Dr. Walter T. Cardwell
15 Dawnwood Drive
Greenville S. C. 29615
January 16, 2014

The Honorable Clerk of the,
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543-0001

Re: Petition for a Writ of Certiorari to the South Carolina Supreme Court

Dear Sir:

Enclosed please find an original and ten copies of a Petition for a Writ of Certiorari, and original and ten copies of a Motion for Leave to Proceed *in Forma Pauperis*, and Proof of Service.

Thank you for your assistance in filing these documents.

Yours truly,

Walter Cardwell
Dr. Walter T. Cardwell.

cc: M. Kevin McCarrell, Esquire
William N. Nettles
The South Carolina Supreme Court

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Dr. Walter T. Cardwell, Jr. — PETITIONER

VS.

The Palmetto Bank — RESPONDENT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in *forma pauperis.*

Petitioner has not previously been granted leave to proceed in forma pauperis in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Walter Cardwell

Dr. Walter T. Cardwell, Jr.

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Dr. Walter T. Cardwell, Jr., am the petitioner in the above-entitled case. In support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

| Income Source | Average monthly amount during The past 12 months | | Amount expected Next month. | |
|---|---|---|---|---|
| | You | Spouse | You | Spouse |
| Employment | $0 | $0 | $0 | $0 |
| Self-employment | $0 | $0 | $0 | $0 |
| Income from real property | $0 | $0 | $0 | $0 |
| Interest and Dividends | $0 | $0 | $0 | $0 |
| Gifts | $0 | $0 | $0 | $0 |
| Alimony | $0 | $0 | $0 | $0 |
| Retirement (Social Security) | $579 | $0 | $579 | $0 |
| Disability | $0 | $0 | $0 | $0 |
| Public-assistance | $0 | $0 | $0 | $0 |
| Other | $0 | $0 | $0 | $0 |
| **Total monthly income:** | $579 | $0 | $579 | $0 |

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Unmarried.

4. How much cash do you and your spouse have? $ Below, state any money you or your spouse have in bank accounts or in any other financial institution.

| **Financial institution** | **Type of account** | **Amount you have** | **Amount your spouse has** |
|---|---|---|---|
| Bank of America | Checking | $175 | $0 |

Home Value: Foreclosed

Other real estate: None

Motor Vehicle #1
2008, Chevrolet Colorado
Value: $4200

Motor Vehicle #2
None

Other assets: None.

6. State every person, business, amount owed. or organization owing you or your spouse money, and the amount owed.

   None.

7. State the persons who rely on you or your spouse for support.

   None.

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

| | |
|---|---|
| Rent or home-mortgage payment: | $0 |
| Utilities: | $0 |
| Home Maintenance | $0 |
| Food | $150 |
| Clothing | $0 |
| Laundry and dry-cleaning | $0 |
| Medical and dental expenses | $0 |

| | |
|---|---|
| Transportation | $100 |
| Recreation | $0 |
| Insurance (Home and Auto) | $0 |
| Taxes | $0 |
| Installment payments | |
| Motor Vehicle | $350 |
| Credit Cards | $0 |
| Department stores | $0 |
| Other | $0 |
| Alimony, maintenance, and support paid to others | $0 |
| Regular expenses for operation of business profession or farm | $0 |
| Other | $0 |
| **Total monthly expenses:** | $600 |

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

   Yes. If I lose the case a large deficiency judgement.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?

    No.

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

    No.

12. Provide any other information that will help explain why you cannot pay the costs of this case.

My income is $579 a month. My expenses are $600. I survive with the help of my friends who I will repay some day.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 16, 2014.

Walter Cardwell

Dr. Walter T. Cardwell, Jr.

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

Dr. Walter T. Cardwell, Jr. — PETITIONER

vs.

The Palmetto Bank — RESPONDENT

**PROOF OF SERVICE**

I, Dr. Walter T. Cardwell, Jr., do swear or declare that on this date, January 16, 2014, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

The Honorable Daniel E. Shearouse, Clerk, South Carolina Supreme Court, Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina 29201.

Mr. Michael Kevin McCarrell, Smith Moore Leatherwood, The Leatherwood Plaza, 300 East McBee Avenue, Suite 500,Greenville, SC 29601.

William N. Nettles, United States Attorney, 1441 Main St.,Suit 500, Columbia, SC 29201

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 16, 2014

Walter Cardwell

Dr. Walter T. Cardwell, Jr.

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SUPREME COURT OF THE UNITED STATES

Dr. Walter T. Cardwell, Jr. — PETITIONER

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The Palmetto Bank — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SOUTH CAROLINA SUPREME COURT

# PETITION FOR A WRIT OF CERTIORARI

Dr. Walter T. Cardwell
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Petitioner Pro Se

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Smith Moore Leatherwood
Post Office Box 87
Greenville, South Carolina 29602
Attorney for Respondent

William N. Nettles
1441 Main St., Suit 500
Columbia, SC 29201
United States Attorney

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United States Attorney

## QUESTIONS PRESENTED

1) South Carolina is a state with a Court of Equity and a Court of law. In a foreclosure case there are specific rules to determine where the case should be tried when the original complaint is a foreclosure and therefore an issue of equity while the answer is in law. All of the rules and laws state that in this situation, the issues of law MUST be tried first by a jury and then the issues of equity are to be decided by the equity court Judge being constrained by the facts determined by the Jury.

In the present case, the complaint was in equity and the answer was in law and the trial Judge ignored the South Carolina Constitution and decided issues of fact that could only be decided by a jury.

The first question presented is:

Can a trial Judge arbitrarily deny a jury trial simply by ruling that an issue is not triable by right of jury when the triability of that issue depends on facts that according to law must be tried by a jury without having those facts determined by a jury?

2) While not presented as a question to the South Carolina Supreme Court because Petitioner believed this issue was a matter of law enforcement and not of law, Respondent did bring up the issue of perjury that Petitioner claimed was committed during the original trial which Petitioner brought to the attention of the trial Judge and the Court of Appeals

and were thus included in documents supplied to the South Carolina Supreme Court. According to the Greenville County South Carolina Sheriff's department, only the trial Judge could order an investigation into this alleged felony. When asked to do so the trial Judge denied the request.

The second question presented is:

Does a Judge have a duty to have charges of perjury investigated when the location of specific corroborating evidence and a potential witness is presented to the trial Judge and it is evidence that only he can obtain?

## LIST OF PARTIES

It is believed that the caption of the case contains the names of all of the parties who participated in the proceedings before the South Carolina Supreme Court.

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### STATUTES AND RULES

## IN THE

## SUPREME COURT OF THE UNITED STATES

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The opinion of the South Carolina Circuit Court, appears at Appendix A to the petition, the opinion of the South Carolina Court of Appeals, appears at Appendix B to the petition, and the opinion of the highest state court to review the merits, The South Carolina Supreme Court, appears at Appendix C.

## JURISDICTION

A denial by the South Carolina Supreme Court on a Petition for a Writ of Certiorari was entered on October 18, 2013. The South Carolina Supreme Court had Jurisdiction under S.C. Code §14-3-310. This Court has jurisdiction under 28 U.S.C. §1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the following United States Constitutional Provisions, South Carolina Constitutional Provisions, and South Carolina Statues.

U.S. Const. Amend. XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1257(a). State courts; certiorari.

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

18 U.S.C. §242. Deprivation of rights under color of law

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted

use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

S.C. Const. art. 1 §14.

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both. (1970 (56) 2684; 1971 (57) 315.)

S.C. Code §14-3-310. Original jurisdiction of Supreme Court.

The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus and other remedial and original writs.

S.C. Code §32-3-10. Statute of Frauds.

Agreements required to be in writing and signed.

No action shall be brought whereby:

(1) To charge any executor or administrator upon any special promise to answer damages out of his own estate;

(2) To charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person;

(3) To charge any person upon any agreement made upon consideration of marriage;

(4) To charge any person upon any contract or sale of lands, tenements or

hereditaments or any interest in or concerning them; or

(5) To charge any person upon any agreement that is not to be performed within the space of one year from the making thereof;

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

S.C. Code §16-13-240-1. Obtaining signature or property by false pretenses.

A person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty of a:

(1) felony and, upon conviction, must be fined not more than five hundred dollars and imprisoned not more than ten years if the value of the property is ten thousand dollars or more;

S.C. Code §16-9-10-A&B-1. Perjury and subornation of perjury.

(A)(1) It is unlawful for a person to wilfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State.

(B)(1) A person who violates the provisions of subsection (A)(1) is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years, or both.

S.C. RCP 38(a)(b). Rule 38 Jury Trial of Right.

(a) Right Preserved. The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.

(b) Demand. Any party may demand a trial by jury of any issue triable of right

by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

S.C. RCP 53(a)(b). Rule 53 Masters and Special Referees

(a) Master and Special Referee Defined. The term "master" means the master-in-equity for the county. The term "special referee" means a member of the South Carolina Bar to whom a matter has been referred under S.C. Code Ann. § 14-11-60.

(b) References. In an action where the parties consent, in a default case, or 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. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court. A case shall not be referred to a master or special referee for the purpose of making a report to the circuit court. The clerk shall promptly provide the master or special referee with a copy of the order of reference.

## STATEMENT OF THE CASE

This is a foreclosure case that was tried in the Circuit Court in Greenville County South Carolina with Master in Equity Judge Charles B. Simmons presiding. Judge Simmons ruled in favor of the Respondent and ordered the Petitioner's home up for sale.

Petitioner did appeal this decision to the South Carolina Court of Appeals where the appeal was denied. As required by South Carolina Court Rules a Motion to Reconsider must be filed with the Court of Appeals prior to petitioning the State Supreme Court for a Writ of Certiorari. In this Motion to Reconsider, the issue of the violation of Petitioner's United States Constitutional Rights was first brought up. The Court of Appeals also denied this Motion and a Petition for a Writ of Certiorari was filed with the South Carolina Supreme Court asking it to rule on the denial of a jury trial and if this did not constitute a violation of Petitioner's United States Constitutional right to due process under U.S. Const. Amend. XIV, §1. The petition was denied. Petitioner does believe that the South Carolina Supreme Court is wrong in its decision and that it should be reversed.

The Respondent in this case filed a Complaint for foreclosure in the South Carolina Circuit Court and Petitioner did file an Answer (Appendix E) to the Respondent's Complaint citing wrong doing by the Palmetto Bank that resulted in their actions. At the time of filing the Answer it was not clear which of several potential wrongful acts occurred all of them issues of law and a Counter Claim for money damages only was also filed against the Bank

for their wrongful acts.

The Respondent filed a Compulsory Motion for Reference under S.C. RCP 53(b) to move the case to the Equity Court for trial by the Master in Equity Judge. Petitioner filed a Motion to restore the case to the Jury Trial Roster under S.C. RCP 38(a)(b). Originally, petitioner was informed by the Clerk of Court that the trial would take place in six months. Moving it to the Equity Court gave Petitioner approximately one month which was spent trying to find a lawyer who could conduct proper discovery. None was found who was willing to take on the Bank and so Petitioner was unable to even begin discovery.

The trial before Judge Simmons took place on March 30, 2011 whereupon at the beginning of the trial Judge Simmons denied the motion to restore the case to the Jury Roster giving no reason at the time for the denial. Judge Simmons was informed that discovery had not been made and he asked if a written request for discovery had been presented to the respondent and because Petitioner was unable to find an attorney, the request was not made in writing and Judge Simmons went on with the trial.

During the trial, the Bank loan officer with whom Petitioner had the agreement, Ms. Josie Stewart, lied under oath about the agreement thus committing perjury, a felony, under S.C. Code §16-9-10-1(a)(b). AS a result, the outcome of course was a forgone conclusion and Judge Simmons ruled in favor of the Bank and foreclosed on the property.

In his Master Order and Judgement of Foreclosure (Appendix A) he states his findings of facts and his reasons for not returning the case to the Jury Roster. His reasons are in essence a rubber stamp of the Respondent's arguments that the agreement was not in writing and thus unenforceable under South Carolina's Statue of Frauds S.C. Code §32-3-10. He states:

> "Cardwell essentially alleges that he entered into an oral agreement with Plaintiff to modify the terms of the mortgage ... Even if these allegations are true, the oral forbearance agreement to modify the Mortgage is unenforceable under the Statute of Frauds."

While Petitioner in his original Answer and Counter-claim (Appendix E) did state erroneously that the agreement was an oral agreement, it was also pointed out in the original Answer that Ms. Stewart whom Petitioner had the agreement with stated that the agreement was entered in the Bank's computer and then confirmed to Petitioner that it was indeed in the computer. Judge Simmons has been an Equity Court Judge for over 25 years. He knew at the time of his decision that this constituted "in writing". Furthermore Petitioner specifically pointed out in his Motion to Restore to the Jury Roster (Appendix F) that the agreement was entered in the Bank's computer and was thus "in writing" so for Judge Simmons to state that "Cardwell essentially alleges that he entered into an oral agreement" as the basis for his decision totally ignores the correction made by Petitioner in his Motion to Restore to the Trial Roster.

But Judge Simmons also seems not to realize that if the facts were as he stated, that

if the information was not in the Bank's computer, then Ms. Stewart would have been attempting to commit what under South Carolina Law S.C. Code §16-13-240-1 is an equally serious felony, obtaining signature or property by false pretenses. Based on the allegations in Petitioner's Answer and Counter-claim (Appendix E) there can be no other possible interpretation. So if the agreement was in writing in the Bank's computer the issue raised in the Counter-claim is triable by right of jury based on S.C. Code § 32-3-10 and if it is not in the Bank's computer it is triable by right of jury based on S.C. Code §16-13-240-1.

S.C. RCP 38(a) is unequivocal that "Issues of fact in an action for the recovery of money only must be tried by a jury unless waived. It was not waived. Was the agreement in writing? That is a fact that must be decided by a jury and not by Judge Simmons as was demanded by Petitioner. Once a jury determined if the agreement was in writing or if Ms. Stewart did attempt to obtain the property under false pretenses then and only then would it be proper for Judge Simmons to determine if the issue is "Triable by right of Jury".

After the trial, Petitioner filed a Motion for a New Trial (Appendix F) based in part on Judge Simmons not returning the case to a Jury for the determination of the facts and because of Ms. Stewart's alleged perjury. The motion was denied by Judge Simmons saying,

> " In the Motion, Cardwell, in substance relates the same arguments and issues previously raised and ruled upon by the Court. Based upon a thorough review of the record, the Court finds no basis to grant the Motion. "

In saying this, Judge Simmons is saying that he did not overlook anything including

Petitioner's correction that the agreement was in writing. This can only mean that he was deliberately deceptive of Petitioner's statements of whether the agreement was in writing.

In the Motion for a New Trial the issue of Ms. Stewart's alleged perjury was brought up, where evidence could be found of her perjury, a potential witness, and that according to the Greenville County Sheriff's Department, only Judge Simmons could order an investigation of this crime. Judge Simmons in his denial of the motion makes no mention of her alleged perjury nor the fact that only he could order an investigation, and in saying that there is nothing new presented is once again stating something that he knows to be false. In refusing to investigate the allegations when the location of evidence of her perjury and also that a potential witness existed and where only he could order this investigation, Judge Simmons did aid and abet the Respondent and/or its agents in the commission of several felonies and in doing so also deprived Petitioner of his United States Constitutional right to equal protection of the law as guaranteed by U.S. Const. Amend. XIV, §1.

Two of the questions asked to be decided by the Court of Appeals were: "Did the trial judge err in not returning the case to the jury roster" and "Does the court have an obligation to investigate an accusation of perjury against one of respondent's agents by appellant when potential corroborating evidence is uncovered at trial". In the denial of the appeal (Appendix B), the Court of Appeals answered neither. In the decision the Court simply reiterated Judge Simmons' assertion that the agreement must be in writing citing the Statute of Frauds which was not the question asked.

1. THE CASE MUST BE TRIED BY A JURY FIRST

With regard to Ms. Stewart's alleged perjury, stating that the issue of perjury had to be brought before the original trial Judge to be considered by the Court of Appeals which of course it was in the Motion for a New Trial (Appendix F). Once again facts clearly presented to the Court of Appeals was simply ignored. It was not overlooked in that it was again pointed out to the Court of Appeals in the Motion to Reconsider where the Court in its denial of the Motion (Appendix C) said it found nothing new in the Motion to Reconsider thus saying it did not overlook this in the original appeal.

In the Petition for a Writ of Certiorari filed with the South Carolina Supreme Court, the Court was asked if, "The court of appeals should have held that denying petitioner's right to a trial by jury the trial judge's actions were improper and unconstitutional". In the denial of the petition, no reason was given.

## REASONS FOR GRANTING THE PETITION

1) Petitioner has a Constitutional Right to a Jury Trial.

It is clear that under South Carolina Laws and its Constitution that Petitioner was entitled to a jury trial and that in denying Petitioner his right to a trial by jury the South Carolina Courts were violating Petitioner's right to due process under U.S. Const. Amend. XIV, §1.

2) Petitioner was Denied the Equal Protection of the Law.

It is also clear that not ordering an investigation into Ms. Stewart's alleged perjury when only he could do so, that Judge Simmons did also deny Petitioner his right to equal protection under the law as also guaranteed by U.S. Const. Amend. XIV, §1.

3) The Denial of Petitioner's Rights was Deliberate.

In looking at the opinions the few times they were given, the deliberate disregard for facts presented to all the courts clearly indicates that these violations of Petitioner's United States Constitutional Rights was not simply an error in judgement but a deliberate and concerted effort by the three South Carolina Courts involved to violate not only South Carolina Law but the United States Constitution as well.

4) Possible Motives for the Courts' Rulings.

Why would the courts conspire to deprive Petitioner of his rights? There are several

possible reasons. Approximately a year before the foreclosure was filed there was an article in the Greenville, South Carolina News where they reported that Chief Justice Toal of the South Carolina Supreme Court ordered all the equity court judges to eliminate the backlog of foreclosure cases. When asked by the reporter how this could be accomplished without violating people's rights, Chief Justice Toal is reported to have said that nobody's rights will be violated. But the next week the paper reported that there was a small mutiny of the equity court judges resisting her order. Nothing further was reported except several articles about concern that the South Carolina Judicial System was out of money and that the Legislature would not provide additional money to handle the foreclosure crisis. There clearly was pressure on Judge Simmons to "expedite" his foreclosure cases.

It must have seemed so simple in Petitioner's case to "expedite" his passage through Judge Simmons' court. At the start of the trial Petitioner didn't even know what court he was in or what rules applied. It seemed so easy BUT, Petitioner does learn quickly. Why would the other courts go along with Judge Simmons' violating Petitioner's rights. Because before the Appeal could be filed, Petitioner's brother who was living with him at the time, died of a heart attack brought on by the stress of Judge Simmons' ruling. To rule against Judge Simmons now would subject him and South Carolina to a wrongful death lawsuit and if he was acting under orders, others as well. Also, in ruling against Judge Simmons, it would expose him and perhaps others to Federal criminal charges under 18 U.S.C. §242if it was proven that Judge Simmons knowingly violated Petitioner's Constitutional rights.

5) Harm to Others.

While the Court must make its decision based only on the law whether this petition should be granted, it is clear that even when a petition has merit it rarely is granted unless there is some compelling reason. There can be no more compelling reason than that the outcome of this petition could affect everyone on the planet.

Carl Sagan once said, "extraordinary claims require extraordinary proof" but unfortunately due to this lawsuit there is no proof, only Petitioner's say so. As a result, to paraphrase Professor Sagan, "that extraordinary harm requires extraordinary caution so please, do not dismiss what is said below out of hand but look into it fully.

The harm that the denial of this petition could cause concerns a new technology that Petitioner has spent the last 10 years developing. It is a technology that is generally dismissed based on historical reasons and not based on scientific fact. The technology concerns ion propulsion in the atmosphere. Ion propulsion was first discussed by Dr. Robert Goddard in 1905 and he received the first patent for it in 1916. But his form of ion propulsion dealt with ion propulsion in the vacuum of space and it was not until 1929 that Hermann Oberth first proposed what would later become the foundation of ion propulsion in the atmosphere.

Petitioner received his PhD in 1978 from Clemson University and his dissertation

was on the development of a new type of transistor called the Merged Depletion Junction Field Effect Transistor. It was based on a new understanding of electrostatic fields that Petitioner developed that Motorola later dubbed the Cardwell Effect and as a condition of obtaining his degree he successfully built and tested several devices as did Motorola, who confirmed the effect.

In developing this transistor Petitioner obtained key insights into certain behavior of electrostatic fields. It was this knowledge that enabled him to explain a characteristic of a conventional junction field effect transistor that the patent examiner told Petitioner that he used to explain the operation of junction field effect transistors to other patent applicant's and at the time he said no patent application he received got it right except Petitioner's. Petitioner states this because a similar lack of understanding exists in the field of ion propulsion in the atmosphere and it is the key obstacle in developing practical ion propulsion for atmospheric applications. In over 40 patents Petitioner has looked at, in countless papers and articles published not one has "got it right". The latest publication was an article published by Steven Barrett of MIT in *The Proceedings of the Royal Society* and unless it is an elaborate disinformation effort, he doesn't have a clue either, nor does NASA, nor does Lockheed Martin nor any other person who Petitioner is aware of. This is said to warn the Court that there are many people who claim to be experts in this field but very few really are and if the Court takes this information seriously and contacts other "experts" the Court would be well advised not to simply

take the opinion of any so called "expert" without Petitioner having the opportunity to comment on his opinions.

Preliminary computer simulations indicate that what was looked upon as a limitation caused by the fundamental laws of nature was a misunderstanding of the fundamental principles of ion propulsion in the atmosphere. The problem has now become simply an engineering design problem to maximize efficiency. A design study has been done to estimate what the performance capabilities of an ion propelled vehicle will be based on computer simulations, depending on what level of efficiency can be obtained. The results are extraordinary. The following excerpt from the last of a four part series of unpublished articles on Ion Propulsion in the atmosphere written by Petitioner illustrates this.

> One measure of the level a Civilization has reached is the amount of power each individual can use to propel himself and how far he could travel in a day.
>
> Level 1: When man could only use his own muscles he had at his disposal 1/10 of a horsepower and could travel about a half mile a day on average.
>
> Level 2: When animals were domesticated man had at his disposal one horsepower and could travel five miles a day on average.
>
> Level 3 : When mankind developed the steam engine he had at his disposal ten horsepower and could travel fifty miles a day on average.
>
> Level 4: When humans developed the automobile they had at their

disposal one hundred horsepower and could travel 500 miles a day on average.

Level 5: With ion propulsion the next level of civilization will be reached by an increase in efficiency not power which will allow one to travel up to a 5000 miles in a day.

The reason the distance traveled each day is a valid measure of the level a civilization has reached is because being able to travel beyond what is necessary to obtain food opens up the world of other activities and endeavors that otherwise would be denied to each individual. With each level of civilization not only did the distance one could travel increase by an order of magnitude the cost to travel a given distance also decreased by an order of magnitude.

But with every advance in civilization came serious consequences, roads and infrastructure, pollution, impact on wildlife, quality of life, and safety. This new transportation system which we call an I-Jet while advancing civilization will at the same time reduce or eliminate many of the negative consequences of earlier advances. There are many so called "Green" technologies; those technologies that are friendly to the planet, but most deal only with one aspect of the environment. The I-Jet if used properly can affect them all.

But of all the benefits that I-Jets may bring to Civilization, the greatest benefit is the saving of over one million lives a year by eliminating most traffic related deaths. It will also save over a billion animals each year that are killed on the highways. The four year delay in the development of the I-Jet due to the legal actions in South Carolina will, if the I-Jet is successful, mean that the Palmetto Bank and the South Carolina Courts and Judges are responsible for the death's of four million people, so far. Not hypothetically but in reality, IF, the I-Jet EVER flies. Petitioner believes it is really not a matter of if, but of when.

If the deaths cited above were not bad enough, it could get much worse. There is a national security issue that I cannot discuss in public but Chief Justice Roberts was made aware of in a petition for a stay pending a decision here and he can make other members of the Court aware of the issue if the Court so chooses. I can make much more information available when I can be sure that it will not be made public.

Because of the delay caused by this lawsuit, to try and make up some of the time lost to potentially save as many lives as possible, if justice does not prevail in this case whereby the Respondent and the State of South Carolina are forced to make restitution for their criminal acts, Petitioner will have no choice but to go public with this new technology to raise the necessary capital to speed up development of the I-Jet. Going public poses a significant risk to the security of the United States as Chief Justice Roberts can explain. Without Petitioner receiving justice in this case, there is no other option.

## CONCLUSION

After reviewing the information provided I hope the Court will agree that Petitioner's constitutional rights have been violated, that these violations were not simply honest mistakes but deliberate acts by the judges involved. That the consequences of the denial of these rights has potentially harmed and could continue to harm millions of people around the world and that therefore the petition for a writ of certiorari should be granted.

Respectfully submitted,

Walter Cardwell

Dr. Walter T. Cardwell

11/16/14

Dated

# APPENDIX



STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GREENVILLE  C.A. NO. 2010-CP-23-4560

| | |
|---|---|
| The Palmetto Bank,<br><br>Plaintiff,<br><br>-vs-<br><br>Walter T. Cardwell, Jr.,<br>Coach Hills Homeowner's Association, Inc.,<br>United States of America,<br><br>Defendants. | **Master's Order and Judgment of Foreclosure and Sale**<br><br>**(Deficiency as to Defendant Walter T. Cardwell, Jr.)**<br><br>**(Non-eligible under the Home Affordable Modification Program)** |

## PROCEDURAL HISTORY

This matter came before the undersigned as Master in Equity for Greenville County, South Carolina, for a hearing on March 30, 2011, attended by M. Kevin McCarrell and F. Marion Hughes of Smith Moore Leatherwood LLP, attorneys for Plaintiff; Robin Thomason and Josie Stewart, representatives of The Palmetto Bank; and Defendant Walter T. Cardwell, Jr. The matter was referred to me for the purposes of taking the testimony and issuing a final decree with any appeal therefrom to be directly to the South Carolina Court of Appeals. On or about March 25, 2011, Defendant Walter T. Cardwell, Jr. ("Cardwell") filed a Motion to Restore to Trial Roster seeking to obtain a jury trial of this case. Plaintiff filed an Objection to Defendant Cardwell's Motion to Restore to Trial Roster on or about March 28, 2011. Cardwell's Motion was addressed immediately before the foreclosure hearing.

## AS TO THE MOTION TO RESTORE TO TRIAL ROSTER

Plaintiff's action for foreclosure is an equitable action, triable before this Court. The question raised by Cardwell's Motion is whether Cardwell's Answer and Counterclaim present





# APPENDIX A

legal issues that should be decided by a jury. Cardwell alleges that (a) he had an oral agreement with Plaintiff to allow him to bring his payments current over time (in essence, an agreement for Plaintiff to forbear in exercising its rights under the Note and Mortgage), and that (b) Plaintiff breached that agreement by reporting his account as delinquent to the credit bureaus and by instituting this foreclosure action. He further alleges that Plaintiff's actions caused him damages.

In C&S Real Estate Services, Inc. v. Messengale, 290 S.C. 299, 350 S.E.2d 191 (1986), the South Carolina Supreme Court summarized the proper analysis for determining the trial of issues raised by counterclaims in an equitable action and set out the procedure to be followed when issues are to be tried by a jury. That analysis is based on whether the counterclaims are determined to be permissive or compulsory. As to the counterclaims filed in this action, however, after careful consideration, I conclude that Cardwell would not be entitled to a jury trial on any of the issues he has raised, regardless of whether the counterclaims were determined to be permissive or compulsory.

A. Lack of Proximate Cause

In an action for breach of contract, "the burden [is] upon the [claimant] to prove the contract, its breach, and the damages caused by such breach. [citation omitted]. The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (S.C.1962).

In the present case, Cardwell admits being delinquent in his payments (Cardwell Ans. ¶ 2). As a result, Plaintiff had the absolute right to report his account as delinquent. Any alleged agreement not to foreclose on the Mortgaged Property has no effect on whether the account was

delinquent. Thus, even if Plaintiff's reporting Cardwell's account as delinquent to credit bureaus lead to the damages he is claiming, no cause of action can arise for such reporting. Therefore, any failure to honor the alleged agreement did not proximately cause the damages alleged by Cardwell, and Cardwell's claims fail as a matter of law.

B. Lack of Consideration

It is well-settled that "[t]he necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (S.C. Ct. App. 1997). Under South Carolina law, "[v]aluable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (S.C. Ct. App. 2009)(quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).

Moreover, a promise to do something that a party is already legally bound to do is not sufficient consideration. Rabon v. State Finance Corporation, 203 S.C. 183, 26 S.E.2d 501 (1943). In Rabon, the maker of a promissory note sued the payor for breach of an alleged contract to extend the time for payment of the note. Id. at 183, 26 S.E.2d at 501. After the payor filed an assignment of wages to secure payment of the promissory note, the maker filed suit, alleging that, although he was delinquent on his payments, the payor had told him he could "catch up the two payments" at a later time. Id. at 183, 26 S.E.2d at 502. The court held that, because the maker was already legally obligated to pay the note, a promise to pay the debt owed was not sufficient consideration to form a new contract. Id.

In the present case, Cardwell requested that Plaintiff forbear from foreclosing on the Mortgage until Cardwell started receiving his social security payments. (Cardwell Ans. ¶ 3c: "I asked if it would be okay for me to resume payments after [my first social security] check arrived.") Under Rabon, Cardwell's promise to resume payments (that he was already legally obligated to pay) after he started receiving social security is not sufficient consideration to form a new contract. Therefore, the alleged agreement is unenforceable as a matter of law due to lack of consideration.

C. Statute of Frauds

South Carolina Code § 32-3-10 requires that certain agreements be in writing in order to be enforceable. The portion of this statute relevant to this case provides as follows:

> No action shall be brought whereby
>
> . . . .
>
> (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them . .
>
> .
>
> Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Id. Furthermore, it is well-settled that "a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)(citing Windham v. Honeycutt, 279 C.S. 109, 302 S.E.2d 856 (1983)).

A mortgage, being a contract concerning an interest in real estate, is subject to the Statute of Frauds. Therefore, any modification of a mortgage would further be subject to the Statute of Frauds.

Cardwell essentially alleges that he entered an *oral* agreement with Plaintiff to modify the

terms of the Mortgage so that Plaintiff would forbear from foreclosing on the Mortgage until Cardwell received his Social Security payments. (Cardwell ¶ 3c.) Even if these allegations are true, the oral forbearance agreement to modify the Mortgage is unenforceable under the Statute of Frauds. See e.g., Secrest v. Security National, 167 Ca. App. 4th 544 (Cal. Ct. App. 4th Dist. 2008)(following several courts that have explicitly held mortgage forbearance agreements must be in writing to be enforceable under the respective state's Statute of Frauds). As a result, Cardwell's counterclaims must fail as a matter of law.

For all of the above reasons, Defendant Cardwell's counterclaims would never be presented to a jury for determination because they involve matters of law to be decided by the Court. Therefore, Defendant Cardwell's Motion to Restore to Trial Roster is denied.

**AS TO THE FORECLOSURE**

Based on the testimony and exhibits presented at the hearing, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. I find that this action was duly and properly instituted by the filing of the Summons and Complaint on June 2, 2010, and the service of the Summons and Complaint upon each Defendant as shown by the proofs of service heretofore filed. I further find that an Amended Complaint was filed on July 6, 2010 and was served upon Defendants of record as set forth on the Certificate of Service filed herein.

2. I find that the Lis Pendens was duly and properly filed in the Office of the Clerk of Court of Greenville County on June 2, 2010.

3. I find that Defendant Coach Hills Homeowners' Association, Inc. is in default as

shown by the affidavit filed herein. In addition, I find that Defendant the United States of America timely filed an Answer. I also find that Defendant Walter T. Cardwell, Jr. ("Cardwell") timely filed an Answer and Counterclaim.

4. I find that notice of the time and place of this hearing has been duly given to each Defendant.

5. I find that this action was instituted by Plaintiff for the purpose of foreclosing the Mortgage given to it by Defendant Cardwell.

6. I find that for value received, Defendant Cardwell made, executed and delivered to Plaintiff a Prime Access Interest Only Note dated on or about April 10, 2008, in the amount of $104,000.00 (the "Note"), with interest thereon as set forth in the Note. Other terms and conditions are stated in the Note which is of record herein.

7. I find that in order to secure the payment of the Note described herein, Defendant Cardwell made, executed and delivered to Plaintiff a Mortgage, in writing, dated April 10, 2008, covering real property in Greenville County, South Carolina, which is the same as that described in the Complaint (the "Mortgaged Property"). The Mortgage was duly recorded on April 10, 2008 in the Register of Deeds Office for Greenville County in Book 4945 at Page 2282.

8. I find that Defendant Cardwell was the sole owner of the Mortgaged Property at the time the Mortgage was executed. Although in a deed dated July 8, 1997 and recorded in the Register of Deeds Office in Book 1702 at Page 992, Defendant Cardwell conveyed title to the Mortgaged Property to himself and Nancy Jean Cardwell with joint rights of survivorship, Nancy Jean Cardwell passed away on July 26, 2004, leaving Defendant Cardwell as the sole owner of the Mortgaged Property.

9. I find that Defendant Cardwell failed to make the payments as called for under the Note, and, as a result, Plaintiff exercised its option to declare the entire unpaid balance due and payable and has placed the Note and Mortgage in the hands of an attorney for collection.

10. I find that the Note and Mortgage provide that in the event this matter is referred to an attorney for collection, the maker would pay all costs of collection including reasonable attorneys' fees. The sum of $16,443.50 is a ~~reasonable fee to allow~~ 15% per Note, p. 3 as attorneys' fees to Plaintiff's attorneys for the services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Note and Mortgage. In making this award, I have considered that this action has been contested by Defendant Cardwell and that Plaintiff's attorneys have had to defend against counterclaims asserted by Defendant Cardwell. I have also considered the time, effort, difficulty and results obtained by Plaintiff's attorneys, as well as their professional standing and the usual fee awarded in Greenville County in similar matters. I find that the record and evidence fully substantiates such a fee and is allowed/required under the terms of the Note. The services anticipated to be performed until final adjudication contemplate completion of this matter within a reasonable time and do not include exceptional circumstances delaying conclusion beyond the normal time.

11. I find that the amount due and owing on the Note, with interest at the rate provided in the Note, and all other costs and expenses of collection, including attorneys' fees, secured by the Note and Mortgage, is as follows:

| | |
|---|---|
| Principal | $104,466.90 |
| Interest accrued as of 03/30/11 | 5,156.41 |
| Cost of collection | 530.00 |
| Attorneys' fees | 16,443.50 |
| TOTAL | $126,596.81 |

12. I find that subsequent to March 30, 2011, interest at the legal rate of 7.25% should

be added to such judgment debt in order to comprise the amount of Plaintiff's debt secured by the Mortgage to the date to which such interest is computed.

13. I find that Plaintiff's Mortgage is a first lien on the Mortgaged Property.

14. Defendant United States of America is made a party to this action by reason of a tax lien filed against Defendant Cardwell recorded in the Register of Deeds Office for Greenville County on August 12, 1998. Defendant United States of America admitted in its Answer that said tax lien is no longer valid. I find that this tax lien should be cancelled of record as more than ten (10) years have passed since this lien was filed and a renewal Notice of Federal Tax Lien was not re-filed by October 21, 2006, the last day for re-filing according to the lien.

15. Defendant Coach Hills Homeowner's Association, Inc. is made a party to this action by reason of:

a) a Notice of Lien in the amount of $50.00, filed against Defendant Cardwell recorded in the Register of Deeds Office for Greenville County on November 5, 2008, in Mortgage Book 5008 at Page 1086; and

b) a Notice of Lien in the amount of $50.00, filed against Defendant Cardwell recorded in the Register of Deeds Office for Greenville County on October 27, 2009, in Mortgage Book 5060 at Page 1453.

I find that these liens are junior and subordinate to the lien of Plaintiff's Mortgage.

16. I find that Plaintiff is seeking foreclosure of the Mortgage and is also seeking a personal or deficiency judgment against Defendant Cardwell.

17. I find that the Note and Mortgage (a) are not owned or guaranteed by Federal National Mortgage Association ("Fannie Mae") or the Federal Home Loan Mortgage Corporation

("Freddie Mac"), and (b) are not owned, guaranteed, or managed by a servicer who has signed an agreement to participate in the Home Affordable Modification Program ("HMP"). I find that this Note and Mortgage are not subject to modification under the HMP, and therefore are not subject to the administrative order issued by Chief Justice Jean Toal of the South Carolina Supreme Court on May 22, 2009, in matter identified as *RE: Mortgage Foreclosures and the Home Affordable Modification Program (HMP)*.

18. I also find that Plaintiff has complied with Justice Toal's Order by including the allegation in its duly signed Complaint that the Note and Mortgage are not subject to Justice Toal's Order.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff is granted judgment against Defendant Cardwell as to Defendant Cardwell's counterclaims for the reasons set forth above under the discussion of the Motion to Restore to Trial Roster.

2. There is due to Plaintiff on the obligation and Mortgage set forth in the Complaint the sum of $126,596.81 representing the total debt due Plaintiff as set out in paragraph 11, supra, together with interest at the rate provided therein until the date of compliance with the sale.

3. The amount due in the preceding paragraph (see total debt as set forth in paragraph 11, supra), and later accrued interest and costs shall constitute the total judgment debt due Plaintiff and shall bear interest hereafter at the legal rate of 7.25% per annum ($25.15 per day).

4. The Defendant liable for the aforesaid Mortgage debt shall, on or before the date of

sale of the Mortgaged Property hereinafter described, pay to Plaintiff, or to Plaintiff's attorney, the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

5. On default of payment at or before the sale of the property, the Mortgaged Property described in the Complaint as hereinafter set forth, shall be sold by me, as Master, at public auction, at the Greenville County Courthouse, in the City of Greenville, County and State aforesaid, on **June 13, 2011,** or on some convenient sales date hereafter (and should the regular day of judicial sales fall on a holiday, then and in such event, the sales date shall be on the Tuesday next succeeding such holiday) on the following terms, that is to say:

a) For cash -- I, as Master, shall require at the time of bid a deposit of five percent (5%) of the amount of the bid (in cash or equivalent), the same to be applied on the purchase price only upon compliance with the bid, but in case of noncompliance within twenty (20) days, the same is to be forfeited and applied to the costs and then to Plaintiff's debt.

b) The sale shall be subject to taxes, assessments, easements, and restrictions.

c) If find that the 120 day right of redemption pursuant to Section 2410(c), Title 28, United States Code, Defendant, United States of America does not apply because the tax lien should be cancelled of record.

d) Purchaser is to pay for deed stamps and the cost of recording the deed and for interest on the debt from March 30, 2011, through the date of compliance.

6. If Plaintiff is the successful bidder at the sale, for a sum not exceeding the amount of costs, disbursements, expenses and the indebtedness of Plaintiff in full, Plaintiff may pay to me, as Master, only the amount of the costs, disbursements, and expenses, crediting the balance of the bid on Plaintiff's indebtedness.

7. Because a personal deficiency judgment has been sought, the sale will not be final as of the close of bidding on sales day but will remain open for 30 days for upset bids. Plaintiff reserves the right to waive its right to a deficiency, which deficiency waiver may be made in writing prior to the sale.

8. I, as Master, will, by advertisement according to law, give notice of the time and place of sale and the terms thereof and will execute to the purchaser, or purchasers, a deed to the Mortgaged Property sold. Plaintiff, or any other party to this action, may become a purchaser at such sale, and if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof within twenty (20) days after the date of sale, I, as Master, shall readvertise the Mortgaged Property for sale on the next or some other subsequent sales date, at the risk of the former highest bidder, and the Mortgaged Property shall be sold from time to time thereafter until compliance shall be secured.

9. I, as Master, shall apply the proceeds of the sale as follows: first, to the payment of the amount of the costs and expenses of this action; next to the payment to Plaintiff or to Plaintiff's attorney of the amount of Plaintiff's debt and interest, or so much thereof as the purchase money will pay on the same.

10. Any surplus will be held pending the further order of this Court.

11. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event the successful bidder is other than Defendant Cardwell in possession herein, the Sheriff of Greenville County is ordered and directed to eject and remove from the premises the occupants of the property sold, together with all personal property located thereon, and to put the successful bidder or its assigns in full, quiet and peaceful possession of the premises without delay and to keep the

successful bidder or its assigns in such peaceful possession.

12. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each Defendant named herein and all persons whomsoever claiming under Defendants, be forever barred and foreclosed of all right, title and interest and equity of redemption in the same mortgaged premises so sold, or any part thereof.

13. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to S.C. Code § 30-9-31, the deed of conveyance pursuant to this sale shall be indexed in the grantor index by the Register of Deeds Office in the name of the owners of record of the subject property immediately prior to the execution of the deed, as well as in the name of the Master in Equity as grantor.

14. This Court will retain jurisdiction to do all necessary acts incident to this foreclosure, including, but not limited to, the issuance of a writ of assistance in disposing of any surplus funds pursuant to Rule 71(c), SCRCP.

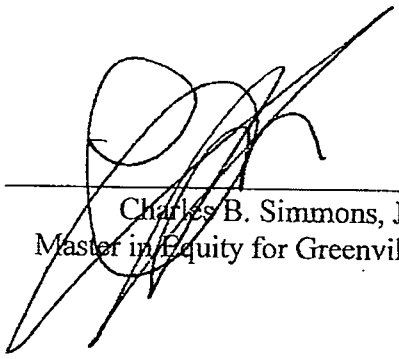
15. The following is a description of the premises ordered to be sold:

> All that certain piece, parcel or lot of land situate, lying and being in the State of South Carolina, County of Greenville, being known and designated as Lot Number One Hundred One (101) of a subdivision known as Coach Hills, according to a plat thereof prepared by Piedmont Engineers, Architects and Planners, dated September 26, 1974, and recorded in the RMC Office for Greenville County, South Carolina, in Plat Book 4-X at page 86 and re-filed in Plat Book 4-X at Page 94, reference is hereby made to said plat for a complete metes and bounds, courses and distances description thereof.
>
> TMS # 0540.01-01-180.00

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the Plaintiff or the Plaintiff's representative does not appear at the scheduled sale of the above-described property, then the sale of the property will be null, void and of no force and effect. In such event, the sale will

be rescheduled for the next available sales day.

AND IT IS SO ORDERED.



Charles B. Simmons, Jr.
Master in Equity for Greenville County

Dated: April 6, 2011

A Certified Copy
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 4/8/11

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The Palmetto Bank, Respondent,

v.

Walter T. Cardwell, Jr., Coach Hills Homeowner's Association, Inc., United States of America, Defendants,

Of whom Walter T. Cardwell, Jr. is the Appellant.

Appellate Case No. 2011-192887

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Appeal From Greenville County
Charles B. Simmons, Jr., Master in Equity

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Unpublished Opinion No. 2012-UP-504
Submitted September 4, 2012 – Filed September 5, 2012

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**AFFIRMED**

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Dr. Walter T. Cardwell, Jr., of Greenville, pro se.

F. Marion Hughes and M. Kevin McCarrell, of Smith Moore, Leatherwood, LLP, of Greenville, for Respondent.

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**APPENDIX B**

**PER CURIAM:** We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the Master erred in denying Cardwell's motion to restore the case to the trial roster: S.C. Code Ann. § 32-3-10(4) (2007) (requiring contracts related to an interest in land to be in writing to be enforceable); *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) ("[A] contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified.").

2. As to whether Cardwell was improperly surprised by evidence, whether Palmetto Bank committed perjury, whether Palmetto Bank's attorney engaged in misconduct, and whether the Master erred in failing to provide clear instructions regarding legal procedures: *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (finding there must be a contemporaneous objection to evidence to preserve an issue for appellate review); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that an issue may not be raised for the first time in a post-trial motion."); *id.* ("[I]t 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." (internal quotation marks omitted)).[1]

**AFFIRMED.**[2]

**FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.**

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[1] There is no evidence to support Cardwell's contention he was prevented from conducting discovery; accordingly, it is without merit.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

# The South Carolina Court of Appeals

The Palmetto Bank, Respondent,

v.

Walter T. Cardwell, Jr., Coach Hills Homeowner's Association, Inc., United States of Amertica, Defendants,

Of whom, Walter T. Cardwell, Jr. is the Appellant.

Appellate Case No. 2011-192887

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ORDER

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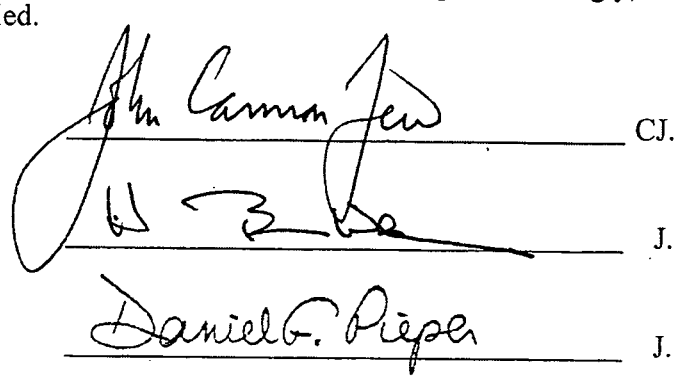
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



CJ.

J.

J.

Columbia, South Carolina

cc:
Walter T. Cardwell, Jr.
Michael Kevin McCarrell

# The Supreme Court of South Carolina

The Palmetto Bank, Respondent,

v.

Walter T. Cardwell, Jr., Coach Hills Homeowner's Association, Inc., United States of America, Defendants,

Of whom Walter T. Cardwell, Jr., is Petitioner.

Appellate Case No. 2012-213407
Lower Court Case No. 2010CP234560

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *Palmetto Bank v. Cardwell, et. al.*, Op. No. 2012-UP-504 (S.C. Ct. App. filed Sept. 5, 2012). We deny the petition.

C.J.
FOR THE COURT

Columbia, South Carolina
October 18, 2013

cc:
Michael Kevin McCarrell
F. Marion Hughes
William Norman Nettles
The Honorable Jenny Abbott Kitchings
Walter T. Cardwell, Jr.
The Honorable Paul B. Wickensimer

**APPENDIX D**

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF GREENVILLE | ) | C.A. NO. 2010-CP-23-4560 |
| | ) | |
| The Palmetto Bank, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| -vs- | ) | ANSWER TO SUMMONS |
| | ) | |
| Walter T. Cardwell, Jr.<br>Coach Hills Homeowner's Association<br>United States of America, | ) | |
| | ) | |
| Defendants. | ) | |
| | } | |

Defendant, Walter T. Cardwell, in answer to the above complaint wish to make known to the court the following facts.

1. As stated by the Plaintiff, I did secure a home equity line of credit of $104,000 on or about April 10, 2008 from the Palmetto Bank through their Woodruff road branch manager, Josie Stewart. .

2. At the time I was working with an individual in Massachusetts developing a new transportation system. He was at the time funding this endeavor from his architectural practice and through private fund-raising. While most of my $150,000 salary was deferred to keep expenses low, he did provide whatever income was necessary to pay outstanding bills.

3. When funding dried up due to the economic down turn I informed Ms. Stewart that I would be late on the mortgage payment but that I would be eligible for social security the following month and as soon as I received the first check I would resume payments and would gradually get caught up. She had no problem with this arrangement.

4. I applied for social security at the earliest opportunity and was informed that I would receive my first check on February 22, 2010. I immediately informed Ms. Stewart that the check would arrive on February 22, and I asked if it would be okay for me to resume payments after the check arrived. She made a call to some department within the bank who at first asked if I could make a payment before the date and when I said it would be a problem Ms. Stewart received authorization for the payment to be made on the 22nd and she said she noted it in my account. I informed her that the check would arrive in the mail on the 22nd and that I would have to deposit it on the 23rd and that I would be in on the 24th to resume making payments. She smiled and typed something on her computer which I assumed was her recording that I would be in on the 24th and I left her office..

**APPENDIX E**

5. I did receive the social security check on the 22nd, I deposited it on the 23rd and I was in Ms. Stewart's office to make the payment on the 24th. She informed me that they had already foreclosed on the house. I asked her how it could be stopped and she said only by paying the entire past due amount plus legal fees. When I objected to this reneging on our agreement she told me to contact either Carter or Robyn and gave me their number. Unlike all of our earlier meetings when Ms. Stewart was warm and friendly, during this meeting she would not look me in the eye and refused to discuss with me the reason for reneging on our agreement.

6. After leaving Ms. Stewart's office and returning home I immediately called the number she gave me. I asked for a Mr. Carter which seemed to confuse the person who answered the phone but when I mentioned that Ms. Stewart asked me to call about the foreclosure the person said they knew about it and reiterated that to stop the foreclosure I would have to pay the entire back amount owed plus legal fees. When I explained about the agreement I had with Ms. Stewart he kept insisting that I make this payment. I asked him if his bank did not honor oral commitments made by their branch managers and he said they did but it was not until I said that if they did not honor their commitment that we would let a jury decide the issue, that he then said he would have to look into the matter and would call me early the next week.

7. He did not call. Approximately two weeks later a person who identified himself as Derrick from that office called on another matter. I asked about the status of the investigation and he said he knew nothing about it but would look into the matter and have the person dealing with the foreclosure call me back the next day. They again did not call.

8. After several more weeks of no response from them I became very suspicious of their actions and sent them a letter so that a written record would exist of our communications. I stopped by the local bank branch to obtain the address where I could contact them. Ms. Stewart was not in the office but another bank representative did look up the address. He informed me that there was no Mr. Carter at the office and that the person there was actually named Carter Ballentine which explained the initial confusion when I first called.

9. I did send a certified letter to Mr. Ballentine a copy of which is attached mentioning that I still had not heard from them about the foreclosure and mentioned that their actions caused American Express to cancel my credit card even though it was current with no outstanding balance and that I had been an American Express card holder for over forty years. I also stated in that letter that all further communication should be in writing so that there will be a written record of our communication. Again, I still did not hear anything from anyone at the bank until I was served this summons.

10. I mentioned that I was engaged in research in a new transportation system. Ms. Stewart was aware of this research and the importance that I attached to this endeavor. I also stated to her that we were working on a prototype model that should be completed in one or two months and that once this prototype was completed that fund raising then would not be a problem.

11. By their actions in reneging on our agreement and the cancellation of the American

Express Card all work on the prototype ceased as we now had to devote all of our efforts in fund-raising and me seeking employment elsewhere.

WHEREFORE, Due to the misbehavior of the Plaintiff in reneging on our agreement whether by mistake or by design and the irrevocable damage caused by Plaintiff's actions the Defendant respectfully prays judgement as follows,

a) That foreclosure be denied.

b) That the personal judgement sought against Defendant by the Plaintiff also be denied.

c) That any other and further relief sought by the Plaintiff be denied.

d). That no additional interest be allowed on any late payments that may occur due to withholding of payments until this matter is adjudicated.

e). That in the interest of justice that all late payments including those not made during this litigation period which are being withheld to cover the cost of this litigation not be considered late and that the account be considered current upon receipt by the Plaintiff of the first payment after all litigation is concluded.

f) That compensatory damages be awarded to the Defendant against the Plaintiff equal to $25,000 per month starting on March 1st 2010 and running until payment of the damages is received by the Defendant from the Plaintiff. This amount represents the combined monthly salary of the Defendant and his partner both of whom have now been forced into fund-raising rather than completing work on our proof of concept model.

g) That should it turn out that the Plaintiff took this action not due to a mistake but deliberately for some other reason that punitive damages also be awarded.

h) That this new transportation technology if successful will have a tremendous positive impact on the economy of South Carolina if Defendant remains here in South Carolina and will have a tremendous negative impact on the State's economy if Defendant is forced to leave the state should the Plaintiff prevail in this action, because the stakes may be so high and all the people of South Carolina may be affected by the outcome of this trial I do respectfully demand my right to a trial by jury in this action which as shown by the loan agreement supplied by the bank was not waived.

Dated June ____, 2010

Dr. Walter T. Cardwell, Jr.
15 Dawnwood Drive,
Greenville, S. C. 29615

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF GREENVILLE | ) | C.A. NO. 2010-CP-23-4560 |
| | ) | |
| The Palmetto Bank, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | DEFENDANT'S MOTION |
| | ) | REQUESTING A NEW TRIAL |
| -vs- | ) | |
| | ) | |
| Walter T. Cardwell, Jr.<br>Coach Hills Homeowner's Association<br>United States of America, | ) | |
| | ) | |
| Defendants. | ) | |

The Defendant Walter T. Cardwell, Jr. Files this motion requesting a new trial based on the following issues of fact and law not properly addressed due to what Defendant considers to be unfair procedures in the original trial and to facts obtained during the original trial.

ISSUES OF FACT

1) Defendant did secure the loan in question from the Palmetto Bank and was behind in payments to the bank. Defendant informed the loan officer, Ms. Josie Stewart, that Defendant was soon eligible for Social Security and kept her informed after Defendant, applied for Social Security, was accepted by them, and when he would receive the first check.

At trial, Defendant testified that on many occasions he would meet with Ms. Stewart in her office when Defendant had a problem and Ms. Stewart would usually call someone and get an approval and then Defendant testified that Ms. Stewart would enter the information into Defendants account information in the banks computer system. Ms. Stewart denied ever entering anything into defendant's record and in fact stated that she could not enter anything into any account from her computer. Defendant now believes that this is the case. Defendant now believes that it was not Ms. Stewart entering the data but the person she called and that Ms. Stewart, when she then typed something in her computer, was merely accessing Defendant's account to confirm that the information was entered by the person she called.

2) Mr. Tomison, a bank representative and Ms. Stewart testified that Defendant promised to make a payment on January 5, 2010. Defendant stated that to the best of his recollection he never promised to make a payment on January 5th. On further reflection Defendant does now remember telling Ms. Stewart that the Social Security Administration had notified Defendant in December that he was eligible. Ms. Stewart then asked when he could make a payment and Defendant said he did not know when the check would arrive. Ms Stewart then pressed for a date and said can you make a payment in January. Defendant now believes that he told Ms. Stewart that his partner was continuing to try and raise money for the transportation project they were working on and that any money raised would be used to make a payment but if no money was raised that the bank would have to wait until the first Social Security check arrived. Defendant now believes that Ms. Stewart said something to the effect that she was putting me down for a payment in January. It was understood that this was conditional on funds arriving. Ms. Stewart it seems had that statement entered as a promise to pay on January 5th which it never was. That is also why when Defendant received a call while he was out of town, where the caller stated that the Defendant had promised to make a payment on January 5th, that Defendant told the caller that there was some mixup that he would clear up with Ms. Stewart when he returned.

3) At the start of the trial, Plaintiff's attorney submitted many document to the court as evidence and gave Defendant copies of each. Included in these documents were copies of the original loan agreement, an account summary and a document titled Debtors Comments which Defendant had never seen before. Again with no time to study any of the documents, Judge Simmons then began the trial by having the Plaintiff immediately call their first witness. Now, after the trial, having time to study the Plaintiff's documents carefully, there is information contained it the documents that support Defendant's version of the dispute.

Defendant swore under oath that there was a verbal agreement between Plaintiff and Defendant where Defendant would begin making payments after Defendant's Social Security Check had been deposited and cleared. Defendant stated that he told Ms. Stewart that he would receive his check on the 22nd of February, would deposit it on the 23rd and be in on the 24th to begin making

payments again. Ms. Stewart then made a call and asked if it was ok for Defendant to begin making payments on the 22nd of February. While Ms. Stewart was on the phone, Defendant corrected Ms. Stewart saying he would make the payment on the 24th. She did not correct the date while on the phone. She said that she received an ok from whomever she was talking to and then as she had done many times in the past typed something on her computer and stated that she had me down for payment on February 22nd. Once again Defendant corrected Ms. Stewart and repeated that he would get the check on the 22nd, deposit it on the 23rd and be in on the 24th to make the payment.

Ms. Stewart swore under oath that no such verbal agreement took place and testified only that Defendant made some vague promise to pay sometime in February.

The testimony of the Defendant and Ms. Stewart are mutually contradictory and so both cannot be the truth. Since each stated categorically that the verbal agreement did or did not exist, either the Defendant or Ms. Stewart lied under oath and thus committed perjury. The issue now is can it be proven which one lied.

One of the documents supplied by Plaintiff at trial was titled "Debtor Comments" and appears to be comments made by the bank about the "Debtor" and not comments made by the "Debtor". Because this document was supplied by Plaintiff and was not verified by Defendant there is no guarantee that it is either complete or undoctored; however, in this document there are two entries, one dated 01/15/2010 stating "SPOKE WITH LO AND SHE SAID HE IS SUPPOSED TO GET A SSCHECK STARTING IN FEBRUARY AND WILL MAKE A PAYMENT. I AM SENDING A DEMAND LETTER GOOD THROUGH 01/29/2010. CCB <BY RMTO795CVQ AT 10.48.45>, and another entry dated 02/23/2010 stating "RECEIVED REQUEST FROM LOAN OFFICER AND REGIONAL TO UINITIATE sic FORECLOSURE PROCEEDINGS. REFERRED MATTER TO LEATHER WOOD (KEVIN MCCARRELL) <BY RMTO795CVQ AT 14.01.42>. This second entry shows that the foreclosure was initiated on February 23, 2010. Why on that date?.

Plaintiff's representative testified that the loan payments were 90 days past due on or before

the 19th of February 2010. In support of Ms. Stewart's claim that there was no agreement, the 19th was on a Friday so the first day they could have foreclosed after that date would have been on Monday the 22nd. While it is possible that the foreclosure was delayed a day for some reason an analysis of other foreclosures could determine if the extra day's delay was usual and if not if there was some reason for the delay. In support of the Defendant, the 23rd was the first day after the date that Defendant testified that Ms. Stewart erroneously first entered as the date that Defendant would resume making payments so the date is more consistent with Defendant's testimony.

Ms. Stewart testified, again under oath, that she never entered any information into Defendant's account and that in fact changes to any accounts from her computer were not possible. Therefore, information could only be entered into Defendant's account by the person she contacted by phone each time she received an ok from the department she called and then confirmed that the information was changed. In the "Debtor Comments" document, every entry is logged with what looks like the terminal that accessed the account. While it is possible that Ms. Stewart was deliberately setting up the Defendant and did not get an ok from the department she called when Defendant discussed the February 24th payment with her and then lied to Defendant both about getting an ok and in stating that she had me down for the 22nd, assuming Ms. Stewart was not lying to the Defendant and that the February 22nd date was entered into Defendant's account, the terminal of the person entering the data would have been logged with the entered data and the person using that terminal to enter the data would have had to "login" so the person who modified Defendant's account can be identified. There is therefore an independent witness who can verify who is telling the truth. Not only is there a witness, but if Ms. Stewart was not lying to Defendant when she said she had me down for the 22nd and the entry was made into Defendant's account, the verbal agreement would also be a written agreement and the logging of the person making these entries into Defendant's account who could only be a representative of the Bank, would constitute a signing of the entry. That this information is not contained in the "Debtor Comments" document supplied by Plaintiff's attorney only means that the document is either incomplete or that this account information is not output by the print routine used to produce the "Debtor Comments" document.

Because perjury is a felony and it is likely that not only does documentary evidence of the crime exist on Plaintiff's computer system and that a witness does in fact exist, Defendant does insist that this matter be turned over to the proper authority having jurisdiction in this matter and having access to competent forensic computer experts, to determine if the evidence outlined above does exists and is sufficient to charge Ms. Stewart with perjury. Also, that steps be taken to protect any evidence remaining in the banks computer system and any internal bank communication that is pertinent.

4) When originating the loan, Ms Stewart said that she would pay off the existing two mortgages and close them out. She did this with the first mortgage but only paid off the second mortgage, see did not close it. I assume that it was Ms. Stewart who had the second mortgage lien removed from the county records.

When it was discovered several months later that the second mortgage, an equity line of credit was not closed, Defendant stopped by the local Bank of America branch down the street from Ms. Stewart's bank branch. A Bank of America representative stated that he had no problem with the line of credit remaining open and when I returned to Ms. Stewart's office and told her that they had no problem with it remaining open and that I did not close it she voiced no objection to it remaining open either. I have been paying on this account up until the court order was signed by Judge Simmons.

Judge Simmons in his ruling gave the Plaintiff's attorneys time to check on the Bank of America equity line of credit and they responded by simply including a copy of the original Plaintiff's loan agreement which said that both mortgages would be closed as proof that only the Plaintiff's exists. Judge Simmons ruled not only that the Plaintiff's mortgage was the first mortgage but that the Bank of America mortgage was not even a second mortgage. This is not right.

If an error has been committed here it was committed by Ms. Stewart first in not closing the Bank of America loan and then later not informing Defendant that it must be closed. Bank of America is totally innocent in this matter, had a valid loan, and was unaware of the actions of the

Plaintiff in removing the lien from the county records as was Defendant until this foreclosure action occurred.

In this matter the Court is only looking at information supplied by the Plaintiff and not giving who should be an opposing party, Bank of America, the opportunity to present their case. The need to be informed of this action.

## ISSUES OF LAW

1) Defendant filed a motion to have the case returned to the jury trial docket in response to Plaintiff's attorney's refusal to agree to a continuance. The motion was filed the Friday before the foreclosure hearing scheduled for the following Wednesday. Plaintiff's attorney filed an objection to the motion which Defendant received the following Monday afternoon. Defendant did prepare an answer to Plaintiff's objection but there was no time to file it before the hearing on the motion. The hearing on the motion was held a half hour before the foreclosure hearing on Wednesday March 30th, 2011. Without hearing any arguments Judge Simmons simply denied the motion without giving any reason for the denial and immediately began the trial.

In the original motion filed by Defendant to return the case to the jury trial docket, Defendant countered the all the arguments Plaintiff raised in his Motion for Reference. In fact, Plaintiff's attorney agreed with Defendant's analysis of the issues and that returning the case to the jury trial docket would depend on whether the counterclaim was permissive or compulsory.

In Plaintiff's objection to the motion to restore the case to the jury trial docket, Plaintiff introduced new arguments and misstated Defendant's answer to Plaintiff's original summons. Again, Defendant was given no opportunity to rebut Plaintiff's new arguments and that is patently unfair. Defendant's rebuttal follows:

Plaintiff in his objection to the motion to return the case to the trial jury docket states:

"INTRODUCTION

> Plaintiff filed this foreclosure action on certain real property (the "Mortgaged Property") secured by a Mortgage (the "Mortgage") because of the payment default by Defendant/Counter claimant Walter T. Cardwell, Jr. ("Cardwell"). Cardwell filed an Answer and Counterclaim alleging that he had entered into an oral forbearance agreement with Plaintiff, whereby Plaintiff agreed not to foreclose on the Mortgaged Property, but rather, agreed that Cardwell could gradually catch up on his mortgage payments once Cardwell began receiving his social security payments (the "Alleged Agreement"). Cardwell raises the Alleged Agreement both as a defense to the foreclosure action, and as a claim for damages allegedly resulting from Plaintiff's reporting of his account to consumer credit bureaus."

Defendant at no time claimed "damages from Plaintiff's reporting of his account to consumer credit bureaus" Defendant stated. "By their actions in reneging on our agreement (foreclosing on the mortgage) *and* (emphasis added) the cancellation of the American Express Card, all work on the prototype ceased as we now had to devote all of our efforts in fund-raising and me seeking employment elsewhere. In addition, Plaintiff misstates Defendant's statement about the nature of the agreement. As stated in Defendant's Answer to Plaintiffs Summons Defendant stated that Plaintiff's agent Ms. Stewart confirmed that the requested forbearance was entered into Defendant's loan record thus the oral forbearance was also in writing.

Plaintiff continues:

> "While Plaintiff did initially attempt to work with Cardwell before his account became ninety (90) days delinquent and, therefore, subject to non-accrual status as required by the FDIC, Plaintiff denies that it agreed to the terms alleged by Cardwell."

While not a banker or accountant, Defendant understands non-accrual status means that the Bank can no longer list the interest on the loan as income as far as bank regulators are concerned. The Plaintiff testified that the account became 90 days past on or before February 19th. The agreement with the Plaintiff was to begin making payments again on February 24th, one week later. If this was a problem, the Plaintiff's representative should not have entered into the agreement.

Plaintiff continues:

> "More importantly, even if Cardwell's factual allegations are assumed to be true, such allegations fail to establish a legal defense or a legal counter-claim."

If this were true it would mean that Plaintiff is free to mislead/lie to anyone and not be held accountable .

> "Because Cardwell does not have a valid counterclaim, he does not have a right to a jury trial. "

Defendant challenges this assertion.

> "Even if Cardwell's allegations were sufficient to allege a counterclaim, such a counterclaim would be permissive, rather than compulsory, and he would not be entitled to a jury trial."

If the counterclaim arises out of the Plaintiff's transaction (the foreclosure) it would be compulsory.

Plaintiff continues:

> "PERTINENT FACTS ALLEGED
>
> On or about April 10, 2008, Cardwell, executed and delivered his Prime Access Interest Only Note to Plaintiff writing, and thereby, for value received, promised to pay to Plaintiff, or order, the sum of $104,000.00 (the "Note"), to be repaid according to the terms of the Note (Amended Compl. 2; Cardwell Ans. 1ft 2.) In order to secure the payment of the Note, Cardwell executed and delivered to Plaintiff a Mortgage of Real Estate (the "Mortgage" or collectively with the Note, the "Mortgage Loan") dated April 10, 2008, thereby granting a lien on certain real property as more fully described therein (the "Mortgaged Property"). (Amended Compl. 11 4; Cardwell Ans. 1g 4.) At one time, Cardwell and Nancy Cardwell held the fee simple title with joint rights of survivorship. However, because Nancy Cardwell became deceased prior to the execution of the Mortgage, Cardwell became the sole fee simple owner of the Mortgaged Property subject to Plaintiffs lien. (Amended Compl. 6 & 7.) Cardwell is in default on the Note and Mortgage for failure to make payments when due. (Amended Compl. 11 9.) Specifically, Cardwell has failed to make any payments since October 19, 2009. "

Defendant stated that there was a forbearance agreement that the bank reneged on..

Plaintiff continues:

"Cardwell admits failing to make the payments when due on the Mortgage Loan (Cardwell Ans. 1[ 3b.) However, Cardwell claims that, in or around January 2010, he reached an oral agreement with a representative of Plaintiff Essentially, he claims that Plaintiff agreed to forbear from foreclosing on the Mortgage until Cardwell began receiving Social Security payments, at which point he would gradually catch up the delinquent payments. (Cardwell Ans. 411- 3c.) According to Cardwell, he attempted to make one monthly payment on or about February 24, 2010 When he began receiving his Social Security funds, but Plaintiff refused his payment, requiring payment of all past due amounts before reinstating his delinquent account. (Cardwell Ans. 4g1g 3d & 3e.) Cardwell alleges that, as a result of Plaintiff's reporting his account as delinquent, his American Express credit card was cancelled. (Cardwell Ans. 3h.) Cardwell further alleges that, due to the cancellation of his American Express credit card, his research on a "new transportation system" has been delayed, causing economic damages to him personally(Cardwell Ans. 3j.)"

Defendant stated, "By their actions in reneging on our agreement and the cancellation of the American Express Card all work on the prototype ceased as we now had to devote all of our efforts in fund-raising and me seeking employment elsewhere." While it was the cancellation of the card that was the immediate cause of cessation of work on the prototype, it alone would only have delayed work for a month or two due to the loss of the up to two month's "float" provided by the card. It was the "reneging" on the agreement, the foreclosure itself, that caused us to shift to fund-raising and Defendant looking for employment to try and save the shop and lab located in Defendant's home..

Plaintiff continues (reference numbers corrected):

LAW

"1. CARDWELL IS NOT ENTITLED TO A JURY TRIAL ON HIS COUNTERCLAIMS

For the reasons stated below in this section, Cardwell's counterclaims would never be presented to a jury for determination. Cardwell's counterclaims against Plaintiff must fail as a matter of law for at least three reasons: (A) the Alleged Agreement lacks any proximate cause to Cardwell's alleged damages from Plaintiffs reporting Cardwell's delinquency to the credit repotting companies; (B) the Alleged Agreement is unenforceable for lack of consideration; © the Alleged Agreement is unenforceable under the Statute of Frauds:"

"A. Lack of Proximate Cause

In an action for breach of contract, "the burden [is] upon the [claimant] to prove the contract, its breach, and the damages caused by such breach. [citation omitted]. The

> general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75 89, 124 S.E.2d 602, 610 (S.C.1962)."
>
> "Cardwell cannot prove that any alleged breach of the Alleged Agreement resulted in the alleged damages. Cardwell admits being delinquent in his payments (Cardwell Ans. 'ff 2).Plaintiff has the absolute right to report any account that is delinquent Any alleged agreement not to foreclose on the Mortgaged Property has no effect on whether the account was delinquent. Therefore, even if we were to assume that Plaintiffs reporting Cardwell's account as delinquent to credit bureaus lead to the cancellation of his American Express, there was nothing improper with Plaintiff so reporting his account. Because Plaintiffs reporting the account as delinquent was not improper, no cause of action can arise for such reporting. Therefore, any failure to honor the Alleged Agreement did not proximately cause the damages alleged by Cardwell, and Cardwell's claims fail as a matter of law."

Plaintiff continues to argue that it was *only* (emphasis added) the cancellation of the credit card that was the cause of suspension of work on the project and our having to devote full time to fund raising. The American Express card requires full payment each month so the funds must be available each month to pay the balance. The card can provide up to two months of float but the speed of development is controlled by the anticipated money available to pay the card. After a month or two we could have continued without the "float".

The foreclosure on the other hand had much more serious consequences. If the foreclosure went through before our proof of concept was completed we estimated that it would take us at least three years before we would be in a position to resume work on the project. While we do not know with 100% certainty that the project will be a success we do know what the implications are if it is successful and why that left us no choice but to try and protect the "lab"(house).

Our design studies indicate that its capabilities are so far superior to any other form of transportation and that, if successful, it would replace the automobile. By transporting people in complete safety it would save the lives of 45,000 Americans each year and will in time save the lives of an estimate 1 million people worldwide each year. The year delay that the foreclosure has already caused will, if the technology is successful, mean that a million people will die needlessly. If the Plaintiff is

successful in foreclosing on the property, again if the technology is successful, an additional three million people will die needlessly. That is why we had no choice but to try and protect the house against the Plaintiff's misconduct.

Because lives are at stake we feel we are morally bound to continue this project until we know if it will be successful or not. Until we know if it will be successful we continue to suffer losses as we receive no income until either funding is obtained or our proof of concept is completed. This is a loss to us caused directly by the filing of the foreclosure by the Plaintiff breaching our agreement and is the basis of our counterclaim.

B. Lack of Consideration

It is well-settled that "(t)he necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (S.C. Ct. App. 1997). Under South Carolina law, "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Plantation A D LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (S.C. Ct. App. 2009)( _quoting Prestwick Golf Club Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).Moreover, a promise to do something that a party is already legally bound to do is not sufficient consideration. Rabon v State Finance Corporation 203 S.C. 183, 26 S.E.2d 501

(1943). In Rabon the maker of a promissory note sued the payor for breach of an alleged contract to extend the time for payment of the note. Id. at 183, 26 S.E.2d at 501. After the payor filed an assignment of wages to secure payment of the promissory note, the maker filed suit, alleging that, although he was delinquent on his payments, the payor had told him he could "catch up the two payments" at a later time. Id. at 183, 26 S.E.2d at 502. The court held that, because the maker was already legally obligated to pay the note, a promise to pay the debt owed was not sufficient consideration to form a new contract. Id. The Alleged Agreement contains no hint of consideration given by Cardwell. Rather, Cardwell merely requested that Plaintiff forbear from foreclosing on the Mortgage until Cardwell's financial situation brightened. (Cardwell Ans. 'ft 3c: "I asked if it would be okay for me to resume payments after [my first social security] check arrived.") Under Rabon Cardwell's promise to "catch up" the missed payments, which he was already legally obligated to pay, is not sufficient consideration to form a new contract. Therefore, the Alleged Agreement is unenforceable due to lack of consideration.

Of course there was consideration given by Defendant (Cardwell) to the Plaintiff. As stated above by the Plaintiff, ""Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." In the case cited by Plaintiff, Rabon v State Finance Corporation 203 S.C. 183, 26 S.E.2d 501, there was no real property involved and thus no other consideration was involved than the promise to pay. In the case where real property is involved the avoidance of lengthy and expensive foreclosure litigation is certainly a benefit to both parties. Otherwise, all banks would foreclose the day after a payment was late. If Plaintiff's argument were to prevails, it would mean that all real property forbearances entered into by a bank are simply a con and license to steal.

In addition, in dealing with another matter with Plaintiff's representative, Plaintiff was made aware of the new transportation system. Defendant on many occasions made Plaintiff's representative aware of the great benefit that Plaintiff would receive from a continuing banking relationship that of course would be lost if the bank foreclosed and Defendant left the state. While it is only the potential for great profit that is conveyed to Plaintiff, is the potential of millions of dollars in profits for the Plaintiff not sufficient consideration to delay a payment of under $300 for one week? Defendant clearly is not obligated to do other business with the bank.

C. Statute of Frauds

South Carolina law has long required that certain agreements be in writing in order to be enforceable, and has explicitly set forth those types of agreement by statute. S.C. Code § 32-3

10. Specifically, South Carolina law provides as follows:

No action shall be brought whereby

...

(4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them...

Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Id. Furthermore, it is well-settled that "a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified." Player v. Chandler 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)(citing Windham I/ Honeycutt, 279 C.S. 109, 302 S.E.2d 856 (1983)). It is axiomatic that a mortgage is a contract concerning an interest in real estate which is subject to the Statute of Frauds. Therefore, any modification of a mortgage would further be subject to the Statute of Frauds.

Cardwell alleges that he entered an oral agreement with Plaintiff to modify the terms of the Mortgage so that Plaintiff would forbear from foreclosing on the Mortgage until Cardwell received his social security payments. (Cardwell 3c.) Even if the alleged facts are true, the oral forbearance agreement to modify the Mortgage is unenforceable under the Statute of Frauds. See e.g., Secrest v. Security National, 167 Ca. App. 4th 544 (Cal. Ct. App. 4th Dist. 2008)(following several courts that have explicitly held mortgage forbearance agreements must be in writing to be enforceable under the respective state's Statute of Frauds).

Defendant had never charged Plaintiff nor Plaintiff's representative with fraud. Defendant's only mention of fraud was that, "Whether this action was due to negligence or fraud is immaterial as the action cannot be undone and the Defendant's only remedy is to seek money damages as was done in the Counterclaim." and that clearly defendant is not categorizing Plaintiff's misbehavior as fraud. Therefore, unless fraud is charged, the state's Statute of Frauds would not apply. However, Plaintiff's representative did call and get approval for the agreement and Plaintiff's representative did confirm that the information was entered into Defendant's loan information in their computer. This entry of course would have to have been in writing. In addition, as shown by the "Debtor Comments" document supplied by Plaintiff's attorney at trial, a record of the person who modified the account was also entered and since the person entering the information could only be an authorized agent of the bank, this would constitute an authorized signature on the agreement.

EVEN IF CARDWELL'S COUNTERCLAIMS COULD SURVIVE DISMISSAL AS A MATTER OF LAW THOSE COUNTERCLAIMS WOULD BE PERMISSIVE AND THEREFORE CARDWELL WOULD NOT BE ENTITLED TO A JURY TRIAL.

Cardwell cites a treatise which properly outlines the analysis for determining whether a defendant is entitled to a jury trial on a counterclaim in a foreclosure action as set forth in C&S Real Estate Services, Inc. v. Messenaale, 290 S.C. 299, 350 S.E.2d 191 (1986). Because Plaintiffs claims for foreclosure and reformation are equitable and

> Cardwell's claims for breach of contract are legal, the question becomes whether Cardwell's counterclaims are compulsory or permissive: if compulsory, then Cardwell would be entitled to assert his right to a jury trial; if permissive, then Cardwell would be deemed to have waived his right to a jury trial. Id. at 301, 350 S.E.2d at 192.
>
> Rule 13(a) states that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Otherwise, a counterclaim is permissive.
>
> Cardwell's counterclaims do not arise out of the Note and Mortgage which are the subject of the foreclosure action, but rather they arise out of Plaintiffs reporting of Cardwell's account to the credit bureaus. Therefore, Cardwell's counterclaims are permissive, and therefore, Cardwell has waived his right to a jury trial.

As Plaintiff states Rule 13(a) states that a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Otherwise, a counterclaim is permissive. As stated above, Defendant's counterclaim does not "arise out of Plaintiff's reporting of Cardwell's accounts to the credit bureaus" but does arise out of the foreclosure itself and are therefore compulsory. Once again Plaintiff misstates Defendant's basis for his counter claim.

Finally, in dealing with Ms. Stewart's alleged perjury, it must be asked why she would do this? All she would have had to say was, "Yes there was an agreement. He promised to pay on February 22nd 2010 and did not so we foreclosed on the 23rd." Even if she had lied to Defendant and no information was entered into Defendant's account simply agreeing with Defendant but challenging the February 24th date, the case would be over. It would seem to make no sense that she would commit perjury for no reason. But the fact is, Plaintiff's attorneys have always stressed that it was a verbal agreement which Defendant originally stated that it was and they have tried to suppress any hint that it was also a written agreement thus Ms. Stewart had to commit perjury and say there was no agreement to keep this case away from a jury where the actual date of the agreement would have been decided by the jury along with any damages arising from the counterclaim. Facing a large damage claim and possible punitive damage, it is easy to see why Plaintiff has gone to such extreme lengths (perjury) to keep this away from a jury.

## ISSUES OF FAIRNESS

1) Lack of Discovery: Between the filing of the action and November of 2010, Defendant was incapacitated with health issues that were only resolved by several surgical procedures in October of 2010. Plaintiff requested a settlement meeting which Defendant was able to schedule after recovery from surgery in November where an attempt was made to try and resolve the case. At the end of the meeting Defendant offered several options to the Plaintiff and while Plaintiff and his attorney stated that settlement was unlikely, Defendant said for them to check with the Bank and if they were not interested to contact Defendant to inform him of the fact so that discovery could begin. Defendant was informed of the Bank's rejection by the filing of the Motion for Reference in February transferring the case to the Master in Equity Court. Defendant was given no opportunity to challenge the order of Reference as it was signed before Defendant was even notified of its existence.

Defendant was told by the Clerk of Court's office that he could file a motion to have the case returned to the trial roster. Not being a lawyer it took Defendant several weeks to research the issues involved. At the same time Defendant found two attorneys who said they might represent the Defendant. The first declined for fear of losing a business relationship it had with the Plaintiff but the second stated he needed time to study the case before committing to it. Defendant contacted the Master in Equity's office to try and obtain a continuance. Defendant was told that the Attorney needed to contact the Plaintiff's attorney and get their approval and if he could not that the attorney should then contact the Master in Equity's office. Unfortunately, Plaintiff did not respond to the request for a continuance until the Attorney was at the airport for a flight to Hawaii to be in court there. There was therefore no time for him to contact the Master in Equity's office for the continuance. This was on the Friday before a hearing was scheduled the following Wednesday. Defendant was left with no choice but to file the Motion to return the case to the Jury Trial Roster on that Friday.

2) Hearing on Defendant's Motion to Return Case to Jury Trial Roster: As discussed above,

it is not fair to allow one party to submit new arguments and not allow the opposing party a chance to challenge them.

3) Misunderstanding of the Rules that Apply: At the beginning of the trial Judge Simmons asked Defendant if he knew that the hearing was before a Master in Equity and a Magistrates court. Defendant said he did not. Judge Simmons then stated that the difference was that there was no Jury in Master in Equity court. There is still confusion as to which rules apply.

According to the Clerk of Court's office the rules of civil court apply and in these rules, Rule 53C, it states that " 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. 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." Because Judge Simmons did not state which rules did apply Defendant has no way of knowing which rules to go by and is following the rules that the Clerk of Court's office said should be followed.

4) Misunderstanding of the Nature of the Hearing: Defendant was served notice of the hearing which stated only that the hearing was an attempt to collect a debt. Calling it a hearing and not a trial led Defendant to believe that this was a pre-trial hearing and not the trial itself. Nowhere in the South Carolina Rules of Civil Procedures can Defendant find any reference to the use of the word hearing as a synonym for trial. The use of the term hearing rather than trial by Plaintiff's attorney Defendant believes was a deliberate attempt to mislead Defendant as to the nature of the Master in Equity Action.

5) It is completely unjust to reward Plaintiff for Plaintiff's mistake with regard to Bank of America's legitimate interest in this action by not allowing Bank of America to present their claims to the court for consideration.

THEREFORE

In view of the issues outlined above, Defendant requests that the Order signed by Judge Simmons either be set aside or stayed until a thorough investigation of the perjury charges can be conducted and that should any evidence be found during that investigation that the alleged agreement did exist that either the case be returned to the trial jury roster or that a new Trial be held.

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Dated April ____, 2011

Dr. Walter T. Cardwell, Jr.
15 Dawnwood Drive,
Greenville, S. C. 29615

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF GREENVILLE | ) | DOCKET NO: 2010-CP-23-4560 |
| The Palmetto Bank, | ) | |
| | ) | |
| Plaintiff, | ) | ORDER |
| v. | ) | |
| | ) | |
| Walter T. Cardwell, Jr., Coach Hills Homeowner's Association, United States of America, | ) | |
| | ) | |
| | ) | |
| Defendants, | ) | |



This is a mortgage foreclosure action involving real estate located in Greenville County, South Carolina. The matter was tried on March 30, 2011 and an Order granting foreclosure was filed with the Clerk's Office on April 8, 2011 setting a foreclosure sale date of June 13, 2011.

On April 18, 2011, Defendant Walter T. Cardwell, Jr. filed a Motion Requesting A New Trial. In the Motion, Cardwell, in substance, relates the same arguments and issues previously raised and ruled upon by the Court.

Based upon a thorough review of the record, the Court finds no basis to grant the Motion. As such, the same is denied. Accordingly, absent an appeal and a stay of sale being issued, the property will proceed to be sold on June 13, 2011.

AND IT IS SO ORDERED.

Charles B. Simmons, Jr.
Judge

April 28 2011

Greenville, South Carolina



## APPENDIX G

Dr. Walter T. Cardwell
15 Dawnwood Drive
Greenville, S.C. 29615

CPU
PB 1P 000
3658828
FCMF

U.S. POSTAGE
$ 3.32⁰
MAILED JAN 16 2014
29607

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201