

THE STATE OF SOUTH CAORLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr. Circuit Court Judge

Case No. 2010-CP-08-1707

Appellate Case No. 2013-001531

HSBC Mortgage Corporation, USA,.....Appellant,

v.

Frederick J. Otterbein, IV a/k/a Frederick John Otterbein, IV,
Heather H. Otterbein, and First Federal Savings and Loan Association a/k/a
First Federal Saving and Loan Association of Charleston.....Defendants,

Of Whom

Frederick J. Otterbein, IV a/k/a Frederick John Otterbein, IV
and Heather H. Otterbein, are.....Respondents.

INITIAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....1

1. The trial court correctly determined the Otterbeins are entitled to have their legal claims for breach of contract and negligent misrepresentation tried by a jury.

2. The trial court correctly determined the Otterbeins claims were compulsory.

STATEMENT OF THE CASE AND FACTS1

STANDARD OF REVIEW.....4

ARGUMENT.....4

I. THE OTTERBEINS HAVE A RIGHT TO HAVE THEIR LEGAL CLAIMS TRIED BY A JURY.....4

A. Breach of contract and negligent misrepresentation are legal claims to be tried by a jury.....5

B. The claims for breach of contract and negligent misrepresentation do not seek equitable relief and cannot be recast as equitable in nature.....6

II. THE COUNTERCLAIMS ASSERTED ARE COMPULSORY AND ARISE OUT OF THE SAME OCCURRENCE AS APPELLANT’S CLAIM.....8

A. The dismissal of the foreclosure action ending the equitable proceedings should preclude Appellant from being able to deprive the Otterbeins of their right to a jury trial..... 10

CONCLUSION.....11

TABLE OF AUTHORITIES

CASES

<u>Bivens v. Watkins</u> , 313 S.C. 228, 230, 437 S.E.2d 132, 133 (Ct.App.1993)	6
<u>C & S Real Estate Servs., Inc. v. Massengale</u> , 290 S.C. 299, 350 S.E.2d 191 (1986).....	6
<u>Carolina First Bank, n/k/a TD Bank, NA v. Badd, LLC</u> , 400 S.C. 343, 733 S.E.2d 619 (Ct. App. 2012)	4,5
<u>Ellie, Inc. v. Miccichi</u> , 358 S.C. 78, 594 S.E.2d 4851 (Ct.App.2004).....	5
<u>First-Citizens Bank and Trust Company of South Carolina v. Hucks</u> , 305 S.C. 296, 298, 408 S.E.2d 222 (1991)	8
<u>Gilliland v. ElmwoodProperties</u> , 301 S.C. 295, 391 S.E.2d 577 (1990)	5
<u>Harrington v. Mikell</u> , 469 S.E. 2d 627, 321 S.C. 518 (Ct. App. 1996)	6
<u>Ins. Fin. Servs., Inc. v. S.C. Ins. Co.</u> , 271 S.C. 289, 247 S.E.2d 315 (1978).....	6, 10
<u>JASDIP Props. SC, LLC v. Estate of Richardson</u> , 395 S.C. 633, 720 S.E.2d 485 (Ct. App. 2011)	5
<u>Johnson v. S.C. Nat'l Bank</u> , 292 S.C. 51, 354 S.E.2d 895 (1987)	6
<u>Lester v. Dawson</u> , 327 S.C. 263, 491 S.E.2d 240 (1997)	5
<u>Moore v. Crowley & Associates, Inc.</u> , 254 S.C. 170, 172, 174 S.E.2d 340, 341 (1970)	5
<u>Mullinax v. Bates</u> , 317 S.C. 394, 453 S.E.2d 894 (1995).	8
<u>Plantation Federal Bank v. Gray</u> , 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013)	10
<u>R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.</u> , 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct.App.2000).....	5
<u>Rosenbaum v. S-M-S 32</u> , 427 S.E. 2d 897, 311 S.C. 140 (1993).....	7, 8
<u>Rushing v. McKinney</u> , 633 S.E. 2d 917, 370 S.C. 280 (Ct. App. 2006)	6
<u>Ward v. West Oil Company, Inc.</u> , 665 S.E. 2d 618, 625, 379 S.C. 225 (Ct. App. 2008).....	5

Wells Fargo v. Smith, 398 S.C. 487, 730 S.E.2d 328 (Ct App. 2012).....4, 5, 7, 8, 9
Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)8

STATUTES

S. C. Const., art. I §.....4, 11

STATEMENT OF ISSUES ON APPEAL

1. The trial court correctly determined the Otterbeins are entitled to have their legal claims for breach of contract and negligent misrepresentation tried by a jury.
2. The trial court correctly determined the Otterbeins claims were compulsory.

INTRODUCTION

Appellant conveniently glosses over and avoids drawing to this Court's attention the fact that in this case no foreclosure action or equitable proceeding presently exists and no right to foreclose existed at the time Appellant moved to strike the jury demand on two separate occasions. This fact should preclude any challenge to the Otterbeins' right to a jury trial. Notwithstanding, the Otterbeins are entitled to a jury trial as determined by the trial court because they have asserted legal and compulsory counterclaims.

STATEMENT OF THE CASE AND FACTS

This case originated as a mortgage foreclosure with HSBC Mortgage Corporation, USA (hereinafter "Appellant") filing an unverified Complaint on May 14, 2010 against Frederick and Heather Otterbein (hereinafter "Respondents or "Otterbeins") relating to their primary residence. Days later, on May 24, 2010, Appellant filed an amended pleading. (Amended Summons and Complaint). On June 25, 2010, Respondents filed an Answer and Counterclaim with a jury trial demand, in essence, claiming wrongful foreclosure. (Answer and Counterclaim), The Counterclaims include the following causes of action: (1) breach of contract and good faith and fair dealing; (2) declaratory and

injunctive relief; (3) unjust enrichment; (4) negligent misrepresentation; and (5) accounting.

The breach of contract counterclaim asserts that Appellant breached the same agreement with the Otterbeins referenced in the Complaint by Appellant by failing to comply with the terms of the agreement and with the contract's implied covenant of good faith and fair dealing. (Answer and Counterclaim and Amended Answer and Counterclaim). The basis for the alleged breach included a failure to appropriately post payments, give proper credit for payments received and for improper fees charged. (Amended Answer and Counterclaim, ¶24). The relief sought as set forth in paragraph 26 is for damages including "actual, consequential, incidental, expectation, and special damages against Plaintiff in the appropriate amount, costs, and such other and further relief as the court deems just and proper." (Answer and Counterclaim). The claim for negligent misrepresentation asserts that Appellant made false and misleading representations as to the loan transaction which Appellant sought relief under. (Answer and Counterclaim). Like the claim for breach of contract, the Otterbeins specifically sought an award of actual damages but also included a claim for punitive damages. (Answer and Counterclaim).

On July 19, 2010 Appellant filed a Second Amended Summons and Complaint. (Second Amended Summons and Complaint). On September 7, 2010 the Otterbeins filed an Amended Answer and Counterclaim reasserting their original claims. (Amended Answer and Counterclaim). On September 14, 2010, Appellant filed a Reply to

Respondents' Counterclaims. (Reply).

On December 6, 2011, Appellant, no longer having a right to foreclose¹, filed a Motion to Dismiss the case with prejudice which included dismissing Respondents' Counterclaims. (Motion to Dismiss). Respondents' agreed the foreclosure action had to be dismissed but opposed their counterclaims being dismissed. On February 27, 2012, the Motion to Dismiss was denied. (Order, Form 4). On September 6, 2012, Appellant filed a Motion for Summary Judgment on Counterclaims and to Strike Jury Demand. (Motion Summary Judgment and to Strike). On November 14, 2012, a hearing was held resulting in an Order being issued on January 17, 2013, denying Appellant's motions. (Order, January 17, 2013). No motion to reconsider was filed however, 29 days later, Respondent filed a Motion to Alter or Amend the Order. (Motion to Alter and or Amend). On February 25, 2013, an Order was issued denying the Motion to Alter or Amend. (Order, February 25, 2013). On March 12, 2013, Respondent filed a second motion to strike the jury demand. (Motion to Strike Jury Demand and Refer case to Master). On April 18, 2013, an Order was filed denying the Motion to Strike. (Order, April 18, 2013). Eighteen (18) days later on May 6, 2013, Appellant filed a Motion to Alter or Amend the Order pursuant to Rule 59, SCRCPP, which motion was denied by an Order filed on July 9, 2013. (Order, July 9, 2013). On July 5, 2013, due to a modification agreement reinstating the Otterbeins' loan two years prior, Appellant finally dismissed by stipulation

¹ On or about July 6, 2011 a modification agreement had been entered therefore the loan was no longer in default and Appellant had no right to foreclose.

the foreclosure action. The dismissal of the foreclosure action leaves the Otterbeins' counterclaims the only remaining causes of action to be addressed and or tried in this matter. Appellant filed its Notice of Appeal in this matter on July 15, 2013.

STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law. An appellate court may decide questions of law with no particular deference to the [circuit] court." Carolina First Bank, n/k/a TD Bank, NA v. Badd, LLC, 400 S.C. 343, 345, 733 S.E.2d 619 (Ct. App. 2012) (Citations Omitted). Further, "[t]he matter of striking from a pleading . . . is largely within the discretion of the trial judge. The granting or refusal 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 an error of law." Wells Fargo v. Smith, 398 S.C. 487, 492, 730 S.E.2d 328 (Ct App. 2012) (Citations Omitted).

ARGUMENT

I. THE OTTERBEINS HAVE A RIGHT TO HAVE THEIR LEGAL CLAIMS TRIED BY A JURY.

Both decisions to deny Appellant's motions to strike the jury demand and to preserve the Otterbeins right to have their legal counterclaims tried by a jury were correct. "The South Carolina Constitution provides '[t]he right of trial by jury shall be preserved inviolate.' S.C. Const, art. I, § 14.'" Smith, 398 S.C. at 493, 730 S.E.2d 328. "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." Id. at 494, (quoting, Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). "If a complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." Id. at 494 (Citations Omitted). "When a complaint raises both legal and equitable issues and rights, the legal issues are determined by a jury while equitable issues are for the judge." Badd, LLC, 400 S.C.at 346, 733 S.E.2d 619(quoting, JASDIP Props. SC, LLC v. Estate of Richardson, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App. 2011)). The Otterbeins claims for breach of contract and negligent misrepresentation are undoubtedly legal claims with a right to jury trial.

A. Breach of contract and negligent misrepresentation are legal claims to be tried by a jury.

The trial court correctly determined the claims for breach of contract and negligent misrepresentation are legal claims entitled to be tried by a jury as demanded. It has been consistently held that "[a]n action for breach of contract seeking money damages is an action at law." Ward v. West Oil Company, Inc., 665 S.E. 2d 618, 625, 379 S.C. 225 (Ct. App. 2008), citing, Sterling Dev. Co. v. Collins, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992); Moore v. Crowley & Associates, Inc., 254 S.C. 170, 172, 174 S.E.2d 340, 341 (1970); Ellie, Inc. v. Miccichi, 358 S.C. 78, 89, 594 S.E.2d 485, 491 (Ct.App.2004); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct.App.2000). Likewise, a cause of action for negligent misrepresentation is recognized as an action at law. See Gilliland v. ElmwoodProperties, 301 S.C. 295, 391 S.E.2d 577 (1990); Rushing v. McKinney, 633 S.E. 2d 917, 370 S.C.

280 (Ct. App. 2006)(causes of action for breach of contract, fraudulent inducement, fraud, negligent misrepresentation, breach of good faith and fair dealing, and breach of fiduciary duty arising from this alleged contract are legal causes of action); Harrington v. Mikell, 469 S.E. 2d 627, 321 S.C. 518 (Ct. App. 1996)(one may bring a common law act in tort for negligent misrepresentation); Bivens v. Watkins, 313 S.C. 228, 230, 437 S.E.2d 132, 133 (Ct.App.1993) (applying a legal standard of review on appeal from causes of action alleging fraud, negligent misrepresentation, and breach of fiduciary duty). The trial court committed no error in law in determining the Otterbeins asserted legal causes of action entitled to a jury trial.

B. The claims for breach of contract and negligent misrepresentation do not seek equitable relief and cannot be recast as equitable in nature.

The Otterbeins' claims cannot be transformed into alleged equitable claims in an effort to deny them their Seventh Amendment right to a jury trial of legal issues. If a complaint is equitable and the counterclaim is legal and compulsory, the defendant has the right to a jury trial on the counterclaim. C & S Real Estate Servs., Inc. v. Massengale, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986), modified by Johnson v. S.C. Nat'l Bank, 292 S.C. 51, 354 S.E.2d 895 (1987).

The characterization of an action as equitable or legal depends on the main purpose in bringing the action. Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978). "The main purpose of the action should generally be ascertained from the body of the complaint." Id. "The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action

as legal or equitable.” Wells Fargo v. Smith, 730 S.E. 2d 328, 398 S.C. 487, 494-95 (Ct. App. 2012).

In this case the Otterbeins asserted several legal causes of action including breach of contract with the implied covenant of good faith and fair dealing, as well as a cause of action for negligent misrepresentation. As required, the Court looked to the allegations of the counterclaims. The relevant paragraphs of the Answer and Counterclaim provide:

25. As a result of the breach of Plaintiff, Defendants have suffered damages including, but not limited to, lost properties, devaluation and lack of marketability of Defendants’ home and excess charges.

26. Defendants are informed and believe they are entitled to actual, consequential, incidental, expectation, and special damages against Plaintiff in the appropriate amount, costs, and such other and further relief as the court deems just and proper.

43. By virtue of the negligent misrepresentations, the Defendants have been actually damaged and because these representations were willful, intentional, with malice towards the Defendants and with a reckless disregard for the rights of the Defendants, they seek an award of actual and punitive damages in accordance with their prayer for relief.

(Answer and Counterclaim). None of these paragraphs seek equitable relief. They in fact seek monetary damages as the remedy. Therefore, the Court did not commit an error in law when it determined the Otterbeins’ causes of action for breach of contract with the implied covenant of good faith and fair dealing, as well as a for negligent misrepresentation are actions at law entitled to be tried by a jury.

In an effort to circumvent the Otterbeins right to a jury trial Appellant cites to the case of Rosenbaum v. S-M-S 32, 427 S.E. 2d 897, 311 S.C. 140 (1993). Rosenbaum is not applicable here nor does it offer any guidance. Rosenbaum dealt with the statutory

construction of the statutes enacted to set aside a tax deed. The court there struck the counterclaims asserted. Here the only thing left to be tried are the counterclaims, there no longer being a right to foreclose. Additionally, in Rosenbaum the trial court struck the counterclaim on the grounds a defendant cannot “earn” the right to a jury trial by asserting a counterclaim for trespass to try title.” Id. at 897. Such an argument that the Otterbeins were trying to “‘earn’ the right to a jury trial in an equitable action” (Appellant Brief, p. 9) was never presented to the trial court. Thus, the presentation of this issue is mere speculation on the part of Appellant and not an issue preserved for consideration. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”). The trial court’s ruling should be affirmed.

II. THE COUNTERCLAIMS ASSERTED ARE COMPULSORY AND ARISE OUT OF THE SAME OCCURRENCE AS APPELLANT’S CLAIM.

“A party does not waive its rights to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature.” First-Citizens Bank and Trust Company of South Carolina v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222 (1991). “The test for determining if a counterclaim is compulsory is whether there is a ‘logical relationship’ between the claim and the counterclaim.” Wells Fargo v. Smith, 730 S.E. 2d 328, 398 S.C. 487, 494-95 (Ct. App. 2012), citing Mullinax v. Bates, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). “In essence, the ‘logical relationship’

determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage.” Id. at 333.

In this case the Otterbeins have pled a cause of action for breach of contract alleging a breach of the same agreement under which Appellant filed its foreclosure action. The Otterbeins have asserted that Appellant violated the terms of the Note and Mortgage relating to posting of payments, credit of payments, fees charged, as well as the implied covenant of good faith and fair dealing in regards to Appellant’s actions in offering, administering, communicating, and dealing with the Otterbeins with regard to loan modification requests, applications, negotiations, documents and agreements. (Amended Answer and Counterclaim). Additionally, the Otterbeins have plead a cause of action for negligent misrepresentation alleging Appellant made false and misleading representations to the Otterbeins regarding the actual terms of the Otterbeins loan transaction and Appellant’s compliance with those terms; the Otterbeins applications for loan modifications; the availability of a loan modification; and Plaintiff compliance with loan modification policies and guidelines. (Amended Answer and Counterclaim).

Here, there is a logical relationship between the allegations of both these causes of action and Appellant’s original claim for foreclosure and its right to enforce the note. Had the Appellant’s foreclosure action not been dismissed, the allegations of the Otterbeins causes of action had the potential to impact Appellant’s right to foreclose. Appellant’s own characterization of the purpose of the Otterbeins claims is to “halt the foreclosure.” If the claims have the purpose and ability to halt the foreclosure they certainly relate to

the enforceability of the Note and are compulsory. See Smith at 333(claims for common law and statutory unconscionability were compulsory since there is a " logical relationship" between the enforceability of the Note, which is the subject of the foreclosure action, and the allegation that the Mortgage between Wells Fargo and Smith is unconscionable). The Otterbeins plead two causes of action which are clearly legal in nature and compulsory. The Otterbeins are entitled to a jury trial as correct held by the court. See Plantation Federal Bank v. Gray, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013)(defendants compulsory counterclaims for breach of contract, breach of fiduciary duty, fraud, violations of the South Carolina Trade Practices Act and tortious interference with economic opportunities were entitled to be tried by a jury prior to the equitable claims being determined.)

A. The dismissal of the foreclosure action ending the equitable proceedings should preclude Appellant from being able to deprive the Otterbeins of their right to a jury trial.

Novel to this case is the fact that in 2011 Appellant moved to dismiss its own foreclosure action having lost the right to foreclose. Each time Appellant moved to strike the jury demand it no longer had a right to maintain the foreclosure action by virtue of reinstatement through a modification. Indeed Appellant ultimately voluntarily dismissed the foreclosure action.

Just as an "[a]n action sounding in law may be transformed to one in equity because equitable relief is sought." Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citing 1 Am. Jur. 2d, Actions § 7 (1962)); it seems

appropriate that the opposite should also hold true. That is, an action sounding in equity may be transformed to one in law when the right in equity is completely lost. Stated differently when an equitable action no longer exists and a legal claim does exist, the party asserting the legal claim should be entitled a jury trial of its claims as if no equitable action had existed. The Otterbeins causes of action now being the only claims that remain the question of whether the claims are transformed from legal to equitable or are compulsory seems to no longer be viable. To hold otherwise would appear to infringe upon the fundamental principle that "[t]he right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. "

CONCLUSION

In conclusion for the reasons stated above the Otterbeins have asserted legal and compulsory causes of action, which were not waived, by originally asserting the claims as counterclaims to a foreclosure complaint, and therefore the Court did not err in denying Appellant's Motion to Strike the Jury Demand.

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Mt. Pleasant, SC

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Of Whom

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and Heather H. Otterbein, are.....Respondents.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the INITIAL BRIEF OF RESPONDENTS on Appellant

and Defendant by depositing copies of it in the United State Mail, Postage prepaid, addressed to the below Counsel of Record:

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Mary Leigh Arnold

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**RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD
ON APPEAL**

Pursuant to Rule 209, SCACR, Respondents Frederick J. Otterbein and Heather H. Otterbein hereby designate the following materials for inclusion in the record on appeal. Undersigned counsel certifies, pursuant to Rule 209(c), SCARC, that the designation contains no matter which is irrelevant to the appeal.

ORDERS

1. Form 4 Order Denying Plaintiff's Motion to Dismiss the Case filed on February 27, 2012;
2. Form 4 Order Denying Plaintiff's Motion for Summary Judgment on the Counterclaims or Referring the case to the Master in Equity filed on November 16, 2012;
3. Order Denying Plaintiff's Motion for Summary Judgment on the Counterclaims or Referring the case to the Master in Equity filed on January 17, 2013;
4. Order Denying Plaintiff's Motion to Alter or Amend filed February 25, 2013;
5. Form 4 Order Denying Plaintiff's Motion to Strike the Jury Demand and Refer the Case to the Master in Equity filed April 18, 2013;

PLEADINGS

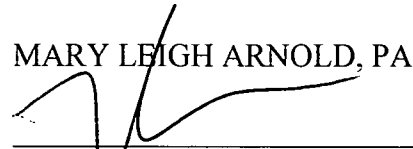
6. Amended Complaint filed May 24, 2010;
7. Answer and Counterclaim of Fredrick and Heather Otterbein filed June 25, 2010;
8. Second Amended Complaint filed July 19, 2010;
9. Amended Answer and Counterclaim of Fredrick and Heather Otterbein filed September 7, 2010;
10. Stipulation of Dismissal of foreclosure claim only filed July 9, 2013;

MOTIONS

11. Plaintiff's Motion to Dismiss the Case without Prejudice filed December 6, 2011;
12. Plaintiff's Motion for Summary Judgment as to Defendants Counterclaims and to Strike the Jury Demand filed September 6, 2012;
13. Plaintiff's Motion to Alter or Amend the Order Denying Summary Judgment and Strike the Jury Demand filed February 15, 2013;
14. Plaintiff's Motion to Strike the Jury Demand and Refer the Case to the Master in Equity filed March 12, 2013;
15. Plaintiff's Motion to Alter or Amend the Order Denying Plaintiff's Motion to Strike the Jury Demand and Refer the Case to the Master in Equity filed May 6, 2013;

RESPECTFULLY SUBMITTED,

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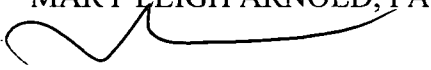
PROOF OF SERVICE

I HEREBY CERTIFY that I have served the DESIGNATION OF MATTER OF
RESPONDENTS on Appellant and Defendant by depositing copies of it in the United State
Mail, Postage prepaid, addressed to the below Counsel of Record:

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MARY LEIGH ARNOLD, PA


Mary Leigh Arnold

December 1, 2013