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Jun 29 2023

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Hon. Bentley D. Price  
Circuit Court Judge

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Appellate Case No. 2021-000504

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

V.

Rex A. Field, Tracy L. Field, Dulamo Estates Home Owner's Association, Inc., Defendants of whom Rex A. Field and Tracy L. Field are the Appellants.

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**PETITION FOR REHEARING**

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This Petition is filed pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. Rule 221 governs rehearing. Rule 240 governs motions and petitions generally.

Respondents, Rex A. Field and Tracy L. Field, *pro se*, (hereinafter "Appellants"), respectfully petitions this Court for rehearing and reconsideration of the Court's June 14, 2023 Opinion in Wilmington Savings Fund Society FSB, not in its individual capacity but solely as owner trustee for CSMC 2018-RPL6 Trust v. Rex A. Field, Tracy L. Field, Dulamo Estates Home Owner's Association, Inc., Defendants Of whom Rex A. Field and Tracy L. Field are the Appellants, Op. No. 2023-UP-239 (Ct. App. Filed June 14, 2023) (hereinafter the "**June 2023 Opinion**") based on facts, points, and arguments overlooked or misapprehended as set forth herein.

This Court issued the decision in this matter. Appellants received this Court's Opinion No. 239 on June 14, 2023. This petition is therefore timely. See Rule 221(a), SCACR.

By Petition for Rehearing, Appellants wishes to incorporate by reference all the arguments and records made before the Court and contained in their briefs. Appellants strongly but respectfully disagrees with the decision to affirm the lower court's decision.

## INTRODUCTION

Appellants brought this appeal seeking to overturn the lower court's determination on the grounds that Judge Price's (April 15, 2021) interlocutory Form-4 Order (*vol. I, pg. 14*) jury strike was improper, premature, error of law, and an abuse of discretion. The operative pleading at the time for Judge Price's Order was the "First Amended Answer, Affirmative Defenses, and Counterclaims filed on (March 25, 2021) containing (9) nine counterclaims (*vol. II, pgs. 456-605*). The pleadings were not closed at the time and remain open. The Defendants/Appellants have until (10) ten days after the pleadings have closed to request a jury trial, that time has not lapsed. The Notice of Appeal (*vol. II, pg. 453*) of Judge Price's jury strike Order to the South Carolina Court of Appeals was filed on (May 13, 2021), the proceeding in circuit court marched forward since that time. On (August 26, 2021), a different circuit court judge, The Honorable Robert J. Bonds, granted "Motion to Amend" (*vol. II, pgs. 686-687*) granting the Defendants' Second Amended Answer, Affirmative Defenses, and (11) eleven counterclaims, (9) nine amended counterclaims and (2) two new counterclaims (*vol. II, pgs 703-816*) whereby the first amended pleading was amended by the second amended pleading **in its entirety** granted by Judge Bonds on (August 26, 2021) via Order (*vol. I, pgs. 29-34*) which is now the operative pleading in circuit court superceding the first amended counterclaims rendering the pleading relating to Judge Price's jury strike moot, thus, rendering the June 2023 Opinion moot. A subsequent jury trial demand is embedded in the second amended answer granted by Judge Bonds. (*vol. II, pg. 814*) Judge Bonds on (August 26, 2021) via Order (*vol. I, pgs. 29-34*) denied Plaintiff's/Respondents Motion

to Dismiss Defendants' counterclaims, denied Plaintiff's Motion for Summary judgment, and granted Defendants' discovery which is in the early stages and currently pending. (*transcript vol. IV, pgs. 1676-1818*) This Court failed to properly address this issue along with the other issues raised on appeal. This Court should have properly evaluated the circumstances, reversed the lower court's rulings, and remanded.

## ARGUMENT

**THIS COURT IMPROPERLY DETERMINED THAT THE CIRCUIT COURT PROPERLY DETERMINED THAT THE APPELLANTS WERE NOT ENTITLED TO A JURY TRIAL BECAUSE THE COUNTERCLAIMS WERE PERMISSIVE RATHER THAN COMPULSORY**

### ARGUMENTS OF COUNSEL ARE NOT EVIDENCE

Arguments of counsel are not evidence. *Trivelas v. S.C. Dept. of Transportation*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); *Higgins v. MUSC*, 326 S.C. 592, 599 S.E.2d 269, 272 (CL App. 1997); *Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). **Arguments of counsel were all that supported the Plaintiffs' position on their Motion to Strike the Defendants' jury demand.** At the April 15, 2021 motion hearing before Judge Price, counsel for the Plaintiff did not present any documents or evidence to support their position. Judge Price relied upon arguments of opposing counsel by assuming those arguments were facts, when in fact, those arguments have been subsequently proven to be inaccurate by Judge Bonds Order and denial of the Plaintiff's Motion for Summary judgment, denial of Plaintiff's Motion to Dismiss Defendants' counterclaims (*transcript vol. IV, pgs 1676-1818*), and discovery that has not yet completed. It has been proven that, and the evidence in the record now shows that the Defendants/Appellants were not (9) nine months delinquent on any payments to the Plaintiff as the opposing counsel had argued, in fact. The Defendants were not in default at all. The Plaintiff has no injury, the Plaintiff has no standing, and is not the real-party-in-interest.

**THIS COURT IMPROPERLY DETERMINED THAT THE CIRCUIT COURT PROPERLY DETERMINED THAT THE APPELLANTS COUNTERCLAIMS WERE NOT ENTITLED TO A JURY TRIAL BECAUSE THE COUNTERCLAIMS WERE NOT COMPULSORY BECAUSE THE COUNTERCLAIMS DO NOT ARISE OUT OF THE SAME TRANSACTION OR OCCURENCE AS THE PLAINTIFF'S CLAIMS BECAUSE THERE IS NO "LOGICAL RELATIONSHIP" AND THE ENFORCEABILITY OF THE GUARANTY AGREEMENT**

Judge Price's (4/20/2021) interlocutory Form 4 Order (*vol. I, pg. 14*) states:

“Plaintiff Wilmington Savings Fund Society FSB not in its Individual capacity Motion to Strike Demand for Jury Trial is granted” **and nothing more.** The Order further states: “Plaintiff’s Motion to Dismiss Amended Answer, Counterclaim and Third Party Complaint and Defendants Motion to Join Third-Party Defendants will be heard at a later date” **and nothing more.** Judge Price gives no explanation as to why the Defendants/Appellants jury demand was stricken. During the April 15, 2021 hearing, Judge Price did not evaluate the Defendants'/Appellants' first amended (9) nine counterclaims (*transcript vol. IV, pgs 1602-1629*). Subsequently, Judge Bonds on (August 26, 2021) via Order (*vol. I, pgs. 29-34*) granted “Motion to Amend” (*vol. II, pgs. 686-687*) granting the Defendants' Second Amended Answer, Affirmative Defenses, and (11) eleven counterclaims, (9) nine amended counterclaims and (2) two new counterclaims containing a jury trial demand (*vol. II, pgs 703-816*) Defendants/Appellants Second Amended counterclaims are now the operative pleading in circuit court superceding the first amended counterclaims as moot, thus, rendering Judge Price's jury strike moot, thus, rendering the June 2023 Opinion moot.

This Court overlooked the Second Amended counterclaims as the current operative pleading in circuit court that contain counterclaims that are compulsory, counterclaims subsequently granted by Judge Bonds via Order on August 26, 2021. This Court misapprehended Appellants arguments in error the circuit court struck defendant's jury demand failing to first engage in logical relationship test under the supreme court precedent of *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). Appellants allege error where the court failed to evaluate whether defendants' pending amended counterclaims were compulsory or permissive prior to referring the case to the non

jury status. (*transcript IV, pgs. 1602-1629*) Judge Price improperly relied on opposing counsel's arguments as if they were evidence that have subsequently been proven inaccurate. Thus, this Court has improperly relied on opposing counsel's arguments as evidence. This Court is now improperly relying on the first amended counterclaims which are no longer the operative pleading.

**DEFENDANTS'/APPELLANTS' HAVE REPEATEDLY CHALLENGED THE ENFORCEABILITY OF THE PLAINTIFF'S CLAIMS AND ALLEGED DOCUMENTS IN THE RELEVANT OPERATIVE PLEADING SECOND AMENDED COUNTERCLAIMS, GENERAL ALLEGATIONS, AND AFFIRMATIVE DEFENSES (*vol. II, pgs 703-816*)**

**RESPONDENT FAILED TO OFFER ANY PROPERLY ADMISSIBLE EVIDENCE IN SUPPORT OF THEIR MOTION TO STRIKE DEFENDANTS' JURY DEMAND**

On August 26, 2021 via Judge Bonds Order, Defendants'/Appellants' Second Amended counterclaims were **granted**, Plaintiff's/Respondent's Motion for Summary judgment was **denied**, and Plaintiff's/Respondents' motion to dismiss counterclaims was **denied**, and Defendants'/Appellants' discovery was granted and still pending. The pleadings have not closed in circuit court.

**DEFENDANTS AT-LAW COUNTERCLAIMS FALL SQUARELY WITHIN THE PURVIEW OF THE CONSTITUTIONAL MANDATE THAT THE RIGHT TO A JURY BE PRESERVED INVIOULATE**

Defendants' at-law counterclaims fall squarely within the purview of the constitutional mandate that the right to jury be preserved inviolate. S.C. Const. Art. I §14. What the constitution so provides the trial court should not take away, particularly if it fails to perform a logical relationship test before ruling. *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). This occurs despite the court being advised by Wilmington counsel as to yet un-determined character of counterclaims at-law. (R. p. 1626 at 11-15). Appellants respectfully assert that, in error, the trial judge strikes jury demand where discovery was yet pending, denying mode of trial to defendants irrespective of what discovery may ultimately reveal. Defendants, in fact, allege both standing and that Plaintiff may not be the real party in interest in their affirmative defenses. (R, p. 1607 at 19-24). Discovery was (and at this time remains) pending. Defendants were granted discovery, but behind circuit court Form-4

order strike of their jury trial demand. (R. p. 14). The strike is premature and erroneously infers waiver by defendants. No logical relationship test at law was conducted by circuit Judge Price before the strike. (R. p. 1626 lines 11- 16). Rather, the strike is premature. This is a case where defendants have twice endured compulsory reference by the courts without a circuit judge first passing upon and evaluating merit and nexus of counterclaims at law, under the logical relationship test set forth in DAV. Appellants assert that it was abuse of discretion and error of law to strike the defendants' demand for jury under these circumstances. The case should respectfully be reversed and/or deem the First Amended counterclaims (operative pleading at the time of the jury strike) as moot and remanded to the circuit court for additional fact finding to evaluate the now (11) eleven Second Amended Counterclaims (operative pleading now) by the lower court returning the case to the general roster preserving the Field's right to trial by jury inviolate.

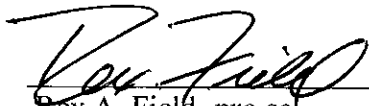
### **CONCLUSION and PRAYER**

Appellants respectfully assert that ruling of the circuit judge is abuse of discretion controlled by error of law, ignoring Supreme Court precedent and the holdings of this court. The error of law is failure to engage in the logical relationship test prior to striking a jury demand of at-law counterclaims; (even if the at-law counterclaims were brought in a foreclosure action). (R. p. 1626). In the case at bar this occurs by Form-4 Order, with the trial courts making absolutely no factual findings or conclusions of law. Amended counterclaims filed of record are not addressed under a logical relationship test analysis.

During the Plaintiff's/Respondent's Motion for Summary hearing with Judge Bonds on August 12, 2021, the Defendants/Appellants proved that they were not in default or behind on any alleged payments. Defendants/Appellants have proven that the Plaintiff/Respondents have no injury, and that it is simply a rogue effort to collect on a unsecured alleged debt that does not meet the prerequisites of a foreclosure. The Plaintiff/Respondent has failed to establish or prove a right to foreclose The ruling

ultimately disregards defendants' constitutional right to trial by jury, wrongfully. The ruling does so by omitting logical relationship review pursuant to N.C. Fed. Say. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). It is controlling error of law and abuse of discretion. Appellants respectfully assert they are entitled to a jury trial on their first amended counterclaims and now, the second amended counterclaims that have yet to be evaluated. This court should reverse and remand accordingly.

Respectfully submitted,



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**PROOF OF SERVICE**

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I certify that I have served the foregoing Petition for Hearing on the date given below by emailing it to counsel for the Respondent(s) and all other counsel of record in the underlying action at the address(es) noted below.

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June 29, 2023

Respectfully submitted

  
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