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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Hon. Bentley D. Price
Circuit Court Judge

Appellate Case No. 2021-000504

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

v.

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

APPELLANTS' MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER, ALTER OR AMEND

Appellants received the Order of this court June 14, 2023. This motion and memorandum is filed pursuant to Rule 221 and Rule 240 of the South Carolina Appellate Court Rules pertaining to the June 14, 2023 Order Affirming the lower court strike of defendants' jury demand. Appellants respectfully seek reversal and remand, and assert that affirming the lower court's order that Plaintiffs' counterclaims were permissive was misapprehended and failed to consider the correct operative pleadings where no logical relationship test had occurred before jury strike. Appellants assert jury strike was premature, not predicated on incomplete discovery but rather predicated upon pleadings not having fully closed, and the Field aver legal error by failing to apply any logical relationship testing. By this petition for Reconsideration, Appellants wish to incorporate by

reference all arguments and documents of record properly submitted to this court and contained in Appellant's memorandum, briefs and the Record on Appeal. Appellants seek remand and assert that as a matter of law they were entitled logical relationship test application prior to strike of jury demand and prior to determination that their claims were permissive vs. compulsory. Appellants cite the Supreme Court jurisprudence *First Citizens Bank & Tr. Co of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991) in support. No such logical relationship was performed under pleadings prior to jury strike affecting mode of trial. The April 15, 2021 jury strike by Judge Price was prejudicial error and abuse of discretion not supported by any record evidence. Reversal is sought particularly in light of ruling of Judge Robert J. Bonds, August 26, 2021 granting defendants' right to file Third-Party Complaint and second amended counterclaims. Appellants assert reversal and remand is therefore necessary. The nexxus of logical relation within the counterclaims should be examined prior to striking the Fields' mode of trial; not strike of the jury demand and forwarding approval or disapproval of pending amended pleadings by another judge to now (post strike) to apply logical relationship testing mandated by *First Citizens, supra.* (citations omitted). Pursuant to *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321(2014) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to jury trial. Whether the amended counterclaims were permissive cannot follow without logical relationship test pursuant to *First Citizens, supra.* It is placing the cart before the horse. It is presumptive and in this case not supported by application of logical relation test, nor evidence under amended pleadings.¹ *The Carolina First Bank v. BADD, LLC*, 414 S.C. 295, 778 S.E.2d 109 further sets forth ..[d]etermining a party "is entitled to a jury trial on h[er] counterclaims in an

¹ Appellants do not assert issue with footnote #1 of the court opinion discussing discovery having not been completed, although they believe this to be the case. By contract, Appellants assert reversible error where amended pleadings were not closed, and this issue properly raised before Judge Price. (R. p. 1643 at 10- R. p. 1644 at 8 (Vol. IV).

equitable action only if the counterclaims are legal and compulsory”. *Id.* If the Complaint is equitable and the counterclaim legal and compulsory, the defendant has a right to jury trial on the counterclaim.” *Johnson v. South Carolina Nat. Bank*, 292 S.C. 51, 52, 354 S.E.2d 95 (1987). Where, as here, a complaint is equitable and the counterclaim is legal and compulsory, the trial judge has two options. He may either order separate trials pursuant to 42(b) SCRCF or may order the claims tried in a single proceeding. In making this determination, caution should be taken to ensure 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.*, 354 S.E. 2d at 897. “The test for determining if a counterclaim is compulsory is whether there is a “logical relationship” between the claim and the counterclaim. *N.C. Fed. Sav. & Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989).

To date, Appellants have affirmatively asserted *three* demands for trial by jury. To date, no logical relationship analysis has occurred by any sitting circuit court judge. No bifurcation order under Rule 42 is requested by Plaintiff motion but is the de-facto effect of the Order. The logical relation analysis espoused in DAV, supra, is entirely omitted from April 20, 2021 Form-4 Order of Judge Price. Even had the Form-4 properly made findings of fact or conclusions of law, the Order of this Court would not be based upon the correct operative pleadings; it also ignores record evidence substantiating Appellants' counterclaims which the Fields aver are compulsory, not permissive. Appellant's right to trial by jury is entirely foreclosed by Judge Price's Form-4 Order striking jury demand before the pleadings or discovery effectively close. Appellants respectfully assert under de novo review and that the Court of Appeals should Reverse and Remand; That the Fields' right to trial by jury should stand inviolate where they were denied application of logical relationship test as to the claims and counterclaims. Appellants aver the logical relationship test should have occurred prior to any strike of jury demand affecting mode of trial where they have

never impliedly waived their right to trial by jury. By contrast, the Fields have at all times expressly demanded trial by jury asserting counterclaims that are compulsory. Lastly, under de novo review Appellants respectfully aver that Judge Price's strike of jury demand with no logical relationship analysis exceeded the scope of Wilmington's motion to strike, as the ruling is based on oral arguments and not supported by information in evidence, erroneously effecting de-facto bifurcation and failing to observe that the Field's right to jury trial on counterclaims should have been preserved inviolate.

STANDARD OF REVIEW

[W]hether a party is entitled to a jury trial is a question of law "which an appellate court reviews de novo". In an action in equity, tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. An order denying a compulsory reference of the issues affects the mode of trial and is immediately appealable. *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978). Issues regarding mode of trial must be raised in the trial court at the first opportunity. *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 431 S.E.2d 587 (1993). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." When deciding whether a claim is compulsory under Rule 13(a) SCRPC, South Carolina Courts apply the "logical relationship" test. *First Citizens Bank & Tr. Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). Normally, "[t]he matter of striking from a pleading . . . is largely within the discretion of the trial judge" such that "[t]he granting ..of a motion to strike..will not be reversed except for an abuse of discretion or unless the action of the trial judge was controlled by error of law." *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975).

“However, whether a party is entitled to a jury trial is a question of law,” and [a]n appellate court may decide questions of law with no particular deference to the trial court.” *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771, 772-73 (2010). It is proper to view a motion to reconsider, alter or amend not only as a vehicle to request the court alter or amend the judgment, but also as a vehicle to request reconsideration of issues and arguments. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 21-22, 602 S.E.2nd 772, 778-79 (2004).

ARGUMENT

Reversal is required when the trial court’s ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner*, 257 S.C. 544, 549-50, 186 S.E.2d 523, 526 (1972). Appellants respectfully aver the Court of Appeals misapprehended no logical relationship analysis had ever occurred and respectfully not, specifically, focused on the correct operative pleadings. That in lower court, it was abuse of discretion and error of law for Judge Price not to have engaged in a logical relationship analysis prior to or at the time of action striking defendants’ jury demand, and it was reversible error to exceed the limit and scope of the motion before the court. Skinner, *supra*, at 549-50. Appellants further take exception to the lower court’s severance and forward of pending amended pleadings from what should properly have occurred, application of the logical relationship test to the claims and counterclaims. Appellants assert this is particularly the case where the strike of jury demand was without supporting evidence pursuant to *First Citizens Bank & Tr. Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 223 (1991). Appellants assert and concede the question at law centers over error of law pertaining to nexus of counterclaims and

third-party complaint to enforceability. In a foreclosure, the right to enforce the security instrument necessarily involves standing.

As correctly cited by plaintiff counsel in oral argument “In this case the Plaintiff has to show that the Fields signed the note and mortgage; that they entered into a valid transaction; they have to show that the *loan is in default*, that the Fields haven’t made all their payments; and they (*sic) will have to show that Plaintiff has *standing* (*sic) to enforce the note.” (R. p. 1610). Under Judge Price’s Order, the Fields have no opportunity under mode of trial demand to refute standing and/or enforceability by the Plaintiff (or any entity named) where no logical relationship testing occurred. The amended counterclaims refute Wilmington’s primary claim, and the burden of proof thus shifted to the Plaintiff not to simply assert, but to confirm for the court with substantiating evidence, ownership, and standing.

REVIEW OF OPERATIVE PLEADINGS

The amended counterclaims are raised by the Fields in their first and second amended pleadings. (R. p. 70); (R. p. 285); (R.p.456)It is raised after the Fields have complied with loss mitigation, concealed from the court, whether inadvertently or not. (R.p.1126). This is why Appellants assert the Court of Appeals should (where pleadings were not closed) have looked to the Order of Judge Robert Bonds (R. p. 29-34), and not the hearing and Form-4 Order of Judge Bentley Price. (R. p. 14). The strike of jury demand was without logical relationship testing was premature, and premised on the length of time the case has been litigated and on the jury roster of cases. Judge Price is most unfamiliar with the case history, confirming he is not “assigned to the case.” (R. p. 20). Jury strike occurs where no logical relationship analysis by any sitting judge. No less than three jury demands were made by the Fields of record. The appellants respectfully assert this is a foreclosure action, yes; a debt collection, specifically, having compulsory (not permissive)

counterclaims affecting standing, note ownership, and enforceability. That said amended counterclaims require a logical relationship test be conducted predicated on most recent court-approved pleadings.

Appellants aver it is misapprehended by the Court of Appeals that this should have necessarily occurred before any jury strike, or action at law that would affect mode of trial, under *Carolina First Bank vs. BADD, LLC* 414 S.C. 295, 778 S.E.2d 109 (2023). Appellants respectfully assert the Court of Appeals erroneously affirms false and wrongfully inferred involuntary Waiver by the Fields. This occurred where their counterclaims would affect enforceability, specifically, and were proven compulsory. By way of example, engagement in loss mitigation rejected prior to alleged default, if true, would affect enforceability. (R. p. 1124-1126, Vol. III). Defendants' allegations of violation of SCUTPA would likewise trigger compulsory review. By further example, the Fields filed Exhibits A-H in the record challenging that the subject loan was by virtue of trust indenture prohibition, by Fannie Mae (FNMA), from being sold or hypothecated. (R. P. 24 at 22-24, Vol. III). Nonetheless, no logical relationship analysis occurs prior to Strike of jury demand. The Fields had submitted evidence of recorded assignments showing "Christiana Trust" as owner-trustee, not Plaintiff whether in its individual capacity or trustee. (R. p. 1620 at 12-17, Vol. IV). Three separate distinct corporate entities purporting to be owner-trustee for a Fannie Mae (FNMA) CSMC 2018-RPL6 Trust. *Id.* Standing to enforcement is directly and expressly raised before the court. (R. p. 1622 at 13-15, Vol. VI).

Plaintiff's motion does not request bifurcation. Judge Price merely strikes counterclaim, but in effect de-facto bifurcation has occurred. "Defendants motion to joint third-party defendants will be heard at a later date". (R. p. 14 Vol. I). The later date becomes August 12, 2021 before Robert Bonds. Bonds finds "*There is good cause to grant Defendant's Motion to Amend seeking to file the*

Second Amended Answer, Counterclaims and Third Party Complaint. ¶(4) goes further, “Plaintiff and Third-Party Defendants have failed to show good cause to dismiss the Defendants’ Counterclaims and Third-Party Claims, and the motion to dismiss these claims is denied.” (R. p. 30 at ¶(3) and (4), Vol. I.)

I. OPERATIVE PLEADING

Judge Price assigns review of amended pleadings to another term after strike of jury demand, resolved by Order of Judge Bonds filed August 26, 2021. Appellants respectfully assert the operative pleading that this court should have reviewed de novo by this court is the August 26, 2021 Order of Judge Robert Bonds. (R. p. 29-34 Vol. I), not the Form-4 Order of Judge Price. (R. p. 14, Vol. I). Price's Order makes no findings of fact and omits any logical relationship test as between the defendants' counterclaims and the Plaintiff's cause of action for foreclosure. (Id.) It merely strikes the Demand for Jury “*Plaintiff Wilmington Savings Fund Society FSB not in its individual capacity's motion to Strike Demand for Jury Trial is Granted.*” (Id.).

The ruling at law is in haste; not substantiated by logical relationship application, and unsupported by evidence. It is only supported by arguments of legal counsel and/or the defendants, which are not evidence. (*Trivelas v. S.C. Dept. of Transportation*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001). Respectfully, Judge Price further kicks the can down the road by ruling “Plaintiff's Motion to Dismiss Amended Answer, Counterclaims, and Third Party Complaint and Defendant's Motion to Join Third-Party Defendants will be heard at a later date. Appellants respectfully assert fairness and proper justice is sacrificed upon the alter of the immediate by Judge Price, and this court should reverse and remand for findings by the trial court requiring application of logical relationship test before any strike of mode of trial demand. Appellants assert they were entitled to at law analysis under the logical relationship test set forth by the Supreme Court in *First*

Citizens Bank & Tr. Co. of S.C. v. Hucks, 305 S.C. 296 (1991) before a strike of their jury demand. To do otherwise violates the constitutional rights of the Fields to jury trial to be preserved inviolate and is no different than procedural imposition of a compulsory reference against defendants prior to service of pleading being effected upon them, an error corrected by Master in Equity in Beaufort. (R. p. 8; R. p. 51). It would not serve judicial economy for yet another circuit judge to have to engage in review of contested motions related to yet another remand; Appellants respectfully aver the jury strike was abuse of discretion controlled by legal error, which the Court of Appeals should reverse and remand. “In a foreclosure action, a counterclaim arises out of the same transaction or occurrence and is thus compulsory, there is a logical relationship between the counterclaim and enforcement of the guaranty agreement.” *Carolina First Bank v. BADD, LLC* 414 S.C. at 295, 778 S.E.2d at 109 (2023).

II. MODE OF TRIAL ISSUES.

Appellants assert no judicial determination of whether their counterclaims were permissive or compulsory through failure to apply logical relationship analysis occurred under Judge Price or Judge Bond’s Orders. Rather, the Court of Appeals Affirms the Form-4 of Judge Price, which made no conclusions of law predicated on logical relation test application and was wholly unsupported by any record evidence. It looked to no amended pleadings or existing exhibits as to whether the defendants' counterclaims had a logical relationship to enforceability, arising (or not arising) under common nucleus of operative fact. “An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support”. The error of law in the trial court is failure to engage in logical relationship test as to the claims and counterclaims before striking the Fields’ jury demand and before *severance* and shifting/forwarding review of amended pleadings to another court Judge. The abuse of discretion

in the trial court is where jury strike occurred without logical relationship test application whatsoever, presuming implied waiver where compulsory claims exist as set forth in *Carolina First Bank*, supra. The Price court is more concerned with nexus of the fact a jury trial demand foreclosure case had so long been pending on the circuit roster. Moreover, Judge Price overly focused on the Fields length of not making payments, yet ignoring loss mitigation efforts by the Fields, primarily. “I have a feeling we are going to be right back here in five months and they are still going to be alleging that any type of foreclosure proceeding are stayed, *therefore I assume they’re not making any payments on the house currently....*” (J. Bentley Price, R. Vol. IV, p. 1599 at 13.) When was the last time they *made a payment* on the home ?” (R. p. 1607 at 15) Judge Price notes the simplicity of discovery in the case not yet produced by Plaintiff “I assume the discovery would be minimal at best...*I mean there’s two pieces of paper (*sic)*” *Id.* There is a reason: The Fields’ amended counterclaim and Third-Party Complaint challenges standing and enforceability, where Judge Bonds approves Third-Party complaint naming all persons within the chain of assignments. At the relevant time of strike, it is the defendants’ (not Plaintiff’s) right to jury that is stricken by trial court order. The Supreme Court in South Carolina had made clear that “We agree and hold that both plaintiffs and defendants have a right to a jury trial of issues related to compulsory legal counterclaim interposed in an equitable action. *Johnson v. S.C. National Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987).

III. DE NOVO REVIEW BY COURT OF APPEALS:

Appellants respectfully assert Remand is proper where under de novo review, the Court of Appeals misapprehended the strike occurs prematurely and predicated upon the wrong operative pleadings and case authority. The Fields further assert the haste to ruling upon a singular issue absent of logical relationship analysis, mere elimination of jury demand, was abuse of discretion

where no logical relationship test was applied. Judge Price improperly foreclosed the Fields' jury demand where no supporting evidence; Only arguments of the parties on record. 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)). Only argument of the parties supported the Plaintiff motion to strike. The core question is whether the trial court wrongfully did strike mode of trial demand, and this court affirmed in error misapprehending defendant's claims not compulsory, where no application of the logical relationship test occurred. Below, defendants had never expressly or impliedly waived mode of trial demand. When viewed through lens of counterclaims nexxus to enforceability by looking to the correct operative pleading under logical relationship test, Appellants assert Reversal and Remand becomes necessary or the error pervades substantial justice through the remainder of the case. Appellants assert that viewing the Order of Judge Bonds (R. p. 29-34), de novo, did any counterclaims pleaded by defendants trigger the need for logical relationship under the authority of *First Citizens Bank & Tr. Co. of S.C. v. Hucks* (citations omitted), supra, going direct to the nature of counterclaims. Appellants respectfully assert this is the case, like given the lack record evidence available at the August 12, 2021 hearing. No documentary evidenced supported Judge Price's Form-4 Order of April 20, 2021. As to documentary evidence not yet submitted by Wilmington, who has the burden of proof upon refute by the Field's rebuttal counterclaims, it is hide-the-ball tactic in light of denial of attempts to dismiss the Field's second amended counterclaims and Third-Party allegations naming purported owners and trustees.

Even should this court disagree that the correct operative pleading was not the second amended counterclaims, cross claim and third-party complaint of the defendants, the Field's initial pleading and first amended counterclaim nonetheless raised counterclaims that were logically related to

both default and enforceability. (R. p. 285). Under no less than seven (7) exhibits A-H submitted within memorandums to the court (R. p. 311 at ¶84).

IV. FIELDS' FIRST AMENDED PLEADING ASSERTED COMPULSORY CLAIMS

The Fields have no less than three (3) times asserted demand for trial by jury. (R. p. 44); (R. p. 47); and (R. p. 70). The latest is the Field's February 19, 2021 Answer, Counterclaims, and Third-Party Complaint. Under this pleading, they set forth counterclaims that go to the compulsory nature as well as enforceability issues pertaining to the note and mortgage. Defendants' challenged both standing and whether Wilmington *not in its individual capacity but solely as owner-trustee*, both had standing and/or was the real party-in- interest under a debt yet to be validated by the Plaintiff. (R. p. 71 – 72, paragraph 8.6). *See, also* paragraph 11.1 (R. p. 73). Defendants deny Wilmington was owner or holder of the note, nor had any legal right to enforce the note and/or mortgage. (Id. At 11.2) By contrast, Plaintiff's Motion to Strike Defendant's Demand for Jury Trial (R. p. 65) merely alleges, with no evidentiary proof, that the action is expressly equitable in nature² and erroneously presuming defendant's claims thus were permissive, citing the two South Carolina cases U.S. Bank Trust Nat'l Ass'n v. Bell, 385 S.C. 364 (Ct. App. 2009) and N.C. Fed. Sav. & Loan Asso. v. DAV Corp., 298 S.C. 514, 381 S.E.2d 514, 381 S.E.2d 903 (1989). Wilmington's position in court is simple, as Plaintiff they need not prove (until later) anything despite Amended Pleadings, and Third-Party Complaint. In argument, they illustrate the legal relationship test they must pass – at some point - to the trial judge: *“So if Wilmington Savings Fund Society, at an appropriate (meaning future) hearing in this case, comes forward and shows that it has the original*

² The Fields have at no time denied this action sounds in equity, but have contested by counterclaims conduct they deem compulsory, and have defended their right to trial by jury as it pertains to Plaintiff's claims for foreclosure. It is the position of Appellants that their right to trial should be preserved inviolate and that legal error and abuse of discretion occurred below erroneously affirmed by this court where no application of logical relationship test.

(*sic) note endorsed in blank (*sic), which it will do, that is all it needs to show to prove standing.” (R. p. 1623 lines 5-9). Appellants aver the timing of the strike without exam of the Amended pleadings should not have been affirmed by the Court of Appeals where no logical relationship test was applied, particularly on the date of hearing argument April 15, 2021 on Jury Strike, or under August 20, 2021 Order after deliberation. The burden of proving enforceability and that the Fields’ claims were not compulsory had shifted back to Wilmington upon rebuttal by the Fields that neither Wilmington or any Trustee named in the Complaint caption had no standing or ownership interest, or that the trust indenture prohibited hypothecation of sale of the subject loan per Fannie Mae (FNMA) Trust Indenture. Judge Bonds continues discovery and grant of forwarding amended pleadings *after* jury strike, and despite Plaintiff advising the court future steps the Plaintiff would necessarily have to prove. But not on the date of jury strike when no logical relationship is being applied and the nexus between claims and counterclaims is proper to be considered.

“[a]nd they will have to show that Plaintiff (*sic) has standing to enforce the note.” (R. p. 1610 at 18)

When refuted by pleadings, the trial court should properly have engaged in a logical relationship test, and not strike down the jury demand predicated on arguments of counsel, which are not evidence. The strike is unsubstantiated by documentary evidence like a note, evidencing ownership. As noted earlier, something Judge Price once equated to a very simple task to produce in support of Wilmington claims. *Two pieces of paper*, when presiding over the very first hearings in the case. “I presume discovery would be minimal at best..I mean there’s *two* pieces of paper”. At minimum, like the defendant in the case of *South Carolina Community Bank v. Salon Proz, LLC*, et al (Case No. 2014-002627) the Fields had raised claims under SCUTPA, under nine (9) amended counterclaims filed of record. (R. p. 11 at 9-24). Not one is reviewed under logical relationship testing pursuant to *First Citizens Bank & Tr. Co. of S.C. v. Hucks*, 305 S.C. 296, 298,

408 S.E.2d 222, 223 (1991). The trial court improperly presumed all Defendant counterclaims to be permissive, which Appellants respectfully aver should be reversed.

VI. DEFENDANTS / APPELLANTS COMPULSORY COUNTERCLAIMS

(a). Defendants' challenge of Standing and Note Enforceability: (R. p. 1495 Vol. III)

The Fields asserted as amended compulsory counterclaims challenges to Wilmington's standing and enforceability, naming purported trustees Christina Trust and DLJ Mortgage Capital (Vol. I, R. p. 70). Thirty-Three (33) defenses and affirmative defenses are filed. Third- Party claims attempt to hunt down the proper owner or trustee Plaintiff's counselor(s) are reluctant to disclose at jury strike, with FNMA being named third party defendant by way of Third-Party Claim. Response pleadings by Wilmington, paragraph (91) affirmatively set forth information the trial court should have viewed as true on face of the amended responses.

(91). that "Wilmington FSB" *does not claim to be the owner of the subject loan (*sic)*. (R. p. 1495-1496, at ¶91).

(93) Wilmington further pleads that "*Plaintiff states that the Third-Party Defendants in this action do not claim an interest in the Note.*" Wilmington Savings Fund Society, FSB is named in its individual capacity by the Fields. The same is affirmed by Plaintiff pleadings as to Christiana Trust Company of Delaware. (R. p. 1496 at ¶93).

(b). Defendants challenge as to Real Party-in-Interest as to Note:

The real party-in-interest, yet to be unmasked by Plaintiff if not by defendants' amended pleadings (individually or by proof it is owner-trustee) has never occurred to date. Plaintiff's pleadings are defective from inception of the Complaint if they hold no standing, which is challenged appropriately by the Fields' amended filings. Enforceability becomes an issue, and thus compulsory, where defendants evidence for the court prior E*Trade mortgage extinguishment of

debt, (R. p. 488 at 213); Moreover where they demonstrate the Field's good faith compliance with court-ordered mediation by Price, and forward of re-instatement payment to servicing entities (who acknowledge receipt).(R. vol. III p. 1124-1126). Loss mitigation efforts fail in lieu of Plaintiff filing a complaint less than a month later where the sun has set on loss mitigation options mandated by the former supreme court justice Toal.

VI. ABSENCE OF LOGICAL RELATIONSHIP APPLICATION WAS ERROR:

Judge Price's Form-4 Order is devoid of conclusions of law. Wilmington takes the position that such an order need not set forth anything of the sort, it is but an *interlocutory* Order. However, it affects mode of trial issue that *must have been raised by the Fields immediately or lost*. Likewise, the strike despite absence of evidentiary support underlying the trial court's strike of jury demand, and the court having been provided inaccurate data or no substantiating evidence at all where mode of trial is stricken. Counsel for Wilmington and the Fields both advised the court regarding counterclaims raised in an equitable foreclosure action, recognized yet treated dismissively with no application testing. "*So, if they are compulsory, then that the Fields would be entitled to a jury trial.*" (R. p. 1610 at 7). Before Judge Price the Fields argued the Salon Proz case for the proposition of their counterclaims, like in Salon Proz, affect enforceability. Plaintiff counsel: "*And I agree that the Salon Proz case, which is a 2017 case from the court of appeals, accurately states the law in South Carolina when a counterclaim brought in a foreclosure action is compulsory vs permissive*". (R. p. 160, Atty Milam at 8-18). Salon Proz likewise involved loss mitigation, including a loan modification. This case sub-judice the Fields engagement into prior modification; mediation; and loss mitigation; and counterclaim allegations under SCUTPA against Plaintiff and third-party defendants.

Appellants assert these claims were compulsory, and that they should properly have been viewed through the lens of logical relationship test applied utilizing the most recent operative pleadings. The error cannot be rectified without reversal and remand. Judge Price's order severed the two issues compounding legal error. This occurs after the Fields motioned to have Judge Price recuse himself. (R. p. 20, Vol. I) for bias. In reference to loss mitigation payment "*You're painting us as some of deadbeats when we paid them completely...*" (R. p. 1654 at 16-25). Appellant respectfully ask this court reverse and remand for correct application of logical relationship test as to claims and counterclaims and ensure their jury demand is preserved inviolate. The court is advised on the date of strike "there are nine (9) counterclaims and third-party claims in this case." (R. p. 1655 at 17-24). Motions to amend are continued by Price ...[s]o, I'm just going to continue the motions". (R. 1672 at 3-5 (Vol. IV).

VII. ASSIGNMENT OF LATER DATE PLEADINGS REVIEW BY JUDGE PRICE FORM-4 AND SEVERENCE:

Appellants assert Judge Price's shift of pending motions to the Master, or other judge, to be later heard, necessarily should have included whether to strike jury demand given no logical relationship analysis had occurred. "*I just don't want to see this go on any longer. Something is going to have to be resolved. All Right ? I'll see what I can do.*" (R. p . 1673 at 22-24). The striking of jury demand without engaging in logical relationship test kicked the proverbial can down the road to another judge. That was Judge Robert Bonds, not Master in Equity Marvin Dukes. Dukes had already remanded the case from non-jury to jury roster. Appellants assert there should have been no sacrifice on the altar of immediate their chosen mode of trial and counterclaim review under logical relationship test which could have been applied by Judge Price at the correct time, that being prior to strike and; prior to severance and forward of pending amended counterclaims.

Further, appellants point out that no logical analysis was likewise performed by the Hon. Robert Bonds, who does grant the Fields ability to file second amended answer and third-party complaint. Judge Bonds receives actual, physical evidence of the Fields engaging in loss mitigation, which would likewise affect enforceability. (R. p. 1124-1126, Vol. III). Bonds grants the Field's Second Amended Counterclaims, and discovery (which remains pending to date). However, the abuse of discretion has occurred, and now manifests itself within the case by virtue of error Judge Price's Form-4 premature strike, occurring on record in view of the following observations of the court listed below section VIII. Without this court's reversal and remand, the abuse of discretion and error of law infects substantial justice in this case and affects mode of trial the Fields assert entitlement to. Reversal by this Court and remand to the trial court for further review under application of logical relationship test is necessary to preserve Appellants' due process rights and substantial justice in the case.

VIII. SACRIFICE OF DUE PROCESS AND PROCEDURAL INJUSTICE UPON ALTER OF IMMEDIATE WHERE NO LOGICAL RELATION TEST

The record evidences that application of a logical relation between claims is not what is on Judge Price's radar. This is evident from comments on record questioning counsel: "While he's looking at that, Mr. Milam, how did this get to circuit court? *How did it get out of the master's court (*sic) ?*" (R. p. 1613 at 3-4). Respectfully, Judge Price exhibits predisposition to strike the Fields' Jury Demand at this stage, questioning why a foreclosure case appears on the circuit jury trial roster. Judge Price is not conducting a logical relationship analysis of the claims and counterclaims. Nor is the court examining the nexxus of the counterclaims to the Plaintiff's foreclosure cause of action. The lower court is erroneously presuming, without evidentiary support, enforceability and implied waiver by the Fields. Because the Fields filed jury demand in

a foreclosure, the case belongs strictly in non-jury court roster per Judge Price. While there is recorded discussion of the nature of compulsory vs permissive counterclaims, the nexxus of the claims and counterclaims is never analyzed or explored. The logical relationship test is never applied whatsoever. The Form-4 Order forecloses Jury Demand and mode of trial sought by Defendants in defense of their home, with zero findings of fact (*in contrast, see Judge Bonds as to compliance with right to cure, below*), error of law, haste, and abuse of discretion. The abuse of discretion Appellants respectfully assert is Judge Price viewing the entire action as non-jury without supporting evidence and impliedly finding permissive counterclaims and involuntary waiver. It is just a typical debt collection foreclosure. The Fields have not made payments for way too long, bias unsupported fact assumed true by the presiding judge, never admitted by Defendants in pleadings or argument. The action, per Price, should not be on the jury roster. The court improperly focuses on payment history facts (R.p. 1607 at 15) and not the nexxus and logical relationship between defendants' amended counterclaims and the Plaintiff's foreclosure claim. No review of whether the claims are compulsory is even contemplated by the court; the counterclaims are immediately and in error *predetermined permissive* and no logical relationship test is applied.

THE COURT: "All right. So this is a foreclosure action correct, from 2019 ?

THE COURT: "And do the Fields still reside in the residence ? (R.p. 1607 at 15).
When was the last time they made a payment on the home ?"

The court is factually mis-advised as to default in oral arguments, so much so that the Fields moved to recuse Judge Price for perceived bias. Counsel for Plaintiff incorrectly asserts "I believe its currently due for January, 2018". This statement is then re-tracked, wherein counsel asserts erroneously "*Let me correct that, Your Honor, I think its due for January, 2019. I believe I may have mis-stated saying it was 2018*". With this statement, counsel omits reference of Notice to

Cure and Appellant's payment to the servicing entity, Shellpoint. (R. p.1126, vol. iii) at no time is Judge Price given accurate information before ruling at law, and hence no logical relationship analysis could effectively occur. Going direct to enforceability, were a logical relationship test in fact have properly been undertaken, it would necessarily include the Appellant's compliance with Notice and Right to Cure. Payment had mailed certified. It has been acknowledged as received. It is rejected by the servicing entity for the Plaintiff by return correspondence. (R. p. 1124-1126, Vol. 111). The Fields motion to recuse Judge Price was premised on perceived bias over payment history. (R. p. 1653, at 17-25, Vol. IV). The court responds, "No, I have not pre-judged anything. I was attempting to try to resolve some motions to see if we could get this case moving forward...but me simply asking two questions does not show bias whatsoever." (R. 1654 p. 7-12, Vol. IV). The same question about a mere *two* (sic) documents that Plaintiff cannot seem to come forward with evidence before the court does not meet with the same bias, it meets with dismissal of jury trial demand not belonging to the Plaintiff. Rather, belonging to the Fields. The ruling is made without substantiating evidence.

IX. ENFORCEABILITY – LOSS MITIGATION (R. p. 1794, 17-21) ["Disney Dollars"]

Appellants respectfully assert that reversal and remand for logical relationship application is proper and necessary to preserve mode of trial demand. Appellants aver the Court of Appeals should reverse predicated upon the Fields' compulsory counterclaims, including compliance with Notice and Opportunity to Cure. (R. p. 1126). Admitted into the court record before Judge Bonds was evidence of defendants' tender and submission of payment to Shellpoint servicing. (R. p. 1125). There is acknowledged receipt. (R. p. 1124). The payment is rejected and returned. The rejected check (redacted) are handed up to the last presiding judge to hear the case. This correctly

grabs the attention of the court. Judge Bonds is the first circuit judge in the case to see the cracks in Wilmington's armor. In questioning the attorney for Wilmington, Judge Bonds states:

THE COURT: *All Right. What about it ? What about the fact that they sent him a right-to-cure, telling him to pay it by a certain date ? He sends them a check and they send it back.*"

This is compulsory conduct. It is compulsory in nature if properly viewed under lens of a logical relationship application, had the jury strike by Price not been premature or severed from the operative pleadings in progress. There is a nexxus as between enforceability of the subject note and mortgage and the defenses, affirmative defenses, and amended counterclaims of the Fields. Despite tender, servicing entities reject tender of payment under right to cure. The foreclosure is filed some (21) days later, October 11, 2019. The Fields had on 9/20/2019 issued \$12,468.28 to Plaintiff's servicing entity, Shellpoint – one of a myriad of "servicers" of the purported debt. The payment was sent and received by Certified mailing, tracking no. 9505-5104-2986-9269-3143-83 (R. p. 1113 Vol. IV). Compulsory Reference occurs prior to service effected upon the Fields, and Master in Equity Judge Dukes (Whom Judge Price is intent that the case go to for further proceeding) remands. Yet, Judge Price is determined to refer to the Master, which is made evident. "*And I am referring this to the master for foreclosure (*sic)*". (R. p. 1626 at 16); See, also (R. p. 1618, at 24 – 1619, line 8). Judge Price is advised that the Master in Equity Dukes granted a motion for *remand* to the circuit roster, not fully recognized by Price. However, Judge Price has pre-determined permissive counterclaims and implied waiver with no logical relationship test. (R. p. 1613 at 7-8). "The Master will handle everything that will be in my order." (R. p. 27 vol. iii). Judge Price references the online roster of cases for the circuit generally and questions the court clerk exhibiting the haste in which Defendants' mode of trial demand meets its demise.

THE COURT:

[M]adam clerk, on the online public index it says court roster CP Jury, McCoy, May 11, 2021. *Does that mean its on her jury trial roster ?* [T]hat's what that means on there ?" ...So, *this is on the docket for May 11th ?* **"For a jury trial."** (R. p. 1619 at 8). See, also: (R. p. 1613 at 3-8) "...[M]r. Milam, how did this get to circuit court ? How did it get *out of* the Master's court ?" Enforceability or non-enforceability through logical relationship counterclaims improperly takes a back seat to moving the case back to the Master and non-jury. The Fields have raised more than one counterclaim that is legal and compulsory, specifically challenging enforceability and standing. Properly viewed through a logical relationship analysis (omitted by all sitting judges to date), the counterclaims would serve as a defense to enforceability. "Disney Dollars" and un-billed time by foreclosure attorneys then presumably obstruct legal and compulsory (payment) counterclaims, again going direct to enforceability, standing, real party-in-interest and owner of the note. The trial court ignores assignments of record relating to the subject loan, where Wilmington wishes (at some subsequent proceeding or hearing) to present its note as endorsed and as in default and prove of its standing.

Although a simple discovery disclosure, the Fields have been put to task to obtain and submit information to the court record that Fannie Mae and the FNMA Trust indenture prohibit assignment or sale. Moreover, MERS tracking reveals their personal loan number is not included in the trust when it closed. *How then does Wilmington, in any capacity, own this note?* It is, again, hide-the-ball bad faith and recalcitrant discovery tactic. The Fields' counterclaims, timely raised and permitted by Order of Judge Bonds' court, would not be claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's foreclosure cause of action. They arise and have logical relationship to enforceability and alleged default – and thus

Appellants respectfully assert this court has misapprehended the counterclaims as permissive and implied waiver, where no logical relationship has ever been properly performed. Appellants' defenses and legal counterclaims bear that same logical relationship this court previously saw and ruled upon in *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). Appellants' counterclaims should, before strike of jury demand, have undergone logical relationship testing applied pursuant to our Supreme Courts' jurisprudence in First Citizens, *supra*.

The Fields have repeatedly challenged enforceability of the Plaintiff's foreclosure cause of action, and respectfully assert the case falls squarely within the purview of constitutional mandate that the right to trial by jury be preserved inviolate. A counterclaim is Compulsory under Rule 13(a) SCRPC only "*if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.*" SCRPC 13(a). The subject matter of Wilmington's claim is foreclosure of an alleged default under note secured by mortgage instrument, not merely execution of a note, itself. The Fields have asserted nine (9) legal and compulsory counterclaims to that cause of action. In this case there is a "blanket" set of compulsory counterclaims under Rule 13(b) with proper foundation where a logical relationship test must be applied. If but one (1) proves true and accurate, including that Defendants engaged in loss mitigation and/or that Plaintiff's conduct or its conduct with third-parties evidence that Wilmington (in fact) has no standing, it would constitute defense to enforceability. The supreme court in South Carolina has made clear that "A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature." *cf. N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989) The "main purpose" of Wilmington's action is collection of an alleged debt, enforceability front and center in bringing foreclosure against the Fields' home via allegedly trust securitized mortgage instrument that has time and time again shifted servicing entities. The

issue can be gleaned from the body of the complaint, and it can be gleaned from the prayer. *Verenes*, 387 S.C. 16, 690 S.E.2d at 773. It can also be gleaned from each response and amended response filed by the Fields, demanding jury trial pursuant to Rule 38 SCRPC repeatedly and expressly filed by the Fields since day one (1) of this litigation. (R. p. 44 vol. I).

CONCLUSION AND PRAYER

Appellants respectfully ask that the Court of Appeals Reverse its Order and Remand to the circuit judge to hear the case and specifically to the last Judge that saw documentary evidence to apply a logical relationship test. Without the lower court engaging in a logical relationship analysis pursuant to the most recent filed operative pleadings, there is strike of a jury demand that was error of law and abuse of discretion that this court respectfully should not Affirm. It presumes permissive counterclaims and waiver. Severance of the pleadings after strike was abuse of discretion, effectively bifurcating mode of trial of defendants' (not Plaintiffs') counterclaims; and failure to apply a logical relationship test was error compounded by abuse of discretion. Under Judge Price, abuse of discretion has occurred by judicial action affecting mode of trial, not supported by evidence, influenced by inaccurate information, ignoring specifically mode of trial the Fields demanded and would be entitled.

A logical relationship test thus should be performed with regard to the nexxus of the compulsory counterclaims and Defendants' right to trial by jury left standing inviolate, particularly if the trial judge exceeded authority of Motion to Strike by de-facto bifurcation which will now pervade the case proceedings and affect substantial justice. Appellants respectfully contends that this court misapprehended the most recent operative pleadings and that during de novo review misapprehended a logical relationship was never applied failing to recognize compulsory nature

of the Fields' amended counterclaims. The lower court should respectfully not have been affirmed. The Court of Appeals should not presume permissive claims without applying the logical relationship test first, and Remand is proper. Plaintiffs' counterclaims, if any one (1) were proven true, go direct to Wilmington's standing to enforce the note it desperately seeks not to reveal. It imposes upon any court hearing a motion to strike no choice but erroneously *presumed* permissive counterclaims and *involuntary waiver*. In this case no such waiver and no logical relationship test has been applied. Appellants therefore request this court's rehearing and that the Court of Appeals reconsider, alter and amend its June 14, 2023, Order to Reverse and Remand the case to the circuit court to hear the matter for logical relationship test bearing on counterclaims nexxus related to enforceability and thus whether the Field's claims are compulsory, not permissive, in nature. The Fields respectfully request this Court honor the mandate that their right to trial by jury be preserved inviolate.

Appellants thank the Court for its reconsideration of these matters.

Respectfully submitted July 28, 2023

Respectfully submitted,

J. CAMERON HALFORD, LLC

/s./ J. Cameron Halford

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Jul 28 2023

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Hon. Bentley D. Price
Circuit Court Judge

Appellate Case No. 2021-000504

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

v.

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

CERTIFICATE OF SERVICE

I hereby Certify that I am the paralegal to counsel for the Appellants in the above
referenced case and that I did serve a copy of the foregoing Appellant Motion and Memorandum
for rehearing, reconsideration, alter or amend the June 14, 2023 upon the following by electronic
filing, U.S. mail, and U.S. postal service postage prepaid July 28, 2023.

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July 28, 2023

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Jul 28 2023

SC Court of Appeals

VIA EMAIL and U.S. Mail

Hon. Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street,
Columbia, South Carolina 29201


Re: Appellate Case No. 2021-000504

Dear Clerk's Offices:

Enclosed and attached is a PDF copy of the Appellant Memorandum in support of rehearing and motion to reconsider, alter or amend. The original will follow by United States mailing. Please file and return an e-copy clocked by the court. Thank you. Should there be any questions, please notify me at 803-619-4177.

With Kind Regards, I remain

Sincerely


J. Cameron Halford

JCH:kdb

cc: Jonathan E. Shulz (via email and US mail)
George Benjamin Milam (via email and US Mail)
J. Martin Page (via email and US Mail)