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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Diane S. Goodstein
Circuit Court Judge

Opinion No. 2022-UP-334
Appellate Case No. 2022-001495

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

v.

Anthony Whitfield and Cindy Whitfield, Defendants.

AND

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant,

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

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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Petitioner, through his undesigned counsel, hereby respectfully submits this brief Reply to Respondent's Brief.

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 judicial scrutiny by this Court, Respondent's Brief goes so far as to inject words into the Record that are simply not there. For example, page 9 of Respondent's Brief 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.'" (Respondent's Brief, p. 9, referring to R. p. 1177, lines 15-16). Respondent's Brief 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 Brief 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 Brief.

ARGUMENT

I. The Court of Appeals' opinion directly conflicts with prior decisions of the South Carolina Supreme Court, which are applicable to this case.

Contrary to Respondent's contention, 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).[1]

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. Here, 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

[1] In *Deutch Bank v. Nat'l Trust Co. v. Houck*, Opinion No 28169, filed August 9, 2023, this Court prospectively abolished the logical relationship test. As Respondent concedes, the present case arose prior to the *Houck* decision. Accordingly, the logical relationship test still controls this appeal. However, even this Court were to disregard the logical relationship test, the civil conspiracy claim would *still* be compulsory pursuant to Rule 13(a), SCRCP, because it arises out of the non-renewal of Mr. Whitfield's loans on or about June 28, 2012 (the transaction or occurrence) that is the very matter precipitating the bank's claims for mortgage foreclosure and alleged default.

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 Brief 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." (Respondent's Brief at p. 12). 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). This has always been Mr. Whitfield's position, who even reiterated it in his Rule 59(e) Motion, stating, "Because there is substantial evidence that tends to prove that the advice was never given at the time Mr. Warren and Mr. Swanson claim it was given, Mr. Whitfield amended his Answer and Counterclaim to assert a cause of action based upon civil conspiracy, because, **if the finder of fact decides the advice was never given at the time and place claimed, then the bank will not be able to foreclose."** (R. p. 385, emphasis in original). 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 Brief further contends, without any substantive argument, that the Court of

Appeals properly relied on *Blackburn* in rendering its decision. (Respondent's Brief, p. 11). Notwithstanding the conclusory nature of this argument, it 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 the civil conspiracy counterclaim stems from whether the 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).

In the present case, 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 Brief 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 a red herring. 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 to renew the loans 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.

Here, the Court of Appeals' unpublished opinion fails to apply the applicable 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. "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). Accordingly, Petitioner respectfully submits that this Court should reverse the Court of Appeals' unpublished opinion and remand this case for a jury trial on the civil conspiracy counterclaim. There is no justifiable reason to deprive Mr. Whitfield of a jury trial in what is indisputably a legal claim and the only remaining cause of action in this case.

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

Respondent's Brief notably fails to set forth even a single substantive counterargument as to Petitioner's argument that Mr. Whitfield is entitled to a jury trial under Rule 42(b), SCRCP. As noted in Respondent's Brief, Rule 42(b), SCRCP sets forth the conditions under which separate trials may be ordered; it also expressly preserves a party's right to a jury trial:

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

Even if bifurcation were appropriate—and 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,* which are still applicable to the present case, Petitioner respectfully submits that this Court should reverse the Court of Appeals' unpublished opinion, and remand this case for a jury trial on the civil conspiracy counterclaim.

III. 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 "the bifurcation order does not affect ones right to a jury trial, as bifurcated cases can still be tried in front of a jury," somehow intimating that the Court of Appeal's opinion does not expressly deprive Mr. Whitfield of his right to a jury trial (Respondent's Brief, p. 15). 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).

Additionally, as Respondent concedes, "all other parties have settled their claims with Appellant, leaving Swanson as the only remaining defendant in the case, and the civil conspiracy counterclaim as the only remaining cause of action in this case." (Respondent's Brief at pp. 10 and 14). This begs the question, why should Mr. Whitfield be deprived of his right to a jury trial where: A) both Mr. Whitfield and Mr. Swanson 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), SCRCP.

Further, as to the issue of damages, Mr. Whitfield's civil conspiracy claim against Mr. Swanson specifically states that the advice of counsel defense caused him special damages in the form of attorney's fees and costs, which he incurred in having to defend an unjustifiable foreclosure action, and that these damages were separate and apart from the damages that were claimed against the bank (Fifth Amended Answer, filed January 8, 2016, Paragraph 82, R. p. 171). Contrary to Respondents' intimation, Mr. Whitfield's claim against Mr. Swanson is still viable, not disposed of, and not subject to any setoff from the co-defendant bank. Because the civil conspiracy claim is compulsory, this case should be heard before a jury. Accordingly, Petitioner respectfully requests

that this Court reverse the Court of Appeals' unpublished opinion and remand this case for a jury trial on the civil conspiracy counterclaim, which is indisputably legal in nature and the only remaining cause of action to be adjudicated.

CONCLUSION

Based on the forgoing, Petitioner respectfully requests that this Honorable Court 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.

[Signatures on following page]

Respectfully submitted,

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