THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No: 2010-CP-26-8505
Appellate Case Number: 2013-000107

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

v.

BADD, LLC and William M. McKown, ... Respondents.

RESPONDENTS' REPLY BRIEF

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The Bank's argument as to the right to a trial by jury is straight forward. "When the General Assembly intends to provide a right to a jury trial, it does so expressly by statute." Petitioner's Brief p. 4. Without "provid[ing] such an express right in Section 29-3-660," none exists. Id. Further, the Bank argues that the only reasonable reading of the term "Court" within this section is to limit it to only a court without a jury. The General Assembly could have "specif[ied] the court of common pleas as the court set to adjudge." Id. The Bank argues it did not. The Bank then goes on to argue our Constitution is irrelevant, particularly to the proper reading of a statute passed by the General Assembly. These arguments quite obviously lack citation to even secondary authority as they are absurd and inapposite to the law in South Carolina. Their very premise supposes a state in which a jury of ones peers is a mere nuisance. There is little doubt the Bank fondly holds this view. Unfortunately for the Bank and fortunately for the citizens of this State, South Carolina adheres to a constitutional republic form of government.

> [T]he object of a written constitution is to fix the fundamental principles and limit the powers of government, and not to legislate on mere details. It is fixed in its nature, and, therefore, unsuited to contain the laws which from time to time are made necessary by the ever-changing necessities and wishes of the people. A constitution has been defined to be "the fundamental law of a State, containing the principles upon which the government is founded, regulating the division of the sovereign powers and directing to what persons each of these powers is to be confined and the manner in which it is to be exercised."

Ex parte Lynch, 16 S.C. 32, 35 (1881).

One of these principals upon which our government is founded is the right to a trial by jury. A statute need not ad nauseam recite terms included in the Constitution and in the Rules of Civil Procedure. Rather, whenever there is a question as to the jurisdiction of a Court unable to

provide a trial by jury, the assumption is always to limit that jurisdiction in accordance with the law of South Carolina. This analysis is very clearly described by the Supreme Court in *Smith & Co. v. Bryce*;

> The only question, therefore, is whether the case was such as to entitle the defendant to demand a trial by jury. To determine this question, it is only necessary to inquire whether this was a case of which the Court of Equity could have taken jurisdiction at the time of the adoption of the present Constitution, for it is not pretended that it falls within any of the other classes of cases in which the parties did not then have a right to a trial by jury; because, if it were not such a case, then clearly the defendant had a right to a trial by jury, which right is secured to him by the express terms of the Constitution, Art. I., Sec. 11. "The right of trial by jury shall *remain* inviolate," that is, wherever that right existed at the time of the adoption of the Constitution, such right should "*remain*"- continue inviolate.

17 S.C. 538, 542 (1882). Even if the language of a statute appears "to be broad enough to authorize a reference without the consent of the parties," South Carolina law holds that the "language must be construed as applying only to those cases in which a trial by jury is not secured to the parties, in order to avoid a conflict with that provision of the constitution guaranteeing that right." Id., at 543-44. The appropriate reading of S.C. Code Ann. § 29-3-660 under the South Carolina Constitution is one that provides a guarantor a right to trial by jury and this Court should hold as such.

I. *The Bank's reading of the statute as limiting foreclosure proceedings to only courts of equity is not a rational reading of the statute.*

The foreclosure statutes as enacted and embodied in S.C. Code Ann. § 29-3-610 et seq. establishes a method of bringing a mortgage foreclosure suit to have a mortgaged property sold and the proceeds of sale applied against the debt secured by the property. In actions to foreclose mortgages, the law provides that the plaintiff may make a person securing the mortgage debt 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." S.C. Code Ann. § 29-3-660. The intent of the legislature, as evidenced by the text and subject matter of the statute can in no way be read as limiting the adjudication of legal matters solely to the Court of Equity. The Bank's reading is not only unnatural and unreasonable, but such a reading would clearly render the statute unconstitutional. The Bank's argument in support of this reading is deeply flawed as it presupposes the following false assumptions: (1) the right to trial by jury must be granted through legislation, (2) foreclosure proceedings are only had in the Court of Equity, and (3) the reading of a statute does not necessitate the consideration of the Constitution. Such arguments are not in accord with South Carolina law and should, therefore, be ignored.

A. The right to a trial by jury is not contingent on explicit provisions providing for such within every statutory framework.

While a guarantor has always had the right to waive his right to a trial by jury, a mere statute may not remove this right under South Carolina law. Thus, any statute passed by the General Assembly presupposed this right. Article 1, Section 14 of the South Carolina Constitution plainly states "[t]he right of trial by jury shall be preserved inviolate." This Supreme Court has held that:

> the great right of trial by jury has existed from time immemorial in all those forms of actions at common law which were in use before the adoption of the Code, such as assumpsit, debt, [and] covenant, [...] and no doubt such right exists in the actions provided by the code as a substitute for these common-law actions"

Frazee v. Bratton, 26 S.C. 348, 2 S.E. 125, 127 (1887). As an action on a guarantee must necessarily fall within the category of an action of assumpsit, debt or covenant, it would have afforded the guarantor a right to have the case tried by jury in the Circuit Court. The Supreme Court, in *Johnson v. South Carolina National Bank*, specifically held that an action against a

guarantor was, in fact, legal and fell within the categories of common law action that entitled a party to a jury trial. 292 S.C. 51, 354 S.E.2d 895 (1987); see also *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 478 S.E.2d 63 (Ct. App. 1996)("it is well settled that a guarantor's liability is an independent contractual obligation"). The guarantor's right to trial by jury for legal actions brought against it cannot be removed through a strained reading of the statute limiting every action to the equity court without specific reservation.

The Bank wishes to establish a new method of when the court may grant a trial by jury. Without sound reasoning, the Bank argues that statutes should be read so as to only grant a trial by jury when such is explicitly stated. It argues evidence of such an approach is the inclusion of statutory language in other code sections that does just this. The Bank asserts that because the General Assembly provided that a "presiding judge" may submit to a jury issues involved in the satisfaction of a mortgage, the failure to provide likewise in the foreclosure section of the same chapter is evidence that use of a jury is prohibited. Not only does such analysis not correspond with the previously discussed analysis by the Courts in South Carolina, but it provides a simple argument in response. Taking the Bank's approach, the Court need not look outside of the very same article of which the statute at issue is found to locate the General Assembly's opposite approach to hearings by a jury. With respect to appeals from a return of an appraiser, the General Assembly expressly provided in Section 29-3-750 of the South Carolina Code that such an appeal is with "the court having jurisdiction of the action or any judge thereof, who shall hear the appeal without a jury in open court." No such language is present in Section 29-3-660. Thus, the logic used by the Bank reasons, had the General Assembly desired to **remove** a right to a jury determination within Section 29-3-660, it would have done so.

Clearly, the Bank's approach is not prudent, nor is it in conformity with South Carolina law. A guarantor, entitled to a jury trial prior to the adoption of the constitution, had its right to such trial by jury enshrined in the Constitution. Silence by the General Assembly should not be interpreted against the right, especially in light of the fundamental right to a trial by Jury. Such a fundamental right cannot be dismissed by assuming future statutes must reference this right ad nauseam.

B. There is no provision limiting foreclosure proceedings exclusively to courts of equity.

The Bank argues that elementary rules of statutory construction dictate that the term "court" within the statute be read to be exclusively the Court of Equity. Again, the Bank's argument is not only unsound, but directly contradicts its position. Even the "[s]ubtle [...] construction of statutory words for the purpose of expanding a statute's operation is prohibited." *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984). The Bank argues that the General Assembly's use of the term "Court of Common Pleas" in other statutes plainly shows the General Assembly's intent to use the term "court" with no qualifier to signify a different court, or in other words the Court of Equity. This argument, again, fails for simple reasons.

The argument relies on another apparent negative pregnant, under the rule of construction that an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance. See *Gozlon–Peretz v. United States*, 498 U.S. 395, 404, 111 S.Ct. 840, 846–847, 112 L.Ed.2d 919 (1991) (Where legislation "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the

disparate inclusion or exclusion")[1]. There is, however, a fundamental objection to depending on a negative pregnant argument here, for in the present circumstances there is reason to reject its soundness even as far as it goes. Quite simply, if it proves anything here, it proves too much. If the negative pregnant is the reason that "court" cannot be read to include the Court of Common Pleas, then the same reasoning will strip the Court of Equity from adjudging the matter as the General Assembly uses this same term throughout the South Carolina Code of Laws. See S.C. Code Ann. § 14-11-15, § 14-11-10, § 15-78-50, § 15-39-630, etc. If the contrast is enough to preclude a Court of Common Pleas to adjudge, it will do as well to remove the ability of the Court of Equity. This logic would ultimately eliminate any "court" from adjudging. But common sense would balk. Such a reading, therefore, must necessarily fail.

The term "Court" in this statute is most reasonably read to include other branches of the courts of South Carolina in conjunction with the equity court. The Petitioner's reference to elementary cannons of statutory interpretation is misplaced. Elementary rules of statutory construction only serve to belabor the reasonableness of the Respondents' reading of the statute. Briefly[2];

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[1] The Bank misstates in its brief it is relying on the canon of construction "expressio unius est exclusio alterius" or "inclusio unius est exclusio alterius" as used in *German Evangelical Lutheran Church of Charleston v. City of Charleston,* 352 S.C. 600, 576 S.E.2d 150 (2003). This canon, however, holds that the **enumeration** of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Id. As S.C. Code Ann. § 29-3-660 does not explicitly exempt the Court of Common Pleas, this elementary canon of construction is not applicable and is surely not the one being used by the Bank.

[2] These general cannons are summarized in Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

(1) "*A statute cannot go beyond its text.*" A reading of the term "court" that effectively adds the qualifier "of Equity" would go beyond the text of the statute and should be considered improper.

(2) "*Statutes are to be read in light of the common law and statutes in derogation of the common law will not be extended.*" As previously and later stressed in this and other briefs by the Respondents, the Courts of South Carolina have, at common law, always held that the Circuit Court, as a court with the power to hear jury trials, was the proper court to hear breaches of contract actions. The action on a guarantee is, fundamentally, an action on a contract and has always been held as such under common law. The Bank's argument that the Statute should now stand as fundamentally changing the nature of the action would serve to have the statute extended in derogation of the common law.

(3) "*After enactment, judicial decisions upon interpretation of particular terms and phrases control.*" The Supreme Court in *White v. Douglas*, specifically read the term "court" in the precursor to 29-3-650 to include the circuit court. 128 S.C. 409, 123 S.E. 259 (1924). Thus, this Court's interpretation of the General Assembly's later adoption of the same term "Court" without qualifier is controlled by the previous interpretation.

(4) "*The same language used repeatedly in the same connection is presumed to bear the same meaning throughout the statute.*" The term court as used by the General Assembly without qualifying language is used throughout the foreclosure statutes to include both the court of common pleas and court of equity.

(5) "*Words are to be taken in their ordinary meaning unless they are technical terms or words of art.*" The term "Court" should in no way be considered a technical term, and in

this Court's history is has never been construed as such.

(6) "*General terms are to receive a general construction.*" The term "Court" should be read with a general construction to include the circuit court as well as the equity court. Limiting the term to only the Court in Equity would not serve as a general construction.

(7) "*Words that are not terms of art and that are not statutorily defined are customarily given ordinary meanings, often derived from the dictionary.*" Merriam Webster defines the term "Court" as the following; "(a) a formal legal meeting in which evidence about crimes, disagreements, etc., is presented to a judge and often a jury so that decisions can be made according to the law; (b) a place where legal cases are heard; (c) an official group of people (such as a judge and jury) who listen to evidence and make decisions about legal cases." Merriam–Webster's Collegiate Dictionary 214 (11th ed.2003).

(8) "*If the word or phrase is defined in the statute, or elsewhere in the Code, then that definition governs if applicable in the context used.*" The term "court" has been defined by the general assembly in the South Carolina Probate Code. The term "Court" was defined as meaning "the court or branch having jurisdiction in matters as provided in this Code." S.C. Code Ann. § 62-1-201. In light of such definition, the term "court" is in no way limited to the Court of Equity.

The elementary rules of statutory interpretation all point to a reading contrary to the one argued by the Bank.

As argued in the Respondents' initial brief for rehearing, but somehow missed by the Bank, the reading used by the Respondents and the Court of Appeals is how the Courts of South Carolina have always read this term in the past. The term "court" as used in this statute has

repeatedly been read to include the circuit court in actions such as the present action against the Guarantor. See *Gray v. Toomer*, 39 S.C.L. 261, 262 (S.C. App. L. 1852), *Hall v. Young*, 29 S.C. 64 (1888), *Williams v. Beard*, 1 S.C. 309, 324 (1870), *Anderson v. Pilgram*, 30 S.C. 499, 9 S.E. 587 (1889), *Perpetual Bldg. & Loan Ass'n of Anderson v. Braun*, 270 S.C. 338, 242 S.E.2d 407 (1978). Perhaps the best example of this is the Supreme Court's decision in *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691 (1912). In the ninth paragraph of the Supreme Court's opinion in *Cobb*, the court made clear that a trial by jury on the claims brought against the guarantor could and were, in fact, heard before a **jury**. Id. at 694. Reading the term "Court" to be limited to the Equity Court as having the power to render judgment on legal matters is not only unreasonable, but also disregards centuries of jurisprudence.

C. The raising of the legal maxim that statutes be read so as to preserve their being constitutional does not require a finding nor raise an argument that the statute is unconstitutional.

The Bank initially argues that the issue of "whether a guarantor who is joined as a party to a foreclosure action pursuant to Section 29-3-660 of the South Carolina Code is entitled to a jury trial" does not address the relevance of the Constitution. See Petitioner's Brief p. 14. Similarly, it argues that such consideration is not preserved, as the Respondents have not properly raised the constitutionality of the statute prior to this rehearing. See Petitioner's Brief p. 15. This argument is unpersuasive. The Court of Appeals agreed with the Respondents that the Statute includes the right for the Guarantor to have a trial by jury under the statute. The Respondents agree with the Court of Appeals that the statute be interpreted and **enforced** with such a reading. The decision by the Court of Appeals is still, presently, the law of the land. The Petitioner is the one that stands before this Court with an argument concerning whether the statute needs to be interpreted

in contrast with the law of the land.

The Bank's first argument, as to whether the constitution is relevant has been addressed. Any reading of a statute necessarily entails consideration to the Constitution. South Carolina courts have long held that the "Legislature is, practically, omnipotent in the matter of legislation, except insofar as it is restrained by the Constitution, either expressly or by necessary implication." *Floyd v. Parker Water & Sewer Sub Dist.*, 203 S.C. 276, 17 S.E.2d 223, 226 (1941). Thus, a statute is always restrained by the Constitution. While, perhaps not advantageous to the Bank, this Court should consider the Constitution in its approach to determining the right to a trial by jury, and the Respondents do not somehow act improperly when they raise this point.

The Bank then argues that the Respondents' reference to the law prior to the Constitution of 1868 is improper, but then in an act of jiggery-pokery[3] states the relevant law for interpreting the rights afforded under the Constitution of 1868 is the law prior to adoption the Constitution of 1868. See Petitioner's Brief p. 16, citing *Sims Amusement Co. v. S. C Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005). Somehow, the Respondents' citation to the Constitution of 1790 has confused the Bank. To be more clear, statutes do not trump constitutions. *Floyd*, Supra. Thus, any act passed after the adoption of a constitution should be read in light of that constitution. Id. The Act of 1791, wrongly relied upon by the Bank in support of its reading of the Constitution of 1868, must, therefore, be read in light of the Constitution adopted prior to its passing, in this case the Constitution of 1790.

As the Constitution of 1790 afforded the Guarantor a right to trial by jury in similar

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[3] The use of this term comes from Justice Scalia dissenting opinion in *King v. Burwell*, No. 14-114, 2015 WL 2473448, at 19 (U.S. June 25, 2015)

actions, the Act of 1791 can not be read to remove such right. Nor does the language of the Act of 1791 provide as such. In *McConnell et al. v. Barnes et al.*, this Court addressed the development of foreclosure actions after the adoption of the 1790 Constitution:

> after the passage of the act of 1791, which declared that the fee to mortgaged property should continue in the mortgagor (the mortgagee having only a lien thereon), the change of the law created also a change in the practice, and that it became proper to include in a decree of foreclosure a direction to report the deficiency, after applying the proceeds of sale to the mortgage debt, and to then allow the mortgagee a judgment for the deficiency.
>
> Later, the act of 1894 was passed [**after the adoption of the Constitution of 1868**], allowing the mortgagee, in the action of foreclosure, to include in the decree a personal judgment against the mortgagor for the amount of the mortgage debt ; that judgment be entered up, constituting a lien upon all other real estate, and later to be credited with the net proceeds of the foreclosure sale.

142 S.C. 112, 140 S.E. 310 (1927)(reference added). The Court then goes to great lengths to describe the inherent powers of the special referee in the Equity Court and how that power extends to issuing reports while the power to render a judgment still lies with the circuit court. Id.

Any reading by this Court of S.C. Code Ann. § 29-3-660 necessarily requires that the constitutional right to trial by jury be retained. The intent of the enacting body as evidenced by the operative language of the statute regarding who has the right to render the judgment is most reasonably read to include a trial by jury. The term "court" has repeatedly been read to include a trial by jury and to not reduce jurisdiction to only the court of equity. Further, reading the statute so as to allow for a guarantor to retain his right to trial by jury allows the statute to be read in accordance with the South Carolina Constitution. Finally, the genesis of the statute provides further support that the joinder of a guarantor to a foreclosure action would not have removed his right to have the legal matter heard in a trial by jury. Thus, a guarantor who is joined as a party to

a foreclosure action pursuant to S.C. Code Ann. § 29-3-660 is entitled to a jury trial.

II. *Compulsory claims brought against a party are not rendered permissive by joining them with permissive claims against third parties.*

The Bank emphatically states the inquiry into the issue of whether the legal claims for breach of contract and conspiracy are compulsory ends with the question of whether any permissive claims were also brought by the Respondents. See Petitioner's Brief p. 19. The Bank wishes to have this Court consider all of the claims filed in the action against separate parties as "combined claims." Id. The Bank seems to argue that the permissive nature of other claims brought against other parties, now renders the compulsory claims permissive. Essentially, a party has no right to a trial by jury for a counterclaim where multiple parties are alleged to be liable. Because the Bank invited friends to participate in its wrongdoing, McKown may no longer argue his case before a jury of his peers. As explained by this Court in its initial Opinion, the analysis of whether a claim is compulsory in no way considers the nature of other claims. While the Bank correctly states the law on this matter is clear, the law on this matter is definitively against the Bank's position. The Supreme Court's decision in *N. Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.* is illustrative. 298 S.C. 514, 381 S.E.2d 903 (1989). Any question of whether the inclusion of permissive claims against a third party effects the compulsory nature of the claims against the Bank has been settled. The Supreme Court's analysis made clear the nature of claims brought in the same action have no effect on the other. Id. (Holding certain counterclaims were compulsory while other third party claims were permissive). The Bank's argument is without merit.

III. *The certainty of a claim being permissive or compulsory is not contingent on a pleader labeling it as such.*

The Bank argues that there is no uncertainty of the compulsory nature of McKown's

counterclaims. The Respondents and the Court of Appeals agree. The only way the analysis used by the Court in *Keels v. Pierce*, becomes relevant is if this Court disagrees with the Bank, Respondents, and Court of Appeals. 315 S.C. 339, 433 S.E.2d 902 (1993). Such analysis was similarly not necessary when the Court of Appeals agreed with the Respondents on Appeal. The Respondents raise the analysis in its briefs only to clarify the impact of this Court's finding such claims to be permissive. Regardless of the nature of the counterclaims, waiver of the Respondents' right to trial by jury would be inappropriate. The right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication. *In re Gilliland*, 248 N.C. 517, 103 S.E.2d 807 (1958). Rule 42 of the South Carolina rules of Civil Procedure provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, **always preserving** inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

(Emphasis added). As previously discussed, if it is uncertain whether a counterclaim is compulsory or permissive, the pleader may simply plead the claim and make demand for a jury trial on it. *Keels*, supra. The Bank argues that the uncertainty must be immediately asserted by the pleader in its pleadings in order for Rule 42 to apply. Such a requirement is not in accord with South Carolina law. Only a pleader on notice they are "asserting an **obviously** permissive counterclaim, which under the Rule 13 could be asserted in a separate jury trial, waives the right to trial by jury by operation of law." Id., 315 S.C. at 341-342, 433 S.E.2d at 903. The Respondents and the Court of Appeals both believed the counterclaims to be compulsory. As

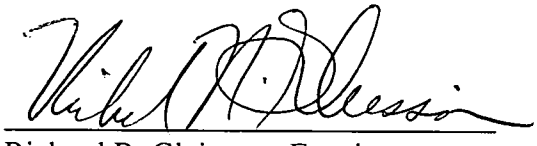
such, this Court should not find them to be "obviously" permissive. Again, the analysis is not needed as the counterclaims are legal and compulsory.

The analysis is provided to completely answer the issue requested to be briefed in this Court's order to rehear. McKown has a right to a jury trial based upon his counterclaims of civil conspiracy and breach of contract. If this Court finds the counterclaims compulsory that jury trial is in the same action as the Bank's foreclosure. If this Court finds the counterclaims permissive, the jury trial is preserved in a separate trial to be ordered under Rule 42.

CONCLUSION

The trial court made clear legal error in finding that the separate claim against the Guarantor did not entitle McKown to a jury trial on the Bank's complaint against him. The trial court made clear error when it found McKown had waived his right to a jury. The trial court made clear legal error when it found McKown's counterclaims were not compulsory based upon a simplistic, and mistaken, chronological analysis. And, the trial court made clear error when it referred this matter to the Master-in-Equity.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I certify that I have served the Respondents' Reply Brief by depositing a copy of it in the United States Mail, postage prepaid, on July 22, 2015, addressed to the attorneys of record as follows:

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