

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

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Nov 23 2022

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

S.C. SUPREME COURT

**Opinion No. 2022-UP-334 (S.C. Ct. App. Filed Aug. 10, 2022)
Appellate Case No. 2020-000162
Circuit Court Case No.: 2012-CP-10-02758**

**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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that Appellant was not entitled to a jury trial on his permissive counterclaim for civil conspiracy asserted in a foreclosure action.
2. Whether the Court of Appeals correctly determined the trial court's bifurcation of the civil conspiracy cause of action against Respondent was rendered moot by the dismissal with prejudice of all claims between the other litigants, leaving the civil conspiracy counterclaim against Respondent as the only remaining cause of action in the litigation.

COUNTERSTATEMENT OF THE CASE

The subject action was commenced in the Charleston County Court of Common Pleas on September 7, 2012, as a foreclosure action filed by Harbor National Bank (now Pinnacle 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

occurred, and that Swanson and Warren conspired *after-the-fact* to testify falsely in their depositions. Whitfield alleged that the after-the-fact conspiracy to testify falsely in their depositions was done for the purpose of manufacturing a defense to Whitfield's counterclaims against the Bank in the foreclosure action. (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).

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), SCRPC. 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. The Parties filed their Final Briefs with the Court of Appeals on December 14, 2021 (Respondent) and December 15, 2021 (Appellant). (Appx. Pp. 1-54).

On August 10, 2022, the Court of Appeals affirmed Judge Goodstein’s decision finding (1) the trial court properly struck the jury demand, because the civil conspiracy counterclaim is permissive and (2) because of the other parties’ settlement, leaving the civil conspiracy counterclaim against Respondent Swanson as the only remaining claim in the case, appeal of Judge Goodstein’s bifurcation of the civil conspiracy counterclaim was moot. (Appx. pp. 55-57)

Thereafter, Appellant filed a Petition for Rehearing on August 24, 2022. (Appx. pp. 58-70). The Court of Appeals denied the Petition for Rehearing on September 22, 2022. (Appx. pp. 71-72). Thereafter, Appellant filed its Petition for Certiorari to this Court on October 24, 2022.

COUNTERSTATEMENT OF FACTS

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 call¹. 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.

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.

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

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 Bank².

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 the jury demand on the civil conspiracy counterclaim and to bifurcate the civil conspiracy counterclaim, arguing that the counterclaim was permissive under Rule 13(b), SCRPC, 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).

ARGUMENT

I. The Court of Appeals correctly affirmed the trial court’s decision striking the jury demand on Appellants’ permissive civil conspiracy counterclaim and Appellants identify no special or important reason to grant certiorari.

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242 (b), SCACR. Rule 242 (b) lists five (5) circumstances to illustrate when certiorari is appropriate: 1) cases in which there are novel questions of law; 2) cases in which there is a dissent in a Court of Appeals decision; 3) cases where a Court of Appeals decision conflicts with a prior Supreme Court decision; 4) cases where substantial constitutional issue are directly involved; and 5) cases involving a federal question when there is a conflict between a Court of Appeals’ decision and a United States Supreme Court opinion.”

In his petition, Appellant suggests the Court of Appeals decision conflicts with two prior cases decided by this Court, *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437, 441 (2014) and *North Carolina Federal Sav. And Loan Ass’n. Dav Corp.*, 298 S.C. 514, 318 S.E.2d 903 (1989); and (2) the Court of Appeals decision involves substantial constitutional issues, “which directly affect Mr. Whitfield’s right to a jury trial.” Thus, Appellant’s petition solely

relates to whether he is entitled to a jury trial on his civil conspiracy counterclaim interposed in an equitable foreclosure action against him.

Consistent with the Court of Appeals decision, as well as this Court's decisions in both *Blackburn* and *Dav Corp.*, it is well established under South Carolina law that he is not, since his civil conspiracy counterclaim is permissive.

Despite Whitfield's assertions, Whitfield does not identify *any* portion of the Court of Appeals decision that conflicts with this Court's precedent. Indeed, the Court of Appeals itself relied upon *Blackburn*, 407 S.C. at 328, 755 S.E.2d at 441, in finding Judge Goodstein properly struck the jury demand as it was indisputable that the civil conspiracy counterclaim was permissive.

“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), SCRCF.

Whether a counterclaim is compulsory or permissive is viewed through the logical relationship test, which this Court has explained:

“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).

In the current matter, the parties do not dispute that if Whitfield prevailed on his civil conspiracy counterclaim, it would not impact the enforceability of the Bank's note and mortgage

in any manner. 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 justification for the bank's failure to renew Mr. Whitfield's loans. (R. p. 168), not to affect the enforceability of the loan documents themselves. 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 suggests that the Bank's "advice of counsel" defense was its sole justification for renegeing on its obligation to renew the maturing loans." (App. Pet. For Cert. at Pg. 8) and now suggests that an alleged breach of an oral agreement to renew the loans by the bank somehow alters the nature of the civil conspiracy counterclaim against Swanson. (App. Pet. For Cert. at Pg. 8).

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.

Whitfield's allegations do not relate to whether or not the Bank relied on Swanson's advice in refusing to renew the loans. Whitfield alleges that the advice never occurred, i.e., the Bank's refusal to renew the loans and nothing to do with Swanson's advice.

Nonetheless, regardless of whether or not the Bank relied upon Swanson's advice, neither Swanson's advice nor any alleged false deposition testimony would alter the unambiguous terms of the note and mortgage-the instruments upon which the equitable foreclosure was premised. Whitfield admitted such during the course of the litigation.

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 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 Bank³.

³ Notwithstanding Whitfield's 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

In all respects, the civil conspiracy counterclaim has no relationship to the enforceability of the Bank's note and mortgage. Therefore, the Court of Appeals correctly held that under the *Blackburn* and *Dav Corp.* analysis, the civil conspiracy counterclaim was permissive. Therefore, Whitfield is not entitled to a jury trial as of right.

2. The Court of Appeals correctly held that, in light of Whitfield's settlement with the other parties', appeal of the bifurcation order is moot since only one cause of action remains in the litigation.

After concluding that the trial court correctly struck the jury demand on Whitfield's civil conspiracy counterclaim, the Court of Appeals declined to rule on the bifurcation issue because all other parties have settled their claims with Whitfield and the civil conspiracy cause of action is the only remaining claim in the case to be tried. (Appx. pp. 55-57). In other words, there will not be a trial between Whitfield and the Bank nor Whitfield and his ex-wife. The only trial to be held will be the claim that was bifurcated, which makes an appeal of the bifurcation order moot.

In his Petition, Whitfield appears to argue that the bifurcation order likewise forecloses Whitfield's right to a jury trial. However, Appellant does not cite, and Respondent is unaware of, any law or authority suggesting a bifurcated trial cannot be tried in front of jury.

Given that there remains only one trial to be conducted in the case, concerning a single cause of action against Respondent, there will not be separate trials. Therefore, the Court of Appeals correctly determined that the bifurcation issue was moot.

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.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that the Petition for Certiorari be denied in its entirety.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'D. Overstreet', written in a cursive style.

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