THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Joseph M. Strickland, Master-in-Equity

Case No. 2024-CP-40-00292
Appellate Case No. 2024-001719

U.S. Bank Trust National Association
not in its individual capacity but solely
as owner trustee for Legacy Mortgage
Asset Trust 2020-GS1, U.S. Bank, and
U.S. Bank National Association .... Respondents,

v.

Jacob Fulks and Florene Fulks... Appellants.

FINAL BRIEF OF THE RESPONDENT

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August 12, 2025

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QUESTIONS PRESENTED

1. **DID THE MASTER CORRECTLY DISMISS THE AMENDED COUNTERCLAIMS INSTEAD OF RETURNING THE CASE TO THE CIRCUIT COURT WHERE THE UNAPPEALED ORDER OF REFERENCE GRANTED THE MASTER JURISDICTION TO DETERMINE ALL MATTERS ARISING FROM OR REASONABLY RELATED TO THIS ACTION?**

2. **IS THE MASTER'S DENIAL OF THE APPELLANTS' MOTION TO TRANSFER APPEALABLE WHERE IT WAS NEVER REDUCED TO A WRITTEN, SIGNED, AND FILED ORDER?**

3. **DID THE MASTER CORRECTLY DENY THE APPELLANTS' MOTION TO TRANSFER WHERE NONE OF THE AMENDED COUNTERCLAIMS ENTITLED APPELLANTS TO A JURY TRIAL?**

4. **IS THE COURT WITHOUT JURISDICTION TO REVIEW THE MASTER'S DENIAL OF THE APPELLANTS' ORAL MOTION TO AMEND WHERE THE APPELLANTS DID NOT SERVE A NOTICE OF APPEAL FROM IT?**

5. **ARE THE MASTER'S DENIALS OF THE MOTION TO TRANSFER AND THE ORAL MOTION TO AMEND PRESERVED FOR APPELLATE REVIEW?**

6. **DID THE MASTER ABUSE HIS DISCRETION IN DENYING THE APPELLANTS' ORAL MOTION TO AMEND?**

STATEMENT OF THE CASE

This is an appeal by mortgage foreclosure defendants from the Richland County Master in Equity's (hereafter the "Master") written order dismissing their counterclaims and from his verbal ruling from the bench that denied their motion to transfer the case back to the Circuit Court for a jury trial on those counterclaims.

On January 17, 2024, Respondent filed the Complaint in this action seeking the foreclosure of a real estate mortgage against Appellants' property based on Appellants' loan default of August 1, 2023. (R. pp. 29-32.)

On January 30, 2024, the Clerk of Court for Richland County entered an Order of Reference that referred the case to the Master. (R. pp. 1-2.) At the time of the reference, there was no jury trial demand filed by any party in the case.

On February 8, 2024, Appellants filed "Defendant(s)…Answer, To Complaint and Counterclaim for Frivolous Lawsuit and Fraud on the Court" (hereafter the "Answer and Counterclaim") in which they demanded a jury trial, asserted affirmative defenses, and asserted counterclaims for fraud and misrepresentation, frivolous conduct, violations of the Fair Credit Reporting Act, and violations of the Fair Debt Collection Practices Act. (R. pp. 35-63.)

In the caption of the Answer and Counterclaim, Appellants added "Rushmore Loan Servicing", "Goldman Sachs Mortgage Company", "U.S. Bank", and "U.S. Bank National Association" as additional plaintiffs. However, Appellants never moved the Court for the joinder of those entities as additional parties and the Master never entered an order of joinder of any of those entities. Further, although Appellants filed a "Certificate of Services" on February 8, 2024, claiming to have served those entities by "Certified Registered Letter", they never filed any proof of service of the Answer and Counterclaim and a summons on those

entities. (R. p. 63.) As such, the lower court never had personal jurisdiction over these entities and they never should have been part of the case caption.

On March 1, 2024, Respondent filed a Reply to the counterclaims asserted within the Answer and Counterclaim. (R. pp. 64-66.)

On March 4, 2024, Respondent filed a Motion to Dismiss Defendants Jacob Fulks and Florene Fulks' Counterclaim and/or Designate Certain Claims as Defenses. (R. pp. 67-69.)

On April 1, 2024, Appellants filed an Amended Answer and Amended Counterclaims in which they demanded a jury trial, asserted affirmative defenses, and asserted different counterclaims for negligent misrepresentation, fraudulent concealment, negligent infliction of emotional distress, and violations of the "South Carolina Fair Trade Act (SCFTA) S.C. Consumer Protection Code (SCCPC)" (hereafter the "Amended Counterclaims"). (R. pp. 70-83.)

The counterclaim for negligent misrepresentation was based on alleged misrepresentations by Respondent or its loan servicers to Appellants starting in May 2021 that they "owed a mortgage note." (R. p. 78 ¶ 26.) The counterclaim for fraudulent concealment was based on Respondent's alleged failure to comply with Appellants' request for complete loan accounting information. (R. p. 79 ¶ 29.) The counterclaim for negligent infliction of emotional distress was based on the alleged emotional distress Appellants' suffered from a bankruptcy filing in 2021 and from the filing of this foreclosure action. (R. pp. 79-80 ¶ 30.) Finally, the counterclaim for violations of the "South Carolina Fair Trade Act (SCFTA) S.C. Consumer Protection Code (SCCPC)" challenged Respondent's right to foreclose the mortgage based on an alleged failure by the originating lender to comply with South Carolina's "Attorney Preference Statute" at the loan closing, based on the loan closing not being supervised by an attorney, and based on the loan being unconscionable when made. (R. pp. 80-81 ¶ 31.)

In their Amended Answer and Amended Counterclaims, Appellants recited the date and contents of the Order of Reference, evidencing that they had reviewed the written order by the date of this pleading. (R. p. 70 ¶ 1.)

On April 2, 2024, Appellants filed a "Motion to Transfer Case to [sic] Back to Circuit Court and Abate Scheduled Hearing Before the Master of Equity" (hereafter the "Motion to Transfer") alleging that their counterclaims were legal and compulsory and that Appellants were therefore entitled to a jury trial on those counterclaims. (R. pp. 84-104.)

On May 2, 2024, Respondent filed a Motion to Dismiss Defendants Jacob Fulks and Florene Fulks' Amended Counterclaim (hereafter the "Motion to Dismiss Amended Counterclaims"). (R. pp. 105-107.) On May 3, 2024, Respondent filed a Memorandum of Law in Support of Motion to Dismiss Defendants Jacob Fulks and Florene Fulks' Amended Counterclaim. (R. pp. 108-121.)

On September 16, 2024, the Master held a hearing on the parties' pending written motions at which he granted Respondent's Motion to Dismiss Amended Counterclaims and denied Appellants' Motion to Transfer. (R. p. 20, lines 17-21.) Appellants now claim to have made a motion to amend their pleadings (hereafter the "Oral Motion to Amend") at that hearing based on the following exchange between Appellants and the Master after the Master had already ruled on the other two motions:

> MS. FULKS: Can I get a stay of extra time to amend the counteraction based on what he read that needs to be included? Can I get a stay of -- of extra time for that?
>
> THE COURT: Your motion's denied. We're going to set a hearing on the merits.
>
> MS. FULKS: Okay.

(R. p. 21, line 25 – p. 22, line 6.) It is not clear whether the "motion" referred to by the Master during this exchange was the Oral Motion to Amend or the Motion to Transfer that the Master had just denied moments earlier. (R. p. 20, line 18.)

On September 18, 2024, the Master entered an "Order Granting U.S. Bank Trust's Motion to Dismiss Defendants Jacob Fulks and Florene Fulks' Amended Counterclaims" (hereafter the "Counterclaim Dismissal Order") that dismissed the Amended Counterclaims. (R. pp. 3-4.) However, neither the Counterclaim Dismissal Order nor any other written order of the Master entered in this action addressed the Motion to Transfer or the Oral Motion to Amend.

Thereafter, Appellants never filed a motion pursuant to Rule 59(e), SCRCP, with respect to the Counterclaim Dismissal Order or the Master's oral rulings on the Motion to Transfer or the Oral Motion to Amend.

On October 9, 2024, Appellants filed a Notice of Appeal to this Court from the Counterclaim Dismissal Order and from the Master's "open court denial of their Motion to Transfer Back to Circuit Court for a Jury Trial." (R. pp. 125-126.) The Notice of Appeal did not include any appeal from the Master's verbal ruling on Appellants' Oral Motion to Amend.

STANDARD OF REVIEW

The Court may affirm for any ground appearing in the record. Rule 220(c), SCACR; s*ee also Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 n. 2 (Ct. App. 2009)(citing *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)).

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Santos v. Harris Inv. Holdings, LLC*, 439 S.C. 214, 218-19, 886 S.E.2d 483, 485 (Ct. App. 2023)(citation and quotation marks omitted). "That standard requires the Court to construe the complaint in a light most favorable to the

nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* (citation and quotation marks omitted). "If the facts and inferences would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Id.* (citation and quotation marks omitted).

"A motion to amend is within the sound discretion of the trial judge…" *Maybank 2754, LLC v. Zurlo*, 444 S.C. 47, 63, 906 S.E.2d 94, 103 (Ct. App. 2024)(citation omitted).

ARGUMENT

The only appealable order before the Court for review is the Counterclaim Dismissal Order. The Court must affirm that order for the following reasons:

I. The Master correctly dismissed the Amended Counterclaims instead of returning the case to the Circuit Court where the unappealed Order of Reference granted the Master jurisdiction to determine all matters arising from or reasonably related to this action.

Appellants do not argue that the Master erred in concluding that their Amended Counterclaims failed to state facts sufficient to constitute a cause of action and dismissing them pursuant Rule 12(b)(6), SCRCP. Appellants have thereby abandoned that argument and conceded the insufficiency of their pleadings. *See, e.g.*, *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994)(issues not argued in the brief are deemed abandoned and will not be considered on appeal).

Instead, Appellants contend that their filing of a jury trial demand automatically and immediately deprived the Master of subject matter jurisdiction to hear the Motion to Dismiss Amended Counterclaims and dismiss their Amended Counterclaims. Appellants' contention is incorrect.

"In … an action for foreclosure, some or all of the causes of action in a case may be

referred to a master or special referee by order of a circuit judge or the clerk of court." Rule 53(b), SCRCP. "Rule 53(b) gives clerks the power to refer some or all causes of action in a foreclosure case when a party *has not yet made* a jury demand under Rule 38." *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 96 n.4, 800 S.E.2d 488, 491 (Ct. App. 2017).

"Once referred, the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter." Rule 53(c), SCRCP.

The Order of Reference in this action, which was entered prior to Appellants' demanding a jury trial, specifically granted the Master the authority to "to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP, and all matters arising from or reasonably related to such action," and provided that the Master "shall retain jurisdiction to perform all necessary acts incident to this foreclosure action." (R. pp. 1-2.)

To the extent that Appellants ever had a right to a jury trial in this case, they waived that right by failing to appeal from the Order of Reference.

"[T]he denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). An order referring a case to a Master in Equity affects the mode of trial—a substantial right—and a party waives his or her objection to the reference and the right to a jury trial by failing to immediately appeal the order. *Creed v. Stokes*, 285 S.C. 542, 542, 331 S.E.2d 351, 352 (1985); *see also Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997)("Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue."). The order of reference becomes the law of the case once a party fails to timely appeal from it. *Creed,* 285 S.C. at 543, 331 S.E.2d at 352.

Appellants clearly had written notice of the Order of Reference no later than April 1,

2024, when they filed their Amended Answer and Amended Counterclaims in which they were able to recite the date and contents of the Order of Reference. By failing to immediately appeal from the Order of Reference thereafter, Appellants waived any right they may have had to a jury trial in this action and the Order of Reference became the law of the case.

Appellants' reliance on *S.C. Cmty. Bank v. Salon Proz, LLC* is misplaced because, unlike in this case, the clerk of court in that case had entered the Order of Refence <u>after</u> the mortgagor defendant had filed a jury trial demand and there was nothing in the record of that case evidencing that the mortgagor or its counsel had received written notice of the Order of Reference. *S.C. Cmty. Bank*, 420 S.C. at 92-93, 800 S.E.2d at 489-90 (Ct. App. 2017).

Further, a jury trial demand made after the entry of an Order of Reference does not mandate an automatic deprivation of the Master's subject matter jurisdiction; rather, the rules of civil procedure provide that a return to the Circuit Court is required only after there has been a determination that the party demanding a jury trial actually has a right to one.

"Any party may request a jury pursuant to Rule 38 on any or all issues triable <u>of right</u> by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court." Rule 53(b), SCRCP (emphasis added); *see also* Rule 38(b), SCRCP ("Any party may demand a trial by jury of any issue triable <u>of right</u> by a jury …")(emphasis added).

Pursuant to the Order of Reference entered in this action, the Master had jurisdiction to make that jury right determination and to determine all other "matters arising from or reasonably related to such action." (R. pp. 1-2.)

For these reasons, as of the date of the motion hearing and as of the date of the entry of the Counterclaim Dismissal Order, the Order of Reference was the law of the case, the Appellants had waived any right to a jury trial they may have ever had by failing to appeal from

it, and the Master had subject matter jurisdiction to hear and determine Respondent's Motion to Dismiss Amended Counterclaims and Appellants' Motion to Transfer. Once the Master determined that the Amended Counterclaims failed to state a cause of action and dismissed them, Appellants' Motion to Transfer was rendered moot as no other issues triable of right by a jury remained in the case and the Master correctly denied it.

Further, Appellants do not argue that the outcome of Respondent's Motion to Dismiss Amended Counterclaims would have been any different if decided by the Circuit Court, and therefore it would have been futile for the Master to transfer insufficiently pleaded counterclaims to the Circuit Court.

For these reasons, the Master did not err in dismissing Appellants' Amended Counterclaims, and the Court must affirm the Counterclaim Dismissal Order.

II. The Master's denial of the Motion to Transfer is not appealable where it was never reduced to a written, signed, and filed order.

The Master's verbal denial of Appellants' Motion to Transfer at the motion hearing on September 16, 2024, is not an appealable order.

"Appeal may be taken, as provided by law, from any final judgment, appealable order or decision." Rule 201(a), SCACR (emphasis added). "No order is final until it is written and entered." *Corbin v. Kohler Co*., 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct. App. 2002)(citations omitted); *see also* Rule 58(a), SCRCP ("Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record.").

Because the Master has not entered any written order denying the Motion to Transfer and because Appellants never filed a Rule 59(e) motion to obtain a written ruling, Appellants have no right to appeal from the Master's denial of that motion.

III. The Master correctly denied the Appellants' Motion to Transfer because none of the Amended Counterclaims entitled Appellants to a jury trial.

None of Appellants' Amended Counterclaims were both legal and compulsory counterclaims. Therefore, Appellants had no right to a jury trial in this action and the Master correctly denied the Motion to Transfer.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Mortg. Elec. Sys., Inc. v. White*, 384 S.C. at 614, 682 S.E.2d at 502 (citation omitted). "Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial." *S.C. Cmty. Bank*, 420 S.C. at 96, 800 S.E.2d at 491-92 (citation omitted).

Further, there is no right to a jury trial on defenses to an equitable cause of action such as foreclosure. *Farley v. Matthews*, 168 S.C. 294, 301-02, 167 S.E. 502, 505 (1933) (citing *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691, 693 (1912)) ("Where a defendant sets up, as a defense to an equitable cause of action, facts which grow out of that cause of action, or the transaction which gave rise to it, and are so interwoven with it as to be inseparable from it, the defense partakes of the nature of the cause of action and is equitable, and not triable by jury, as of right.").

A mortgagor defendant is entitled to a jury trial in a foreclosure action "only if the counterclaims are legal and compulsory." *S.C. Cmty. Bank*, 420 S.C. at 96, 800 S.E.2d at 491-92 (citation omitted).

Appellants' counterclaims for negligent misrepresentation, fraudulent concealment, and negligent infliction of emotional distress were all permissive, rather than compulsory, because they did not arise out of the transaction or occurrence that was the subject of the Complaint.

"[T]he question of whether a counterclaim is compulsory is governed by the plain language of Rule 13(a)." *Deutsche Bank Nat'l Tr. Co. v. Estate of Houck*, 440 S.C. 409, 413, 892

S.E.2d 280, 282 (2023)(prospectively abolishing the logical relationship test). "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP.

The "transaction or occurrence" that was the subject of the Complaint included the origination of the mortgage that Respondent sought to foreclose and Appellants' loan default that occurred on August 1, 2023. The counterclaim for negligent misrepresentation did not arise out of the mortgage origination or the loan default, but rather out of alleged misrepresentations by Respondent or its loan servicers starting in May 2021. The counterclaim for fraudulent concealment did not arise out of the mortgage origination or the loan default, but rather out of Respondent's alleged failure to comply with Appellants' request for complete loan accounting information. The counterclaim for negligent infliction of emotional distress did not arise out of the mortgage origination or the loan default, but rather out of alleged emotional distress they suffered from a bankruptcy filing in 2021 and from the filing of this foreclosure action.

Appellants' counterclaim for violations of the "South Carolina Fair Trade Act (SCFTA) S.C. Consumer Protection Code (SCCPC)" was equitable, rather than legal, because it relates to Respondent's right to foreclose. The South Carolina Supreme Court has explained that in a mortgage foreclosure action, counterclaims relating to the plaintiff's right to foreclose are merely part of the equitable action and the mortgagor defendant has no right to a jury trial on such claims:

> Nor is the nature of the action changed by reason of the fact that the defendants have, in their answers, set up defenses and counterclaims based upon alleged misrepresentations in the transaction upon which the plaintiff's note and pledge are predicated. The questions raised by these defenses and counterclaims directly

> affect the validity of the plaintiff's lien and the question as to the amount due upon the debt secured by the lien. Where, in actions of foreclosure, the defendant sets up a defense and/or a counterclaim affecting the consideration, and arising out of the transaction in which the mortgage or lien was created, the authorities hold that the issues thus raised are equitable and are to be tried by the court upon its equity side.

Collier v. Green, 244 S.C. 367, 371, 137 S.E.2d 277, 280 (1964).

The main purpose of Appellants' counterclaim was to challenge Respondent's right to foreclose the mortgage based on an alleged failure of the original lender to comply with South Carolina's "Attorney Preference Statute" at the loan closing, based on the loan closing not being supervised by an attorney, and based on the loan being unconscionable when made. (R. pp. 80-81 ¶ 31.) As such, this counterclaim was equitable.

Because none of Appellants' Amended Counterclaims were both legal and compulsory counterclaims, Appellants never had a right to a jury trial in this action and the Master did not err in denying Appellants' Motion to Transfer and granting Respondent's Motion to Dismiss Amended Counterclaims.

IV. The Court is without jurisdiction to review the Master's denial of the Appellants' Oral Motion to Amend where the Appellants did not serve a Notice of Appeal from it.

While Appellants argue in their Brief that the Master erred in denying their Oral Motion to Amend, and putting aside the fact that this denial was never set forth in a written and appealable order in this action, the Court lacks jurisdiction to review that denial because Appellants have not served a Notice of Appeal from it.

"Service of the notice of appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Camp v. Camp*, 386 S.C. 571, 574-75, 689 S.E.2d 634, 636 (2010)(citation and quotations marks omitted).

The only Notice of Appeal served by the Appellants makes no mention of the Master's denial of their Oral Motion to Amend. Accordingly, even if the Master's denial of their Oral Motion to Amend was an appealable order (which Respondent denies), the Court lacks jurisdiction to review it and should disregard Section 2 of the Brief of the Appellants.

V. The Master's denials of the Motion to Transfer and the Oral Motion to Amend are not preserved for appellate review.

Aside from the lack of an appealable order denying the Motion to Transfer and aside from Appellants' failure to serve a notice of appeal from the denial of the Oral Motion to Amend, Appellants failed to preserve those rulings for appellate review.

"It is well settled that an issue must have been raised to and ruled upon by the trial court to be preserved for appellate review." *S.C. DOT v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 658, 667 S.E.2d 7, 14 (Ct. App. 2008) (citation omitted). "Additionally, [i]f the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *Id.* at 658, 667 S.E.2d at 14-15 (citation and quotation marks omitted)

"[W]here an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review." *Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999)(citation omitted).

The Master never entered any written order denying the Appellants' Motion to Transfer or their Oral Motion to Amend, and Appellants' never filed a Rule 59(e) motion seeking a written ruling on those motions. Therefore, the issues of whether the Master erred in denying those two motions is not preserved for appellate review.

VI. The Master did not abuse his discretion in denying the Appellants' Oral Motion to Amend.

Aside from the Appellants' failure to perfect and preserve an appeal from the Master's denial of the Oral Motion to Amend, and to the extent that the Master actually denied that motion[1], the Master did not abuse his discretion in doing so where the Appellants had already amended their counterclaims once and still failed to state of cause of action, where Appellants tendered no proposed amended pleading to the Master to consider, and where Appellants articulated no grounds or basis for their motion to amend for the Master to consider.

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[1] As discussed herein, *supra*, it is not clear to Respondent whether the "motion" referred to by the Master following the Appellants' request for leave to amend their pleadings was the Oral Motion to Amend or the Motion to Transfer that the Master had just denied moments earlier. (R. p. 20, line 18.)

CONCLUSION

Based on the foregoing and any additional sustaining grounds appearing in the record, Respondent respectfully requests that the Court affirm the Counterclaim Dismissal Order and find that Appellants' purported appeals from the Master's oral denials of the Motion to Transfer and the Oral Motion to Amend are not reviewable by the Court.

Respectfully submitted,

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