

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Edward G. Wellmaker, Circuit Court Judge

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Case No. 2010-CP-23-1621  
Appellant Case No. 2013-001441

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Chase Home Finance, LLC

v.

Thomas R. Irby, Roy C. Irby a/k/a Roy C. Irby, II and Bank of America, N.A.

Thomas R. Irby.....Appellant,

Roy C. Irby a/k/a Roy C. Irby, II.....Respondent,

Bank of America, N.A. ....Respondent.

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**INITIAL BRIEF OF RESPONDENT ROY C. IRBY A/K/A ROY C. IRBY II**

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## **QUESTIONS PRESENTED**

- 1. SHOULD THE COURT CONSIDER CRIMINAL ALLEGATIONS DURING CIVIL TRIALS HELD IN THE COURT OF COMMON PLEAS?**
- 2. SHALL THE JURY VERDICT THAT HAS RULED IN FAVOR OF PLAINTIFF AND AWARDED A JUDGMENT ALSO MAKE SPECIFIC FINDINGS OF FACT?**

## STATEMENT OF THE CASE

Thomas Irby and Roy Irby were borrowers in a loan from Chase Home Finance, LLC secured by a mortgage on 1.43 acres of property. Chase Home Finance initiated a foreclosure action on March 1, 2010, to recover the property naming as defendants Thomas R. Irby, Roy C. Irby a/k/a Roy C. Irby II, and Bank of America.

Throughout much of the course of litigation Thomas Irby and Roy Irby appeared pro se. Various motions and cross complaints were filed among the parties related to the loans and agreements. Ultimately, the Master-in-Equity for Greenville County, Charles B. Simmons, Jr., foreclosed the interests of the named defendants in favor of Chase Home Finance, LLC and the remainder of the cross-claims proceeded to trial.

Before trial, Thomas Irby retained David Alford as counsel and Roy Irby retained Jerry A. Gaines. At trial, Roy Irby agreed to drop any actions it had against the parties leaving Thomas Irby pursuing actions against Bank of America and Roy Irby and Bank of America pursuing actions against Thomas Irby and Roy Irby.

The jury returned a verdict for breach of contract in favor of Bank of America against Roy Irby for \$21,508.46 and against Thomas Irby for \$1,510.61. The jury returned a verdict for breach of contract in favor of Thomas Irby against Roy Irby for \$31,700.00. These verdicts were entered on May 31, 2013. Counsel for Appellant, David Alford, filed a notice of appeal on June 19, 2013, and withdrew as counsel by Order dated September 5, 2013. Thomas Irby has appeared pro se continuously thereafter. Thomas Irby appeals the decision.

## FACTS

Roy Irby wanted to build a house. To do so, he needed the help of his uncle Thomas Irby (hereinafter “Appellant”). Appellant owned the land and had the requisite credit to help Roy Irby (hereinafter “Irby”) qualify for a loan. The intended plan was simple. Irby and Appellant would get a construction loan, build the house, then refinance the house and use proceeds from the refinance to pay Appellant for the land. In the end, Appellant would be paid for the land and Irby would have a house albeit with a mortgage.

In large part, the plan worked. Irby and Appellant applied for and received loans to construct the house. After building the house, Irby and Appellant refinanced the house and paid Appellant for the land. Unforeseen at the time, however, was that Irby would be in a horrific automobile accident that left him debilitated and unable to work to pay for his new home.

When Irby could no longer make the mortgage payments, the bank initiated foreclosure and more problems were realized. First, one of the loans Irby and Appellant used to construct the house was an equity line. During the refinance, the balance on the equity line was paid down, but the line was not closed. Secondly, Appellant had executed a deed for the property which Appellant planned to remain unrecorded.

Despite being paid for the land, Appellant filed a cross claim against Irby and Respondent Bank of America alleging damages which resulted from the equity line remaining opened and from Irby recording a deed that Appellant wanted unrecorded.

Ultimately, however, the outcome was not unforeseeable. When Irby could no longer make the mortgage payments, the house and land were lost to foreclosure and Irby and Appellant were liable for the debt and Appellant was awarded a judgment against Irby.

Appellant now appeals the decision.

## ARGUMENTS

### **I. THE CRIMINAL ALLEGATIONS OF APPELLANT SHOULD BE REJECTED BECAUSE A COURT OF COMMON PLEAS IS THE INCORRECT FORUM TO ADJUDICATE ALLEGED CRIMINAL ACTIONS AND THE ISSUE WAS NOT RAISED AT TRIAL.**

(Appellant's Questions 13-15)

Sometimes the most basic and accepted traditions and foundations of law are the hardest to address. Such is the case with Appellants request for this court to consider criminal remedies for a civil matter.

The South Carolina Constitution authorized the establishment of the circuit court system.

“The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law.” S.C. Const. art V, §1.

Additionally, the South Carolina Constitution provided that the circuit court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law. S.C. Const. art V, §11.

The division of the South Carolina Court system is further enumerated by the legislature which provides in part:

The following are courts of justice in this State:

- (1) the court for trial of impeachments;
- (2) the Supreme Court;
- (3) the court of appeals;

(4) the circuit courts, to wit:

(a) a court of common pleas and

(b) a court of general sessions...

S.C.Code Ann. § 14-1-70 (1976).

It has long been the tradition and established law of this state that the circuit court is divided into a court of common pleas and a court of general sessions. While no case may specifically address the issue, the intent is clear, the court of general sessions was established for criminal matters and the court of common pleas was established for deciding civil matters. To mix the two, makes creation and separation of the two courts pointless and irrelevant.

The division was not arbitrary, but with forethought, the drafters of the constitution and the legislature, established two forums to adjudicate separately criminal and civil matters. The purpose of the criminal code is to redress harm against society in whole with the court of general sessions designated as the forum to hear these issues. In such cases, the government acts as the plaintiff prosecuting for the harm caused. While an individual or group may be acutely affected by the harm, the payment for this harm is to the broader public.

In this case, Appellant is unsatisfied with the remedies that civil laws provide him and is requesting the common pleas court to usurp the jurisdiction and authority that has been granted to another court. Yet, Appellant has never taken any procedural steps to make the criminal matter a part of his case. Conceivably, Appellant might have moved to add the United States of America or the State of South Carolina as a party to his case; but he has not.

The reason Appellant did not take any such action is simple. The matters in this case are not criminal in nature and common pleas court was not established to address criminal matters. Appellant's frustration with the outcome and lack of criminal prosecution creates no right to turn the court of common pleas into a court of general sessions. Appellant's brief acknowledges his frustration, "[m]y efforts to have criminal charges filed against Roy were unsuccessful." Appellant's brief Page 29.

The court of common pleas is the proper forum established for resolving disputes among individuals or organizations.

This case has been, at all times, a civil matter. The case was initiated by a private organization seeking a foreclosure, the counter claims and cross claims are among individuals and private organizations, and the remedies sought by Appellant were civil remedies. Therefore, any request to include criminal charges or make criminal findings should be rejected.

In addition to Appellant's request being baseless on the merits, the request for criminal charges should also be denied because any such claims were not preserved for appeal. In South Carolina, for an issue to be preserved for appeal, the issue must be brought before the circuit court and ruled on at trial. *Ness v. Eckerd Corp.*, 350 S.C. 399, 403, 566 S.E.2d 193, 196 (Ct. App. 2002). In this case, criminal charges were neither brought before the court, nor ruled on by the court. The only matters considered by the circuit court, and correctly so, were civil remedies. Therefore, this issue should not be considered on appeal.

**II. THE VERDICT AND JUDGMENT OF THE JURY ARE DISPOSITIVE AS TO THE DUTIES AND OBLIGATIONS OF A PARTY.**

## Appellant Question 16

The decision of the jury makes no specific findings as to duties and obligations of the parties. However, Appellant may reasonably infer from the judgment awarded to him that the jury concluded there were some duties Irby owed Appellant. Consequently, the jury found a breach of contract and awarded Appellant a judgment.

Because Appellant does not likely wish to reverse that decision which was favorable to him, I will address the more likely intent of his question which is the amount of damages. (See Appellant's brief Page 31-32.)

Appellant's argument that the judgment against Irby actually benefits Mr. Irby by \$142,491.54 is nonsensical. Loan proceeds were used to construct a house whose value was depleted the moment foreclosure was complete. In exchange for his house, Irby now has a judgment owed to Bank of America of \$21,508.46 and to Appellant for \$31,700.00. Appellant has not offered any bank records or testimony from trial which demonstrates Irby personally received funds of \$142,491.54, or the net of \$110,791.54, or any other lasting monetary gain.

If there is any windfall in this case, Appellant is the recipient. Irby had agreed to pay Appellant for the land and did so. Appellant received the benefit of the bargain. *South Carolina Federal Savings Bank v. Thornton-Crosby Development Company, Inc.* 303 S.C. 74, 399 S.E.2d 8 (S.C. App. 1990). Other than minor out of pocket expenses, Appellant's testimony did not demonstrate that he sustained actual damages. Appellant argues that the foreclosure action damaged his credit. Even if true, neither the damaged credit nor any costs for such damaged credit were proven at trial. With Appellant

receiving payment for his land and the damage award, Appellant has been put in a position that is better than if Irby had been able to complete payments for the loan.


### III. JOINING OF BRIEFS

To the extent Irby has not answered all issues presented by Appellant including issues Appellant designated as issues for Respondent Bank of America, Irby hereby adopts and incorporates herein the brief of Respondent Bank of America. Rule 208(b)(6) SCACR.

### CONCLUSION

Appellant's arguments in the circuit court excluded any criminal matters and, had such matters been presented, were improper in the court of common pleas. Furthermore, Appellant received a judgment despite a lack of evidence of damages. For these reasons the requests of Appellant should be rejected and the judgment against Irby should be vacated.

Respectfully submitted,

  
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April 19, 2014

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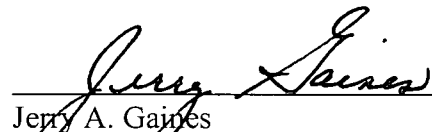
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**PROOF OF SERVICE**

The undersigned hereby certifies that on April 19, 2014, he served the foregoing **RESPONDENT ROY C. IRBY a/k/a ROY C. IRBY, II'S INITIAL BRIEF** on all parties listed below by placing a copy of it in the United States Mail, first class postage prepaid, addressed as follows:

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