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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals / Supreme Court

IN THE COURT OF COMMON PLEAS
15th Judicial Circuit

Alan D. Clemmons, Horry County Master-in-Equity

Appellate Case No.: 2025-002471

(Circuit Court Case No.: 2024-CP-26-00567)

Nicholas Wilson a/k/a Nichlas F. Wilson,

Appellant,

v.

Select Portfolio Servicing, Inc., successor in interest to Flagstar Bank, N.A.,[i]

Respondent.

APPELLANT'S PETITION FOR WRIT OF CERIORARI

Pursuant to Rule 242, SC ACR, Appellant Nicholas Wilson respectfully files this petition for writ of certiorari of the Court of Appeal's Aug. 28, 2026, Order dismissing this appeal.[1] On Sept. 14, 2026, Appellant filed his petition for rehearing, which was denied by Order dated Oct. 16, 2026.

[1] This appeal was filed on Dec. 10, 2025. Respondent filed its Motion to Dismiss the Appeal on Feb. 25, 2026, Appellant filed his Return on March 9-10, 20026, and Respondent filed its Reply on Mar. 13, 2026.

1. Did the trial court view the issues too narrowly in not fully considering the procedural history between these parties, and their substantive pleadings on the issue of the scope of the mortgage at the time the foreclosure action was filed on Jan. 23, 2024?[2]
2. Did the trial court commit error in not applying the logical relationship test to this action, which was filed on April 19, 2023, before the ***Houck*** decision on Aug. 9, 2023 ?
3. Should this Court exercise its discretion to exercise jurisdiction over this appeal to avoid inconsistent judgments due to the extraordinary procedural history of these cases?

As noted with the Petition for Rehearing in the Court of Appeals, certiorari is warranted because the Master's Order dated Nov. 10, 2025, treats the present circumstance as a mere denial of an ordinary motion to dismiss governed by *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 (1994). In contrast, because of the procedural history of these two cases, this, *arguably*, could act as a grant of a motion to dismiss Appellant Wilson's earlier filed claims in the 2023 Fraud Action,[3] seeking a declaration of scope of both his deed and the related mortgage. The fact that Respondent here also joined in the 2023 Fraud Action to plead its own declaratory judgment claim only further emphasizes this reality. (June 19, 2023, Respondent's Answer, Counterclaim and Crossclaim, at ¶¶'s 176-77).

[2] As of Jan. 23, 2024, Respondent Mort. Elec. Resource Systems., Inc. ("MERS") / Flagstar, n/k/a Select Portfolio Servicing, Inc. had plead its own "First Counterclaim and Crossclaim (Declaratory Judgment)," in the earlier filed 2023-CP26-02475 case (*i.e.*, the "2023 Fraud Case"), alleging, *inter alia*, "Based upon the facts as set forth herein, in Plaintiff's Verified Complaint, and in the public record, under S.C. Code § 15-53-10 et seq., the Uniform Declaratory Judgments Act, Flagstar is entitled to an order from this Court declaring that its mortgage encumbers the driveway/Tract D," (*Id.* at ¶ 176), and stating further, "Such order / declaration should be recorded in the RMC office for Horry County." (*Id.* at ¶ 177).

[3] Even though MERS / Flagstar never filed any such motion.

Accordingly, here, MERS / Flagstar filed a "Counterclaim," to reform the mortgage, but not to foreclose on it, but later filed a separate action to foreclose on a mortgage that did not include the deed to the driveway.

Another reality that Appellant must address here is that he has been held in default in this underlying foreclosure action (*i.e.*, the 2024 FC Action" Order dated Mar. 4, 2025). However, such a default almost certainly could not have occurred if both Appellant and Respondent knew they were each pleading in their respective common interests for declaratory judgments in the 2023 Fraud Action regarding the scope of the subject mortgage and deed, at the time this 2024 FC Action was filed on Jan. 23, 2024. It is likely the Lender / Respondent here, after acquiring the Note from MERS / Flagstar changed its mind on how to proceed in pleading the two cases. It is also likely MERS / Flagstar never could have foreseen (on June 19, 2023 when it plead its Declaratory Judgment claim to reform the mortgage) that the 2023 Fraud Action would be tied up in an appeal of a grant of a motion to dismiss that occurred on Sept. 8, 2023, and has still not been decided in the Court of Appeals (Case No. 2024-000440).

By way of further practicality, Respondent here, Select Portfolio Servicing, Inc. ("SPS"), filed its own Motion to Dismiss itself from the 2023 Fraud Action on Apr. 3, 2025 in the 2023 Fraud Action, which was denied by Order filed June 25, 2026, in the 2023 Fraud Action. Appellant Wilson argued against that motion, *inter alia*, based on the fact that he had joined the Lender in the 2023 Fraud Action, and if and when that case comes back down from the Court of Appeals (Flagstar / SPS had no no part in that appeal), Wilson could chose to amend his pleadings as against the Lender. (June 1, 2026, Plaintiff's Memorandum in Opposition to Motion to Dismiss of Defendant Lender Select Portfolio Services, Inc., Successor to Flagstar Bank, N.A., Successor to Mortgage Electronic Registration Systems, Inc., at 5, noting, "on remand,

Plaintiff [Appellant Wilson] would be amending [his] claims to specifically seek the same relief formerly sought by the Lender in this the first-filed 2023 action."). Had that motion been granted, Appellant Wilson could have appealed it as well. So, the situation presented, particularly in view of the trial court's denial of Plaintiff's Motion for a Stay [of this foreclosure action pending the outcome of the earlier filed claims], cries out for inconsistent judgments.

One rule intended to prevent a situation like this from arising, or at least a rule that serves that purpose, is Rule 13(a), SCRCP, which provides:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party,[4] if it arises out of the transaction or occurrence[5] that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought the suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Id. (underline emphasis added).

The trial court order also holds that Appellant Wilson waived his Rule 13(a) defense by going into default, and if that settles the matter, then perhaps these orders would not be appealable under S.C. Code Ann. § 14-3-330. However, such a view necessarily omits the

[4] According to the Complaint in this foreclosure action (*Id.* at ¶), the default by Appellant Wilson began in 2021, so the foreclosure claim existed at the time MERS / Flagstar were joined in the 2023 Fraud Action.

[5] In *Houck*, infra., the "logical relationship," test was abolished in favor of the plain language interpretation of Rule 13(a)'s provision for determining if a follow up claim involved the same "transaction or occurrence." The date the "logical relationship" test was abolished was Aug. 9, 2023, which was after MERS / Flagstar plead its Declaratory Judgment claim in the 2023 Fraud Action seeking an order "declaring that its mortgage encumbers the driveway/Tract D, [to] be recorded in the RMC office for Horry County." (*Id*. at ¶¶'s 176-177). Accordingly, and to the extent it makes any difference, the dates of these filings support application of the "logical relationship," test to the Rule 13(a) analysis. To the extent the "logical relationship" test results in a broader view of same "transaction or occurrence," which it is believed to do, then Appellant's argument to apply Rule 13(a) under these circumstances is stronger.

preceding procedural history, namely to include that the Lender / Plaintiff in this 2024 FC Action had already plead its Declaratory Judgment claim in the 2023 Fraud Action (and it was still pending when the 2024 FC Action was filed). That declaratory judgment claim also included an allegation by the Lender that, "[b]ased upon the facts as set forth herein, in Plaintiff's Verified Complaint, and in the public record, under … the Uniform Declaratory Judgments Act, Plaintiff is entitled to an order from this Court declaring his ownership of the driveway/Tract D." (*Id*. at ¶ 175). A better example of "common interests" between a Plaintiff and a named Defendant in pleading might be hard to find.

This procedural history supports Appellant Wilson's claim for a preserved ground of appeal that the Master finally adjudicated Wilson's Rule 13(a), SCRCP, compulsory-counterclaim defense and authorized Respondent to prosecute a later foreclosure action outside the earlier-filed action involving the same loan, mortgage, title, and property transaction.

A few things not in dispute here:

- The mortgage was directly at issue in both actions;
- The foreclosure claim had accrued when Wilson filed the 2023 Action; and
- A subsequent change of position doesn't erase the earlier litigation history.

Appellant Wilson is not asking for certiorari that the March 4 and March 25, 2025, default-related orders are not independently appealable. Appellant petitions for certiorari only the dismissal of the appeal from the Nov. 10, 2025, Rule 13(a), SCRCP ruling, withdrawal that portion of the dismissal order, and to permit the appeal to proceed on the dispositive compulsory-counterclaim issue.

Appellant would additionally submit the discretionary decision of the lower court in denying the stay of the foreclosure action pending the outcome of the earlier filed 2023 Fraud

Action claims against the Lender / SPS, also resulted in an "order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action," under Section 330(2).

Here, the "substantial right," at issue is Appellant's ability to hold onto ownership of his primary residence. While such an interest is arguably personal only to Appellant, the right of home ownership is a right held in high esteem in this country, and for good reasons. For most citizens, their home will always be their greatest investment and their security in times of financial crisis. The public interests here lies with the homeowner, and cannot be viewed without consideration the allegations of fraud in the 2023 Fraud Action without considering Appellant to be the victim of gross negligence, and outright fraud.

If this foreclosure action is not stayed pending the outcome of the earlier filed claims in the 2023 Fraud Action, Appellant will likely lose his home. Had Appellant not wanted to lose such right or had not cared, he would not have taken the time to join MERS / Flagstar in the 2023 Fraud Action. This constitutes an "exceptional circumstance" warranting review by this Court. *See e.g.*, *Laffitte v. Bridgestone Corp*., 381 S.C. 460, 471-472 (2009) (noting, "[t]he instant case presents such exceptional circumstances as it involves a novel question of law, … [and a decision] best serves the interests of judicial economy by eliminating the numerous inevitable appeals," and likely inconsistent judgments); *see also* *Hagood v. Sommerville*, 362 S.C. 191, 199 (2005) (noting, some "order[s] must be immediately appealed or any later objection in a subsequent appeal will be waived."). In *Hagood*, the litigant would have been deprived of his choice of legal counsel. Here, Appellant would lose his right to litigate with his lender who he sued first.

Here, also, it is worth noting in terms of "exceptional circumstances," that the default was the result of service to a third-party on Appellant Wilson's property, not upon direct service to Wilson who was already represented by the undersigned counsel in the 2023 Fraud Action. (Affidavit of Service on Co-Resident, Keneth Bryant, filed May 3, 2024).

OTHER POINTS OVERLOOKED OR MISAPPREHENDED

The subject motion of Appellant filed Jan. 16, 2025, and denied on Nov. 10 2025, was not merely a Rule 12 motion. It was titled a "Motion to Dismiss Based on Compulsory Counterclaims Filed in Earlier Case under Rules 12 and 13, SCRCP." (Respondent's Motion to Dismiss Appeal acknowledged that title. (Resp. Mot. Dismiss Appeal, at p. 2 n.1). Appellant Wilson's Return noted, the Court of Appeals relied on decisions involving ordinary Rule 12 denials while "skip[ping] over," the Rule 13 issue. (Appellant's Return, at p. 2). The dismissal Order does not decide or address whether an order conclusively adjudicating a Rule 13 defense is an intermediate order involving the merits under S.C. Code Ann. § 14-3-330(1).

Here, the end result is that Appellant will be deprived of the right to litigate the scope of the mortgage and the deed as pleaded in his first-filed action by the actions of the lender in filing the second action, while its own pleadings in the 2023 Fraud Action were inconsistent with the scope of the mortgage in the 2024 FC action, at the time of filing. *Compare* Foreclosure Complaint, filed Jan. 23, 2024 at ¶¶'s 2 and 6, with Answer, Counterclaim and Crossclaim at ¶¶'s 175-177, filed June 19, 2023.

The Nov. 10, 2025, Order finally decided the Rule 13 question. It did not merely decline to dismiss without reaching the defense. The Master ruled that the two actions involved "mutually exclusive" transactions, that the 2023 action concerned only the driveway parcel, and that the foreclosure claim arose from a separate loan-default transaction. (Resp. Reply, at pp. 5-6

(quoting Nov. 10, 2025, Order, at pp. 5-7)). Those determinations rejected the factual and legal premise of Appellant Wilson's compulsory-counterclaim defense. Whether a counterclaim is compulsory is a question of law reviewed *de novo*. *Deutsche Bank National Trust Co. v. Estate of Houck*, 440 S.C. 409, 412 (2023) (citing *Ziegler v. Dorchester County*, 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019)).

The 2023 Fraud Action was commenced before *Houck*, which was decided on Aug. 9, 2023. As of Aug. 9, 2023, Flagstar, predecessor to Respondent here, had just recently filed its June 19, 2023, pleading asserting its counterclaim and crossclaim for Declaratory Judgment, as described herein at ¶¶'s 175-177. Accordingly, there is an argument that the Rule 13(a) question is governed by the former "logical relationship" test.

The 2024 FC action (filed Jan. 23, 2024) was commenced after *Houck*, which was decided on Aug. 9, 2023. Applying *Houck's* Rule 13(a) "plain language," test only prospectively, results in application of the rule's newly declared plain language test, and not by a generalized characterization of the claims. *Houck* prospectively abolished the former logical-relationship test and held that courts must ask whether the claim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." *Id.* at 414-15. The trial court's dismissal Order does not address *Houck* or the effect of the Master's conclusive Rule 13 determination. It also does not apply the two tests, but instead states, "[t]hese arguments are irrelevant as the Court concludes that SPS's foreclosure claim is not a compulsory counterclaim under either test." (*Id*. at 6, fn.2).

In *North Carolina Federal Sav. & Loan Asso. v. DAV Corp.*, 298 S.C. 514, 517-518 (1989), this Court reviewed the factors to consider when applying various Rule 13(a) tests, as follows:

> By definition a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim. Rule 13(a), SCRCP. Courts have employed four tests [footnote omitted] to determine whether a counterclaim is compulsory under this definition:
>
> 1) Are the issues of fact and law largely the same?[6]
> 2) Would res judicata bar a subsequent suit on the counterclaim?
> 3) Does substantially the same evidence apply?
> 4) Is there any logical relationship between the claim and the counterclaim?[5]
>
> The fourth test, the "logical relationship test" is by far the most widely accepted because of its flexibility. See 6 C. Wright & A. Miller, Federal Practice & Procedure § 1410 (1971). The Court of Appeals applied both the "same issues of law and fact test" and the "logical relationship test" to determine DAV's counterclaims were permissive rather than compulsory.

Id.

Here, none of these tests were applied by the trial court, as was required by *Houck*. Still further, this Court in *DAV* reversed the Court of Appeals conclusion that some of the counterclaims were not compulsory, stating, "[t]hese five are compulsory legal counterclaims and DAV therefore did not waive its right to a jury trial by asserting them in a foreclosure action." *Id*. at 519.

Appellant has argued both statutory routes for immediate review: section 14-3-330(1), because the ruling finally determined the compulsory-counterclaim defense, and section 14-3-330(2), because allowing the later filed foreclosure to proceed separately defeats the right protected by Rule 13 to have transactionally related claims adjudicated in one action before the collateral is sold. (Return, at pp. 3-8). The dismissal Order does not address either argument in the Rule 13 posture. In *Houck*, it must be presumed this Court changed the "compulsory counterclaim" test for a reason. Also in *Houck*, the facts were substantially identical to the facts of this case. Namely, the first sentence of the *Houck* decision states, "[i]n this appeal, we must

[6] The scope of the mortgage is different tin the two cases.

decide whether a bank's foreclosure claim is barred because the bank did not assert the claim as a counterclaim in prior litigation between the parties." *Id*. at 411. Appellant maintains that when viewed in the proper context, Rule 13(a) bars the second filed action under either the "logical relationship" or the "plain language" test. The subject of the action is the mortgage and the scope of the mortgage. Respondent here affirmatively plead its own declaratory judgment action to establish the proper scope of the mortgage on June 19, 2023 in the 2023 Fraud Action, and then filed to foreclose the same mortgage with a different scope on Jan. 23, 2024.

Section 14-3-330(1) authorizes immediate review of an intermediate order in a law case that involves the merits. An order involves the merits when it "finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993); *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995).

McLendon v. S.C. Dep't of Highways & Pub. Transp., 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994), relied upon in the Court of Appeals order dated Aug. 28, 2026, does not establish that every ruling captioned as a denial of dismissal falls outside that definition. *McLendon* also involved much simpler facts than this case. *McLendon* explained that an ordinary denial of a motion to dismiss does not establish the law of the case and may be raised later. *Id.* at 540, n.2. Here, by contrast, the Master reached and rejected the legal defense itself. He determined that the two actions involved different transactions and that SPS's foreclosure claim was not compulsory in the earlier action. Those conclusions finally disposed of Wilson's Rule 13 defense unless reversed or revisited; they were not a refusal to reach it.

As noted in *Midland*, "A party who is denied a dismissal under Rule 12 has forfeited nothing, they must simply continue to trial." *Id.* at 780. Such is not the case here, as the denial of

the motion under Rule 13(a), will likely result in Appellant's loss of his primary residence property via foreclosure of a mortgage, for which the scope of that mortgage was already being litigated in the 2023 Fraud Action.

Houck confirms that this is a merits issue, not merely docket administration. There, borrowers asserted that a bank's later foreclosure was barred because foreclosure had been a compulsory counterclaim in earlier litigation involving the same loan. This Court treated compulsoriness as a question of law, applied Rule 13(a), and reviewed the ruling on the merits. 439 S.C. at 284-87, 887 S.E.2d at 413-15. *Houck* ultimately found the foreclosure claim was not compulsory on its facts, but it establishes the governing legal inquiry and the substantive consequence of the determination. Here, the distinguishing fact is the June 19, 2023 voluntarily pursuit by Respondents Flagstar / SPS in the 2023 action to reform the mortgage to include the driveway, which was ending when the foreclosure action as filed.

The November 10, 2025, Order performed that inquiry and resolved it adversely to Appellant Wilson, it that it finally determined a substantial defense to SPS's separate foreclosure action. It therefore satisfies Section 14-3-330(1), even though the foreclosure case remains pending. This Court should grant certiorari as to the dismissal and distinguish an ordinary Rule 12 denial from this conclusive Rule 13 adjudication.

Appellant respectfully requests the Court grant its petition for certiorari,[7] withdraw the August 28, 2026, order dismissing the appeal, and reinstate the appeal limited to whether Respondent SPS's foreclosure was a compulsory counterclaim in the earlier-filed action, at the time it was filed.

[7] Appellant does not petition to overturn the March 4 and March 25, 2025 default-related orders.

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November 16, 2026

[i] The August 28, 2026, Order identifies SoFi Lending Corp. in the caption. SoFi was identified in the Circuit Court pleading for a recorded judgment in Case No. 2022-CP-26-02258, which is now marked as satisfied on the sccourts.org online docket, as of July 5, 2024. Similarly, prior recorded judgments of Wells Fargo Bank, N.A. in an amount of $8,263.25 (2022-CP-26-06012), and Midland Credit Management (2023-CP-26-05566) in an amount of $11,577.69, are also paid off, but not yet marked as satisfied on the record.