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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM DORCHESTER COUNTY
The Honorable Diane Schafer Goodstein, Circuit Court Judge

Case No. 2011-CP-18-1013
Appellate Case No. 2013-002066

Bank of New York Mellon, as Successor Trustee under
NovaStar Mortgage Funding Trust, Series 2004-1 Respondent,

v.

Rachel R. Lindsay, Jeffrey Wayner, Tammy Wayner, Tiffany
Spann-Wilder, Esq., The Steinberg Law Firm and United
State of America acting by and through its agency, the Internal
Revenue Service, Defendants,

Of Whom Rachel R. Lindsay is the **Petitioner**

Rachel R. Lindsay Petitioner,

v.

Saxon Mortgage Services, Inc. Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

- I. When there is non-traditional foreclosure action, (e.g., the Bank has stolen the borrowers money) is not the borrower entitled to a jury trial.
- II. Does a party lose her right to a jury trial when she asserts both permissive and compulsory counterclaims in a foreclosure action?
- III. If a party asserts legal and compulsory counterclaims shouldn't her demand for a jury trial be granted?
- IV. In the State of South Carolina when both legal and equitable issue are in dispute it is well established that legal matters will be entertained first by the jury and matters of equity entertained last by the judge, consequently, is it necessary or required for the motion hearing judge to specify and label each claim and counterclaim asserted in the case when one legal and compulsory counterclaim is identified?

STATEMENT OF THE CASE

The Bank of New York Mellon, Successor Trustee under NovaStar Mortgage funding Trust, Series 2004-1 “*lender/holder of note and mortgage*” filed a foreclosure action against the Rachel Lindsay “*borrower*” (App. pp. 34-45), *after the Bank misapplied/misplaced/lost/misappropriated/stole or converted to its’ own use the mortgage payments made by Lindsay to the Bank and the Bank then held Lindsay in default for missing said payments.* Rachel Lindsay filed an Answer and Counterclaim against Bank of New York Mellon and Third Party Complaint against Third Party Defendant Saxon Mortgage Services, Inc., “*servicer*” demanding a trial by jury (App. pp. 62-89). Bank of New York Mellon and Saxon Mortgage filed an Answer (App. pp. 90-100), and Reply (App. pp. 101-111). Bank of New York Mellon and Saxon Mortgage filed a Joint Motion for a Non-Jury Trial in Equity Court and to Strike the Jury Trial Demand on March 22, 2013. (App. pp. 120-123). Lindsay filed a Memorandum of Law in Opposition to the Motion for a Non-Jury Trial in Equity Court and to Strike the Jury Trial Demand (App. pp. 124-130). On August 14, 2013, the Honorable Diane Schafer Goodstein issued an Order denying the motion filed by Bank of New York Mellon and Saxon Mortgage (App. pp. 27-30). Bank of New York Mellon and Saxon Mortgage filed a Motion to Alter or Amend pursuant to Rule 59(e) on August 15, 2013 (App. pp. 131-136). The Honorable Diane Schafer Goodstein issued a Form 4 Order denying said motion on August 22, 2013 (App. pp. 31-33). The Bank of New York Mellon and Saxon Mortgage filed a Notice of Appeal (App. pp. 1-2, and 280-299) objecting to the Court Order recognizing and acknowledging the Lindsay’s right to a trial by a jury of her peers.

The Respondent hereto, namely, the Bank of New York Mellon and Saxon Mortgage (as *Appellant*) filed its/their Final Brief (App. pp. 196-119), and Final Reply

Brief on March 27, 2014 (App pp. 245-256). Petitioner Lindsay (as *Respondent*) filed her Final Brief on March 18, 2014 (App. pp. 220-244). The appeal was heard by a three justice panel of the Court of Appeals on March 11, 2015 and the Unpublished Opinion No. 2015-UP-208 was filed on April 22, 2015, reversing the lower court decision (App. pp. 257-261). Petitioner Lindsay filed her Petition for Rehearing (App. pp. 262-263) together with a Memorandum in Support of Petition for Rehearing on May 7, 2015 (App. pp. 264-268). Bank of New York Mellon and Saxon Mortgage filed its/their Return in Opposition to Rachel Lindsay's Petition for Rehearing on June 5, 2015 (App. pp. 269-277). The Court of Appeals filed an Order denying Lindsay's Petition for Rehearing on June 16, 2015 (App. p. 278-279). Petitioner seeks a Writ of Certiorari to review the decision of the Court of Appeals.

Pertinent - Case Filings.

I. **FIRST CASE FILING** (Case No. 2008-CP-18-02543):

1. The Bank of New York Mellon (as Plaintiff) filed a Lis Pendens, Summons and Complaint on October 8, 2008. (App. pp. 34-45).
 - a. Causes of Action against Lindsay
 - (1) Foreclosure
2. An Order of Judgment of Foreclosure and Sale was filed on January 14, 2009. (App. pp. 6-13).
3. The Lindsay (as Defendant) filed a Motion for Temporary Restraining Order & Show Cause Order on January 30, 2009. (App. pp. 112-119).
4. An Order Vacating Judgment and Dismissing Action was filed on April 2, 2009. (App. pp. 14-17).

II. **SECOND CASE FILING** (Case No. 2009-CP-18-01311) :

1. The Bank of New York Mellon filed a Lis Pendens, Summons and Complaint on May 13, 2009. (App. pp. 51-61).

a. Causes of Action against Lindsay

(1) Foreclosure

2. Lindsay filed an Answer and Counterclaim and Third Party Complaint (i.e., against Saxon Mortgage Services, Inc. –Third Party Defendant) on June 16, 2009. (App. pp. 62-89).

a. Counterclaims against Bank of New York Mellon and Third Party Complaint Causes of Action against Saxon Mortgage:

(1) Breach of Contract

(2) Negligence

(3) Fraud

(4) Negligent Misrepresentation

(5) Promissory Estoppel

(6) Violation of the South Carolina Unfair Trade Practices Act

(7) Quantum Meruit/Unjust Enrichment

(8) Intentional Infliction of Emotional Distress/Outrage

(9) Invasion of Privacy

(10) Defamation/Libel Per Se

(11) Intentional Interference with Contract

(12) Intentional Interference with Prospective Economic Advantage

(13) Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan

(14) Declaratory Judgment for correction of credit report

3. A Consent Order pursuant to S.C. R. Civ. P. Rule 40(j) was filed on June 1, 2010 removing the case from the active docket. (App. pp. 17-22).

III. **THIRD (CURRENT) CASE FILING** (Case No. 2011-CP-18-01013) :

1. A Joint Consent Motion to Restore and Proposed Order was filed on May 20, 2011. (App. pp. 23-26).

ARGUMENT

Summary of Facts: The subject lawsuit stems from a disputed transaction and occurrence involving the malevolent filing of the second foreclosure lawsuit after the Bank's misappropriation/misallocation of payments made by check by Lindsay to be applied to her monthly mortgage loan obligation, *otherwise, referred by the Bank of New York Mellon and Saxon Mortgage as an accounting error and by Lindsay as fraudulent larceny*. The Bank of New York Mellon admits to the fact that it took \$6,557.04 from Lindsay and failed to show said sum on its "Books"; and, that since its "Books" did not account for said payments it considered Lindsay to be in default for failure to make the loan payments represented by said \$6,557.04. It was after the filing the first foreclosure action against Lindsay (Case No. 2008-CP-18-02543), when confronted by Lindsay the Bank of New York Mellon inexplicably located said sum of money. The Bank of New York Mellon dismissed the first case after said revelation. It was later that the Bank of New York Mellon, knowing that it created the circumstances which made it appear that Lindsay was in default, filed the second foreclosure action (Case No. 2009-CP-18-01311) in complete disregard for Lindsay which has caused her to suffer damages, monetary and otherwise.

Detailing of Facts: Lindsay executed and delivered a promissory note in the amount of \$140,250.00 and mortgage of property bearing TMS: 171-06-01-016-000 to

Universal Mortgage Consulting, LLC on February 13, 2004. Saxon Mortgage became the servicer of the loan on behalf of Bank of New York Mellon which allegedly through assignment(s) of the note and mortgage became the holder of the of the note and mortgage. The Bank failed to apply payments made by Lindsay. The Bank of New York Mellon and Saxon Mortgage filed negative actions against Lindsay's credit which has caused Lindsay to have a lower credit score and wrongfully filed the above referenced foreclosure actions against Lindsay which has also adversely impacted Lindsay's credit. The Bank of New York Mellon and Saxon Mortgage Motion for Summary Judgment has been denied in the case at hand. Saxon Mortgage Services, Inc., acts as the servicer of the mortgage loan held by Bank of New York Mellon, as Successor Trustee under NovaStar Mortgage funding Trust, Series 2004-1. Saxon acted as agent or apparent agent of the Bank of New York Mellon; all of its' acts were within the scope of its authority or agency, and/or were ratified by Bank of New York Mellon, alluding to the doctrine of *respondeat superior*. On or about the early spring or summer of 2008, Lindsay provided five months of payments to the Bank in the amount of \$6,557.04 to be applied accordingly. Neither of the Bank of New York Mellon nor Saxon Mortgage applied these payments to Lindsay's home mortgage loan account. The check written by Lindsay for said payments cleared her bank checking account on or about June 19, 2008. In the Fall of 2008, the Bank of New York Mellon brought a foreclosure suit Case No. 2008-CP-18-2543 against the same parties as in this matter, which resulted in a judgment against Lindsay. However, Lindsay was never served with a Summons and Complaint nor served any notices of hearing(s) in Case No. 2008-CP-18-2543. (App. pp. 66-68). Upon Lindsay's hiring of legal counsel after finding out that her property had be surreptitiously foreclosed on, the Bank acknowledged the aforementioned payment had not been applied and agreed to apply this previously made

payment to Lindsay's home mortgage loan account in or around the first months of 2009. The Bank of New York Mellon dismissed the prior foreclosure action Case No.2008-CP-18-2543 by Stipulation of Dismissal of Foreclosure Action and Cancellation of Lis Pendens dated March 20, 2009 and filed on April 2, 2009. (App. pp. 46-50). Lindsay with her attorney communicated on numerous occasions with the Bank by telephone and by e-mail regarding correction of Lindsay's home mortgage loan account. Sharon Cotton a supervisor and employee of the Bank indicated via numerous e-mails that this payment would be applied to Lindsay's home mortgage loan account. The Bank of New York Mellon and Saxon Mortgage failed to properly apply payments to Lindsay's home mortgage loan account. Lindsay also made additional payments to be applied to her home mortgage home mortgage loan account for which she received no credit. Bank of New York Mellon and Saxon Mortgage failed to apply these additional loan payments to Lindsay's home mortgage loan account. Lindsay vehemently declares and asserts that her money was stolen. The Bank of New York Mellon and Saxon Mortgage refused to modify Lindsay's loan after numerous discussions and requests for the same. The Bank of New York Mellon on May 13, 2009 filed a foreclosure action Case No.2009-CP-18-1311 against Lindsay (App. pp. 51-61). On May 28, 2010 the Bank of New York Mellon pursuant to SCRCF Rule 40(j) dismissed the action. (App. pp. 18-22). On May 17, 2011 the parties consented to restoring this case under CaseNo.2011-CP-18-1013. (App. pp. 23-26).

This case is about more than foreclosure, it is about wrongful foreclosure, a lender fraudulently stealing money from one of its borrowers, Breach of Contract; Negligence; Fraud; Negligent Misrepresentation; Promissory Estoppel; Violation of the South Carolina Unfair Trade Practices Act; Quantum Meruit/Unjust Enrichment; Intentional Infliction of Emotional Distress/Outrage; Invasion of Privacy; Defamation/Libel Per Se; Intentional

Interference with Contract; Intentional Interference with Prospective Economic Advantage; Declaratory Judgment for Compliance with Homeowner Affordability and Stability Plan; Declaratory Judgment for correction of credit report, and “Conversion” . Lindsay in her Answer, Counterclaim and Third Party Complaint has demanded a trial by a jury of her peers. (App. pp. 62-89).

Bank of New York Mellon and Saxon Mortgage allege that the misapplication of payments were just an accounting error. Lindsay argues that the funds were intentionally misapplied which is tantamount to the funds being fraudulently converted for the benefit of the Bank of New York Mellon and/or Saxon Mortgage all to the detriment of Lindsay (i.e., stolen). It is up to a jury to determine whether this money was stolen or simply negligently misapplied through an accounting error. Even if it were simply an accounting error that error caused Lindsay to suffer in a myriad of ways as set out in the subject Answer, Counterclaim and Third Party Complaint (App. pp. 62-89). Lenders and servicers regularly refuse to take monthly payments once a foreclosure action has been filed. It is very disingenuous for the Bank of New York Mellon and Saxon Mortgage to argue that Lindsay is living in the home without making payment. They refused payment. Lindsay has in fact asserted the causes of action (e.g., Quantum Meruit/Unjust Enrichment, Fraud, Negligence, etc.) alleging damages for loss of her money.

Query: *Where did the \$6,557.04 in payments go? What did lender or servicer do with these funds?*

Again, Lindsay contends that these funds have been taken by lender and/or servicer (i.e., Bank of New York Mellon and Saxon Mortgage). If these funds had been applied to the Lindsay’s loan records/payment history the Bank of New York Mellon would have never considered Lindsay to be “in default” and would have never filed the first foreclosure

action in 2008. The filing of the foreclosure action has caused the Lindsay to suffer in the eyes of her customers and their tenants. Lindsay owns and operates 1 Sterling Place, LLC a real estate management company, and one of the tenants she deals with failed to make a monthly payment and he came to her office to discuss the matter and averred that “*Lindsay does not make her payments why should I*”. The fact is, that the foreclosure (Case No. 2008-CP-18-02543) became public record in the Office of the Dorchester County Clerk of Court placing the foreclosure information regarding Lindsay on the internet for the whole world to see. (App. pp.34-45). In the first case filing, Lindsay was never served with the Summons and Complaint, resulting in that case being dismissed, after the damage had been done to Lindsay’s reputation as a result of Libel¹. In the 2008 case, the Bank of New York Mellon erroneously obtained an Order of Foreclosure and Sale and published in the local newspaper that the Lindsay’s house would be auctioned off at a foreclosure sale. (App. pp. 6-13). This action amounts to defamation basically announcing that Rachel Lindsay is/was not fit to conduct the business of her chosen profession which that of a “Property Manager” (i.e., person *in the business of managing matters pertaining real estate for land/home owners*). Lindsay also suffered on a social level as a result of the defamation. The Bank of New York Mellon knew or should have known that Lindsay did not receive service of process yet Bank of New York Mellon obtained judgment and published in the newspaper anyway. The Bank of New York

¹ South Carolina Constitution. Declaration of Rights, Section 16. Libel. In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and facts. (1970 (56) 2684; 1971 (57) 315.) Note: This concept has been recognized in criminal cases, thus, it is and/or should be extended to civil cases, for it is a question of fact in either event.

Mellon had a complete disregard for Lindsay's "right to due process"² and a complete disregard for the damages and suffering its actions would cause the Lindsay.

I. OPINION NO. 2015-UP-208 ISSUED BY THE SOUTH CAROLINA COURT OF APPEALS IN THE CASE AT HAND ERRONEOUSLY EXTENDS THE RULING BY THE SOUTH CAROLINA SUPREME COURT IN THE CASE OF CAROLINA FIRST BANK V. BADD, LLC., OP. NO. 27486 (S.C. SUP. CT. FILED JAN. 28, 2015) FAR BEYOND WHAT THE SUPREME COURT INTENDED.

In the case at hand, it is a fact that the payments made by Lindsay went missing, was lost, stolen, etc... . Upon reading the ruling in Bank of New York Mellon v. Lindsay, Opinion No. 2015-UP-208, one might conclude that when it comes to foreclosure litigation Banks receive preferential treatment that individuals do not receive. Can a Bank really prevent a Plaintiff from having a matter litigated before a jury by simply filing a claim for

² As a result of the 2008 foreclosure action, the Lindsay was going to be erroneously removed from her home and put out on the street via a wrongful foreclosure wherein she was never served with the Summons and Complaint. The circumstances in that case were dire and extremely important to Lindsay, yet, the Bank of New York Mellon failed to serve Lindsay . The Bank of New York Mellon went through with the publication of the foreclosure even after it negligently filed the 2008 foreclosure action and even after it knew or should have known that the 2008 filing was erroneous because of the missing funds which were in the possession of the Bank of New York Mellon, furthermore, the action was tainted due to failure to serve Lindsay .

All individuals have a constitutional right to due process under the Constitution of the State of South Carolina and Constitution of the United States America. This concept should apply in both criminal and civil cases. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. "*Due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur*". S.C.N.B. v. Central Carolina Livestock Market, 289 S.C. 309, 345 S.E.2d 485 (1986). The U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. The Due Process Clause of the Fifth Amendment, ratified in 1791, asserts that no person shall "*be deprived of life, liberty, or property, without due process of law.*" This amendment restricts the powers of the federal government and applies only to actions by it. The Due Process Clause of the Fourteenth Amendment, ratified in 1868, declares, "*[N]or shall any State deprive any person of life, liberty, or property, without due process of law*" (§ 1). The Constitution of the State of South Carolina, Article 1, Section 3. states that "*The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.*"

foreclosure? This could not have been the intention of the Supreme Court in the case of Carolina First Bank v. Badd, LLC. Op. No. 27486 (S.C. S. Ct. Filed Jan. 28, 2015).

Query: *If Lindsay had sued the Bank of New York Mellon, first, “demanding a jury trial”³ on the grounds that the Bank fraudulently stole her money, would she lose her right to a trial by jury due to the filing of a counterclaim by the Bank of New York Mellon asserting that she defaulted on her home mortgage loan payments (foreclosure action)?*

Answer: Lindsay should and would retain her right to a trial by jury.

In the scenario where a borrower files a Complaint (*demanding a jury trial*) and the Bank asserts a counterclaim alleging a foreclosure cause of action, said equitable counterclaim would not facilitate nor require the removal of the case from the “jury trial docket” to “non-jury trial docket”. The die is not cast in the “non-jury realm of civil litigation” just because a Bank is the first to file a Complaint asserting a foreclosure action against a borrower. If the borrower could have filed a Complaint, first, alleging certain legal causes of action entitling her to a jury trial for wrongs or breaches perpetrated by the Bank, then, she should be entitled to have her counterclaims heard by a jury of her peers.

That the Court of Appeals’ interpretation of Carolina First Bank v. Badd, LLC., apparently is, that once a party to a foreclosure action files just one permissive counterclaim

³ The South Carolina Constitution preserves the right of trial by jury only in those cases in which parties would have been entitled to it at the time of the adoption of the Constitution. Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). According to South Carolina Rules of Civil Procedure, 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 or of specific real or personal property must be tried by a jury, unless a jury trial be waived. “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.” Lester, 327 S.C. at 267, 491 S.E.2d at 242. Whether an action is legal or equitable is primarily determined by the allegations in the complaint. See Nat’l Bank of South Carolina v. Daniels, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (Ct. App. 1984). Where legal and equitable issues or rights are raised in the same complaint, the legal issues are for determination by a jury and the equitable issues are for determination by the court. Floyd v. Floyd, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991).

that said party waives the right to a jury trial, whether or not the party has also asserted a compulsory counterclaim; this interpretation cannot be correct. Lindsay asserts that the converse is true, the ruling in Carolina First Bank v. Badd, LLC., indicates that the filing of just one compulsory counterclaim in a foreclosure action guarantees one's right to a trial by jury, even if permissive counterclaims are also pled. Surely, the filing of a permissive counterclaim does not taint a case initiated by foreclosure litigation to the point that a party waives her constitutional right to a trial by a jury of her peers.

II. THE COURT OF APPEALS OVERLOOKED THE FACT THAT THERE ARE SIGNIFICANT DISTINCTIONS AND DIFFERENCES BETWEEN IN THE CASE AT HAND AND CAROLINA FIRST BANK V. BADD, LLC., OP. NO. 27486 (S.C. SUP. CT. FILED JAN. 28, 2015).

The Court of Appeals relies almost exclusively on the case of Carolina First Bank v. Badd, LLC., in formulating its opinion regarding the case at hand. The differences and distinctions between the facts in Carolina First Bank v. Badd, LLC., and Bank of New York Mellon v. Lindsay. are delineated as follows:

1. Reason for the Filing of the Foreclosure Action.

(a) BADD, LLC actually failed to make loan payments to the lender and defaulted on the loan and involves the filing of one foreclosure action.

(b) Lindsay actually made the loan payments to the lender but through an "accounting error" or other nefarious act or omission on the part of the lender, Lindsay was not credited with making the loan payments, and was erroneously classified as being in default. *Where did the money for the monthly mortgage payments go?* But for, the Banks admitted "accounting error" (*euphemism*) regarding loan payments made by Lindsay, Lindsay would have never been

considered to be in default, and the foreclosure action would have never been filed in the first place. Also, this case involves the negligent filing of the first foreclosure action and the malicious filing of a second foreclosure action.

2. Borrower/Lender Relationship.

(a) McKown as a guarantor was ancillary to the dealings between borrower and lender; BADD, LLC was the primary participant in the borrower/lender relationship.

(b) Lindsay was the primary participant in the borrower/lender relationship.

3. Extent of interaction in the Borrower/Lender Relationship.

(a) McKown had no direct interaction with the lender regarding the making of loan payments, or the failure to make said payments.

(b) Lindsay personally interacted with the lender periodically by making the loan payments directly to the lender.

4. Reason for being named as a Defendant in a Foreclosure action.

(a) McKown was joined in as a party to the foreclosure action by the lender who did not claim that McKown was in default but only claimed that he was secondarily liable for the debt as a “guarantor”, due to the failure of BADD, LLC to make the required loan payments.

(b) Erroneously, Lindsay was directly sued by the lender in the foreclosure action based on the claim that Lindsay was in default. (*Lender admits to making an accounting error*).

5. Counterclaims asserted.

(a) McKnown as an ancillary party counterclaimed asserting permissive counterclaims involving the lender and William Rempher.

(b) Lindsay as a primary party did in fact assert legal compulsory counterclaims and delineated in the Final Brief of Respondent (Lindsay).

III. THE COURT OF APPEALS OVERLOOKED THE FACT THAT LINDSAY DID FILE LEGAL COMPULSORY COUNTERCLAIMS AGAINST THE BANK OF NEW YORK MELLON.

The legal causes of action already pled by Lindsay are as follows: Breach of Contract, Negligence, Fraud, Negligent Misrepresentation, Violation of the South Carolina Unfair Trade Practices Act, Invasion of Privacy, Intentional Infliction of Emotional Distress/Outrage, Defamation/Libel Per Se, Intentional Interference with Contract, Intentional Interference with Prospective Economic Advantage, justify the judicial determination that Lindsay is entitled to a jury trial in the case at hand. (App. pp. 62-89).

"By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." First-Citizens Bank & Trust Co. v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. Mullinax v. Bates, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). Whether a counterclaim is logically related to the initial claim depends upon the facts of each case. See Hucks, 305 S.C. at 298, 408 S.E.2d at 223 (finding a logical relationship between a trustee regarding the administration of a trust and a legal counterclaim alleging that the trustee breached a fiduciary duty); N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518-19, 381 S.E.2d 903, 905 (1989) (finding a logical relationship between an action on a note brought by the lender to foreclose and the validity of a purported oral agreement modifying the note alleged by the borrower). If a compulsory counterclaim is not raised in

the first action, a defendant is precluded from asserting the claim in a subsequent action. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997).⁴ The purpose of Rule 13(a) is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." S. Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962) "Rules of procedure, like statutes, should be given their plain meaning." Valentine v. Davis, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995).

Counterclaims are governed by S.C. R. Civ. P. Rule 13, which provides:

13(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it *arises out of the transaction or occurrence 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.

13(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party *not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim*.

The Defendant Lindsay asserted legal compulsory Counterclaims and Claims raising legal issues while at all times demanding a trial by jury. Fraud and Negligent Misrepresentation are fundamentally legal in nature. The Bank of New York Mellon and Saxon Mortgage stole money and attempted to steal Lindsay 's house without even notifying her of the initial lawsuit Case No.2008-CP-18-2543. (App. p. 168, line 19 – p. 171, line 7) which is in Violation of the South Carolina Unfair Trade Practices Act.

⁴ The South Carolina Reporter's Note following Rule 13 states: "[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted."

Intentional Interference with Existing Contracts, Breach of Contract, Negligence, Intentional Interference with Prospective Contractual Relations, Intentional Infliction of Emotional Distress/Outrage, Invasion of Privacy/Intrusion Upon Solitude, and Defamation/Libel *Per Se* are all legal in nature. Although Lindsay has asserted other claims and/or counterclaims which may be considered equitable in nature; there are sufficient legal compulsory claims/counterclaims which have been asserted which arise out of the same transaction and occurrence logically relating back to the wrongful acts of the Bank of New York Mellon and Saxon Mortgage to warrant a trial by jury. But for the action of stealing Lindsay's money this legal action would have never be filed in the first place.

IV. THE COURT OF APPEALS DISREGARDED LINDSAY'S NOTIFICATION THAT SHE INTENDS INCLUDE THE CLAIM OF "CONVERSION" A PURE LEGAL CAUSE OF ACTION AND COMPULSORY COUNTERCLAIM.

Pursuant to SCRPC Rule 15(a) Amendments. "*.... a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party....*". Motions to amend are liberally granted by the courts and it should have been permissible for the Court of Appeals to consider that Lindsay would be permitted to as the legal compulsory counterclaim of "Conversion". The Bank of New York Mellon and Saxon Mortgage converted the Lindsay's money (funds earmarked to make home mortgage loan payments) to its/their own use. Conversion is a wrongful act emanating from either a wrongful taking or wrongful detention. Moore v. Weinberg, 373 S.C. 209, 227, 644 S.E.2d 740, 749 (Ct. App. 2007). The Lindsay intends to make a motion to amend her Answer and Counterclaim to include the cause of action of "Conversion" upon obtaining leave of court pursuant to S.C. R. Civ. P. Rule 15(a). Conversion is defined as "the unauthorized assumption and exercise of the rights of

ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner.” Mullis v. Trident Emergency Physicians, 351 S.C. 503, 507, 570 S.E.2d 549, 550-51 (Ct. App. 2002). “An action for damages for conversion is an action at law.” Blackwell v. Blackwell, 289 S.C. 470, 471, 346 S.E.2d 731, 732 (Ct. App. 1986). But for said conversion of the mortgage money payments this foreclosure action would have never been filed against the Lindsay. The Bank in the case at hand used the Lindsay’s mortgage payments for its own devices, failed to give credit to the Lindsay for making said payments, and, then held Lindsay in default for failing to make said payments. Surely, this is a question of fact for a jury to determine regarding a legal cause of action. Conversion is definitely a legal and compulsory counterclaim and third party claim which would entitle Lindsay to a trial by jury.

V. THE COURT OF APPEALS FAILED TO CONSIDER THAT THE JURY SHALL DETERMINE THE LEGAL ISSUES AND THE JUDGE SHALL DETERMINE THE EQUITABLE ISSUES IN THE CASE AT HAND WHICH IS CUSTOMARY IN THE STATE OF SOUTH CAROLINA.

The jury shall first decide the basic facts of this case and the trial judge assigned to handle the case at hand shall dictate how he or she wishes to conduct the trial. Where legal and equitable issues or rights are raised in the same complaint (counterclaim), the legal issues are for determination by a jury and the equitable issues are for determination by the court (i.e, presiding judge). Floyd v. Floyd, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991). The jury will make its determination on the legal issues and after that point it shall be necessary for the judge to determine the equitable issues. If both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court. Johnson v. South Carolina Nat’l Bank, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987).

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the petition for a Writ of Certiorari.



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July 15, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstien, Circuit Court Judge

Case No. 2011-CP-18-1013

Appellate Case No. 2013-002066

The Bank of New York Mellon, as Successor Trustee
under NovaStar Mortgage funding Trust, Series 2004-1,.....Appellant,

v.

Rachel R. Lindsay; Jeffery Wayner; Tammy
Wayner; Tiffany Spann-Wilder, Esq.; The Steinberg
Law Firm; and United States of America, Acting by
and through its agency, the Internal Revenue
Service, Defendants,

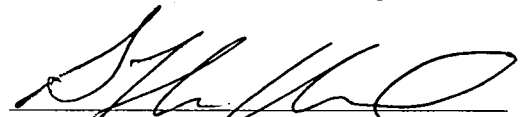
Rachel R. LindsayRespondent,

v.

Saxon Mortgage Services, Inc.,.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Petition for Writ of Certiorari complies with Rule
242, SCACR.



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Rachel R. LindsayRespondent,

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PROOF OF SERVICE

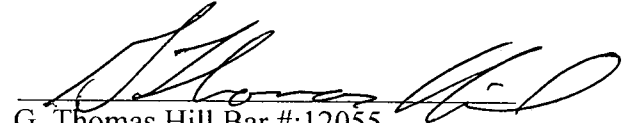
I HEREBY CERTIFY that I have served the **Writ of Certiorari** and **Appendix** on Appellant, Plaintiff, Defendant and Third Party Defendant by hand-delivery on July 16, 2015 to the address of the Counsel of Record, below:

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July 16, 2015