THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No.: 2015-001149

PNC Bank, N.A., successor to RBC Bank (USA),

Respondent,

v.

Liberty Cottages, LLC; GW Dorchester, LLC;
USS Clarksville, LLC; Liberty Cottages Land, LLC;
Royal Beach Properties, LLC; The Brothers of SC, LLC;
Deborah Rice-Marko a/k/a Deborah G. Rice-Marko;
Evan R. Marko and John E. Marko, Jr.,

Appellants.

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in ruling that Appellants waived their right to a jury trial even though Appellants' meritorious counterclaims attack the enforceability of the agreements containing the jury trial waivers?

STATEMENT OF THE CASE

This appeal arises from an order granting Respondent's motion to strike Appellants' jury demand. In this case, Respondent seeks to foreclose on mortgages and collect on notes and personal guaranties executed by Appellants. But, this is not a garden variety foreclosure action. Appellants have asserted legal counterclaims claiming that Respondent procured the agreements through bad faith and misrepresentation and that Respondent itself has breached the agreements. For that reason, Appellants argue Respondent is not entitled to enforce the subject agreements. In moving to strike Appellants' jury demand, Respondent relied on jury trial waivers contained within those agreements, the very agreements which Appellants contend are not enforceable as a result of Respondent's bad faith, misrepresentations, and prior material breach.

In this case, the Court must decide, on facts that are unique to this case, whether jury trial waivers can apply to counterclaims when the counterclaims question the enforceability of the contracts that contain the jury trial waivers. The trial court incorrectly answered this question in the affirmative, and this Court should reverse.

STATEMENT OF FACTS

In 2005, Appellant Deborah Rice-Marko ("Rice-Marko") opened a line of credit with RBC Bank ("RBC"), predecessor to Respondent PNC Bank, N.A. ("PNC"). (R. p. 48 ¶ 87 ; R. p. 1649 ¶ 2; R. p. 873, line 8 – R. p. 874, line 8.) In 2007, Rice-Marko increased the amount of the line of credit and the line of credit was secured by a pledge of securities, including stock in Wachovia Bank. (R. p. 1649 ¶ 3; R. pp. 1307-1323.) By late 2007, Rice-Marko and entities she controlled had four real estate loans and the line of credit with RBC. (R. p. 1650 ¶ 4.) The loans were independent of one another, had varying maturity dates,

and the bank agreed to omit any cross default or cross collateralization provisions from the loan documents. (R. p. 1650 ¶ 4; see also, R. pp. 92-570.) By the end of 2007, Appellant The Brothers of SC, LLC ("Brothers of SC"), an entity owned by Appellants Evan R. Marko and John E. Marko, Jr. (Rice-Marko's sons), and in which Rice-Marko had no interest, had two real estate loans unrelated and separate from the loans Rice-Marko and her entities had. (R. p. 1650 ¶ 5.) The bank maintained separate files for the Appellants' various loans and did not consider the loans to be related. (R. p. 1100, lines 13-22.)

In the second half of 2007, the value of Wachovia stock began to decline. (R. p. 876, lines 12-15; R. p. 1650 ¶ 6.) At the request of RBC, Rice-Marko agreed to draw on a home equity line of credit secured by her personal residence in order to reduce the balance of the line of credit and maintain an agreeable loan-to-value ratio. (R. p. 860, line 23 – R. p. 861, line 4; R. p. 1650 ¶ 6.) In March of 2008, Rice-Marko pledged more than 23,000 additional shares of Wachovia stock to the RBC line of credit. (R. p. 1650 ¶ 7; R. p. 1329.)

Wachovia's stock again declined in June of 2008, leading to margin calls from RBC. (R. p. 1651 ¶ 9; R. p. 1331.) Rice-Marko was proactive and responsive to the effect the declining stock value had on the loan-to-value covenants of the line of credit. Specifically, she made significant principal payments on the line of credit by drawing on other lines of credit that she, or entities she owned, had with RBC. (R. p. 1651 ¶ 9.) Rice-Marko also used proceeds from her late mother's life insurance policies. (R. p. 1651 ¶ 10.) Rice-Marko reduced the outstanding balance of the line of credit from $5.3 million in June 2008 to $1.8 million in January 2009. (R. p. 1651 ¶ 10.)

Despite Rice-Marko's good faith dealings with the bank concerning the impact of the decline in the value of Wachovia stock on the line of credit, in the fall of 2008, there

was a decisive and conscious shift in RBC's behavior and dealings with Rice-Marko. RBC shifted its focus from ensuring there was adequate collateral for the line of credit to plotting to enhance its security and its overall position with respect to all of Appellants' loans by requiring Appellants to cross-collateralize and cross-default their previously unrelated existing loans, loans that were not in default and that reflected substantial equity in the real estate that secured them. The sole purpose of this required modification was to obtain more favorable terms for the bank. On September 30, 2008, Stephen Draper wrote to Michael Baker that RBC "need[s] to consider all options to bring our Wachovia exposure to a cross collateralized position with other available collateral to improve our overall collateral position." (CR_001.) In October 2008, RBC informed Rice-Marko of its desire to restructure all of the loans so that they were cross-collateralized. (R. p. 1652 ¶ 13; see also, e.g., R. p. 1333.)

Having no reason to suspect RBC's ulterior motive and continuing to focus on ensuring compliance with the loan-to-value covenants contained in the line of credit, Rice-Marko continued to be proactive and attempted, in good faith, to negotiate with RBC to determine possibilities for replacing or enhancing the collateral securing the line of credit. Namely, Rice-Marko suggested that RBC finance a shopping center she desired to purchase in Asheville, North Carolina as a part of a 1031 exchange that would have provided substantial additional equity and would have produced additional income to help with payments on the line of credit. (R. p. 999, lines 18-25.) There were significant delays in RBC's consideration of Rice-Marko's request (see R. p. 1335) and RBC ultimately denied the request. (R. 1000, lines 5-8.)

Unreasonably having rejected all of Rice-Marko's suggestions and attempts to address the loan-to-value issue in the line of credit, RBC continued to pursue its objective of enhancing its collateral position with respect to all of Appellants' loans. RBC sent Rice-Marko loan modification documents in December 2008. (R. p. 1652 ¶ 14.) Those documents included much more favorable language for the lender, including interest rate increases, higher fees, waivers and releases, synchronization of all loan maturity dates, unlimited guaranties, and cross-collateralization and cross-default for Rice-Marko's loans and for her children's previously unrelated loans. (R. p. 1652 ¶ 14; see also R. pp. 92-570.) The loan documents also required additional quarterly payments of $100,000 to be applied to the line of credit. (R. p. 1652 ¶ 14; see also R. pp. 92-570.) Rice-Marko had not agreed to any of these terms at the time the bank presented the modification documents and, in fact, the bank had not even discussed the proposed new terms with Rice-Marko. (R. p. 1652 ¶ 14.)

Appellants opposed the proposed modifications and, in response, RBC began using unfair and heavy-handed practices to convince Appellants to sign the modification documents. For example, Michael Baker, a representative of RBC, informed Rice-Marko that RBC would not renew any of Rice-Marko's outstanding loans or the loans of her family members as they matured if she did not agree to the bank's newly demanded loan terms. (R. pp. 1652-1653 ¶ 15-16.) According to Baker, failure to renew the notes ultimately would result in bankruptcy for Rice-Marko and her sons. (R. p. 1653 ¶ 16.) Baker informed Rice-Marko that unless she and her sons agreed to the cross-collateralization and cross-default documents, the bank would "foreclose and force [her] and [her] family into financial ruin, bankruptcy." (R. p. 990, lines 6-8.) Rice-Marko

requested that the loan be referred to RBC's workout department, but Baker misrepresented to her that there was not an internal workout group within RBC. (R. p. 1653 ¶ 17.) Baker informed Rice-Marko that "special assets was foreclosure" and that "if [she] went to special assets . . . there would be a ratcheting up of fees and interest rates and that [special assets] would kill [her] with high rates and fees." (R. p. 991, line 6 – R. p. 992, line 4.) Rice-Marko advised RBC that she could not afford to make the $100,000 quarterly payments that were included in the revised documents. (R. p. 1653 ¶ 18.) She was assured that RBC would work with her if she had trouble making the payments. (R. p. 1653 ¶ 18.)

By threatening Rice-Marko with the bankruptcy of her children, and by threatening Rice-Marko's children with the financial ruin of their mother, the bank left Appellants with no choice but to agree to RBC's demands. (R. p. 1653 ¶ 18.) Indeed, RBC had informed Rice-Marko that no alternative solution was available (R. p. 1653 ¶ 18) and at no time did the bank propose any other solutions. (R. p. 1113, lines 7-13.) In fact, Michael Baker informed Rice-Marko that the bank's proposed revisions were non-negotiable. (See R. p. 1341, stating "[t]he documents will need to be standard" and that he "can't get approval to modify documents in this type restructure situation"; see also R. p. 996, lines 15-20; R. p. 1653 ¶ 16.)

Rice-Marko made three $100,000 payments over the course of 2009, but could not afford to make the final $100,000 payment in December of that year. (R. p. 1653 ¶ 19.) Rice-Marko requested that RBC work with her, as the bank had previously assured her it would. (R. p. 1653 ¶¶ 18-19.) The bank's response was to request a fourth mortgage on Rice-Marko's personal residence. (R. p. 1004, line 7 – R. p. 1005, line 4; R. p. 1653 ¶ 19.)

In May 2010, all of the now cross-defaulted and cross-collateralized loans were transferred to RBC's Asset Resolution Group for the purpose of a workout. (R. p. 1654 ¶ 20.) This was the very group RBC had previously represented to Rice-Marko did not exist. (R. p. 1654 ¶ 20.) According to its own policy, the goal of RBC's workout group was "to be a best-in-class professional workout/restructuring group that is viewed by clients as being understanding, creative, and fair in providing solutions." (CR_053 – CR_068.) As Rice-Marko would soon find out, however, RBC's Asset Resolution Group was not focused on working with the Appellants to find a creative business solution, but on maximizing the amount of cash the bank obtained from Appellants, making the contractual terms much more advantageous to the bank, and, ultimately, exiting the relationship, while pretending to work with Appellants.

In June 2011, PNC entered into an agreement to purchase RBC. (R. p. 1654 ¶ 22.) At about the same time, RBC requested that Appellants execute a forbearance agreement for all of the loans. (R. p. 1654 ¶ 23.) Believing they had no alternative, Appellants agreed to the Forbearance Agreement, pursuant to which all of the loans matured simultaneously in July 2013. (R. p. 1654 ¶ 23.) The Forbearance Agreement was executed on July 15, 2011. (CR_069 – CR_098.)

RBC's motivation for entering into the Forbearance Agreement is clear. Through the Forbearance Agreement, RBC obtained an acknowledgment of default, further cross-collateralization of the once independent loans, waivers of defenses, and waivers of the right to a jury trial. (R. p. 1125, line 13 – R. p. 1126, line 25.) Moreover, under the Forbearance Agreement, RBC would receive payments of $33,000 per month (R. p. 1129, lines 3-6) thus giving the bank a chance "to collect what money [it] could" during the

forbearance period. (R. p. 1140, lines 7-18.) RBC used the Forbearance Agreement as an opportunity to greatly enhance its position with no expectation that the Forbearance Agreement would serve as a solution to Appellants' financial hardships. (See, e.g., R. p. CR_099, stating Rice-Marko is "in a position to achieve higher returns on these assets than the Bank would in a foreclosure action.")

In fact, as is now evident, at the time RBC entered into the Forbearance Agreement, it had every intention of exiting the banking relationship with Appellants, although this information was withheld from Appellants. As Bill Harrington confirmed during his deposition, RBC had determined it was in an exit strategy before the parties entered into the Forbearance Agreement. (R. p. 1147, lines 10-23.) That RBC wanted to exit the relationship is further evidenced by the fact that, well prior to the execution of the Forbearance Agreement, Appellants' loans were on non-accrual status. (R. p. 1137, lines 8-13.) As Harrington confirmed, nonaccrual status signifies that "the bank no longer believes a collection of full amount of principal and interest is going to happen." (R. p. 1118, lines 1-8.) Harrington confirmed that RBC's decision to exit the relationship happened around the same time as when Appellants' loans went on nonaccrual status. (R. p. 1350, lines 13-16.)

In connection with PNC's agreement to purchase RBC, PNC conducted due diligence on RBC's outstanding loans, including Appellants' loans. (R. p. 1155, line 16 – R. p. 1156, line 20.) The due diligence involved assessing the financial condition of the borrowers and the guarantors. (R. p. 1157, lines 4-11.) On January 23, 2012, during the due diligence period, Harrington asked Rice-Marko for financial information that PNC was requesting. (R. p. 1376; R. p. 1141, line 25 – R. p. 1142, line 14.) Harrington explained

that the request was "routine due diligence." (R. p. 1376; R. p. 1143, lines 2-12.) Rice-Marko provided the requested information. Although PNC's "appetite for information" was "insatiable" (CR_100-102), PNC did not request additional information regarding Appellants' loans during the due diligence period.

PNC completed the acquisition of RBC in March of 2012. (R. p. 1655 ¶ 26.) Shortly after closing, Harrington attended a meeting with PNC representatives during which he discussed all of his credits. (R. p. 1144, lines 10-20.) Shortly thereafter, also in March 2012, Harrington called Rice-Marko and warned her that PNC did not like the Forbearance Agreement and that PNC would be looking for a reason to declare a default. (R. p. 1655 ¶ 25.) Harrington specifically mentioned the failure to provide financial information as an issue that PNC might seize on to declare a technical default. (R. p. 1655 ¶ 25.)

It is evident that PNC did not like the Forbearance Agreement (see, e.g., CR_105 ("terms of the Forbearance Agreement *only require*, for all loans, a monthly payment of $33,000") (emphasis added)) and was looking for a way to exit the relationship from the moment it acquired RBC in March 2012. As Harrington stated during his deposition, PNC "liked very short-term forbearance or extensions in the – in the 90 to 180-day-range as opposed to a two-year type thing." (R. p. 1145, line 19 – R. p. 1146, line 2.) Moreover, like RBC, PNC had determined shortly after its acquisition of RBC that Appellants' loans were nonaccrual loans and had decided its strategy would be to exit the relationship. (CR_103 – CR_109; R. p. 1173, lines 19-24; R. p. 1174, lines 19-25; R. p. 1176, lines 5-8.) As noted in the August 2012 PNC Special Assets Report, PNC's strategy was simple: "Determine when we can terminate the forbearance agreement." (CR_108.)

In June of 2012, at PNC's request, Rice-Marko, as she had previously, provided the bank with substantial financial and other information relating to the properties. (R. p. 1655 ¶ 27.) Within days, Rice-Marko was contacted by a known note purchaser, Kenneth Nix, who inquired about each of the collateral properties held by PNC. (R. p. 1655-1656 ¶ 29.) Rice-Marko was concerned that PNC, in its effort to market the properties for sale, had disclosed to third parties the confidential information Rice-Marko had provided. (R. p. 1655-1656 ¶ 28-29.) PNC continued to press for additional financial information from Rice-Marko. (R. p. 1158, line 15 – R. p. 1159, line 7.) Despite its knowledge of Rice-Marko's concerns over the breach of confidentiality, PNC never offered to maintain the confidentiality of the financial information it was requesting. (R. p. 1656 ¶ 30-31.) On July 9, 2012, Stephen Wursta and Elizabeth Paulson met with Rice-Marko and, among other things, attempted to obtain from Rice-Marko additional financial information. (R. p. 1161, lines 7-10; R. p. 1656 ¶ 31.) When Rice-Marko repeatedly voiced her concerns regarding the confidentiality of those documents, the bank's representatives told Rice-Marko they could "do this the easy way" or "the hard way," and left the meeting abruptly. (R. p. 1165, lines 20-23; R. p. 1656 ¶ 31.)

With Rice-Marko concerned about the confidentiality of her financial information and unwilling to provide it to the bank without the bank's reasonable assurance that confidentiality would be maintained, PNC orchestrated an opportunity to get out of the Forbearance Agreement. On November 26, 2012, PNC issued a default letter to Rice-Marko, claiming she was in technical default under the Forbearance Agreement for failure to provide requested financial information. (R. p. 1657 ¶ 33; R. pp. 1384-1389.) At that time, no payment default existed. (R. p. 1208, lines 4-7.) The default letter accelerated the

debt and demanded payment, within ten days, of $20,065,815. (R. p. 1384-1389.) Appellants were unable to pay the amount demanded and, on February 15, 2013, PNC issued a second default letter for Appellants' failure to pay the amount demanded. (R. p. 1657 ¶ 35; R. pp. 1395-1398.)

Through heavy-handed tactics indicative of bad faith, the bank coerced Appellants to modify loan agreements so that the bank could obtain various waivers of Appellants' rights, cross-collateralization and cross-default provisions, and synchronized maturity dates. The bank then used a non-material and technical default to accelerate the full balance of all the loans within ten days. This happened exactly as RBC's representative Bill Harrington had warned Rice-Marko it would just six months prior, when he warned her that the bank did not like the Forbearance Agreement and might seize on the failure to provide financial information to declare a technical default. (R. p. 1655 ¶ 25.) When Appellants were unable to pay the full balance in ten days, the bank used that failure to pay as the basis for a second default letter and, ultimately, the trigger for this litigation.

In May of 2013, PNC filed complaints in Charleston, Dorchester, and Florence Counties seeking to foreclose on real property located in those counties and seeking to collect on personal guaranties associated with the notes and mortgages at issue. Appellants answered and counterclaimed, contesting PNC's right to foreclose on the properties and collect on the personal guaranties, and contending that PNC, through its bad faith, misrepresentations, breaches of the agreements, and other misconduct, is precluded from enforcing the subject agreements and is liable to Appellants for actual and punitive damages. (See R. pp. 815-854; R. pp. 1649-1707.) Appellants asserted breach of contract, breach of covenant of good faith and fair dealing, breach of duty of confidentiality,

conspiracy, negligence, misrepresentation/fraud, and unfair trade practice causes of action in their counterclaim. (R. pp. 826-834 ¶¶ 44-97.) In connection with their counterclaims, Appellants seek a determination that all "duties or responsibilities of [Appellants] to [Respondent] are discharged and that all agreements between [Respondent] and [Appellants], including but not limited to all notes, guaranties, and mortgages are null and void." (R. p. 833.) In June of 2014, the Charleston, Dorchester, and Florence courts entered orders pursuant to which the legal claims and the equitable claims were bifurcated, the three cases were consolidated for the purpose of resolving the legal claims, and the equitable claims were stayed pending resolution of the claims at law. (R. pp. 5-6; R. pp. 1-4; R. pp. 7-10.)

Because Appellants asserted legal counterclaims, Appellants demanded a jury trial. (R. p. 815.) Respondent moved to strike Appellants' jury demand and, by orders dated April 29, 2015 and May 12, 2015, the trial court granted Respondent's motion. (R. pp. 13-15 and R. pp. 16-19.)

STANDARD OF REVIEW

"Whether a party is entitled to a jury trial is a question of law." Wachovia Bank, Nat. Ass'n v. Blackburn, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). The Court of Appeals "reviews questions of law *de novo*," Mitul Enters., L.P. v. Beaufort County Assessor, 410 S.C. 430, 433, 764 S.E.2d 720, 721-22 (Ct. App. 2014), "with no particular deference to the circuit court's findings." Blackburn, 407 S.C. at 328, 755 S.E.2d at 441.

ARGUMENT

In response to Respondent's foreclosure complaint, Appellants asserted counterclaims, arguing Respondent is not entitled to enforce the agreements entered into

between the parties because Respondent procured the agreements through bad faith and misrepresentation and because Respondent itself breached the agreements. As the above-stated facts demonstrate, this case presents the Court with facts that differ in significant respects from recent cases in which South Carolina courts have addressed the issue of a jury trial demand in connection with a counterclaim to a foreclosure action. In this case, Appellants present both factual and legal support for the counterclaims upon which they rely to attack the enforceability of the agreements containing the jury trial waivers. Despite the fact that Appellants have asserted meritorious counterclaims that question the enforceability of the contracts at issue, the trial court relied on jury trial waivers contained in those very contracts to strike Appellants' jury demand. In so ruling, the trial court erred and this Court should reverse.

I. Appellants have asserted compulsory, legal counterclaims that give rise to the right to a jury trial.

The right to trial by jury is a fundamental right in South Carolina. See Wright v. Colleton County School Dist., 301 S.C. 282, 291, 391 S.E.2d 564, 570 (1990). The South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." S.C. CONST. ART. I, § 14; see also Rule 38(a), SCRCP. "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." Mims Amusement Co. v. S.C. Law Enforcement Div., 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) (citation omitted). "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 v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Parties are entitled to jury trials, however, for actions arising at law. See, e.g., Bateman v. Rouse, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct. App. 2004).

While "[a] mortgage foreclosure is an action in equity," U.S. Bank Trust Nat'l Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (internal quotation marks omitted), "counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial." Blackburn, 407 S.C. at 328, 755 S.E.2d at 441. The South Carolina Supreme Court recently explained the framework used to determine whether a matter consisting of claims and counterclaims is triable by a judge or a jury:

> (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
>
> (2) If both are at law, the issues are triable by a jury.
>
> (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
>
> (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:
>
> > (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
> >
> > (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
> >
> > (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

Id. at 329-330, 755 S.E.2d at 441-42.

In this case, while the complaint is equitable, the counterclaims are legal. As stated above, Appellants have asserted, in part, counterclaim causes of action for breach of contract, conspiracy, negligence, negligent misrepresentation, and unfair trade practices. Each of these causes of action is an action at law. See Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) ("An action for breach of contract is an action at law."); Gynecology Clinic, Inc. v. Cloer, 334 S.C. 555, 556, 514 S.E.2d 592, 592 (1999) ("An action for civil conspiracy is an action at law."); Bundrick v. E. Richland Cty Pub. Serv. Dist., 2005 WL 7083866 at *1, No. 2005-UP-225 (S.C. Ct. App., March 31, 2005) ("A suit based on negligence is an action at law."); Payne v. Holiday Towers, Inc., 283 S.C. 210, 215, 321 S.E.2d 179, 182 (Ct. App. 1984) (holding cause of action for unfair trade practice is "in the nature of an action at law for recovery of money damages.")

Appellants' counterclaims also are compulsory. Rule 13(a), SCRCP, provides that "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." See also Blackburn, 407 S.C. at 330, 755 S.E.2d at 442. The South Carolina Supreme Court has adopted the "logical relationship" test for determining whether a counterclaim is compulsory under Rule 13(a). N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). Under this test, a counterclaim is compulsory if there is "*any logical relationship between the claim and the counterclaim.*" Id. (emphasis added). "If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the

underlying suit, and the counterclaim is therefore compulsory." Blackburn, 407 S.C. at 330, 755 S.E.2d at 442, note 7 (citing N.C. Fed., 298 S.C. at 518-19, 381 S.E.2d at 905).

In this case, Respondent asserted eighteen causes of action sounding in property foreclosure and collection on guaranties. (R. pp. 25-88.) Those causes of action arise from agreements entered into by the parties over the course of a banking relationship that began approximately fifteen years ago. Appellants' counterclaims plainly bear a "logical relationship" to Respondent's claims because, through their counterclaims, Appellants argue that Respondent's misconduct renders it unable to enforce the contracts it seeks to enforce. The relationship between the claim and counterclaim is apparent: the counterclaim calls into question the validity of the claim.

In their counterclaims, Appellants assert that Respondent has breached the contracts between the parties. (R. pp. 826-827 ¶¶ 44-49.) Appellants further argue Respondent breached the covenants of good faith and fair dealing contained within those contracts. (R. p. 827-828 ¶¶ 50-59.) Appellants claim Respondent, in its contractual dealings with Appellants, conspired with others for the purpose of injuring Appellants. (R. p. 829 ¶¶ 68-73.) Appellants claim Respondent was negligent, in part, by coercing Appellants to execute modified agreements, in misrepresenting contractual remedies available to Appellants, and in leading Appellants to execute one or more agreements with which Respondent never intended to comply. (R. pp. 828-832 ¶¶ 60-90.) Appellants also allege Respondent violated South Carolina's Unfair Trade Practices Act by taking advantage of Appellants throughout the course of the parties' contractual relationship. (R. pp. 832-833 ¶¶ 91-97.) As a result of all of this misconduct, Appellants assert that all "duties or responsibilities of [Appellants] to [Respondent should be] discharged and that

all agreements between [the parties], including but not limited to all notes, guaranties, and mortgages, [should be declared] null and void." (R. p. 833.) It is evident that there is a logical relationship between the claims and the counterclaims.

Because Appellants' counterclaims are claims at law and because they are compulsory counterclaims, Appellants' counterclaims give rise to the right to a jury trial. Thus, Appellants are entitled to a jury trial "unless a valid jury trial waiver exists that encompasses the counterclaim." Blackburn, 407 S.C. at 329-330, 755 S.E.2d at 441-42. As is discussed below, there are no valid and enforceable jury trial waivers encompassing Appellants' counterclaims.

II. The trial court erred in using the jury trial waivers to strike Appellants' jury demand.

The right to trial by jury is a fundamental right in South Carolina and "any abridgement of that right is subject to strict scrutiny." Lane v. Gilbert Constr. Co., Ltd., 383 S.C. 590, 600, 681 S.E.2d 879, 884 (2009) (citing City of Beaufort v. Holcombe, 369 S.C. 643, 632 S.E.2d 894 (Ct. App. 2006). While a party may waive the right to a jury trial by contract, such a waiver must be strictly construed as the right to trial by jury is a substantial right. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2002); see also N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992); Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). As the court recognized in AttorneyFirst LLC v. Ascension Entertainment, 144 Fed. Appx. 283, 290 (4th Cir. 2005), "[a] waiver of the right to trial by jury will not be lightly implied [and because] the right of jury trial is fundamental, courts must indulge every reasonable presumption against waiver." 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. Keels, 315 S.C. at 342, 433 S.E.2d at 904. A waiver procured by misrepresentation or bad faith is not enforceable. See Restatement (Second) of Contracts § 164 ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."); Johnson v. Key Equip. Fin., 367 S.C. 665, 668, 627 S.E.2d 740, 741 (2006) ("[W]hen wrongs arise inducing a party to execute a contract and not directly from the breach of that contract, the remedies and limitations specified by the contract do not apply.").

Although Respondent is able to identify jury trial waivers contained in the agreements that Appellants executed, those waivers should not apply to the instant case. This is true because (1) the counterclaims asserted by Appellants attack the enforceability of the contracts that contain the jury trial waivers, (2) Appellants' counterclaims are supported by substantial evidence, and (3) if Appellants are successful on those counterclaims, Respondent would not be entitled to enforce the subject contracts.

A. Appellants' counterclaims attack the enforceability of the contracts that contain the jury trial waivers.

This case centers around the enforceability of the loan documents and the related contracts entered into between the parties. Respondent seeks to foreclose on mortgages and collect on personal guaranties. Appellants have asserted counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, breach of confidentiality, conspiracy, negligence, negligent misrepresentation, and violation of South Carolina's Unfair Trade Practices Act. (R. pp. 826-833 ¶¶ 44-97.) Appellants assert that Respondent—by its egregious and willful misconduct—is precluded from enforcing the subject agreements and is liable to Appellants for money damages. Respondent, in asking the trial

court to decide that Appellants "expressly and irrevocably waived their right to a jury trial," sought (and obtained) a ruling from the trial court on the case's central issue: the enforceability of the contracts.

The trial court ruled that Appellants' "counterclaims do not attack the enforceability of every single one of the jury trial waivers signed by [Appellants]" and "at least one of the loan documents contains a valid, enforceable jury trial waiver." (R. p. 18.) The trial court did not, however, specifically identify the agreement or waiver upon which it relied. The trial court specifically declined "to rule that the counterclaims only attack the 2009 Loan Modifications and July 2011 Forbearance agreements," but did not identify any loan documents that the counterclaims did not attack. (R. p. 18.)

Importantly, contrary to the trial court's ruling, all of the jury trial waivers signed by Appellants are not at issue in this case. Over the course of the approximately fifteen year banking relationship between the parties, Appellants signed documents that contained jury trial waivers. However, the agreements Respondent seeks to enforce through this foreclosure action are the modified, cross-collateralized, cross-defaulted agreements, the agreements Appellants contend were the result of Respondent's egregious misconduct. Those are the only agreements at issue and, as a result, the jury trial waivers contained in those documents are the only jury trial waivers at issue. Respondent cannot rely, and the trial court erred in suggesting that it could, on jury trial waivers buried in loan documents that have been modified over the course of the parties' relationship.

Additionally, the trial court's ruling at this point in the litigation was both premature and prejudicial to Appellants. If, following the trial court's denial of Appellants' demand for a jury trial, the trier of fact ultimately determines that the subject contracts are

unenforceable, then there was no valid waiver of the right to a jury trial, and Appellants will have been wrongfully denied the constitutionally-protected right.

The South Carolina Supreme Court has recognized that "when wrongs arise inducing a party to execute a contract and not directly from the breach of that contract, the remedies and limitations specified by the contract do not apply." Key Equip. Fin., 367 S.C. at 668, 627 S.E.2d at 741. Accordingly, if Appellants are able to prove—as they have alleged and as the weight of evidence strongly supports—that Respondent induced them to enter into the subject agreements by misrepresentation and other bad faith conduct, the jury trial waivers do not apply. Appellants are, at a minimum, entitled to a jury trial on that issue.

Other courts have recognized the predicament of counterclaims that attack contracts containing jury trial waivers and have afforded parties the right to a jury trial on the issue of the enforceability of the contract at issue. For example, in Fed. Housecraft, Inc. v. Faria, the court held that a party defending a breach of contract action by challenging the validity of the contract is entitled to a jury trial on the enforceability of the contract, despite the existence of a jury trial waiver. 216 N.Y.S.2d 113, 114 (N.Y. App. 1961). In so holding, the court noted that "[o]therwise the party seeking such a trial would be at a disadvantage in having to proceed to trial without a jury by virtue of the waiver provision in an agreement which may be void in its entirety." Id. The court found that this problem "may be avoided by the simple expedient of requiring a jury trial as to the defense of fraud before the remaining issues are litigated." Id. Other courts recognize a similar rule. See, e.g., C&C Wholesale, Inc. v. Fusco Mgmt. Corp., 564 So.2d 1259, 1261 (Fl. Ct. App. 1990)

(recognizing that a defendant's allegations that a lease as a whole is not legally enforceable would impact the waiver of jury trial contained within the lease).

B. Appellants' counterclaims are supported by substantial evidence.

Appellants' attack on the enforceability of the subject agreements is not a hollow attack. Appellants' have asserted meritorious counterclaims that are supported by both the facts and the law. For example, the record contains ample evidence to conclude that Respondent breached the duty of good faith and fair dealing, misrepresented material facts to Appellants, and breached its duty to maintain the confidentiality of Appellants' personal and financial information.

1. Respondent breached the duty of good faith and fair dealing.

"There exists in every contract an implied covenant of good faith and fair dealing," Time Warner Cable v. Condo Servs., Inc., 381 S.C. 275, 285, 672 S.E.2d 816, 820 (Ct. App. 2009), that is "viewed as another contract term." Williams v. Riedman, 339 S.C. 251, 274, 529 S.E.2d 28, 40 (Ct. App. 2000). The implied covenant of good faith and fair dealing requires "that neither party . . . do anything to impair the right of the other to receive the benefits of the agreement." Episcopal Church in S.C. v. Church Ins. Co. of Vermont, 993 F. Supp. 2d 581, 593 (D.S.C. 2014).

Throughout the course of this banking relationship, Respondent acted in bad faith by using increasingly heavy-handed tactics both to improve its collateral position by acquiring cross-collateralization and cross-default of previously independent loans and to obtain more and more terms favorable to the bank and detrimental to Appellants. For example, Respondent threatened Rice-Marko with the bankruptcy of her children, and threatened Rice-Marko's children with the financial ruin of their mother. (R. p. 1653 ¶¶ 16,

18.) Respondent misrepresented the availability of alternative remedies and solutions. (R. pp. 1653-1654 ¶¶ 18; 20.) Respondent made confidential and private information about Appellants and their financial condition and assets available to third parties to pressure Appellants to deal with Respondent on terms dictated by Respondent and to interfere with Appellants' efforts to resolve the issues between Appellants and Respondent. (See generally R. pp. 1649-1707.)

The only reasonable conclusion to be reached from the evidence in this case is that Respondent consistently acted in contravention of the implied covenant of good faith and fair dealing.

2. Respondent misrepresented material facts to Appellants.

Appellants have asserted a counterclaim for negligent misrepresentation. To prove a claim for negligent misrepresentation, a plaintiff must allege and establish the following elements:

> '(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.'

Quail Hill, LLC v. County of Richland, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (quoting West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000)). South Carolina law recognizes "a negligent misrepresentation claim where the misrepresented facts induced the plaintiff to enter into a contract or business transaction." Gilliland v. Elmwood Props., 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990); see also Armstrong v. Collins, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005).

In this case, in connection with the execution of the modified loan documents which cross-collateralized and cross-defaulted Appellants' previously unrelated loans, Respondent misrepresented several material facts. Michael Baker misrepresented to Rice-Marko that there was not an internal workout group within RBC. (R. p. 1653 ¶ 17; R. p. 1654 ¶ 20.) Then, subsequent to Appellants' execution of the modified documents, Appellants loans were transferred to RBC's Asset Resolution Group for the purpose of a workout. (R. p. 1654 ¶ 20.) This was the very group RBC had previously informed Rice-Marko did not exist. (R. p. 1653 ¶ 17; R. p. 1654 ¶ 20.)

At the time of the execution of the forbearance agreement, when Rice-Marko advised Respondent that she could not afford to make the $100,000 quarterly payments that were included in the revised documents, Respondent misrepresented that it would work with Rice-Marko if she had trouble making the payments. (R. p. 1653 ¶ 18.) When Rice-Marko was unable to make the fourth payment, she requested that RBC work with her, as the bank had previously assured her it would. (R. p. 1653 ¶¶ 18-19.) The bank's response was to request a fourth mortgage on Rice-Marko's personal residence. (R. p. 1004, line 7 – R. p. 1005, line 4; R. p. 1653 ¶ 19.)

Appellants were induced to enter into the modified agreements and the forbearance agreement by Respondent's multiple material misrepresentations of fact. Appellants' negligent misrepresentation claim is well supported by both the facts and the applicable law.

3. Respondent breached its duty to maintain the confidentiality of Appellants' personal and financial information.

"It is implied in every contract between a bank and a customer that the bank will not divulge any confidential information regarding the customer without the customer's

consent." 10 S.C. Jur. Banks and Banking § 158 (citing 10 Am. Jur. 2d, Banks and Banking § 332). And while there does not appear to be South Carolina case law explicitly addressing a bank's duty to protect the confidentiality of its customer's financial information, South Carolina case law suggests that such a duty does exist. (See, e.g., Rycroft v. Gaddy, 281 S.C. 119, 123, 314 S.E.2d 39, 42 (Ct. App. 1984) (holding a bank's disclosure of customer information was not wrongful *because* the bank disclosed the information in response to a valid subpoena); Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 482, 514 S.E.2d 126, 132 (1999) (recognizing, in the context of a bank's disclosure of customer information, that a cause of action for breach of confidentiality may exist). Additionally, South Carolina courts recognize liability arising from the wrongful disclosure of information obtained in the course of a confidential relationship. (See, e.g., McCormick v. England[1], 328 S.C. 627, 641, 494 S.E.2d 431, 438 (Ct. App. 1997) ("A confidential relationship is breached if unauthorized disclosure is made to only one person not a party to the confidence."); Swinton Creek, 334 S.C. at 482, 514 S.E.2d at 133 (recognizing "breach of contract, trust or other confidential relationship" as an "independent basis of relief"). The imposition of such a duty is particularly important when the party providing the confidential obligation is, as here, contractually obligated to provide it.

[1] McCormick concerned the disclosure of confidential information in the course of a doctor-patient relationship. Notably, the court recognized that in the course of a doctor-patient relationship, the patient's disclosure of confidential information is not "totally voluntary." 328 S.C. at 635, 494 S.E.2d at 435. The court thus noted that "in order to obtain cooperation, it is expected that the physician will keep such information confidential." Id. The same is true in the context of a lender-borrower relationship. The disclosure of confidential information is not voluntary and, as such, the borrower expects that in exchange for the borrower's cooperation in providing the confidential information, the lender will maintain the confidentiality.

Further, courts in other jurisdictions recognize that a bank has a duty to protect the confidentiality of its customer's financial documents. See, e.g., Richfield Bank & Trust Co. v. Sjogren, 244 N.W.2d 648, 651 (Minn. 1976); R.A. Peck, Inc. v. Liberty Federal Sav. Bank, 766 P.2d 928, 933 (N.M. Ct. App. 1988); Jordan v. Shattuck Nat. Bank, 868 F.2d 383, 386 (10th Cir. 1989); Djowharzadeh v. City Nat. Bank and Trust Co. of Norman, 646 P.2d 616, 619-620 (Ok. Ct. App. 1982). As the Djowharzadeh court aptly stated, "[t]his duty has existed traditionally and continues to exist, if not specifically in the law books, at least in the mind of the public in general and within the banking community in particular." Id. at 620. Notably, there is no case in South Carolina in which an appellate court has held that a bank owes no duty of confidentiality toward its customers.

Moreover, Respondent itself consistently has recognized a duty and obligation to protect its customers' confidential information. First, Respondent's witnesses in this case recognize as much. For example, Stephen Draper testified that it was Respondent's policy that it "didn't disclose confidential financial information." (R. p. 1101, lines 21-23.) Mr. Draper defined confidential information as "[i]nformation that's not public knowledge." (R. p. 1101, line 24 – R. p. 1002, line 3.) Mr. Draper further testified that he would consider "the disclosure of personal financial statements of [bank] clients to third parties outside the bank to be a breach of the bank's policies on confidentiality." (R. p. 1102, line 10 – R. p. 1103, line 9.)

Similarly, Respondent's witness Stephen Wursta testified as follows concerning Respondent's protection of information concerning its customer's loans:

> Q: Do you agree it would be inappropriate for PNC to provide information on Ms. Rice-Marko's loans to Mr. Nix or any other third party?
>
> A: Absolutely.

(R. p. 1160, lines 5-8.) Karyn Stiller, Respondent's representative charged with the marketing of notes, stated that her role is to "protect the information" in the possession of Respondent and, according to Stiller, that is why the bank has confidentiality agreements. (See R. p. 1182, lines 4-10.) Without question, Respondent's representatives view the protection of customer confidential information as an obligation of Respondent.

Second, Respondent's own policies make clear that Respondent recognizes its obligation to protect its customer's confidential information. Respondent's Code of Business Conduct and Ethics states that the bank "must safeguard all Confidential Information our clients and customers share with us by ensuring that their information is used only for the reasons for which the information was gathered or other reasons allowed by law and that their information is only shared with authorized individuals." (R. p. 1438.) During his deposition, Wursta agreed that, as a bank employee, he is obligated to comply with the Code of Business Conduct and Ethics. (R. p. 1166, line 17.) The Code of Conduct also contains the following question and answer:

> Q: I am not sure when I am permitted to disclose Confidential Information outside PNC. Is there a procedure that I need to follow?
>
> A: You may never disclose Confidential Information unless (1) the individual or organization to which the information relates gives written consent, (2) the disclosure is authorized by a member of the Legal Department, or (3) the disclosure is in response to proper legal process or regulation or as required by law.

(R. p. 1439.) Plainly, Respondent recognizes the duty to protect its customers' confidential information.

Third, the fact that Respondent entered into confidentiality agreements with some of the entities to whom it disseminated Appellants' information confirms that Respondent

recognizes its duty to protect that information, and the potential harm to the customer in the event of a breach. For example, Respondent entered into a Confidentiality Agreement with Summit Investment Management, LLC ("Summit"), a potential purchaser of Appellants' loans. (R. p. 1684-1690; see also R. p. 1183, lines 7-20.) The Confidentiality Agreement includes a provision pursuant to which the recipient acknowledges that the information it is receiving concerning the bank's customer is confidential and that the disclosure of that information could result in harm to the bank's customer. (R. p. 1684 ¶ 2.)

Additionally, Respondent's own expert witness in this case, William Barksdale, testified that a bank is obligated to hold a borrower's financial information in confidence. (R. p. 1188, lines 2-10; R. p. 1189, line 3 – R. p. 1193, line 16; R. p. 1194, lines 13-25.) Barksdale defined confidential information to include loan applications, tax returns, appraisals, rent rolls, payment histories, and loan balances. (R. p. 1189, line 3 – R. p. 1193, line 16.) Barksdale testified that disclosing a borrower's confidential information without a confidentiality agreement would be improper. (R. p. 1195, lines 2-12.)

Finally, despite its insistence in this case that it owes no duty to protect the confidentiality of its customers' information, Respondent has argued in prior litigation that it had a *fiduciary duty* to protect that information. In Berrios v. PNC Bank, 2006 WL 2933899, No. L-2372-03 (N.J. Oct. 16, 2006), a security officer employed by a firm that contracted with PNC was removed from his post at PNC after PNC reported to his employer that the officer had accessed confidential customer information without authorization. Plaintiff sued PNC, arguing that the bank interfered with his contract and defamed him. Id. at *2. In arguing it was justified in its summary dismissal of the security

officer from his position at PNC, PNC argued the area where the security guard was stationed "contained sensitive, confidential, client information *which PNC had a fiduciary duty to protect.*" (PNC Bank's Brief in Opposition to Plaintiff's Appeal, 2006 WL 6239210, p. 2 (emphasis added).) The New Jersey Superior Court agreed with PNC and noted PNC's argument that "it has a fiduciary duty to protect its clients' confidential information." Berrios, 2006 WL 2933899 at *2. Simply put, PNC cannot have it both ways. It cannot use its obligation to protect the confidentiality of its customers' information when doing so is convenient to its position in one lawsuit and disclaim any obligation to suit its interests in a separate legal matter.

Respondent not only had a duty to protect Appellants' personal and financial information. It also breached that duty. On June 14, 2012, Rice-Marko received a telephone call from Kenneth Nix, a representative of a company called LandSouth of Charleston, LLC. (R. p. 986, lines 5-14.) LandSouth of Charleston, LLC engages in the purchase and sale of distressed loans and properties. (R. pp. 1655-1656 ¶ 29; see also R. p. 1198, line 15 – R. p. 1199, line 14.) Nix asked Rice-Marko questions concerning each of the properties Rice-Marko had described in her conversation with bank representative Wursta only six days prior. (R. pp. 1655-1656 ¶ 29.) None of the Appellants had provided this information to Nix or his company. (R. pp. 1655-1656 ¶ 29.) Plainly, Respondent provided confidential information concerning Appellants' properties to Nix or his company without Appellants' consent.

Thereafter, in an effort to market the sale of the subject loans, the bank also made confidential information concerning Appellants and their loans available on the internet via a virtual deal room through a third-party entity known as Real Capital Markets. (See, e.g.,

R. pp. 1729-1849; see also R. p. 1658 ¶ 37.) That information included sensitive property information, "property financial statements, loan documents [including pay histories and appraisals], legal notices to the Borrowers and other relevant documents." (R. pp. 1729-1849.) While many of the entities that accessed the Real Capital Markets virtual deal room signed confidentiality agreements, several individuals or entities were granted access to the virtual deal room without agreeing to be bound by any confidentiality provisions. Bank representative Karyn Stiller informed Wursta that "[t]hirteen investors expressed a strong interest and executed the confidentiality agreement." (See CR_178) However, a spreadsheet produced by Respondent that identifies the individuals and entities that accessed the confidential information contained in the virtual deal room plainly identifies that substantially more than thirteen individuals, representing entities that had not signed any confidentiality agreement, accessed Appellants' confidential information via the website. (See R. pp. 1729-1849.)

Moreover, the bank's Bid Report for the properties at issue identifies eleven entities that submitted bids. (See CR_166-177.) Several of the entities identified on the Bid Report apparently did not sign confidentiality agreements as the bank has not produced confidentiality agreements for all of those entities.

Another example of disclosure of confidential information is described in the Affidavit of Drew Chaplin ("Chaplin"). Chaplin is the managing partner of Palmetto Commercial Real Estate ("Palmetto Commercial"), an entity that serves as the leasing manager for the BB&T building in Florence which is owned by Appellant The Brothers of S.C., LLC. (R. p. 1642 ¶¶ 2-3.) Palmetto Commercial also is a tenant in the BB&T building. (R. p. 1642 ¶ 4.) On February 27, 2013, Chaplin received a telephone call from Trey

Morrison ("Morrison") of LandSouth of Charleston. (R. p. 1643 ¶ 5.) Morrison asked Chaplin questions about the BB&T building, and Morrison told Chaplin that he had a copy of the latest appraisal and was very familiar with the rent rolls. (R. p. 1643 ¶ 6.) While Morrison testified that he did not remember what he asked Chaplin (see R. p. 1202, line 21 – R. p. 1203, line 3; R. p. 1204, lines 14-17), he did not contradict Chaplin's affidavit or the consistent account contained within the Affidavit of Rice-Marko. (See R. p. 1659 ¶ 39.)

Respondent owed a duty to Appellants to maintain the confidentiality of Appellants' personal and financial information. Respondent breached that duty by disseminating repeatedly the confidential information. The trial court acknowledged that Appellants' claims relating to Respondent's dissemination of Appellants' confidential information may have merit. Respondent moved for partial summary judgment on the ground that South Carolina does not recognize a duty of confidentiality between a bank and a borrower. In the same order in which the court struck Appellants' jury demand, the trial court denied Respondent's motion for partial summary judgment, noting that "the claim appears to be a novel issue in the State of South Carolina and the Court feels that the facts should be further developed." (R. p. 17.)

C. If Appellants are successful on their counterclaims, Respondent would not be entitled to enforce the contracts.

Appellants' counterclaims, if successful, would justify the remedy of holding the agreements unenforceable by Respondent. As one of their remedies, Appellants seek a determination that all "duties or responsibilities of [Appellants] to [Respondent] are discharged and that all agreements between [Respondent] and [Appellants], including but not limited to all notes, guaranties, and mortgages are null and void." (R. p. 833.)

The remedy of rescinding or otherwise precluding Respondent from enforcing the subject agreements in the event Appellants are successful on their counterclaims is supported by the law.

First, with respect to Appellants' negligent misrepresentation cause of action, "[a] rescission of a contract is allowed when there is evidence of misrepresentation or concealment." State Farm Mut. Auto. Ins. Co. v. Turner, 303 S.C. 99, 102, 399 S.E.2d 22, 23 (Ct. App. 1990) (citing Jumper v. Queen Nab Lumber Co., 115 S.C. 452, ___, 106 S.E. 473, 476 (1921). The Restatement (Second) of Contracts[2] confirms such a remedy, noting that "[i]f a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." Restatement (Second) of Contracts § 164. Plainly, if Appellants are able to prove their claim for negligent misrepresentation, a determination that Respondent cannot enforce the subject contracts would be an available remedy.

Additionally, with respect to Appellants' allegations that Respondent breached both express terms of the agreements and the implied covenant of good faith and fair dealing, the law recognizes that "[a] party who first commits a material breach cannot enforce the contract." Williston on Contracts § 63:3 (citing Horton v. Horton, 254 Va. 111, 487 S.E.2d 200 (1997); see also Restatement (Second) of Contracts § 237 ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such

[2] South Carolina courts routinely rely upon the Restatement (Second) of Contracts to establish relevant legal standards. See, e.g., Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 51, 747 S.E.2d 178, 186-87 (2013); Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 745 (Ct. App. 2007).

performance due at an earlier time."). Thus, if Appellants are able to prove that Respondent, by its bad faith and misconduct, materially breached the subject agreements, the result would be that Respondent would not be entitled to enforce the terms of the contracts against Appellants.

Accordingly, Appellants' attack of the enforceability of the subject contracts is not theoretical. Appellants have asserted causes of action that, if proven, would entitle Appellants to a determination that Respondent cannot enforce the contracts, including the jury trial waivers, against Appellants. Therefore, as the New York court held in Faria, the trial court should have ordered that Appellants are entitled to a jury trial, at a minimum, on the enforceability of the agreements containing the jury trial waivers. To hold otherwise is to deprive Appellants of a constitutionally-protected right based upon agreements, the very enforceability of which remains in question.

CONCLUSION

The facts of this case are unique. Appellants have asserted counterclaims that attack the enforceability of the contracts containing the jury trial waivers upon which the trial court relied in striking Appellants' jury demand. Appellants' counterclaims are not hollow assertions; they are meritorious claims supported both by the law and by the substantial factual record developed in this case. If Appellants are successful in proving the causes of action asserted in their counterclaims, Appellants would be entitled to an order finding that the contracts are not enforceable. For that reason, Appellants must, at a minimum, be entitled to a jury trial on the enforceability of the subject agreements. The trial court's order was in error and this Court should reverse.

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December 11, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No.: 2015-001149

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Respondent,

v.

Liberty Cottages, LLC; GW Dorchester, LLC; USS Clarksville, LLC; Liberty Cottages Land, LLC; ROA, LLC; Royal Beach Properties, LLC; The Brothers of SC, LLC; Deborah Rice-Marko a/k/a Deborah G. Rice-Marko; Evan R. Marko and John E. Marko, Jr.,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

[Signatures follow]

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Appellants.

PROOF OF SERVICE

I certify that I have caused a copy of the Final Brief to be served on Respondent by hand delivery on December 14, 2015, addressed to their attorneys of record, Frank B.B. Knowlton, Esquire, Tara C. Sullivan, Esquire Thomas W. McGee, Esquire, and A. Mattison Bogan, Nelson Mullins Riley & Scarborough, LLP, 1320 Main Street, 17th Floor, Columbia, SC, 29201.

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