whitfield suggests that the trial court has no power to order a non-jury trial once a party has demanded a jury trial, regardless of whether or not the claim is entitled to a jury trial as of right.

However, Rule 38 does not create a right to a jury trial where one does not exist. Rather, it provides the mechanism for demanding a jury trial on "issue[s] triable of right by a jury . . ." and is limited to "issues so triable" by jury. Here, the permissive counterclaim for civil conspiracy was not a claim triable of right by a jury.

Furthermore, any contention that a party's demand under Rule 38 usurps the trial court's authority to strike that demand is dispelled by Rule 39, SCRCP, which provides that "[w]hen a trial by jury had been demanded as provided in Rule 38 . . . [t]he trial of all issues so demanded shall be by jury, unless . . . *the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.*" (emphasis added).

Accordingly, the trial court had the authority to order a non-jury trial of the civil conspiracy counterclaim, and properly did so.

b. The trial court correctly ruled that Whitfield's civil conspiracy counterclaim was permissive.

"The constitutional declaration that a right to trial by jury shall remain inviolate does not apply to cases within the equitable jurisdiction of the court." *Defender Properties, Inc. v. Doby*, 307 S.C. 336, 338, 415 S.E.2d 383, 384 (1992). "In equity the parties are not entitled, as a matter of right, to a trial by jury." *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975).

A foreclosure action is an action in equity, and a party has no right to trial by jury. *Gardner v. Travis,* 316 S.C. 315, 317, 450 S.E.2d 54, 56 (Ct. App. 1994) ("Because a foreclosure action is an action in equity, a party has no right to a jury trial of the issues raised in a foreclosure action.");

Wachovia Bank, Nat'l Ass'n. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014) ("If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.").

"By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *Blackburn*, 407 S.C. at 331, 755 S.E.2d at 442 (citing *Wells Fargo Bank, N.A. v. Smith,* 398 S.C. 487, 495, 730 S.E.2d 328, 332-33 (Ct. App. 2012)); *see also* Rule 13(a), SCRCP. Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are instead, permissive. Rule 13(b), SCRCP.

Under South Carolina law, whether a counterclaim is compulsory or permissive is viewed through the logical relationship test, which the Supreme Court has explained:

> Under this test, "the 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory.

Blackburn, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7 (internal citations omitted).

Here, there is no dispute between the parties that Whitfield prevailing on the civil conspiracy counterclaim would not impact the enforceability of the Bank's note and mortgage in any manner. Indeed, Whitfield's counsel conceded at oral arguments that the civil conspiracy counterclaim "does not relate to the foreclosure." (R. pp. 1177).

Likewise, the factual allegations, Whitfield's testimony, and his counsel's open court statements unequivocally demonstrate that the actions making up the alleged civil conspiracy occurred *after* commencement of the foreclosure action. (R. pp. 168-171, pp. 1149-1152). Thus,

there is no outcome of the civil conspiracy counterclaim that could ever call into question the enforceability of the note and mortgage that originated in 2007.

Whitfield's civil conspiracy counterclaim confirms as much. Paragraph 69 alleges:

> Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact evidence shows it was not made at the time, was given with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans.

(R. p. 168) (emphasis in original).

Here, it is clear from Whitfield's own allegations that the alleged ulterior motive of the civil conspiracy was to create an after-the-fact, false "legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans." (R. p. 168). All of the alleged activity underpinning the alleged civil conspiracy, therefore, occurred after the failure of the loan renewal.

Nonetheless, in an attempt to frame the civil conspiracy counterclaim as compulsory, Whitfield now suggests that "Mr. Swanson's alleged advice is the only reason that Plaintiff Bank did not close on Mr. Whitfield's loan renewals." (Brief of App. p. 10). This argument, however, is directly at odds with the unambiguous allegations of the civil conspiracy counterclaim, and the prior open court statements of Whitfield's counsel.

In a hearing on March 21, 2018, counsel for Whitfield engaged in the following exchange with Judge Goodstein:

> The Court: But other than being a witness to the – and a participant in the coverup and all of the problems that that would then create for this attorney [Swanson], okay, is he then responsible for the underlying damages of Mr. Whitfield with regards to the failure of the bank to fund the loans?
>
> Whitfield's Counsel: I got you. I understand your question, Your Honor. The answer is no.

(R. pp. 1149-1152).

In other words, for purposes of attempting to gain an advantage in this appeal, Whitfield now takes a position directly contrary to the position he has maintained throughout the entirety of this litigation, *i.e.* that the phone call never occurred. Whitfield cannot have it both ways, and the allegations of his civil conspiracy claim are clear and unequivocal—Whitfield alleges that the phone call never happened and was made-up after-the-fact to provide cover for the Bank[3].

In all respects, the civil conspiracy counterclaim has no relationship to the enforceability of the Bank's note and mortgage. Therefore, the trial court correctly held that the civil conspiracy counterclaim was permissive and was not entitled to a jury trial as of right.

II. The appeal of the order bifurcating the civil conspiracy counterclaim is moot in light of Appellant's settlement with the Bank.

Appellant also avers that the trial court erred in bifurcating the civil conspiracy counterclaim from the remainder of the claims asserted in the lawsuit. However, Whitfield and the Bank have settled all of their claims against each other. (R.p. 477). Thus, there is no trial to be had between the Bank and Whitfield.[4]

Accordingly, Whitfield's appeal of the trial court's order bifurcating the trial of the civil conspiracy counterclaim is now moot.

III. To the extent the bifurcation order is not moot, the trial court properly exercised its discretion in bifurcating the civil conspiracy counterclaim.

Rule 42(b), SCRCP provides that "the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a

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[3] Notwithstanding Whitfield's inexplicable change of position, to the extent that Whitfield argues Swanson did in fact advise the Bank to obtain a title endorsement on the phone call, Swanson was an attorney for the Bank, and his advice to obtain a title endorsement would constitute legal advice to a client that is not actionable by Whitfield, a non-client.

[4] Whitfield's crossclaim against his ex-wife sought only equitable indemnification "to the extent Mr. Whitfield is held liable to the [Bank] in this action." (R. pp. 172-173.).

separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State." Bifurcation is proper by the trial court where the issues in the case are complex, and bifurcation helps to clarify or simplify the issues. *Durham v. Vinson*, 360 S.C. 639, 645 n.2, 602 S.E.2d 760, 763 n.2 (2004).

Here, a trial between the Bank and Whitfield would be long and complex, with eight causes action unrelated to the civil conspiracy counterclaim and an estimated ten expert witnesses and fifteen to twenty fact witnesses who would testify to issues only relevant to the foreclosure and counterclaims regarding enforcement of the note and mortgage. (R. pp. 321-373, pp. 1166-1201).

To the contrary, as it relates to the civil conspiracy claim against Swanson, the witnesses will be limited, and the trial will address only one issue—whether the testimony of David Swanson and Scott Warren was truthful, or as Whitfield alleges, was fabricated to allegedly bolster the Bank's position in this litigation. (R. pp. 321-373, pp. 1166-1201).

The introduction of the claims against Swanson—which do not impact the foreclosure, loan enforcement, or Whitfield's counterclaims related to alleged unfair lending practices—would unnecessarily complicate the primary trial and cause blurring of the issues in the claim against Swanson. Thus, forcing the narrow counterclaim against Swanson to be tried along with a lengthy and complex trial between the Bank and Whitfield would unnecessarily complicate the issues and prejudice Swanson's defense, and would be inefficient for the trial court and parties and inconvenient for those witnesses relevant to the civil conspiracy counterclaim.

Accordingly, to the extent that this Court does not rule that Whitfield's appeal of the trial court's bifurcation order is now moot, the trial court did not abuse its discretion in determining

that the civil conspiracy counterclaim should be bifurcated from the remainder of the claims, counterclaims and cross-claim in the litigation.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that the trial court's order be affirmed in its entirety.

Respectfully submitted,

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December 14, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2020-000162

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff,

v.

Anthony Whitfield and Cindy Whitfield, Defendants.

AND

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant,

Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent.

CERTIFICATE OF COUNSEL

I certify that the *Final Brief of Respondent David Swanson* complies with Rule 211(b), SCACR.

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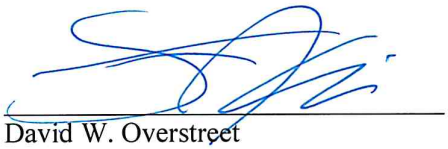

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December 14, 2020

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I certify that on the date indicated below, I served the *Final Brief of Respondent David Swanson* upon Appellant via email on December 14, 2020, addressed to counsel of record as follows:

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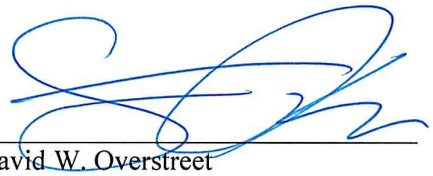

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Counterclaimant

v.

David Swanson, Counterclaim Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENTS

I. The lower court did not have the authority to strike Mr. Whitfield's jury demand because the civil conspiracy counterclaim asserted by Mr. Whitfield against Mr. Swanson is both legal and compulsory; whether the civil conspiracy occurred before or after the scheduled closing is of no consequence.

It is undisputed that the civil conspiracy counterclaim asserted by Mr. Whitfield against Mr. Swanson is a legal claim. The sole controversy surrounding this counterclaim stems from whether it is compulsory or permissive. If the counterclaim is compulsory, then Mr. Whitfield has a clear **right** to a jury trial on the claim. "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014).

As noted in Mr. Whitfield's Brief, the test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In a foreclosure action, the "logical relationship" test is performed by determining whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. 266*, 449 S.E.2d 580 (Ct. App. 1994).

Respondent contends that there is no logical relationship between Mr. Whitfield's civil conspiracy counterclaim and Plaintiff Bank's right to enforce the note and foreclose on the Mortgage because the alleged conspiratorial acts (i.e. manufacturing a defense in order to justify reneging on the previously agreed-upon renewal terms and to foreclose on the Mortgage) occurred sometime after the June 28, 2012 closing fell through. This argument is flawed. It is of no consequence whether Mr. Swanson conspired with Plaintiff Bank to manufacture a bogus

defense before or after the closing date. Under either scenario, Plaintiff Bank used the alleged "advice of counsel defense" as justification for not renewing the loans and pursuing a foreclosure action. Said differently, even if the conspiratorial acts occurred after the June 28, 2012 closing, the acts would still have occurred prior to Plaintiff Bank's pursuit of a foreclosure action. Plaintiff Bank could have chosen to honor its agreement with Mr. Whitfield at any time following the scheduled closing date. Instead, it chose to pursue a foreclosure action.

A finding that Mr. Swanson conspired with Plaintiff Bank to manufacture a bogus defense—even after the scheduled closing date had passed—would have affected the Plaintiff bank's ability to subsequently enforce the note and foreclose on the mortgage. This was the Plaintiff Bank's only justification for reneging on the agreement and pursuing a foreclosure action. There is, accordingly, a logical relationship between Mr. Whitfield's civil conspiracy counterclaim and the foreclosure action. See *North Carolina Federal Sav. and Loan Ass'n v. Dav Corp.*, 268 S.C. 514, 381 SE.2d 903 (1989), wherein the South Carolina Supreme Court held that a Defendant's counterclaim in a mortgage foreclosure action was **compulsory** where the Defendant had (as in the present case) alleged that the Plaintiff Bank breached an oral agreement to modify the terms of the original loan and provide additional financing. ("Clearly, there is a **logical relationship** between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided the default on the note by joint venture." [Emphasis added] *Id.* at 268 S.C. 518). It was, therefore, an abuse of discretion for the lower court to find that no logical relationship existed between Mr. Whitfield's civil conspiracy counterclaim and the underlying foreclosure action.

It was also error to deny Mr. Whitfield his right to a jury trial. "If the complaint is

equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). The lower court's finding that Mr. Whitfield is not entitled to a trial by jury as a matter of right should be reversed.

II. Mr. Whitfield's appeal of the lower court's order bifurcating the civil conspiracy counterclaim from the rest of the case and referring it to the Master in Equity is not moot because the order of reference affects the mode of trial and denies him a trial by jury.

The resolution of claims interposed between Mr. Whitfield and Plaintiff Bank does not render the bifurcation issue moot because the bifurcation order refers the bifurcated counterclaim to a bench trial, thereby affecting the mode of trial. "Issues regarding mode of trial must be raised in the trial court at first opportunity, and the order of the trial judge is immediately appealable." *Foggie v. CSX Transp.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993). "Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241(1996), citing *Edwards v. Timmons*, 297 S.C. 314, 377 S.E.2d 97 (1988) (where appellant did not appeal the order referring matter to master in equity, she could not complain after final order that she was deprived of her right to a trial by jury), and *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (where appellant failed to timely appeal an order referring dispute to master in equity, appellant could not later complain that he had been entitled to a trial by jury).

In the present case, there does not exist "the most imperative circumstances" to warrant separate trials: nearly all of Mr. Whitfield's claims are grounded in the bank's failure to renew the loans. See *Gardner v. Travis*, 316 S.C. 316, 317-318, 450 S.E.2d 54, 56 (Ct. App. 1994). Mr. Swanson's alleged advice is the only reason that Plaintiff Bank did not close on Mr. Whitfield's loan renewals. This decision to not close on the loan renewals served as a catalyst for

the alleged default, the ensuing foreclosure action, Mr. Whitfield's counterclaim against Mr. Swanson, and also Mr. Whitfield's crossclaim for contractual indemnification against Cindy Whitfield.

As set forth above and in Appellant's Brief, if Mr. Whitfield were to prevail in his civil conspiracy claim against Mr. Swanson, all other claims in this action would have been affected and, in effect, likely subsumed and rendered moot. There would have been no foreclosure action at all. Accordingly, it was a legal error to bifurcate Mr. Whitfield's compulsory counterclaim from the rest of the case. More importantly, because Mr. Whitfield's claim for civil conspiracy is a compulsory claim, it was error to refer this case to the Master in Equity for a bench trial. "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). A bench trial on a compulsory counterclaim does not preserve inviolate Mr. Whitfield's right of trial by jury, as required under Rule 42(b), SCRCP. Accordingly, the lower court's Order should be reversed.

Conclusion

For each of the foregoing reasons, as well as those stated in Appellant's [Initial] Brief, the lower court's order should be reversed. A logical relationship exists between Mr. Whitfield's civil conspiracy counterclaim and Plaintiff Bank's ability to foreclose on the mortgage. The claim is compulsory, affording him the right to a jury trial.

In addition, it was error for the lower court to bifurcate Mr. Whitfield's claim from the rest of the case and refer it to the Master in Equity for a bench trial, because 1) a Defendant in an equitable action who asserts a compulsory counterclaim has a right to a jury trial, and 2) The reference to the Master in Equity for a bench trial will deprive Mr. Whitfield of his right to a full

jury trial of the legal issues in this case. The lower court's order should be reversed.

Respectfully submitted,

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December 15, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Case No. 2012-CP-10-02758
Appellate Case No. 2020-000162

RECEIVED
Dec 15 2020
SC Court of Appeals

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff

v.

Anthony Whitfield and Cindy Whitfield,
Defendants

Anthony Whitfield, Counterclaimant

v.

David Swanson, Counterclaim Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

APPELLANT'S RULE 211 CERTIFICATION

The undersigned certifies that the *Final Brief of Appellant* and *Final Reply Brief of Appellant*

comply with Rule 211(b), SCACR.

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Attorney for Appellant

Charleston, South Carolina
December 15, 2020

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous sucessor in interest to Harbor National Bank, Plaintiff,

v.

Anthony Whitfield and Cindy Whitfield, Defendants.

AND

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant,

Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent.

Appellate Case No. 2020-000162

Appeal From Charleston County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2022-UP-334
Submitted July 27, 2022 – Filed August 10, 2022

AFFIRMED

Daniel Scott Slotchiver and Andrew Joseph McCumber, both of Slotchiver & Slotchiver, LLP, of Mount Pleasant; Jesse Sanchez, of The Law Office of Jesse Sanchez, LLC, of Charleston; and Brent Souther Halversen, of Halversen & Halversen, LLC, of Mount Pleasant, all for Appellant.

Steven Raymond Kropski, Michael B. McCall, and David W. Overstreet, all of Earhart Overstreet, LLC, of Charleston, for Respondent.

PER CURIAM: Anthony Whitfield appeals the circuit court order striking the jury demand for his civil conspiracy counterclaim against David Swanson and bifurcating it to the master in equity. Whitfield argues the circuit court erred in finding his civil conspiracy counterclaim was permissive rather than compulsory. We affirm pursuant to Rule 220(b), SCACR.

1. The trial court properly struck the jury demand for the civil conspiracy counterclaim because it correctly determined it was permissive rather than compulsory. *See Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) ("[W]hether a party is entitled to a jury trial is a question of law. Appellate courts may decide question of law with no particular deference to the circuit court's findings." (citation omitted) (quoting *Verenes v. Alvanos,* 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010))); Rule 39(a), SCRCP ("The trial of all issues so demanded shall be by jury, unless . . . the court[,] upon motion or its own initiative[,] finds that a right of trial by jury of some or all of those issues does not exist."); *S.C. Dep't of Com., Div. of Pub. Rys. v. Clemson Univ.*, 432 S.C. 352, 363, 851 S.E.2d 735, 741 (Ct. App. 2020) ("[I]f the circuit court finds a right of trial by jury of some or all of the issues does not exist, a jury trial is not required[,] even if the parties have demanded one."); *Blackburn*, 407 S.C. at 330, 755 S.E.2d at 441 ("If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial."); Rule 13(b), SCRCP (providing a permissive counterclaim is "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim"); *Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7 (2014) ("If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the

counterclaim and the underlying suit, and the counterclaim is therefore compulsory.").

2. Because of the other parties' settlement, the bifurcation issue is moot; therefore, we need not address that issue. *See Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 428 S.C. 638, 642, 837 S.E.2d 485, 487 (2020) ("A case is moot 'when judgment, if rendered, will have no practical legal effect upon existing controversy.'" (quoting *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973))); *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.").

AFFIRMED.[1]

THOMAS, MCDONALD, and HEWITT, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED
Aug 24 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Appellate Case No. 2020-000162

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff

v.

Anthony Whitfield and Cindy Whitfield, Defendants

Anthony Whitfield, Counterclaimant

v.

David Swanson, Counterclaim Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant Anthony Whitfield, through his undersigned attorney, hereby petitions this Honorable Court for a rehearing in connection with the

unpublished opinion issued in this case, filed on August 10, 2022 and attached hereto (Opinion No. 2022-UP-334). Appellant respectfully submits that the following points have been overlooked or misapprehended by the Court:

I. Appellant has a right to a jury trial because his civil conspiracy counterclaim is both legal and compulsory. "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014). Appellant has a right to a jury trial because he meets the criteria set forth in *Blackburn*. Specifically, the underlying complaint is equitable and the counterclaim is legal and compulsory.

A. The complaint is equitable. As a preliminary matter, it is undisputed that Pinnacle Bank's underlying foreclosure action is equitable in nature. "A mortgage foreclosure is an action in equity." *Id*. 407 S.C. at 328, 755 S.E.2d at 440, quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). (Appellant's Final Brief, p. 6)

B. The civil conspiracy counterclaim is legal. It is also undisputed that Appellant's counterclaim for civil conspiracy is legal in nature. See *Mcmillan v. Oconee Memorial Hosp., Inc.*, 626 S.E.2d 884, 886, 367 S.C. 559 (2006), stating "An action for civil conspiracy is an action at law." (Appellant's Final Brief, p. 6)

C. The civil conspiracy counterclaim is compulsory because it affects Plaintiff Bank's ability to enforce the subject note and foreclose the mortgage. The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In a foreclosure action (as is the case here), the "logical relationship" test is performed by determining whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage.

Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C., 316 S.C. 266, 449 S.E.2d 580 (Ct. App. 1994), aff'd in part, vacated in part, 320 S.C. 532, 466 S.E.2d 367 (1996).

Appellant's civil conspiracy counterclaim asserts that Respondent David Swanson and Plaintiff Bank conspired with one another to fabricate a legal defense (i.e., the Plaintiff Bank's asserted "advice of counsel" defense was not based in fact) as a pretext for Plaintiff Bank's failure to close on loans it was obligated to renew. (R. pp. 170-171). Appellant asserts that no such legal consultation ever occurred between Respondent and Plaintiff Bank, and that Plaintiff Bank was therefore unjustified in reneging on its obligation to renew the maturing loans for an additional five-year term and at a reduced rate. (R. pp 170-171).

There is a logical relationship between Appellant's civil conspiracy counterclaim and the underlying foreclosure action because proving civil conspiracy would affect Plaintiff Bank's ability to enforce the note and foreclose the mortgage. Indeed, Plaintiff Bank's "advice of counsel" defense was its ***sole*** justification for reneging on its obligation to renew the maturing loans. (Appellant's Final Brief, p. 2; R. at p. 98). Had Plaintiff Bank not reneged on its obligation, the underlying note would not have matured and the foreclosure action would never have occurred.

Appellant's civil conspiracy counterclaim is compulsory because a finding that Respondent and Plaintiff Bank conspired to fabricate the "advice of counsel" defense would eliminate Plaintiff Bank's ability to enforce the note and foreclose the mortgage. "If defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose on the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory." *Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7.

In addition, the facts in this case mirror the facts in *North Carolina Federal Sav. and Loan Ass'n v. Dav Corp.*, 268 S.C. 514, 381 SE.2d 903 (1989), wherein the South Carolina Supreme Court held that Defendant's counterclaim in a mortgage foreclosure action was compulsory where the Defendant had (as in the present case) alleged that Plaintiff Bank breached an oral agreement to modify terms of the original loan and provide additional financing. "Clearly, there is a **logical relationship** between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided the default on the note by joint venture." [Emphasis added] *Id.* at 268 S.C. 518. In the present case, not only was there an oral agreement to renew the loans, the loans were fully underwritten and approved by the bank, new loan documents had been drafted and were ready for execution, and it was only at the closing table that the bank reneged. (R. p. 159-160).

Appellant respectfully submits that this Court erred in affirming the lower court's order striking Appellant's jury demand because A) there is indeed a logical relationship between the complaint and the counterclaim and B) under *Blackburn,* Appellant has a right to a jury trial on his civil conspiracy counterclaim because the complaint is equitable and the counterclaim is both legal and compulsory. Accordingly, Appellant respectfully requests that this court vacate its unpublished opinion and find that Appellant has a right to a jury trial because he meets the criteria set forth in *Blackburn*.

II. <u>Appellant's settlement with Plaintiff Bank does not render the bifurcation issue moot because the bifurcation order still acts as an order of reference that affects the mode of trial by improperly referring the civil conspiracy counterclaim to a bench trial and denying Appellant of his right to a jury trial.</u>

The resolution of claims interposed between Appellant and Plaintiff Bank does not render the bifurcation issue moot because the bifurcation order still refers the civil conspiracy counterclaim to a bench trial, thereby affecting the mode of trial. (R. at p. 8). As discussed above and in Appellant's Briefs, Appellant has a right to a jury trial on his civil conspiracy counterclaim because the complaint is equitable and the counterclaim is legal and compulsory. The order of reference contained within the subject bifurcation order deprives Appellant of this right. See also *Gardner v. Travis*, 450 S.E.2d 54, 56, 316 S.C. 315, 318 (Ct. App. 1994), stating, "In determining whether to order separate trials or a single proceeding, 'caution should be taken' by the trial court 'to assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full jury trial of legal issues.'" [Emphasis added]

In addition, while Rule 42(b), SCRCP, sets forth the conditions under which separate trials may be ordered, it also expressly preserves a party's right to a jury trial:

> **(b) Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State**.** [Emphasis added]]

Even if bifurcation were appropriate—and Appellant asserts that it is not—the subject order fails to preserve Appellant's right to a jury trial on the civil conspiracy counterclaim Accordingly, Appellant respectfully submits that this court should vacate its unpublished opinion and find that Appellant has a right to a jury trial pursuant to the criteria set forth in *Blackburn*.

CONCLUSION

Based on the forgoing, Appellant respectfully requests that this court vacate its unpublished opinion and find that Appellant has a right to a jury trial pursuant to the criteria set

forth in *Blackburn*. Appellant has a right to a jury trial because the complaint is equitable and the counterclaim is legal and compulsory. The civil conspiracy counterclaim is compulsory because it affects Plaintiff Bank's ability to enforce the subject note and foreclose the mortgage. In addition, Appellant's settlement with the Plaintiff Bank does not render the bifurcation issue moot because the bifurcation order still acts as an order of reference that affects the mode of trial by improperly referring the civil conspiracy counterclaim to a bench trial and denying Appellant of his right to a jury trial.

Respectfully submitted,

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August 24, 2022
Charleston, South Carolina

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous sucessor in interest to Harbor National Bank, Plaintiff,

v.

Anthony Whitfield and Cindy Whitfield, Defendants.

AND

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant,

Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent.

Appellate Case No. 2020-000162

Appeal From Charleston County
Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2022-UP-334
Submitted July 27, 2022 – Filed August 10, 2022

AFFIRMED

Daniel Scott Slotchiver and Andrew Joseph McCumber, both of Slotchiver & Slotchiver, LLP, of Mount Pleasant; Jesse Sanchez, of The Law Office of Jesse Sanchez, LLC, of Charleston; and Brent Souther Halversen, of Halversen & Halversen, LLC, of Mount Pleasant, all for Appellant.

Steven Raymond Kropski, Michael B. McCall, and David W. Overstreet, all of Earhart Overstreet, LLC, of Charleston, for Respondent.

PER CURIAM: Anthony Whitfield appeals the circuit court order striking the jury demand for his civil conspiracy counterclaim against David Swanson and bifurcating it to the master in equity. Whitfield argues the circuit court erred in finding his civil conspiracy counterclaim was permissive rather than compulsory. We affirm pursuant to Rule 220(b), SCACR.

1. The trial court properly struck the jury demand for the civil conspiracy counterclaim because it correctly determined it was permissive rather than compulsory. *See Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) ("[W]hether a party is entitled to a jury trial is a question of law. Appellate courts may decide question of law with no particular deference to the circuit court's findings." (citation omitted) (quoting *Verenes v. Alvanos,* 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010))); Rule 39(a), SCRCP ("The trial of all issues so demanded shall be by jury, unless . . . the court[,] upon motion or its own initiative[,] finds that a right of trial by jury of some or all of those issues does not exist."); *S.C. Dep't of Com., Div. of Pub. Rys. v. Clemson Univ.*, 432 S.C. 352, 363, 851 S.E.2d 735, 741 (Ct. App. 2020) ("[I]f the circuit court finds a right of trial by jury of some or all of the issues does not exist, a jury trial is not required[,] even if the parties have demanded one."); *Blackburn*, 407 S.C. at 330, 755 S.E.2d at 441 ("If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial."); Rule 13(b), SCRCP (providing a permissive counterclaim is "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim"); *Blackburn*, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7 (2014) ("If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the

counterclaim and the underlying suit, and the counterclaim is therefore compulsory.").

2. Because of the other parties' settlement, the bifurcation issue is moot; therefore, we need not address that issue. *See Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 428 S.C. 638, 642, 837 S.E.2d 485, 487 (2020) ("A case is moot 'when judgment, if rendered, will have no practical legal effect upon existing controversy.'" (quoting *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973))); *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.").

AFFIRMED.[1]

THOMAS, MCDONALD, and HEWITT, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

RECEIVED
Aug 24 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

_____

Case No. 2012-CP-10-02758
Appellate Case No. 2020-000162

_____

Pinnacle Bank, as successor in interest to
Bank of North Carolina, previous successor in
interest to Harbor National Bank, Plaintiff

v.

Anthony Whitfield and Cindy Whitfield,
Defendants

Anthony Whitfield, Counterclaimant

v.

David Swanson, Counterclaim Defendant

of whom

Anthony Whitfield is the Appellant and David Swanson is the Respondent.

_____

PROOF OF SERVICE

_____

I, the undersigned, certify that I have served *Appellant's Petition for Rehearing* on

Respondent David Swanson, by emailing a copy on August 24, 2022, addressed to his attorneys of record at the following email addresses: David W. Overstreet, Esq. (david@earhartoverstreet.com), Michael B. McCall, Esq. (mike@earhartoverstreet.com), and Steven R. Kropski, Esq. (steve.kropski@earhartoverstreet.com).

Pursuant to Rule 262(C)(3), SCACR, and the Order of The Supreme Court of South Carolina, RE: Methods of Electronic Filing Under Rule 262 of the South Carolina Appellate Court Rules (as Amended May 6, 2022), a copy of the email to counsel is attached.

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

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Attorney for Appellant

Charleston, South Carolina
August 24, 2022

From: **Jesse Sanchez** jesse@jessesanchezlaw.com
Subject: Anthony Whitfield v. David Swanson // 2020-000162
Date: August 24, 2022 at 2:34 PM
To: david@earhartoverstreet.com, mike@earhartoverstreet.com, Steve Kropski steve.kropski@earhartoverstreet.com, Brent Halversen Brent@halversenlaw.com, Dan dan@slotchiverlaw.com, Andrew J. McCumber andrew@slotchiverlaw.com, Susan Maulden paralegal@slotchiverlaw.com

Counsel,

Attached for service, please find Appellant's Petition for Rehearing and corresponding cover letter, which are being filed momentarily with the South Carolina Court of Appeals via electronic OneDrive submission.

Regards,

Jesse
--
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August 24, 2022

RECEIVED
Aug 24 2022
SC Court of Appeals

VIA ONEDRIVE ELECTRONIC SUBMISSION
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff, v. Anthony Whitfield and Cindy Whitfield, Defendants. AND Anthony Whitfield, Counterclaimant, v. David Swanson, Counterclaim Defendant, Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent. Appellate Case No. 2020-000162

Dear Ms. Kitchings:

Enclosed herewith, please find the following for filing with the Court:

1. Appellant Anthony Whitfield's *Petition for Rehearing*.

2. The *corresponding Proof of Service*, evidencing service on all counsel of record for the above-captioned appeal by electronic mail.

3. A copy of Opinion No. 2022-UP-334, filed on August 10, 2022, from which this *Petition for Rehearing* is made.

In addition, a check for the fifty dollar ($50.00) filing fee has been placed in today's outgoing mail.

Thank you for your assistance with this matter. Should you have any questions or wish to discuss the filing, please do not hesitate to contact me directly.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez

Cc (Via Email Only): Daniel S. Slotchiver, Esquire
Andrew J. McCumber, Esquire
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The South Carolina Court of Appeals

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff,

v.

Anthony Whitfield and Cindy Whitfield, Defendants.

AND

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant,

Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent.

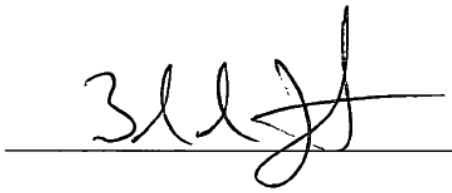
Appellate Case No. 2020-000162

ORDER

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

_____ J.

_____ J.



J.

Columbia, South Carolina

cc:
Brent Souther Halversen, Esquire
Daniel Scott Slotchiver, Esquire
Andrew Joseph McCumber, Esquire
Jesse Sanchez, Esquire
David W Overstreet, Esquire
Michael B. McCall, Esquire
Steven Raymond Kropski, Esquire
The Honorable Diane Schafer Goodstein

FILED
Sep 22 2022