THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No. 2010-CP-26-08505
Appellate Case No. 2013-000107

| | |
|---|---|
| Carolina First Bank n/k/a TD Bank, NA, ..... | Petitioner, |
| v. | |
| BADD, LLC, William McKown and Charles A. Christenson, ..... | Defendants, |
| Of whom BADD, LLC and William McKown are ..... | Respondents. |
| BADD, LLC and William McKown, ..... | Third-Party Plaintiffs, |
| v. | |
| William Rempher, ..... | Third Party Defendant. |

# BRIEF OF PETITIONER TD BANK

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I. Did the Court of Appeals err in holding that TD Bank's foreclosure action, which included a request for a deficiency judgment against Respondents pursuant to S.C. Code Ann. § 29-3-660, created a right to a trial by jury for Respondents on TD Bank's request for a deficiency judgment?

II. Did the Court of Appeals err in reversing the circuit court's order referring this foreclosure action to the Master-in-Equity for a bench trial on a ground not raised by Respondents?

III. Did the Court of Appeals err in failing to address the circuit court's order on TD Bank's arguments that Respondents' counterclaims and third-party claims also do not give rise to the right to a jury trial because the counterclaims are permissive and subject to being tried before the Master-in-Equity in a bench trial?

## Introduction

In accordance with Rule 242(j), SCACR, Petitioner Carolina First Bank n/k/a TD Bank, NA ("TD Bank") hereby files its brief following this Court's May 8, 2014 order granting its petition for writ of certiorari to review the Court of Appeals' October 24, 2012 Opinion No. 5041 ("the Opinion" or sometimes "*BADD* decision"). *See Carolina First Bank n/k/a TD Bank, NA v. BADD, LLC, et. al.*, 400 S.C. 343, 733 S.E.2d 619 (Ct. App. 2012). The Court of Appeals' Opinion is in conflict with prior decisions of this Court and inconsistent with statutory provisions governing foreclosure actions. As the appendix and below arguments demonstrate, the circuit court properly referred this foreclosure action to the Master-in-Equity for a bench trial. This Court should reverse the Court of Appeals' decision and remand this action to the Master-in-Equity.

## Statement of the Case

The Court of Appeals held that BADD, LLC and William McKown ("Respondents") are entitled to a jury trial in this foreclosure action because TD Bank, in its foreclosure complaint, also sought a judgment against the guarantor for any deficiency that may remain following any foreclosure order and sale of the subject property. (App. 199.)

On September 9, 2010, TD Bank filed a foreclosure complaint seeking the total amount due on the mortgages and notes against Respondent BADD. (App. 19-27.) In its foreclosure complaint, TD Bank also requested a deficiency judgment against Respondent William McKown as guarantor of the subject mortgages and notes for any amount that remained unpaid on the mortgages and notes following any foreclosure order and sale. (App. 19-27.) TD Bank alleged in its complaint that S.C. Code Ann. § 29-3-650 and § 29-3-660 provided it with the right to foreclose and seek a deficiency judgment

against those persons liable for any remaining indebtedness following the foreclosure sale. (App. 23, 26.) Contemporaneous with its commencement of the foreclosure action, TD Bank filed a motion for an order of reference requesting that the matter be referred to the Master-in-Equity for a bench trial. (App. 77-80.) Respondents answered the complaint and filed counterclaims for unconscionability and preserved other defenses and counterclaims. (App. 81-85.) Respondents demanded a jury trial. (*Id.*) Subsequently, Respondents filed an amended answer, counterclaims, and a third-party complaint raising claims for unconscionability, civil conspiracy, breach of contract, intentional interference with contractual relations and prospective business relations, and breach of fiduciary duty. (App. 96-105.) The trial court allowed the amendment and heard TD Bank's motion for an order of reference. Respondents again demanded a jury trial in their amended pleading and requested an accounting. (App. 96-105.) The trial court held that the matter should be referred to the Master-in-Equity for a bench trial and that Respondents were not entitled to a jury trial on any claims raised in the action because Respondents' claims were permissive. (App. 3-11.)

Respondents appealed. (App. 149.) On appeal, TD Bank argued that the matter was properly referred to the Master and no jury trial rights were available to Respondents. (App. 177-194; App. 187.) The Court of Appeals disagreed and reversed the trial court's order referring the matter to the Master-in-Equity for bench trial. (App.196-99.) The Court of Appeals held that the request for a deficiency judgment against the guarantor, Respondent McKown, was similar in nature to a breach of contract action and entitled him to a jury trial. (App. 198-199.) The Court of Appeals did not

address any arguments related to Respondents' counterclaims and third-party claims. (App. 196-199.)

TD Bank filed a petition for rehearing. (App. 200-214.) The Court of Appeals requested a return from Respondents, but none was filed. (App. 217-218.) In its rehearing petition, TD Bank argued that the Court of Appeals' Opinion overlooked statutes and prior decisions from this Court that pertain to foreclosure actions which establish that no jury trial rights accrue because this foreclosure action, including any request for a deficiency, is an equitable action. (App. 201, 206.) Further, TD Bank argued that the Court of Appeals failed to address Respondents' counterclaims due to its erroneous analysis with respect to the nature of the bank's request for a deficiency judgment. (App. 207-208.) The Court of Appeals denied the petition for rehearing. (App. 219.) TD Bank's petition for certiorari followed. This Court granted TD Bank's petition on May 8, 2014.

**Summary of Argument Respecting the Issues Before the Court**

First, the Court of Appeals' Opinion, if not altered, would mean that every foreclosure action in South Carolina wherein a deficiency judgment is sought could be forced to being tried before a jury. The Court of Appeals held that the request for a deficiency judgment was a "legal" action for breach of contract, thereby triggering Respondents' right to a jury trial because TD Bank's foreclosure complaint sought judgment "for any indebtedness resulting after the sale of the subject properties." (App. 196-199.) No damages at law, however, were sought in the foreclosure complaint—only the amounts lawfully due and permitted in a foreclosure action as provided by the loan instruments. (App. 19-27.) Since 1791, South Carolina has recognized that a foreclosure action seeking a deficiency judgment sounds in equity and no right to a jury trial exists in

such an action. This remains true today. S.C. Code Ann. § 29-3-650 and § 29-3-660 provide that in a foreclosure action where a deficiency judgment is sought, the ***court*** determines whether the mortgagee is entitled to a deficiency—not a jury. TD Bank's foreclosure complaint was grounded upon this statutory basis. (App. 23, 26.)

Second, the Court of Appeals erred in utilizing the *Floyd v. Floyd* case to support its conclusion that Respondents were entitled to a jury trial. As demonstrated by the applicable foreclosure statutes and the cases interpreting those statutes, foreclosure suits seeking a deficiency judgment sound in equity. The Court of Appeals overlooked this in its Opinion along with the nature of foreclosure actions. Further, Respondents did not cite the *Floyd* case or argue that the trial court's ruling on the main purpose rule was in error in its briefing before the Court of Appeals. Respondents' failure to specifically raise this argument bars the Court of Appeals from using it as the basis for reversal. Hence, the Court of Appeals' opinion runs contrary to this Court's long-established issue preservation rules.

Third, due to the Court of Appeals' ruling that the deficiency request gave rise to a right to a jury trial, the Court failed to address TD Bank's arguments regarding Respondents' counterclaims and third-party claims. The counterclaims and third-party claims as raised in this action are all ***permissive*** because Respondents were not compelled to raise them in response to the foreclosure complaint. By ***electing*** to raise them as counterclaims and third-party claims in response to the foreclosure suit, however, the Respondents affirmatively waived their right to a jury trial on those claims.

## Argument

### I. A request for a deficiency judgment in a foreclosure action pursuant to S.C. Code Ann. § 29-3-650 and § 29-3-660 sounds in equity and Respondents are not entitled to a jury trial.

The Court of Appeals erred in finding that TD Bank's foreclosure action, which included a request for a deficiency judgment against the mortgagor and guarantor, gave rise to a right to a jury trial for Respondents. The Court of Appeals reached its erroneous conclusion by incorrectly holding that a claim for a deficiency judgment is a separate breach of contract action (*i.e.*, a "legal" action as opposed to an equitable one). The South Carolina statutory claim pled by TD Bank in its foreclosure complaint establishes that the ***court*** makes the determination regarding whether a mortgagee is entitled to a deficiency judgment when the request for a deficiency is brought within the foreclosure action. The request for a deficiency is part of the foreclosure proceeding, which is an equitable proceeding. Asking for a deficiency judgment is not an action for damages at law or a breach of contract action.

#### A. A request for a deficiency judgment in a foreclosure action is equitable in nature.

TD Bank filed this foreclosure suit and requested a deficiency judgment for any remaining indebtedness that may exist following the foreclosure and sale of the subject properties. (App. 19-27.) In its complaint, TD Bank alleged that S.C. Code Ann. § 29-3-650 and § 29-3-660 provided it with the right to foreclose and seek a deficiency judgment against those persons liable for any remaining indebtedness following the foreclosure sale. (App. 23, 26.) TD Bank did not request damages at law—only the financial obligations provided by and pursuant to the loan contracts. Contemporaneous with its complaint, TD Bank filed a motion for an order of reference of the foreclosure suit to the

Master-in-Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure. (App. 77-80.) The trial court granted the motion, based in part, on the finding that the applicable statutory scheme did not give rise to a right to a jury trial and that the proceeding was equitable in nature. (App. 3-11.) In reversing the trial court, however, the Court of Appeals did not cite or analyze sections 29-3-650 and 29-3-660. The Court of Appeals' oversight and failure to adhere to the statutory regime necessitates reversal.

Prior to 1791, South Carolina followed the common law rule regarding mortgages whereby an action to foreclose a mortgage was regarded as strictly *in rem*. *Perpetual Bldg. and Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 341-42, 242 S.E.2d 407, 409 (1978). Prior to 1791, in the event of default, the mortgagee was required to commence an action in a ***court of equity*** to foreclose the mortgage, to bar the mortgagor's right to equity of redemption and to confirm good title in the mortgagee. *Id.* (emphasis added). If a personal or deficiency judgment was sought, the mortgagee was required to commence a separate ***action at law*** to obtain a judgment. *Id.* (emphasis added).

In 1791, the South Carolina Legislature changed the nature of a mortgage from that of a conveyance on condition to a lien. *Id.* Thus, at the time of the adoption of The South Carolina Constitution of 1868, no jury trial right existed in a foreclosure action seeking a deficiency judgment in the same action. *See Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 145, 621 S.E.2d 344, 345-46 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.").

The courts of this state have long-abided by the legislative pronouncement evincing the lack of a jury trial right in a foreclosure action seeking a deficiency. In

*Anderson v. Pilgram*, 30 S.C. 499, 9 S.E. 587 (1888), this Court stated that in this State, an action for foreclosure was a proceeding *in personam* as well as *in rem*, and therefore, a deficiency judgment could be granted in a foreclosure suit sounding in equity. Similarly, in *McConnell, et al. v. Barnes, et al.*, 142 S.C. 112, 140 S.E. 310 (1927), this Court recognized that a judgment for deficiency is an incident of the relief sought in a foreclosure action. In *McConnell*, the Supreme Court noted that the Act of 1791 integrated the action for foreclosure and the action for the deficiency after sale, abandoning the strict distinction between actions *in rem* and *in personam*. *Id.* Thus, two centuries ago, South Carolina adopted a structure by which rights arising under mortgage obligations are adjudged when the action for foreclosure and deficiency judgment are filed together.

This structure exists under the current version of the South Carolina Code and provides that a mortgagee:

> shall be deemed the . . . owner of the money lent or due and the mortgagee shall be entitled to recover satisfaction for such money out of the land by ***foreclosure and sale according to law***.

S.C. Code Ann. § 29-3-10 (emphasis added). In codifying these rights, the General Assembly then established the mechanism—"according to law"—through which a mortgagee can obtain payment for the money lent or due under a mortgage contract—foreclosure sale and deficiency judgment. The General Assembly empowered ***the court***, not a jury, with the duty to determine whether payment for any remaining indebtedness is owed by a mortgagor or guarantor. The Code states:

> In actions to foreclose mortgages ***the court may adjudge and direct the payment*** by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be

> personally liable for the debt secured by such mortgage ***and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment*** of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

S.C. Code Ann. § 29-3-660 (emphasis added). The General Assembly further directed that the power of the court to render such deficiency judgments can arise at the same time as the issuance of the order of foreclosure and sale. Specifically the General Assembly directed:

> ***The court may also render judgment against the parties liable for the payment of the debt secured by the mortgage*** and direct at the same time the sale of the mortgaged premises. ***Such judgment so rendered may be entered and docketed in the clerk's office in the same manner as other judgments. Upon the sale of the mortgaged premises the officer making the sale under the order of the court shall credit upon the judgment so rendered for the debt the amount paid to the plaintiff from the proceeds of the sale.***

S.C. Code Ann. § 29-3-650 (emphasis added).

The Court of Appeals failed to adhere to the above statutory regime in its Opinion and its decision conflicts with the prior decisions of this Court recognizing that a foreclosure proceeding, including a request for a deficiency, is equitable in nature. The Court of Appeals also overlooked a number of this Court's decisions on point. In 1912, based on prior versions of the above-cited statutes, this Court held that a foreclosure action which also seeks a deficiency judgment against a guarantor is an action sounding in equity. *See, e.g., Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 681 (1912) (holding that a foreclosure action which also seeks a deficiency judgment is an equitable action); *see also General Plywood Corp. v. Richard Jones, Inc.*, 216 S.C. 322, 57 S.E.2d 636 (1950)

(holding that a foreclosure suit seeking a deficiency sounds in equity and is properly referable to the equity court). In fact, the precise grounds offered by Respondents and adopted by the Court of Appeals in the Opinion were expressly rejected by this Court in 1950 in *General Plywood Corp. v. Richard Jones*. This Court in *General Plywood Corp.*, in affirming the lower court's referral of the case to the Master wrote: "[a]ppellant further contends that, since respondent does not waive a deficiency judgment, the matter is for determination by a jury and not referable." *General Plywood Corp.*, 216 S.C. at 325, 57 S.E.2d at 636. This Court rejected the argument and held that "[t]he purpose of the foreclosure is to fully determine the entire controversy while at the same time protecting the rights of all parties, to determine the amount of the debt in order to disburse the proceedings of the sale, and should there be a deficiency, the *Court of Equity* may give relief by way of a personal judgment." *Id.* (emphasis added).

Similarly, in *Welborn v. Cobb*, the foreclosure complaint was filed against the mortgagor and the mortgagee sought a deficiency against the guarantor in the complaint. *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691 (1912). The guarantor claimed the Bank improperly named him in the action. *Id.* The Court rejected the argument and held that the mortgagee "had the right to proceed against both at the same time and in the same action." *Id.* at 387, 75 S.E. at 692-93. The Court found, contrary to the guarantor's arguments, that the action for a deficiency was properly "united in the complaint." *Id.* at 388, 75 S.E. at 693. The Court went on to find that the foreclosure complaint "states only one cause of action." *Id.* In reaching this decision, this Court cited to Section 188 of the South Carolina Code which provided:

> [i]f the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such

> person a party to the action, and ***the Court*** may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

*Welborn*, 92 S.C. at 387, 75 S.E. at 693 (emphasis added). The provision quoted above is identical to the provisions in today's Code found at Section 29-3-660. *Welborn v. Cobb*, therefore, precisely supports the notion that the General Assembly devised a structure by and through which a mortgagee could obtain judgment in a foreclosure action against a guarantor for a deficiency should such remain following the foreclosure sale in an action at equity.

Moreover, this Court has recognized the nature of foreclosure proceedings in more recent cases. This Court has "explained that a mortgage 'represents security for an obligation, [but] not full payment thereof.'" *Am. Gen. Fin. Servs. v. Brown*, 376 S.C. 580, 583, 658 S.E.2d 99, 100 (2008) (quoting *Perpetual Bldg. and Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 340, 242 S.E.2d 407, 408 (1978)). As a result, the deficiency judgment becomes an incident to the foreclosure to ensure full payment of the debt obligation. *Braun*, 270 S.C. at 340, 242 S.E.2d at 408.

In *American General Financial Services*, this Court reversed the Master-in-Equity who ruled that he had discretion as to whether he would enter a deficiency judgment in a case where the foreclosure sale did not satisfy the entire amount due the lender. *Id.* This Court held that in a foreclosure action where the sale leaves money owed to the lender, the Master-in-Equity ***must*** enter a deficiency judgment. *Id.* Hence, the general rule is that "if the mortgaged premises are sold under a foreclosure decree and fail to bring a sufficient amount to satisfy the debt, the mortgagee is entitled, absent any statutory limitation or waiver on his part, to a personal judgment for the remaining deficiency."

*Perpetual Bldg. and Loan Ass'n of Anderson v. Braun*, 270 S.C. at 340, 242 S.E.2d at 408 (internal citation and quotation omitted). The same is true in this matter. TD Bank asked for a deficiency judgment and the court, sitting in equity, would be the entity to make that determination, not a jury.

The right to a deficiency judgment in a foreclosure proceeding is not an insignificant right. The Legislature intended for a deficiency judgment to be denied only when it has been "expressly waived" by the mortgagee. *Braun*, 270 S.C. at 343, 242 S.E.2d at 409. TD Bank did not waive its right to a deficiency and expressly pled for a deficiency judgment. (App. 26-27.)

**B. None of the cases cited by the Court of Appeals in its Opinion establish that a request for a deficiency judgment in an action seeking to foreclose upon real property gives rise to a right to a jury trial for a guarantor.**

In its Opinion, the Court of Appeals relied upon *Southern Bank & Trust Co. v. Harley*, 295 S.C. 423, 368 S.E.2d 908 (1988) for its holding. The Court of Appeals cites *Harley* for the proposition that "plaintiff's case seeking a deficiency judgment on a guaranty agreement after the foreclosure of real properties 'was a law case.'" A review of *Harley* reveals, however, that the court, not a jury, decided the issues with respect to the deficiency judgment. This Court in *Harley* notes "[t]he facts are reported in the Court of Appeals' opinion." *Harley*, 295 S.C. at 424, 368 S.E.2d at 908. Thus, turning to the facts in the *Harley* opinion from the Court of Appeals, it is apparent that "the circuit court concluded the guaranty agreements place . . . ," and "the court held," and "the court entered judgment." *Southern Bank & Trust Co. v. Harley*, 292 S.C. 340, 342, 356 S.E.2d 410, 410-11 (Ct. App. 1987). Hence, *Harley* is not a case that changes the outcome the Bank advocates for in this action. No jury determination was made in *Harley*. Instead,

*Harley* represents an example of how the statutory foreclosure process is supposed to work when a mortgagor defaults on his mortgage and a guarantor has promised to make good on the mortgagor's obligation to repay the debt. The proper procedure and timeline for a foreclosure action seeking a deficiency against a guarantor can be summarized as follows:

- A mortgagor defaults on his mortgage;
- The bank institutes a foreclosure action against the mortgagor and requests a deficiency judgment against the guarantor for any remaining indebtedness following the foreclosure judgment and sale;
- If the foreclosure is contested, the court would undertake to decide the matter along with any defenses or counterclaims arising in the case;
- If the mortgagee prevails, the property is sold and if the sale price does not garner an amount sufficient to satisfy the debt obligation; then
- The Court determines how much is remaining unpaid under the mortgage and the court enters judgment in favor of the mortgagee against the guarantor for that amount.

*See, e.g., Harley*, 292 S.C. 340, 356 S.E.2d 410 (Ct. App. 1987) (demonstrating procedural posture of a foreclosure action when a request for a deficiency is made and the court determines the amount of the deficiency); *American General Financial Services v. Brown*, 376 S.C. 580, 658 S.E.2d 99 (same).

Similarly, the Court of Appeals cited to *TranSouth Fin. Corp. v. Cochran.* In *Cochran*, the court addressed a guaranty in connection with a promissory note securing an interest ***in dealer inventory***. 324 S.C. 290, 292, 478 S.E.2d 63, 64 (Ct. App. 1996) (emphasis added). Unlike the present case, *Cochran* did not involve a foreclosure action or real property. The guaranty agreement there was executed in connection with a security interest in personal property—automobiles. *Id.* Hence, *Cochran* was not a

foreclosure and the case was not commenced under the South Carolina Code provisions applicable to foreclosure actions upon which TD Bank's complaint was founded here.

The Court of Appeals also cited to *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). *Johnson* was also not a foreclosure action. Like *Cochran*, it involved a suit on a guaranty and issues surrounding the making of that instrument. First, the claims on the guaranty were brought by the bank as a counterclaim. *Id.* at 53, 354 S.E.2d at 896. Second, the claims on the guaranty were not brought in connection with the foreclosure of real property under the statutory foreclosure regime. *Id.* As a result, *Johnson* is distinguishable from the present action commenced seeking to foreclose upon real property.

Accordingly, as established by the General Assembly and this Court, the right to a deficiency judgment arises in connection with the foreclosure suit by operation of law and the action is one that sounds only in equity. No jury trial right exists in a foreclosure action because the court is sitting in equity and is vested with authority over the entirety of a foreclosure action, including the deficiency judgment determination. This procedure has been in place since 1791. The BADD decision would throw this long-standing regime into disruption and thus should be reversed.

## II. The Court of Appeals improperly reversed on an argument not raised by Respondents.

In deciding to refer the matter to the master, the trial court also relied upon the "main purpose rule," and this ruling served as an independent basis for the trial court's order. Before the Court of Appeals, Respondents did not cite *Floyd v. Floyd*, 306 S.C. 376, 412 S.E.2d 397 (1991) or argue that the trial court's "main purpose" ruling was in error. Hence, right or wrong, that ruling became the law of the case. *See Buckner v.*

*Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (holding that an unappealed ruling, right or wrong, is the law of the case). Respondents' failure to specifically raise this argument bars the Court of Appeals from using it as a basis for reversal. The Court of Appeals' Opinion is thus in conflict with decisions of this Court on issue preservation. As this Court requires, an issue not argued by a party is deemed abandoned and is not preserved for appellate review. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issue deemed abandoned where appellant failed to provide arguments or supporting authority for his assertion). The decision also conflicts with prior opinions from the Court of Appeals. *See e.g., Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011) (finding the appellate court does not need to address an argument on the merits where it was not included in the statement of issues on appeal). Thus, the Court of Appeals' use of the *Floyd* case and its interpretation of the main purpose rule to reverse the trial court was improper, as the argument was not made by the Respondents. Hence, the Court of Appeals should be reversed.

## III. The Court of Appeals erred in failing to address the trial court's ruling that Respondents' counterclaims and third-party claims were permissive. This Court should thus affirm the trial court's ruling on this issue.

Due to the Court of Appeals' error regarding the nature of this foreclosure action and the request for a deficiency judgment, the Court did not substantively address whether the Respondents' counterclaims and third-party claims were permissive or compulsory. The Court of Appeals summarily concluded that because it had determined that Respondents were entitled to a jury trial on the request for a deficiency, Respondents were entitled to a jury trial on their counterclaims for breach of contract and civil

conspiracy as well. Because the Court of Appeals erred in its analysis as to whether the request for a deficiency triggered a right to a jury trial, it also erred in failing to address the ruling of the trial court that the Respondents' offensive claims were permissive, thereby waiving any right to a jury trial concerning those claims.

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Mortgage Electronic Systems, Inc. v. White*, 384 S.C. 606, 682 S.E.2d 498 (Ct. App. 2009) (citing *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). In some instances, "[i]f the complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim." *Id.* (citing *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986)). However, if a defendant asserts a counterclaim which is not legal and compulsory in an equitable action, he waives any right to a jury trial on that counterclaim. *See N.C. Federal Savings and Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 516, 381 S.E.2d 903, 904 (1989); *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 54, 354 S.E.2d 895, 897 (1987) (summarizing the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims, holding, "[i]f the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial"). Foreclosure proceedings are equitable proceedings in South Carolina. *See, e.g., DAV Corp.*, 298 S.C. at 516, 381 S.E.2d at 904 (referring to foreclosure proceeding as equitable). Therefore, a defendant must assert a counterclaim that is **both** legal **and** compulsory to be entitled to a jury trial on that counterclaim.

Legal counterclaims asserted in a foreclosure proceeding are permissive unless they are logically related to enforceability of the note. *See DAV Corp.*, 298 S.C. at 518, 381 S.E.2d at 905 (adopting "logical relationship" test to determine whether counterclaims were permissive). In *DAV Corp.*, this Court determined that counterclaims related to an oral agreement whose breach could not have avoided a default on the note at issue were permissive. This Court reasoned that the counterclaims were permissive because they "do not affect the enforceability of the Note." *Id.* Recently, the Court of Appeals applied the logical relationship test to determine that a violation of the attorney-preference statute was not logically related to the enforceability of the note and mortgage because the statute provided for damages for its violation, but not rescission. *Wells Fargo Bank v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012). The Court of Appeals erred in failing to apply the same analysis in this matter.

In examining Respondents' amended answer and counterclaim and third-party complaint (App. 96-105), Respondents have set forth five claims as counterclaims and third-party claims.[1] Respondents raise claims based on unconscionability, civil conspiracy, breach of contract, intentional interference with contractual relations and prospective business relations, and breach of fiduciary duty. (App. 98-105.)

While the unconscionability claim attacks the debt obligations giving rise to any deficiency, the unconscionability claim is itself an equitable claim under South Carolina law. *Wells Fargo Bank v. Smith*, 398 S.C. at 497, 730 S.E.2d at 333 (noting that because

[1] While Respondents have not separately identified their counterclaims and third-party claims in their amended answer and counterclaim, all third-party claims are by their nature deemed permissive by the courts. *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002). Thus, to any extent the court seeks to distinguish the combined claims brought against TD Bank and third-party defendant William Rempher, the claims against Rempher are deemed permissive by operation of law.

the only remedies available for common law unconscionability are equitable, there is no right to a jury trial on this claim) (citing *Brown v. Greenwood Sch. Dist. 50 Bd. of Trs.*, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001). Thus, no jury trial right exists for the unconscionability claim.

Beyond the unconscionability claim, the other four remaining offensive causes of action are legal claims that relate to events that occurred after the execution of the debt obligations. In *Mullinax v. Bates*, this Court focused on the timing of events in finding that claims arising subsequent to the execution of the contract had no logical relationship to the enforceability of the contract. 317 S.C. 394, 396, 453 S.E.2d 894, 896 (1995). Thus, the determination respecting when the claims arose is critical. Here, there is no logical relationship between the four legal causes of action and the debt obligations relied upon by TD Bank in its complaint. Respondents essentially allege that through allegedly negligent business management and self-serving control of revenues, Respondents' business counterparts allowed the debt obligations to go into default to Respondents' detriment. (App. 98-105.) Therefore, the claims for civil conspiracy, breach of contract, intentional interference with contractual relations and prospective business relations, and breach of fiduciary duty all arise ***after*** the execution of the instruments at issue in the foreclosure complaint based on Respondents' allegations. None of these four legal cases of action attack the enforcement of the debt instruments sought in the foreclosure suit. No logical relationship thus exists between the foreclosure complaint and these claims. As a result, the trial court properly concluded these counterclaims are permissive and that the Respondents waived their right to a jury trial on each. This analysis is consistent with this Court's recent decision in *Wachovia Bank, N.A. v. Blackburn*, 755 S.E.2d 437, 441-

442 (2014) (analyzing jury trial issues in connection with a contractual waiver of the right to a jury trial and reciting the prior decisions of the Court). Thus, the Court of Appeals should be reversed in this regard as well, and the trial court affirmed.

**Conclusion**

Based on the above, the Court should reverse the Opinion of the Court of Appeals in order to affirm the order of the trial court referring the entire action to the Master-in-Equity for a bench trial. Respondents have no right to a jury trial in this foreclosure action.

Respectfully submitted,

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Columbia, South Carolina

June 9, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge



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Case No. 2010-CP-26-08505

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Carolina First Bank n/k/a TD Bank, NA, ..... Petitioner,

v.

BADD, LLC, William McKown and Charles A. Christenson, ..... Defendants.

Of whom BADD, LLC and William McKown are ..... Respondents.

BADD, LLC and William McKown, Third-Party Plaintiffs,

v.

William Rempher, Third-Party Defendant.

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PROOF OF SERVICE

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I, the undersigned, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Carolina First Bank n/k/a TD Bank, NA, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by to the following address(es):

Pleadings:

**Brief of Petitioner TD Bank**

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