

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

Appellate Case No. 2022-001495

RECEIVED

Dec 05 2022

S.C. SUPREME COURT

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

PETITIONER'S REPLY
TO RESPONDENT'S RETURN TO
THE PETITION FOR WRIT OF CERTIORARI

Jesse Sanchez
98 ½ Broad Street, Suite B
Charleston, South Carolina 29401
(843) 814-8181

Daniel S. Slotchiver
Andrew M. McCumber
751 Johnnie Dodds Boulevard, Suite 100
Mount Pleasant, South Carolina 29464
(843) 577-6531

Brent Halversen
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, South Carolina 29464
(843) 284-5790

Attorneys for Petitioner Anthony Whitfield

Petitioner, through his undesignated counsel, hereby respectfully submits this brief Reply to Respondent's Return to the Petition for Writ of Certiorari.

Reply to Respondent's Factual Representations

As a preliminary matter, Respondent's Counter-Statement of the Facts notably misrepresents the Record in this case. Contrary to Respondent's contention, Mr. Whitfield's trial counsel **did not** concede at oral argument that the civil conspiracy counterclaim and foreclosure action were unrelated. The exact opposite is true. Mr. Whitfield's counsel specifically argued that the civil conspiracy counterclaim would indeed have an effect on the underlying foreclosure action:

Mr. Slotchiver: The **only defense** that the bank has presented to why they did not close is based on their allegation that came years later that they relied on advice that was given to them by Mr. Swanson, which for a variety of reasons is questionable whether or not it ever took place, and it's something we will argue. (R. p. 1175, lines 7-12, Emphasis Added)

and

This is a conspiracy action tied into a foreclosure lawsuit that's started, but this is a conspiracy action that's been filed against Mr. Swanson in this case. **And we believe it does impact the effectiveness of the foreclosure** because [...] the only reason they didn't renew the loan which would have precluded the foreclosure was based on the advice given to them by Mr. Swanson [...]. (R. p. 1177, lines 16-23, Emphasis Added)

In an apparent effort to avoid *Certiorari*, Respondent's Return goes so far as to inject words into the Record that are simply not there. For example, page 9 of Respondent's Return states "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.'" (Return, p. 9, referring to R. p. 1177, lines 15-16). Respondent's Return notably includes the words "the civil conspiracy counterclaim" in brackets for a reason: Mr. Whitfield's counsel never said these words. A review of counsel's actual statements demonstrate that he was not

referring to Mr. Whitfield's civil conspiracy counterclaim, but rather, the Bank's purported claim that the closing could have presented an equitable subordination concern:

Mr. Slotchiver: He gave advice on something that's, that's called -- it's coined equitable subordination concern. Although he, himself, agreed in his deposition that there are no literature, there's no notations, there's no, no articles, there's no case law supporting **an equitable subordination claim**. That's something that belongs in bankruptcy court; it doesn't belong in civil court. It's never been heard anywhere that he knows of. It's just theoretical it could be heard. (R. p. 1178, lines 2-10, Emphasis Added).

Respondent's Return not only mischaracterizes the arguments made by Mr. Whitfield's counsel at R. p. 1177, lines 15-16, but also conveniently ignores the very next sentences, cited *supra*, which set forth Mr. Whitfield's actual position: A) That the civil conspiracy counterclaim is tied into the foreclosure action, and B) That the civil conspiracy counterclaim directly impacts the effectiveness of the foreclosure (R. p. 1177, lines 16-23). In other words, there is a logical relationship between Mr. Whitfield's civil conspiracy counterclaim and the underlying foreclosure action.

Having addressed Respondent's Counter-Statement of Facts, Petitioner now turns to the enumerated arguments in Respondent's Return.

ARGUMENT

I. Special and important reasons exist for granting Mr. Whitfield's Petition for a Writ of Certiorari: A) The Court of Appeals' opinion directly conflicts with prior decisions of the South Carolina Supreme Court, and B) this case involves substantial constitutional and/or otherwise novel issues affecting Mr. Whitfield's right to a jury trial.

A. The Court of Appeals' opinion directly conflicts with this Court's prior decisions.

Contrary to Respondent's contention, Mr. Whitfield's Petition raises special and important issues warranting review of the Court of Appeals' unpublished opinion under Rule 242(b), SCACR. Specifically, the Court of Appeals' unpublished opinion directly conflicts with this Court's decisions in *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014), and *North*

Carolina Federal Sav. and Loan Ass'n v. Dav Corp., 268 S.C. 514, 381 SE.2d 903 (1989).

Under *Blackburn*, “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. As set forth in Mr. Whitfield’s Petition and Final Briefs, there is a logical relationship between Mr. Whitfield’s civil conspiracy counterclaim and the underlying foreclosure action because proving civil conspiracy would affect the Bank’s ability to enforce the note and foreclose the mortgage. Indeed, the Bank’s “advice of counsel” defense was its sole justification for reneging on its obligation to renew the maturing loans and pursuing the foreclosure. (Appellant’s Final Brief at App. p. 7; R. at p. 98). Had the Bank not reneged on its obligation, the underlying note would not have matured and the foreclosure action would never have ensued.

The Court of Appeals’ opinion also directly conflicts with this Court’s decision in *North Carolina Federal Sav. and Loan Ass'n v. Dav Corp.*, 268 S.C. 514, 381 SE.2d 903 (1989), wherein this Court held that a Defendant’s counterclaim in a mortgage foreclosure action was compulsory where the Defendant had (as in the present case) alleged the Bank breached an agreement to modify the terms of the original loan and provide additional financing. (Appellant’s Final Brief at App. pp. 14-15). “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 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).

Respondent's Return alleges that Mr. Whitfield's civil conspiracy counterclaim is permissive rather than compulsory because "the parties do not dispute that if Whitfield prevailed in his civil conspiracy counterclaim, it would not impact the enforceability of the Bank's note and the mortgage in any manner." (Return at p. 11). Respondent's purported argument is unfounded and directly contradicted by the Record. As set forth in the *Reply to Respondent's Factual Representations* section, *supra*, Respondent's argument is based on his mischaracterization of the Record. Mr. Whitfield **did not concede** that the civil conspiracy counterclaim and underlying foreclosure action were unaffected by each other. The exact opposite is true: Mr. Whitfield specifically argued that the civil conspiracy counterclaim is "tied into a foreclosure lawsuit" and that it "does impact the effectiveness of the foreclosure." (R. p. 1177, lines 16-23). Clearly, if Mr. Whitfield shows the trier of fact that the only reason the bank did not close the loans was because of purported advice that was **never** actually given by Mr. Swanson, then the bank could not have instigated the foreclosure proceedings.

Respondent's Return further contends that the Court of Appeals properly relied on *Blackburn* in rendering its decision. Notwithstanding the conclusory nature of this argument, the argument still fails because the Court of Appeals did not *apply* the law in *Blackburn* and/or *North Carolina Federal Sav. and Loan* to the particular facts of this case:

Specifically, it is undisputed that the civil conspiracy counterclaim asserted by Mr. Whitfield against Respondent is a legal claim and that the foreclosure action is equitable in nature. The sole controversy surrounding civil conspiracy counterclaim stems from whether the civil conspiracy claim 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 Petition and Final Briefs, 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's Return contends that there is no logical relationship between Mr. Whitfield's civil conspiracy counterclaim and the underlying foreclosure action because the alleged conspiratorial acts may have occurred sometime after June 28, 2012 (i.e. after the scheduled closing fell through). Respondent's argument is flawed on its very face. It is of absolutely no consequence whether Mr. Swanson conspired with the Bank to manufacture a bogus defense before *or* after the closing date. Under either scenario, the 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 the Bank's pursuit of a foreclosure action which in this case was filed on September 7, 2012.* The 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 against him and only raised the advice of counsel defense over a year after the foreclosure action was filed.

A finding that Respondent conspired with the Bank's representative to manufacture a bogus defense—even after the scheduled closing date had passed—would clearly affect the Bank's ability to subsequently enforce the note and foreclose on the mortgage because this was, again, the Bank's *sole* justification for reneging on the agreement and pursuing a foreclosure action in the first place.

Accordingly, a logical relationship exists between Mr. Whitfield's civil conspiracy counterclaim and the foreclosure action itself.

Special and important reasons exist for granting Mr. Whitfield's Petition for a Writ of Certiorari because the Court of Appeals failed to apply the law in *Blackburn* and *North Carolina Federal Sav. and Loan Ass'n* to the facts in this case. The Court erred in holding that the civil conspiracy counterclaim was permissive rather than compulsory where the complaint is undisputedly equitable, the counterclaim is undisputedly legal, and where the legal counterclaim would clearly have an effect on the underlying equitable action. As noted throughout Mr. Whitfield's Petition and Final Briefs, "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) (Emphasis added).

The Court of Appeals erred in holding that Mr. Whitfield is not entitled to jury trial as of right on his civil conspiracy counterclaim. Accordingly, Petitioner respectfully submits that this Court should grant his Petition for Writ of Certiorari, reverse the Court of Appeals' unpublished opinion, and remand this case for a jury trial on the civil conspiracy counterclaim.

B. This appeal involves substantial constitutional and/or otherwise novel issues affecting Mr. Whitfield's right to a jury trial.

Respondent's Return notably fails to set forth even a single counterargument as to Petitioner's argument that Mr. Whitfield is entitled to a jury trial under Rule 42(b), SCRPC. As noted in Respondent's Petition and Final Briefs, Rule 42(b), SCRPC 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 Petitioner asserts that it is not—the subject order fails to preserve Petitioner’s right to a jury trial on the civil conspiracy counterclaim. Accordingly, pursuant to the criteria set forth by this Court in *Blackburn* and *North Carolina Federal Sav. and Loan Ass’n*, Petitioner respectfully submits that this Court should grant his Petition for Writ of Certiorari, reverse the Court of Appeals’ unpublished opinion, and remand this case for a jury trial on the civil conspiracy counterclaim.

II. Petitioner’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 A) Improperly referring the civil conspiracy counterclaim to a bench trial, and B) Denying Petitioner of his right to a jury trial.

Respondent’s Return confoundedly claims that “Respondent is unaware of, any law or authority suggesting a bifurcated trial cannot be tried in front of jury,” somehow intimating that the Court of Appeal’s opinion does not expressly deprive Mr. Whitfield of his right to a jury trial (Return, p. 14). The Court of Appeal’s opinion, however, specifically affirms the lower court’s order, *striking* Mr. Whitfield’s jury demand and referring the case to a *bench trial*. (Appendix, p. 56). “Mr. Whitfield is not entitled to jury trial as of right on his civil conspiracy counterclaim [...] the civil conspiracy counterclaim shall be tried by non-jury trial.” (R. at p. 14).

Further, as Respondent concedes, “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.” (Return at 14). This begs the question, why should Mr. Whitfield be deprived of his right to a jury trial where A) both parties specifically demanded a jury trial on the issue and, B) the only remaining cause of action is undisputedly legal rather than equitable 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.” Petitioner respectfully submits that the Court of Appeals erred in finding that the bifurcation issue is moot where the order of reference clearly affects the mode of trial and specifically denies Petitioner his right to a jury trial. 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), SCRCF. Accordingly, Petitioner respectfully submits that this Court should grant his Petition for Writ of Certiorari, reverse the Court of Appeals’ unpublished opinion, and remand this case for a jury trial on the civil conspiracy counterclaim.

CONCLUSION

Based on the forgoing, Petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari, reverse the Court of Appeals’ unpublished opinion, and find that Petitioner has a right to a jury trial on his civil conspiracy claim pursuant to the criteria set forth in *Blackburn* and *North Carolina Federal Sav. and Loan Ass’n*. Mr. Whitfield 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 the Bank’s ability to enforce the subject note and foreclose the mortgage. In addition, Mr. Whitfield’s settlement with the 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 Petitioner of his right to a jury trial.

[Signature on following page]

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/ Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

98 ½ Broad Street, Suite B

Charleston, SC 29401

(843) 814-8181

jesse@jessesanchezlaw.com

SLOTCHIVER & SLOTCHIVER, LLP

Daniel S. Slotchiver

Andrew M. McCumber

751 Johnnie Dodds Boulevard, Suite 100

Mount Pleasant, South Carolina 29464

(843) 577-6531

dan@slotchiverlaw.com

andrew@slotchiverlaw.com

HALVERSEN & HALVERSEN, LLC

Brent S. Halversen

751 Johnnie Dodds Blvd., Suite 200

Mount Pleasant, South Carolina 29464

(843) 284-5790

brent@halversenlaw.com

Attorneys for Petitioner Anthony Whitfield

December 5, 2022
Charleston, South Carolina