
THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master-in-Equity

Appellate Case No. 2009-125666

Refiled Opinion No. 4988 (S.C. Ct. App. Filed August 8, 2012)

Wells Fargo Bank, NA,

Respondents,

v.

Michael Smith; South Carolina
Department of Motor Vehicles; M&T
Properties, Inc.; State of South Carolina;
Arthur State Bank; South Carolina
Department of Probation, Pardon and
Parole Services,

Of Whom Michael Smith is the Petitioner

AMENDED APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr.
Master in Equity

Case No. 2008-CP-23-6833

Wells Fargo Bank, N.A.

Respondents,

v.

Michael Smith; South Carolina
Department of Motor Vehicles; M&T
Properties, Inc.; State of South Carolina;
Arthur State Bank; South Carolina
Department of Probation, Pardon and
Parole Services

Of Whom Michael Smith is the
Appellant.

RECORD ON APPEAL

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CERTIFICATE OF COUNSEL

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLE.

COUNTY OF GREENVILLE

CASE NO. 08-CP-23-6833

MOTION AND ORDER
INFORMATION FORM
AND COVER SHEET

Wells Fargo Bank, NA ☒ Plaintiff

v.

Michael Smith; South Carolina Department of Motor Vehicles; M & T Properties, Inc.; State of South Carolina; Arthur State Bank; South Carolina Department of Probation, Pardon and Parole Services; ☐ Defendant

Check box above indicating submitting party

name, S.C. Bar no. and address of plaintiff's attorney

Samuel C. Waters (SC Bar #5958), Cheryl H. Fisher (SC Bar #15213), Reginald P. Corley (SC Bar #69453), Jennifer W. Rubin (SC Bar #16727), Ellie C. Floyd (SC Bar # 68635), Michael P. Morris (SC Bar #73560), Eve Moredock Stacey (SC Bar # 5300), Mary R. Powers (SC Bar #16534), Robert P. Davis (SC Bar # 74030), Timothy B. Killen (SC Bar #72501) William S. Kochler (SC Bar# 74935)
220 Executive Center Drive, Suite 109, Columbia, SC 29210
telephone: 803-744-4444 fax: 803-343-7013

name, S.C. Bar no. and address of
Defendant's attorney

telephone:
email: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed: YES/NO

SECTION II: Motion Fee

☒ PAID —AMOUNT: \$25.00

☐ EXEMPT:

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: Referred to Master by Motion and Order of Court

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
WICKENBARGER

2008 SEP 24 P 4:09

SECTION III: Motion Type

☐ Written motion attached

☒ Form Motion —

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff/Defendant

September 17, 2008

Date submitted

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other

JUDGE
CODE: _____

Date: _____

CLERK'S VERIFICATION

Collected by: HK

(print name)

☒ MOTION FEE COLLECTED: 25.00

☐ CONTESTED—AMOUNT DUE: _____

DATE FILED

CK # 348507

KIT

RECEIVED

SEP 24 2008

SCCA7233(1/2003)

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Wells Fargo Bank, NA;

Plaintiff,

v.

Michael Smith; South Carolina Department of
Motor Vehicles; M & T Properties, Inc.; State of
South Carolina; Arthur State Bank; South
Carolina Department of Probation, Pardon and
Parole Services;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-23-6833

Motion Fee Paid

2008 SEP 24 P 4: 04

ORDER OF REFERENCE

Deficiency Judgment Waived

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
P. WICKENSIMER

ENTERED COMPL

(011784-07573)

Pursuant to Rules 53(b) of the South Carolina Rules of Civil Procedure, the above-entitled case is an action for foreclosure and may be referred to a Master in Equity or Special Referee in the above-entitled county by order of a circuit court judge or the clerk of court.

IT IS HEREBY ORDERED, that this action is referred to the Honorable Charles B. Simmons, Jr., as Master in Equity to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP, and all matters arising from or reasonably related to such action. The Master in Equity shall retain jurisdiction to perform all necessary acts incident to this foreclosure action including issuance of a writ of assistance or issuance of any rule to show cause including but not limited to any rule to show cause why a party should not be bound by the judgment of foreclosure. Further, the Master in Equity shall retain jurisdiction to hear any action contesting the validity of the foreclosure action or sale or any motions pursuant to the South Carolina Rules of Civil Procedure including but not limited to Rule 60(b). Judicial sales will be conducted pursuant to S.C. Code Section 15-39-680 or on any other convenient sale's date as may be determined by the Master in Equity/Special Referee.

The hearing shall be held in the Office of the Honorable Charles B. Simmons, Jr., as Master in Equity for Greenville County, located at:

Greenville County Courthouse
Judicial Wing, 3rd Floor, Courtroom 5
Greenville, SC 29601

and the final order by the Master in Equity shall be filed with the Clerk of Court for Greenville County not later than sixty (60) days after the date of the hearing.

Paul B. Wickensimer

☒ Circuit Court Judge for Greenville County or
☒ Clerk of Court for Greenville County

Greenville, South Carolina

September 24, 2008

Copy mailed to

Attorney *Floyd*

on *9/24/08*

SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Wells Fargo Bank, NA,

Plaintiff,

v.

Michael Smith; South Carolina Department of
Motor Vehicles; M & T Properties, Inc.; State of
South Carolina; Arthur State Bank; South Carolina
Department of Probation, Pardon and Parole
Services;

Defendant(s).

(511734-07573)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-21-6211

ORDER

FILED CLERK OF COURT
GREENVILLE CO. S.C.
BRIAN WICKENSHER

2009 MAR 12 A 10:23

CS
This matter came before me at a hearing on February 23, 2009, on Plaintiff's Motion to Strike Jury Demand. Sean M. Foerster, Esq., appeared on behalf of Plaintiff, Wells Fargo Bank, NA ("Wells Fargo"). Susan Ingles, Esquire, attended the hearing on behalf of Defendant Michael Smith ("Smith") and argued against the motion. For the reasons stated below, Plaintiff's Motion to Strike Jury Demand is GRANTED and the order of reference filed in this matter on September 24, 2008, is confirmed.

FACTS

On April 29, 2003, Smith gave a Fixed Rate Note ("Note") to Wells Fargo Home Mortgage, Inc., in the principal sum of \$83,000.00. To secure repayment of the Note, Smith gave Wells Fargo Home Mortgage, Inc., a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road, Greenville, SC 29617, as well as a 2003 Fleetwood mobile home. Wells Fargo is the successor by merger to Wells Fargo Home Mortgage, Inc.

Smith is in default on his loan payments as of June 1, 2008. Smith still owes \$77,460.63 on the debt, with interest from May 1, 2008, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

Wells Fargo filed this action for foreclosure on September 9, 2008, seeking foreclosure of the Mortgage. An Order of Reference was filed in this matter on September 24, 2008. Smith filed a Motion to Allow Late Filing of Responsive Pleadings on October 17, 2008. Wells Fargo consented to an extension of time to file a late Answer.

Smith filed an Answer and Counterclaim with a jury trial request on November 7, 2008. Smith asserted the following counterclaims:

1. Accounting—Smith seeks an accounting of all payments credited and charges assessed to his account, and seeks setoff for any overcharges or unsubstantiated charges found. (Answer and Counterclaim ¶¶ 19-20.)

2. Unconscionability—Smith claims that the mortgage agreement between himself and Wells Fargo was unconscionable at the time it was made because Wells Fargo knew or should have known of Smith's inability to protect his own interest and inability to repay the loan. (Answer and Counterclaim ¶¶ 22-23.) Smith claims the ultimate amount of the debt bears no reasonable relationship to the amount of value received by Smith in the loan transaction. *Id.*

3. Attorney Preference Statute Violation—Smith claims that Wells Fargo never attempted to ascertain his preference for a closing attorney in violation S.C. Code Ann. § 37-10-102. (Answer and Counterclaim ¶¶ 25-28.)

LAW

The right to a jury trial "shall be preserved to the parties inviolate" as 1) "declared by the Constitution" or 2) "given by a statute of South Carolina." Rule 38(a), SCRPC. "Any party may

demand a trial by jury of any issue *triable of right* by a jury ..." Rule 38(b), SCRCP (emphasis added). "Any party may request a jury pursuant to Rule 38 on any or all issues *triable of right* by a jury ..." Rule 53(b), SCRCP (emphasis added).

Whether a party is entitled to a jury trial is determined by the pleadings. *National Bank of South Carolina v. Daniels*, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (1984).

A foreclosure action is normally referred to a master-in-equity. See Rule 53(b), SCRCP. A mortgage foreclosure is an equitable proceeding. *Continental Mortgage Investors v. Quail Run Assocs.*, 280 S.C. 409, 412, 312 S.E.2d 272, 274 (Ct. App. 1984). "Because a foreclosure action is an action in equity, a party has no right to a jury trial of the issues raised in a foreclosure action." *Gardner v. Travis*, 316 S.C. 315, 317, 450 S.E.2d 54, 56 (Ct. App. 1994).

Furthermore, there is no right to a jury trial on defenses to an equitable cause of action such as foreclosure. *Farley v. Matthews*, 168 S.C. 294, 301-302, 167 S.E. 502, 505 (1933) (citing *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691, 693 (1912)) ("Where a defendant sets up, as a defense to an equitable cause of action, facts which grow out of that cause of action, or the transaction which gave rise to it, and are so interwoven with it as to be inseparable from it, the defense partakes of the nature of the cause of action and is equitable, and not triable by jury, as of right").

Where a defendant has legal (rather than equitable) compulsory (rather than permissive) counterclaims, however, he does not waive his right to a jury trial of those counterclaims by asserting them in the foreclosure action. *C&S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 193 (1986), modified, *Johnson v. South Carolina National Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). If a defendant has permissive counterclaims, he has two choices:

- (1) He may assert them as counterclaims in the foreclosure action (but he waives his right to a

trial by jury); or (2) he may assert them in a separate lawsuit (and retain the right to a jury trial).
See O&S Real Estate Services, 298 S.C. 299, 350 S.E.2d 191; *Johnson*, 382 S.C. 51, 354 S.E.2d 895.

The test for whether the counterclaims in a mortgage foreclosure action are compulsory or permissive is whether the counterclaims have a "logical relationship" to the mortgage company's right to enforce the promissory note. *North Carolina Federal Savings & Loan Assn. v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). That determination is made by asking whether the counterclaims would affect the lender's right to enforce the note and foreclose the mortgage. *Advance International, Inc. v. North Carolina National Bank of South Carolina*, 316 S.C. 266, 269, 449 S.E.2d 580, 582 (Ct. App 1994), affirmed in this holding but other parts deemed dicta and vacated, 320 S.C. 532, 466 S.E.2d 367 (1996).

 The case of *Gardner v. Travis*, 316 SC 315, 450 S.E.2d 54 (Ct. App. 1994), provides a good example of a compulsory counterclaim in a foreclosure action. There, the counterclaim alleged that the note and mortgage was void because they were used to secure a gambling debt. *Id.* at 316, 450 S.E.2d at 55. Because whether the note was void was logically related to the plaintiff's ability to enforce the note, the court found that the counterclaim was compulsory and allowed the defendant to have a jury trial on that issue. *Id.* at 318, 450 S.E.2d at 56.

The case of *Advance International, Inc. v. North Carolina National Bank of South Carolina* is also instructive. 316 S.C. 266, 449 S.E.2d 580 (Ct. App 1994), affirmed but other parts vacated on other grounds, 320 S.C. 532, 466 S.E.2d 367 (1996). There, the holder of a second mortgage asserted a counterclaim alleging that the plaintiff first mortgagee had assured the second mortgagee that the borrower could pay the loan amount. *Id.* at 268, 449 S.E.2d at 582. The Court of Appeals held that the counterclaim was not compulsory because the counterclaim

did not challenge the enforceability of the note or the lender's right to foreclose it. *Id.* at 269, 449 S.E.2d at 582. Hence, the Court of Appeals found that the counterclaim was permissive rather than compulsory and that the Defendant had waived his right to a trial by jury on that counterclaim by asserting that claim as a counterclaim rather than as a separate lawsuit. *Id.*

A related issue is the right to a jury trial for a cause of action created by statute. The South Carolina Constitution has been interpreted by the Supreme Court as securing the right to a jury only in cases in which that right existed at the time of the adoption of the Constitution in 1868; if the case is a statutory action, a jury will be allowed only if the action is in the nature of a suit triable at common law in 1868. *C. W. Matthews Contracting Co., Inc. v. South Carolina Tax Commission*, 267 S.C. 548, 553, 230 S.E.2d 223, 225 (1976); *Unisys Corp. v. South Carolina Budget and Control Bd. Div. Of ...*, 346 S.C. 158, 172, 551 S.E.2d 263, 271 (2001) ("It is well-settled that art. I, § 14, secures the right to a jury trial only in cases in which that right existed at the time of the adoption of the constitution in 1868."). The right to a jury trial in a statutory action also exists if expressly created by a South Carolina statute. *See* Rule 38(a), SCRPC. Further, if a statute specifically empowers only the court to determine whether it has been violated and whether the statutory damages are awardable, then there can be no claim to a jury trial.

1) Accounting

Smith is not entitled to a jury trial on his counterclaim for an accounting because the counterclaim is equitable and permissive. A claim for an accounting is an equitable action. *Laughon v. O'Braitts*, 360 S.C. 520, 524, 602 S.E.2d 108, 110 (Ct. App. 2004); *Historic Charleston Holdings v. Gerard Mallon*, 2009 S.C. LEXIS 38, at *7 (S.C. Feb. 17, 2009) ("An action for an accounting sounds in equity."). Smith's counterclaim for an accounting is

permissive because it challenges only the application of payments and charges to Smith's loan account and has no logical relationship to Wells Fargo's right to enforce the promissory note. When it is clear the counterclaim is permissive, a pleader is on notice that asserting the obviously permissive counterclaim waives the right to trial by jury by operation of law. *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993).

Because Smith's counterclaim for an accounting is equitable and permissive, he has waived any right to a jury trial he may have had on that counterclaim by asserting it in this foreclosure action. Smith's request for a jury trial on this counterclaim is hereby stricken.

2) Unconscionability

Smith's counterclaim for unconscionability fails to specify whether it is claim for common law unconscionability or statutory unconscionability under S.C. Code Ann. § 37-5-108. If he is claiming common law unconscionability, Smith is not entitled to a jury trial because this is an equitable claim that only allows for relief in the form of rescission of the contract. If he is claiming statutory unconscionability, Smith is not entitled to a jury trial because the determination of whether an agreement is unconscionable under § 37-5-108 is a matter of law for the Court to decide, not a jury.

a. Common Law Unconscionability

"Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996).

Jurisdictions throughout the country agree that common law unconscionability is an equitable cause of action that allows only for equitable relief such as rescission. *See Doe v.*

SexSearch.com, 551 F.3d 412, 419 (6th Cir. 2008) ("At common law, unconscionability is a defense against enforcement, not a basis for recovering damages."); *Bennett v. Bektong Corp.*, 466 F. Supp. 689, 700 (S.D. Fla. 1979) ("[T]he equitable theory of unconscionability has never been utilized to allow for the affirmative recovery of money damages."); *Johnson v. Long Beach Mortg. Loan Trust 2001-4*, 451 F. Supp. 2d 16, 36 (D.D.C. 2006) ("Plaintiff cannot recover compensatory damages under the common law doctrine of unconscionability."); *Cowin Equip. Co. v. GM Corp.*, 734 F.2d 1581, 1582 (11th Cir. Ala. 1984) ("[T]he cases which have addressed the issue have consistently rejected the theory that damages may be collected for an unconscionable contract provision."); *Super Glue Corp. v. Avis Rent a Car Sys., Inc.*, 517 N.Y.S.2d 764 (N.Y. App. Div. 1987) ("The doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery."); see also 8 Williston on Contracts § 18:1 (4th Ed.) ("Equity recognized unconscionability as a ground for refusing its aid to a party alleging breach of contract long before the Uniform Commercial Code formulated its provision making 'unconscionable' agreements unenforceable.").

Because the only remedies available for common law unconscionability are equitable, there is no right to a jury trial on this claim. See *Brown v. Greenwood School District 50 Board of Trustees*, 344 S.C. 522, 524, 544 S.E.2d 642, 643 (Ct. App. 2001) ("There is no right to a jury trial for equitable remedies such as rescission and restitution.").

Whether an agreement is unconscionable is for the Court to decide, not a jury. See *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) ("In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties'

relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." (emphasis added)); see also *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1046 (D.S.C. 1993) ("Whether an exclusion is unconscionable is a matter of law reserved for determination by the court.")

The Restatement reinforces the argument that unconscionability is a matter of law determinable by only the Court. Restatement (Second) of Contracts § 208 cmt. f (1981) ("A determination that a contract or term is unconscionable is made by the court in the light of all the material facts... [I]ncidental findings of fact are made by the court rather than by a jury, but are accorded the usual weight given to such findings of fact in appellate review."). South Carolina courts have relied on this section of the Restatement in determining whether an agreement is unconscionable. *Hardee v. Hardee*, 348 S.C. 84, 95-96, 558 S.E.2d 264, 269-70 (Ct. App. 2001) (citing the Restatement for the proposition that "[i]n determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed.").

b. Statutory Unconscionability

The language of the South Carolina unconscionability statute confirms that this issue is one for the Court alone to decide. S.C. Code Ann. § 37-5-108(1) ("[I]f the court as a matter of law finds the agreement or transaction to have been unconscionable ... the court may refuse to enforce the agreement."); § 37-5-108(3) ("If it is claimed or appears to the court that the agreement or transaction or any term or part thereof may be unconscionable ... the parties shall be afforded a reasonable opportunity to present evidence ... to aid the court in making the determination."); see also § 37-10-105(C) ("If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may [grant relief or damages].").

To save his jury trial demand on his unconscionability counterclaim, Smith asserts that somehow his claim is essentially an action for negligence and thus was triable at common law in 1868. (Defendant's Memorandum of Law p. 2.) The Court finds this argument hard to swallow for two reasons. First, if Smith wanted to bring a negligence claim against Wells Fargo, he should have directly pled negligence as a counterclaim in his Answer. He failed to do this. Second, Smith cites no authority whatsoever that directly supports the proposition that unconscionability, whether under common law or under § 37-5-108, is somehow grounded in or derived from the common law tort of negligence.

The determination of whether Smith's Note and Mortgage were unconscionable, whether under common law or under § 37-5-108, is a matter of law for the Court alone to decide, and his request for a jury trial on that counterclaim is hereby stricken.

3) Attorney Preference Statute Violation

The language of the statute clearly states that it is for the Court to determine whether the statute has been violated and whether the statutory penalty should be awarded. See § 37-10-105 ("If the court finds as a matter of law that..." and "a penalty in an amount determined by the court..."). The determination of whether the attorney preference statute was violated is therefore a matter of law for the Court to decide.

Even if it was for a jury to decide whether the attorney preference statute had been violated, this counterclaim has no logical relationship to the enforceability of the Note and Mortgage. In a foreclosure case, the test for whether the counterclaims are compulsory or permissive is whether the counterclaims have a "logical relationship" to the mortgage company's right to enforce the promissory note. *North Carolina Federal Savings & Loan Assn. v. DAY Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). If a violation of the statute were found,

Smith would only be entitled to actual damages and possibly a penalty of between \$1500 and \$7500, but not rescission of the Note and Mortgage. Therefore, this counterclaim is permissive and Smith waived his right to a jury trial by asserting it in this foreclosure action.

To save his jury trial demand on his attorney preference statute violation counterclaim, Smith asserts that this claim also sounds in the common law tort of negligence. (Defendant's Memorandum of Law p. 3.) Again, the Court finds this argument problematic because 1) if Smith wanted to bring a negligence claim against Wells Fargo, he should have pled negligence directly and 2) Smith cites no authority whatsoever that directly supports the proposition that the attorney preference statute sounds in negligence.

Smith claims that "[t]here is no contention that the statutes merely codify or reproduce actions at common law." (Defendant's Memorandum of Law p. 5.) Yet the Court is not convinced that closing attorneys in 1868 had a duty to ascertain the borrower's preference as to legal counsel at the time of the loan application, the breach of which duty permitted a cause of action for negligence and entitled the claimant to a jury trial.

A claim for a violation of the attorney preference statute is simply not grounded in any common law cause of action, much less one that was in existence at the time of the Constitution, and the statute itself does not expressly grant the right to a jury trial. *See S.C. Code Ann. §§ 37-10-102 and 37-10-105; Tilley v. Pacesetter Corp.*, 355 S.C. 361, 379, 585 S.E.2d 292, 301 (2003) (claim for attorney preference statute violation deemed "not grounded in fraud and deceit"). Because Smith's counterclaim is not "declared by the Constitution" or "given by a statute of South Carolina," there is no right to a jury trial on this claim under Rule 38(a).

Furthermore, Smith's counterclaim has no merit. On April 10, 2003, at the time Smith applied for the loan, he signed a form entitled "Attorney/Insurance Preference Check List." On

this form, he selected Harvey Breland, Esquire, as his attorney. Because Smith would not be entitled to relief as against Wells Fargo on this counterclaim, it can hardly be said he would be entitled to a jury trial on it.

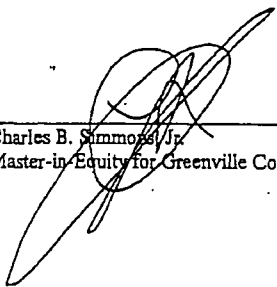
For these reasons, Smith's request for a jury trial on this counterclaim is hereby stricken.

Conclusion

Because a right of trial by jury does not exist in an action for the foreclosure of a mortgage and there is no right to a jury trial for any of Smith's counterclaims, Plaintiff's Motion to Strike Jury Demand is GRANTED and the order of reference filed in this matter on September 24, 2008, is confirmed.

AND IT IS SO ORDERED.

March 9, 2009



Charles B. Simmons, Jr.
Master-in-Equity for Greenville County

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

DOCKET NO: 2008-CP-23-6833

Wells Fargo Bank, NA,)

Plaintiff,)

v.)

Michael Smith; South Carolina Department)

Of Motor Vehicles; M & T Properties, Inc.;)

State of South Carolina; Arthur State Bank;)

South Carolina Department of Probation,)

Pardon and Parole Services,)

Defendants,)

ORDER

FILED-CLERK OF COURT
PAUL E. JOHNSON
CLERK OF COURT
2009 APR 15 PM 6:44

This is a mortgage foreclosure action involving real property located in Greenville County, South Carolina. Defendant Michael Smith, in his Answer, and among other things, requested a Jury Trial. Plaintiff then filed its Motion to Strike Jury Demand. The Court granted Plaintiff's Motion pursuant to its Order filed with the Clerk of Court on March 12, 2009.

Defendant Smith has now filed his Motion to Reconsider pursuant to Rule 59, SCRPC.

Upon a careful review of the record, the Court finds that the issues raised in the Rule 59 Motion were fully and correctly addressed in the Court's Order filed March 12, 2009. As such, Smith's motion is denied.

AND IT IS SO ORDERED.

Charles B. Simmons, Jr.
Judge

April 1, 2009

Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Wells Fargo Bank, NA,

Plaintiff(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

vs.

Michael Smith; South Carolina Department of Motor Vehicles; M & T Properties, Inc.; State of South Carolina; Arthur State Bank; South Carolina Department of Probation, Pardon and Parole Services;

Defendant(s)

2008-CP-2326833

Submitted By: Samuel C. Waters (SC Bar #5958)
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Michael P. Morris (SC Bar #73560)
Eve Moredock Stacey (SC Bar # 5300)
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info@rtt-law.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

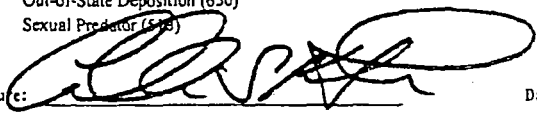
DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| Contracts | Torts - Professional | Torts - Personal Injury | Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☒ Foreclosure (420) |
| ☐ General (130) | ☐ Notice/File Med Mal (230) | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | ☐ Other (299) | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | | ☐ Personal Injury (350) | ☐ Possession (450) |
| | | ☐ Wrongful Death (360) | ☐ Building Code Violation (460) |
| | | ☐ Other (399) | ☐ Other (499) |
-
- | | | | |
|--|--|---|--|
| Inmate Petitions | Judgments/Settlements | Administrative Law/Relief | Appeals |
| ☐ PCR (500) | ☐ Death Settlement (700) | ☐ Reinstate Driver's License (800) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Foreign Judgment (710) | ☐ Judicial Review (810) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Magistrate's Judgment (720) | ☐ Relief (820) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Minor Settlement (730) | ☐ Permanent Injunction (830) | ☐ Municipal (930) |
| | ☐ Transcript Judgment (740) | ☐ Forfeiture Petition (840) | ☐ Probate Court (940) |
| | ☐ Lis Pendens (750) | ☐ Forfeiture-Consent Order (850) | ☐ SCDOT (950) |
| | ☐ Other (799) | ☐ Other (899) | ☐ Worker's Comp (960) |
| | | | ☐ Zoning Board (970) |
| | | | ☐ Administrative Law Judge (980) |
| | | | ☐ Public Service Commission (990) |
| | | | ☐ Employment Security Comm (991) |
| | | | ☐ Other (999) |
-
- | | |
|--|--|
| Special/Complex /Other | |
| ☐ Environmental (600) | ☐ Pharmaceuticals (630) |
| ☐ Automobile Arb. (610) | ☐ Unfair Trade Practices (640) |
| ☐ Medical (620) | ☐ Out-of-State Deposition (650) |
| ☐ Other(699) | ☐ Sexual Predator (699) |

Submitting Party Signature: 

Date: 09/05/08

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY
Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form or by the 210th day of filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code § 15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Case are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals;
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases no subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference had been concluded.

011784-07573

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

GREENVILLE COUNTY

Wells Fargo Bank, NA,

Plaintiff

vs.

Michael Smith; South Carolina Department of Motor
Vehicles; M & T Properties, Inc.; State of South
Carolina; Arthur State Bank; South Carolina
Department of Probation, Pardon and Parole Services;
Defendant.

IN THE CIRCUIT COURT FOR THE
THIRTEENTH
JUDICIAL CIRCUIT

2008-CP-23-6833

CERTIFICATE OF EXEMPTION
FROM ADR

DOCKET NO.

I certify that this action is exempt from ADR because:

- ☐ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus or prohibition;
- ☐ this action is appellate in nature;
- ☐ this is a post-conviction relief matter;
- ☐ this is a contempt of court proceeding;
- ☐ this is a forfeiture proceeding brought by the State;
- ☒ this is a case involving a mortgage foreclosure; or
- ☐ the parties submitted the case to voluntary mediation with a certified mediator prior to the filing of this action.

FILED CLERK OF COURT
GREENVILLE CO. S.C.
JAMES B. WICKENS

2008 SEP -9 A 11:04

Plaintiff/Attorney(s) for Plaintiff(s)

Samuel C. Waters (SC Bar #5958)
Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453)
Jennifer W. Rubin (SC Bar #16727)
Ellie C. Floyd (SC Bar # 68635)
Michael P. Morris (SC Bar #73560)
Eve Moredock Stacey (SC Bar # 5300)
Mary R. Powers (SC Bar# 16534)
Robert P. Davis (SC Bar # 74030)
Timothy B. Killen (SC Bar #72501)
~~William S. Koehler (SC Bar# 74935)~~
Rogers Townsend & Thomas, PC
220 Executive Center Drive, Suite 109
Post Office Box 100200
Columbia, SC 29202
(803) 744-4444

Defendant/Attorney(s) for Defendant(s)

Date: September 5, 2008

011784-07373

SCCA / 234 (5/04)

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

DOCKET NO.

Wells Fargo Bank, NA,

Plaintiff,

v.

Michael Smith; South Carolina Department of
Motor Vehicles; M & T Properties, Inc.; State of
South Carolina; Arthur State Bank; South Carolina
Department of Probation, Pardon and Parole
Services;

Defendant(s).

2008-CP-23-6833

LIS PENDENS
Deficiency Judgment Waived

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
WICKENSHER

2008 SEP -9 A 11:04

(011784-07573)

NOTICE IS HEREBY GIVEN THAT an action has been or will be commenced in this Court upon complaint of the above-named Plaintiff against the above-named Defendant(s) for the foreclosure of a certain mortgage of real estate given by Michael Smith to Wells Fargo Home Mortgage, Inc. dated April 29, 2003, and recorded in the Office of the RMC/ROD for Greenville County on May 5, 2003, in Mortgage Book 3916 at Page 378. Wells Fargo Bank, NA is successor by merger to Wells Fargo Home Mortgage, Inc.

The premises covered and affected by the said mortgage and by the foreclosure thereof were, at the time of the making thereof and at the time of the filing of this notice, described as follows:

All that piece, parcel or lot of land, situate, in the County of Greenville, State of South Carolina, and being shown and designated as Lot No. 73 on a plat for River Valley, Section 1, Map 3, dated November 12, 2000, by Carolina Surveying and Mapping, and recorded June 6, 2001 in Plat Book 44-B, Page 29, ROD Office for Greenville County. Reference is hereby made to said plat for a more detailed metes and bounds description.

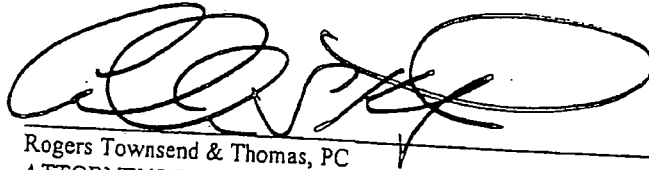
This being the same property conveyed to Michael Smith by Deed of M & T Properties, LLC, dated November 22, 2002 and recorded January 8, 2003 in Book 222 at Page 1309, in the Office of the Register of Deeds for Greenville County.

This also includes a mobile/manufactured home: 2003 Fleetwood VIN#: GAFL239A/B16894F212

RECORDED IN BOOK 56 PAGE 043

Property Address: 1 ANCHOR RD
GREENVILLE, SC 29617

TMS# 0509 04 01 02 100.



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958) Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453) Jennifer W. Rubin (SC Bar #16727)
Ellie C. Floyd (SC Bar # 68635) Michael P. Morris (SC Bar #73560)
Eve Moredock Stacey (SC Bar # 5300) Mary R. Powers (SC Bar #16534)
Robert P. Davis (SC Bar # 74030) Timothy B. Killen (SC Bar #72501)
William S. Kochler (SC Bar# 74935)
220 Executive Center Drive, Suite 109 Post Office Box 100200 (29202)
Columbia, SC 29210 (803) 744-4444

Columbia, South Carolina
September 5, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

2008-CP-23-10833

COUNTY OF GREENVILLE

DOCKET NO.

Wells Fargo Bank, NA,

Plaintiff,

SUMMONS AND NOTICES
(NON-JURY)
FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Waived

v.

Michael Smith; South Carolina Department of
Motor Vehicles; M & T Properties, Inc.; State of
South Carolina; Arthur State Bank; South Carolina
Department of Probation, Pardon and Parole
Services;

Defendant(s).

(011784-07573)

FILED CLERK OF COURT
GREENVILLE CO. S.C.
JAMES W. WIGGINS

2008 SEP -9 A 11:04

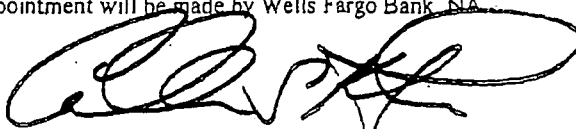
TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 220 Executive Center Drive, Suite 109, Post Office Box 100200, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service, except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

YOU WILL ALSO TAKE NOTICE that Plaintiff will move for an order of reference or that the Court may issue a general order of reference of this action to a master in equity/special referee, pursuant to Rule 53 of the South Carolina Rules of Civil Procedure.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by Wells Fargo Bank, NA.



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958) Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453) Jennifer W. Rubin (SC Bar #16727)
Ellie C. Floyd (SC Bar # 68635) Michael P. Morris (SC Bar #73560)
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~~William S. Koehler (SC Bar# 74935)~~
220 Executive Center Drive, Suite 109 Post Office Box 100200 (29202)
Columbia, SC 29210 (803) 744-4444

Columbia, South Carolina
September 5, 2008

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

DOCKET NO. **2008-CP-23-6833**

Wells Fargo Bank, NA,

Plaintiff,

COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE
MORTGAGE

Deficiency Judgment Waived

v.

Michael Smith; South Carolina Department of
Motor Vehicles; M & T Properties, Inc.; State of
South Carolina; Arthur State Bank; South Carolina
Department of Probation, Pardon and Parole
Services;

Defendant(s).

(011784-07573)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
B. WICKENS JR.

2008 SEP -9 A 11:04

Plaintiff alleges:

GENERAL ALLEGATIONS

- A
1. This is an action for the foreclosure of a mortgage upon certain real estate in Greenville County, South Carolina.
2. Pursuant to S.C. Code Section 33-15-101, Plaintiff is a corporation or other legal entity doing business in the State of South Carolina.
3. Plaintiff is the owner and holder of the Note and Mortgage described hereafter and the subject of this action. The premises covered and affected by the said mortgage and by the foreclosure thereof is described as follows:
- dit

All that piece, parcel or lot of land, situate, in the County of Greenville, State of South Carolina, and being shown and designated as Lot No. 73 on a plat for River Valley, Section 1, Map 3, dated November 12, 2000, by Carolina Surveying and Mapping, and recorded June 6, 2001 in Plat Book 44-B, Page 29, ROD Office for Greenville County. Reference is hereby made to said plat for a more detailed metes and bounds description.

This being the same property conveyed to Michael Smith by Deed of M & T Properties, LLC, dated November 22, 2002 and recorded January 8, 2003 in Book 2022 at Page 1309, in the Office of the Register of Deeds for Greenville County.

This also includes a mobile/manufactured home: 2003 Fleetwood VIN#: GAFL239A/B16894F212

Property Address: 1 ANCHOR RD
GREENVILLE, SC 29617

TMS# 0509 04 01 02 100

d.b
4. Some lien on or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.

5. The Defendant(s) herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of South Carolina Code Section 15-35-840.

6. Based upon a search of the public records of Greenville County, all persons or entities having an interest or lien or possible claim in or upon the mortgaged premises subordinate to the lien of the Plaintiff as of the date and time of the filing of the Lis Pendens herein have been made defendants.

A
7. South Carolina Department of Motor Vehicles is a governmental agency of the State of South Carolina and is responsible for issuing Certificates of Title for mobile/manufactured homes in this State.

d
8. Pursuant to the terms of the Mortgage and applicable state law, Plaintiff requests the Mortgage be foreclosed and that the property be sold at public auction in accordance with law, subject to any liens for taxes, special assessments of record against such property, and existing easements or restrictions of record.

D
9. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set forth below, or some part thereof, but that such interests or liens are junior and subsequent to the lien of the Plaintiff's Mortgage, or, if specified below, have been paid in full and either should be satisfied of record or the lien released from the subject real estate. Said liens or interests are of record in the Office of the RMC or Clerk of Court of the aforesaid county and are described as follows:

A. ~~M & T Properties, Inc., by virtue of a mortgage given by~~
Michael Smith to M & T Properties, LLC in the amount of \$80,000.00, dated November 22, 2002, and recorded January 8, 2003 in Book 3828 at Page 1720. The Plaintiff is informed and believes that this mortgage has been paid in full and either should be satisfied of record or the lien of the mortgage released from the subject real estate. M & T Properties, Inc. is formerly known as M & T Properties, LLC.

B. State of South Carolina, by virtue of a judgment against Michael Smith in the amount of \$1,585.00, recorded on November 1, 2006 in Judgment

Roll No. 2004-CP-23-7722.

C. Arthur State Bank, by virtue of a judgment against Michael Smith in the amount of \$1,585.00, recorded on November 1, 2006 in Judgment Roll No. 2004-CP-23-7722.

D. State of South Carolina, by virtue of a judgment against Michael Smith in the amount of \$317.00, recorded on November 1, 2006 in Judgment Roll No. 2004-GS-23-7722.

E. South Carolina Department of Probation, Pardon and Parole Services, by virtue of a judgment against Michael Smith in the amount of \$317.00, recorded on November 1, 2006 in Judgment Roll No. 2004-GS-23-7722.

FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment that Mobile/Manufactured Home is Subject to the Lien of Plaintiff's Mortgage)

10. The Plaintiff incorporates the allegations of Paragraphs 1-9 herein.

11. Heretofore, on or about April 29, 2003, Michael Smith made, executed and delivered a certain Fixed Rate Note ("Note") in the principal sum of \$83,000.00, payable in monthly installments of principal and interest of \$511.05, commencing on July 1, 2003.

12. In order to secure the payment of the Note according to the terms and conditions thereof, Michael Smith made, executed and delivered unto Wells Fargo Home Mortgage, Inc. a certain real estate mortgage ("Mortgage") covering the previously described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

13. The Mortgage was signed, witnessed and probated April 29, 2003; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Greenville County on May 5, 2003, in Mortgage Book 3916 at Page 378. Wells Fargo Bank, NA is successor by merger to Wells Fargo Home Mortgage, Inc.

14. Upon information and belief, there sits upon the realty which is described above a mobile/manufactured home described as a 2003 Fleetwood bearing VIN#GAFL239A/B16894F212.

15. Upon information and belief, when Michael Smith applied for a mortgage loan from Plaintiff or Plaintiff's predecessor-in-interest Wells Fargo Home Mortgage, Inc., Michael Smith represented that (s)he owned or was purchasing all the property which is the subject of this litigation and that (s)he was willing to execute a mortgage upon the entire property, that is the realty described herein and all improvements thereon, that is the mobile/manufactured home to secure the mortgage loan.

16. In reliance upon the representations of Michael Smith, the property, including the mobile/manufactured home, was appraised and, in reliance upon the appraised value of the entire property, a mortgage loan was extended to Michael Smith with the intent that the loan would be secured

by a first mortgage loan upon the realty described herein and all improvements thereon, including the mobile/manufactured home.

17. That, to evidence the parties' intention that the loan would be secured by all of the property of Michael Smith located at 1 ANCHOR RD, GREENVILLE, SC 29617, including the mobile/manufactured home, on or about April 29, 2003, the Defendant Michael Smith executed a mortgage, in which (s)he mortgaged to Wells Fargo Home Mortgage, Inc. the realty which is described herein, and which includes any improvements located thereon.

18. The relationship between Michael Smith and Wells Fargo Home Mortgage, Inc., Borrower and Lender, respectively, is such that a reasonable person would expect Wells Fargo Home Mortgage, Inc. to require that its loan be secured by a mortgage upon all of Michael Smith property, including the mobile/manufactured home, and that a reasonable person would expect Michael Smith to mortgage all of the property, including the mobile/manufactured home, in exchange for receiving the mortgage loan.

19. Because Michael Smith and Wells Fargo Home Mortgage, Inc., in furtherance of their relationship as Borrower and Lender, respectively, intended for the mobile/manufactured home to secure the mortgage loan to Michael Smith, the Plaintiff is informed and believes that, pursuant to S.C. Code Ann. § 15-53-20, et seq., it is entitled to a declaratory judgment that the mobile/manufactured home is an improvement to the property which is the subject of this action and that it is subject to the lien of the Plaintiff's mortgage.

FOR A SECOND CAUSE OF ACTION
(Foreclosure of Mortgage)

20. The Plaintiff incorporates the allegations of Paragraphs 1-19 herein.

21. This cause of action is for the foreclosure of the Mortgage described above.

22. Heretofore, on or about April 29, 2003, Michael Smith made, executed and delivered a certain Fixed Rate Note ("Note") in the principal sum of \$83,000.00, payable in monthly installments of principal and interest of \$11.05, commencing on July 1, 2003.

23. In order to secure the payment of the Note according to the terms and conditions thereof, Michael Smith made, executed and delivered unto Wells Fargo Home Mortgage, Inc. a certain real estate Mortgage covering the previously described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

24. The Mortgage was signed, witnessed and probated April 29, 2003; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Greenville County on May 5, 2003, in Mortgage Book 3916 at Page 378. Wells Fargo Bank, NA is successor by merger to Wells Fargo Home Mortgage, Inc.

25. The Mortgage evidences and secures the repayment of money advanced by Plaintiff or its predecessor in interest to, or on behalf of, the mortgagor(s) and constitutes a first lien on the mortgaged premises.

26. Any notice required by the terms of the Mortgage or by state or federal statutes has been given to the applicable Defendant(s) prior to the commencement of this action.

27. After all payments received by the Plaintiff have been credited to the subject loan, the loan is in default and due for June 1, 2008, and the conditions of the Note and Mortgage have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and that there is due on the Note and Mortgage as of June 1, 2008, the principal sum of \$77,460.63, with interest from May 1, 2008, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

28. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is such sum as the Court may find appropriate.

29. Plaintiff may be forced to pay sums for taxes and insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

30. Plaintiff's right to a personal or deficiency judgment pursuant to South Carolina Code Sections 29-3-650 and 29-3-660 is expressly waived.

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters and set forth herein and:

(1) Determine that the mortgage held by M & T Properties, Inc., recorded January 8, 2003 in Book 3828 at Page 1720, has been paid in full, and direct the Clerk of Court/Register of Deeds for Greenville County to release the lien of the judgment from the subject property.

(2) Direct the RMC/ROD to annotate the public records to reflect ownership of the Mortgage in the Plaintiff.

(3) Ascertain and determine the amount due upon the Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.

(4) Grant a declaratory judgment to the Plaintiff pursuant to S.C. Code Ann. § 15-53-20, et seq., declaring that the mobile/manufactured home of Defendant(s) is an improvement to the property which is the subject of this action and is therefore subject to the lien of the Plaintiff's mortgage.

(5) Declare Plaintiff's Mortgage a first lien and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes or insurance premiums which may be due and have been advanced by the Plaintiff, with reasonable attorney's fees, and for the costs of this action.

(6) Pursuant to S.C. Code Ann. § 56-19-390, order the South Carolina Department of Motor Vehicles to issue a Certificate of Title to the mobile/manufactured home to the successful purchaser of the subject property at the foreclosure sale herein or its successors or assigns.

(7) Order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

(8) Appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

(9) Under the direction of this Court, sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

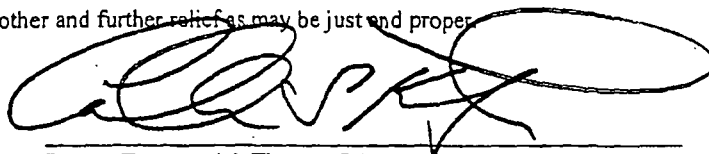
First, to the costs and expenses of the within action and sale;

Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees as aforesaid; and

Third, to the distribution of any surplus pursuant to Rule 71, SCRPC.

(10) Issue an order directing the Sheriff of Greenville County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary.

(11) Order such other and further relief as may be just and proper.



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958) Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453) Jennifer W. Rubin (SC Bar #16727)
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William S. Koehler (SC Bar# 74935)
220 Executive Center Drive, Suite 109 Post Office Box 100200 (29202)
Columbia, SC 29210 (803) 744-4444

Columbia, South Carolina
September 5, 2008

NOTICE REQUIRED BY THE FAIR DEBT
COLLECTION PRACTICES ACT
15 U.S.C. Section 1692, As Amended

- ~~1. The amount of the debt as of June 1, 2008, is the principal sum of \$77,460.63, with interest from May 1, 2008, advances, late charges, and the costs and disbursements of this action, including attorney's fees.~~
2. Wells Fargo Bank, NA is the Creditor to whom the debt is owed.
3. The debt described in this notice will be assumed to be valid by the Creditor's law firm unless you, the Debtor, within thirty (30) days after the receipt of this notice, dispute, in writing, the validity of the debt or some portion thereof.
4. If you, the Debtor, notify the Creditor's law firm in writing within thirty (30) days of the receipt of this notice that the debt or any portion thereof is disputed, the Creditor's law firm will obtain a verification of the debt, and a copy of the verification will be mailed to the Debtor by the Creditor's law firm.
5. If the Creditor named in this notice is not the original Creditor, and if you make a request to the Creditor's law firm within the thirty (30) days from the receipt of this notice, the name and address of the original Creditor will be mailed to you by the Creditor's law firm.
6. Written requests should be addressed to Rogers Townsend and Thomas, PC, Post Office Box 100200, Columbia, South Carolina 29202-3200.
7. This notice should not be construed as a thirty (30) grace period. Creditor may pursue collection efforts immediately and not wait thirty (30) days.

THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) C.A. NO.: 2008-CP-23-6833

Wells Fargo Bank, N.A. 2008 NOV -7 P 4:51

Plaintiff,

vs.

Michael Smith, et al

Defendant.

FILED-CLERK OF COURT
GREENVILLE CO. S. ANSWER AND COUNTERCLAIM
JURY TRIAL REQUESTED

Responding to the Plaintiff's Complaint, Defendant would respectfully show unto the Court:

FOR A FIRST DEFENSE:

1. Each and every allegation of the Complaint which is neither admitted, modified, explained or qualified is hereby denied, and strict proof is demanded.
2. This Defendant admits the allegations contained in paragraphs 1, 7, 14, 30
3. The Defendant denies the following paragraphs of the Complaint: 8, 10, 19, 20, 26, 27, 28, and 29.
4. The Defendant has no information or belief upon which to admit or deny the allegations of paragraphs 2, 3, 4, 5, and 6, and therefore denies the same, demanding strict proof thereof.
5. As to the allegations contained in paragraph 9, this Defendant denies that the remaining Defendants have any interest in or lien upon the real estate and is informed and believes that he is entitled to an Order of the Court releasing this Defendant's property therefrom.
6. As to the allegations contained in paragraphs 11, 12, 13, 15, 16, 17, 18, 21, 22, 23, 24, 25, 30, the Defendant answers that the documents speak for themselves and

it is for the Court to determine if they were properly executed and recorded and to
~~establish any priority of one over the other.~~

FOR A SECOND DEFENSE

7. Each and every allegation of the foregoing paragraphs is repeated as if fully realleged herein.
8. The Complaint fails to state a claim upon which relief can be granted.

FOR A THIRD DEFENSE

9. Each and every allegation of the foregoing paragraphs is repeated as if fully realleged herein.
10. There is no document attached to the Complaint signed by the Plaintiff constituting any verification of the statements contained in the Complaint, nor any copies of documents referred to in the Complaint. Therefore this case is not an appropriate one for referral to the Master in Equity at this time as it does not show on its face that the Plaintiff has appropriate documentation entitling it to foreclosure of any mortgage. The designations on the Civil Cover Sheet attached to the Complaint are, therefore, in error. The Plaintiff is informed and believes that he is entitled to a stay of the foreclosure proceedings in Master in Equity Court pending discovery and a jury trial of issues so triable in the Circuit Court.

FOR A FOURTH DEFENSE

11. ~~Each and every allegation of the foregoing paragraphs is repeated as if fully realleged herein.~~
12. The Defendant would show that, if there was a contract between the parties as described in the Complaint, the Plaintiff has charged unreasonable charges and

interest rates in excess of that allowed by law and any sums found due and owing
~~should be set off by the amount overcharged.~~

FOR A FIFTH DEFENSE

13. Each and every allegation of the foregoing paragraphs is repeated as if fully realleged herein.
14. The Defendant would show that, if there was a contract between the parties as described in the Complaint with the alleged omissions of proper security, the Plaintiff's own negligence caused it to fail in the alleged goal of securing the debt as alleged in the Complaint.

FOR A SIXTH DEFENSE

15. Each and every allegation of the foregoing paragraphs is repeated as if fully realleged herein.
16. The Defendant would show that if the Court finds that there was a binding contract between the parties, it was unconscionable and unenforceable.

BY WAY OF FIRST COUNTERCLAIM

17. Each and every allegation of the foregoing Paragraphs is repeated as if fully realleged herein.
18. The Defendant reserves all rights under its defenses set forth above.
19. The Defendant requests an accounting of all payments credited and charges assessed on this account.
20. The Defendant requests the following relief: That the Court reduce any amount found to be owing by Defendant, if any, by the amount of any overcharges and/or unsubstantiated charges as determined by a jury.

BY WAY OF SECOND COUNTERCLAIM

21. ~~Each and every allegation of the foregoing Paragraphs is repeated as if fully~~
realleged herein.
22. If the Defendant entered into the agreement alleged in the Complaint, it was unconscionable at the time it was made because the Plaintiff knew or should have known that the Defendant was unable to reasonably protect his own interest and was financially unable to make payment on any such arrangement. Further, the ultimate amount of debt that has been and is being accrued bears no reasonable relation to any value that may have been obtained by the Defendant if there was a contract between the parties as described in the Complaint, which is denied.
23. The Defendant requests the following relief: That the Plaintiff be required to pay actual and punitive damages, and/or penalties to which the Plaintiff is entitled in an amount to be determined by a jury.

BY WAY OF THIRD COUNTERCLAIM

24. Each and every allegation of the foregoing Paragraphs is repeated as if fully realleged herein.
25. The lenders made no efforts whatsoever to determine Smith's attorney preference in the transaction referred to in the Complaint. Instead, the Plaintiff set up a closing without properly informing Smith of his right to choose or providing him any opportunity to give his preference.
26. The failure to ascertain Smith's preference as to legal counsel prior to closing is a violation of South Carolina Code Section 37-10-102.

27. Smith has been damaged by the failure to ascertain his preference as to legal counsel prior to closing in an amount of actual damages to be determined, plus the total amount of the loan finance charge, double the amount of the excess loan finance charge or other charges or fees paid by Smith and statutory damages.
28. Upon information and belief, this violation of the South Carolina Consumer Protection Code by Defendants entitles the Washingtons and each of them to not less than one thousand five hundred (\$1,500.00) dollars and not more than seven thousand five hundred (\$7500.00) dollars, for each violation

REQUEST FOR JURY TRIAL

Plaintiff requests a trial by jury on all claims so triable.

WHEREFORE, the Defendant respectfully prays as follows:

- A. The dismissal of the complaint;
- B. Stay of the foreclosure proceedings;
- C. For a jury trial of all issues;
- D. An Order granting actual and punitive damages on the Counterclaims in an amount to be determined by a jury.
- E. Such other and further relief as the Court deems just and proper.

SOUTH CAROLINA LEGAL SERVICES



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11-7, 2008
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Wells Fargo Bank, NA,

Plaintiff,

v.

Michael Smith; South Carolina Department of
Motor Vehicles; M & T Properties, Inc.; State of
South Carolina; Arthur State Bank; South Carolina
Department of Probation, Pardon and Parole
Services;

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-23-6833

REPLY

(511784-07573)

The Plaintiff, Wells Fargo Bank, NA (hereinafter "Plaintiff"), by way of Reply to the Answer and Counterclaim of Defendant Michael Smith, would respectfully show unto the Court as follows:

1. Each and every allegation of the Answer and Counterclaim not specifically admitted is denied.
2. There is no need for a response to Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the Answer and Counterclaim, but to the extent a response is deemed required, they are denied.

FOR A FIRST DEFENSE
TO ALL COUNTERCLAIMS
(Qualified General Denial)

AS TO THE FIRST COUNTERCLAIM

3. There is no need for a response to Paragraphs 17 and 18 of the Answer and Counterclaim, but to the extent a response is deemed required, they are denied.
4. Plaintiff denies the allegations of Paragraphs 19 and 20.

Defendant intended for Plaintiff to rely on his ability to repay this loan. The Defendant expected Plaintiff to act on the impression that the Defendant could repay this loan. The Defendant now confesses that he knew or should have known that he would not be able to repay this loan. Plaintiff did not know the Defendant's true inability to repay this loan, and Plaintiff detrimentally relied on the statements made or impressions given by the Defendant when he borrowed money from Plaintiff or its predecessor in interest, and in relying on those statements or impressions, Plaintiff detrimentally changed its position by laying out thousands of dollars to or on behalf of the Defendant. The Defendant should be estopped from asserting any right to damages resulting from his own improper or inequitable conduct.

FOR A FIFTH DEFENSE TO ALL COUNTERCLAIMS

(No Notice)

14. The Defendant failed to give Plaintiff adequate or timely notice of his complaints, and he should therefore be barred from alleging such complaints now.

FOR A SIXTH DEFENSE TO ALL COUNTERCLAIMS

(Laches)

15. The Defendant waited an unreasonable length of time before complaining of any deficiencies in the origination, in his monthly statements, or in closing of this loan. Plaintiff was prejudiced by this delay, and any relief otherwise available to the Defendant is barred by the doctrine of laches.

FOR A SEVENTH DEFENSE TO ALL COUNTERCLAIMS

(Waiver)

16. The Defendant was represented by counsel at the closing of this loan and had a fair and full opportunity at the closing to object to the aspects of the closing that he now contests. The Defendant failed to read the papers presented to him at the closing, failed to ask his attorney for advice as to their legal effect, or, if he asked for such advice, failed to heed it, signed

documents he had not read, and failed to exercise that degree of care and caution that a reasonable and prudent person would have exercised under the same or similar circumstances. Instead of objecting to any deficiencies, the Defendant accepted the benefits of the financing provided by Plaintiff, and he thereby waived any deficiencies in the origination or closing of this loan. The Defendant or his counsel presented the mortgage for filing with the Register of Deeds and presented the loan documents to Plaintiff with the implicit representation that they were proper and would provide Plaintiff with a security interest in the real property being mortgaged. By doing so, the Defendant waived any deficiencies in the origination or closing of the loan.

17. The Defendant had a fair and full opportunity throughout the history of the loan to object to the alleged deficiencies in his monthly statements that he now contests. Instead of objecting to any deficiencies, the Defendant accepted the benefits of the financing provided by Plaintiff. By doing so, the Defendant waived any objection to the alleged deficiencies in his monthly statements.

FOR AN EIGHTH DEFENSE TO ALL COUNTERCLAIMS
(Unclean Hands)

18. The Defendant knew what he was doing when he entered into this transaction, he received the benefit of the loan, and then he defaulted on the loan. Because the Defendant comes into this court with unclean hands, he should be barred from any recovery. Also, the Defendant himself signed and delivered the loan documents, a HUD settlement statement, a Note and a Mortgage. The Defendant should be barred from recovering sums for any alleged wrongful conduct in a transaction in which he participated.

FOR A NINTH DEFENSE TO ALL COUNTERCLAIMS

(Right of Recoupment)

19. Plaintiff advanced a sum of money to the Defendant, which sum the Defendant promised to repay in full, with interest at the rate the parties agreed upon. If the Court were to grant the Defendant the relief he seeks in his Counterclaims, Plaintiff would be entitled to the repayment of the sums advanced, plus interest and the other relief allowed by the Note and Mortgage.

FOR A TENTH DEFENSE TO ALL COUNTERCLAIMS

(Punitive Damages Unconstitutional)

20. To the extent that Defendant seeks punitive damages, Plaintiff denies Defendant's claim for punitive damages. An award of punitive damages as alleged by Defendant would violate the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

- a. The judiciary's ability to correct a punitive damage award only upon a pending of passion, prejudice or caprice is inconsistent with due process guarantees;
- b. Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. Any award of punitive damages based upon the wealth of Plaintiff violates due process guarantees;
- d. The juror's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. Even if it could be argued that the standard governing the imposition of punitive damages exist, the standard is void for vagueness; and

- f. Defendant's claim for punitive damages violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution to the extent that the amount of punitive damages is based upon the wealth of Plaintiff.
- g. Defendant's claim for punitive damages violates the federal doctrine of separation of powers and Article I, Section 3 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

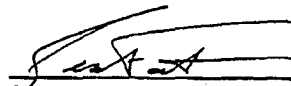
FOR AN ELEVENTH DEFENSE TO ALL COUNTERCLAIMS
(Failure to Mitigate)

21. Defendant failed to mitigate his damages as required by law.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays that it be granted the following relief:

- (1) Dismiss the Defendant's Counterclaims with prejudice and award the Defendant no relief;
- (2) Award Plaintiff reasonable attorneys fees and costs; and
- (3) Award any other and further relief to Plaintiff as is deemed just and proper.



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December 9, 2008
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

DOCKET NO. 08-CP-23-6833

Wells Fargo Bank, NA,

Plaintiff,

v.

Michael Smith; South Carolina Department of
Motor Vehicles; M & T Properties, Inc.; State
of South Carolina; Arthur State Bank; South
Carolina Department of Probation, Pardon and
Parole Services;

Defendant(s).

**PLAINTIFF'S MOTION TO STRIKE
JURY DEMAND**

(511784-07573)

TO: SUSAN INGLES, ESQUIRE, ATTORNEY FOR DEFENDANT MICHAEL
SMITH

YOU WILL PLEASE TAKE NOTICE that at such time and place as is set by the Court the Plaintiff will respectfully move the Court for an order striking Defendant Michael Smith's demand for a jury trial and for an order confirming the order of reference filed in this matter on September 24, 2008. This motion is based on the grounds that a right of trial by jury does not exist in an action for the foreclosure of a mortgage, and:

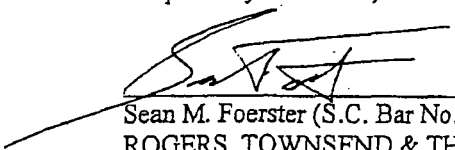
1. Defendant's counterclaim for an accounting is an equitable and permissive counterclaim, and he waived the right to a jury trial by asserting it in this foreclosure action;
2. Defendant's counterclaim that the loan was unconscionable is a matter of law for the Court to decide, not a jury; and

3. Defendant's counterclaim for violation of the attorney preference statute is a

~~statutory claim, and the statute itself does not expressly grant the right to a jury~~
trial.

This motion is further based on the pleadings, the laws of the State of South Carolina, and
such other and further grounds as may be properly presented to the Court.

Respectfully submitted,



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Attorneys for Plaintiff Wells Fargo Bank, NA

January 7, 2009.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

C.A. NO.: 2008-CP-23-6833

Wells Fargo Bank, N.A.)

Plaintiff,)

vs.)

MEMORANDUM OF LAW

Michael Smith, et al)

Defendant.)

Responding to the Plaintiff's Motion to Strike the Defendant's Request for a Jury Trial, the Defendant would respectfully submit unto the Court as follows:

I.

Rule 38(a) of the South Carolina Rules of Civil Procedure provides that the right of a trial by jury will be preserved inviolate. This rule codifies the right as established under Article I, Section 14 of the South Carolina Constitution. And when the right to a jury has been invoked by a party, the issues demanded to be tried shall be tried by a jury unless the judge determines that the right to a jury trial of some or all the issues does not exist. See SC Rule Civ. Pro. 39(a). Thus, this Court should deny Wells Fargo's [hereinafter "the Plaintiff"] motion to strike the defendant's demand for a jury trial should it appear that any of the defendant's defenses or counterclaims are entitled to a jury trial as provided in Rule 38(a).

In its motion, the Plaintiff argues that Defendant's claims are not entitled to a jury trial because the rights in question are rights created by statute, and, since the statute itself does not explicitly provide for a trial by jury, the defendant has no such right.

Plaintiffs' position confuses the existence of a duty with the standards of care establishing the extent and nature of the duty and asserts its motion to strike the jury demand as if the defenses and counterclaims were solely statutory claims. In a particular case, standards by which a fact finder may determine whether a duty was breached are grounded in the common law, statutes, regulations, etc and do not serve to preclude a jury trial.

In addition to legal defenses, the Defendant alleged two counterclaims. Both counterclaims seek actual damages for actions that are prohibited by the S.C. Consumer Protection Code (SCCPC). Although, the third counterclaim additionally seeks the statutory penalties allowed by the statute, both the second and third counterclaims are essentially actions for negligence that seek actual damages. The SCCPC remedies "are in addition to other remedies available for the same conduct under law other than this title" (37-5-108).

If this Court determines that the defendant does have the right to a jury trial on some or all of its defenses and counterclaims, then the Court may consider whether the counterclaim is compulsory or permissive. When, as in this case, the complaint sets out an equitable cause of action, the defendant does not waive his right to a jury trial by asserting a legal and compulsory counterclaim. *North Carolina Federal S & L v. DAY Corp.*, 298 S.C. 514, 517 (1989). Rule 53 clearly contemplates the Defendant's right to a jury trial of defenses and counterclaims as it provides that the mere demand under Rule 38 is sufficient to transfer the trial of legal issues to the circuit court to be heard by a jury. The rule does not distinguish between permissive and compulsory.

In the present case, the Defendant's second counterclaim sounds in negligence and is based on unconscionable conduct at the origination of the loan. Although, SCCPC Section 37-5-108 forms the duty alleged to be breached, the Defendant did not express the second counterclaim as a statutory claim. In fact, 37-5-108 (7) states that "The remedies of this section are in addition to remedies available for the same conduct under law other than this title."

The third counterclaim also sounds in negligence based on a violation of § 37-10-102(a) of South Carolina's Consumer Protection Code [hereinafter SCCPC]. In it, the Defendant seeks actual damages to be determined, plus the total amount of the loan finance charge, double the amount of the excess loan finance charge or other charges or fees paid by Smith and statutory damages for the plaintiff's failure to ascertain Defendant's preference as to legal counsel prior to closing. S.C. Code Ann. § 37-10-102(a). Even if the Court were to disregard the Defendant's phraseology as a cause of action for negligence, the Plaintiff's position fails to even apply the appropriate analysis regarding the statutory remedy.

For example, the statutes establishing both the legal right that is the subject of the Defendant's third counterclaim and a corresponding statutory remedy for that right are found in S.C. Code Ann Sections 37-10-102(a) and 37-10-105(A). These sections neither grant nor prohibit jury trials. In fact, Section 37-10-102(a)¹ requires, for certain personal

¹ 37-10-102. Attorney's fees and other charges on mortgage loans for personal, family or household purposes.

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose -

(a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

or family purpose loans, that a creditor ascertain the preference of the borrower as to the legal counsel that will represent him when closing the loan. This section says nothing about procedure. On the contrary, Section 37-10-105(A) authorizes two remedies for debtors injured by a creditor's failure to comply with § 37-10-102(a). First and foremost the debtor may bring an action to recover actual damages. This clearly indicates that the Defendant's action is triable to a jury.

Additionally, the debtor has a *right*, in the action for damages, to recover a statutory penalty in an amount to be determined by the court.² However, this power of the judge in no way compromises the right to a jury trial upon factual issues raised in the action for damages. Significantly, § 37-10-105(A) is silent as to any requirement regarding whether a judge or jury should try issues of fact raised by the statutory cause of action for damages. Furthermore, there appears to be no case on point denying the borrower the right to a jury trial in an action based on an attorney preference violation. Therefore, no legal authority prohibits a jury trial nor requires a bench trial in an action for damages under § 37-10-105(A) or in a negligence claim couched in unconscionability language.

II.

Defendant denies the basis of Plaintiff's motion which mischaracterizes the claims as statutory claims. However, the Defendant would have the right to a jury trial even if the Court finds these are statutory actions. To address the Plaintiff's argument of

² Section 37-10-105 reads, in part,

If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.

the counterclaims as statutory actions, one must look to authority that establishes the general analysis to be made to determine whether a statutory action enjoys a right to a jury trial.

The proper analysis to follow to determine a party's right to a jury was established in *C.W. Matthews Contracting Co., Inc. v. South Carolina Tax Commission*, 267 S.C. 548 (1976). In that case the Supreme Court said that "if the case is a statutory action, a jury will be allowed only if the action is in the nature of a suit triable at common law in 1868." *Id.* at 553. The Court then assessed the following questions: (1) Whether the right sued on was recognized in 1868 as triable to a jury; and (2) If not, whether the statutory action is "in the nature" of a common-law suit. *Id.*; see also *Pelfry v. Bank of Greer*, 270 S.C. 691, 693-94 (1978) (following *C.W. Matthews Contracting Co., Inc.*, analysis to determine whether a shareholder's derivative action is entitled to a jury trial of factual issues and finding that such a suit historically sounded in equity and is not so entitled). Thus, while the statute themselves may be unclear regarding what procedure is required regarding the statutory violation itself and the accompanying penalties, the Plaintiff's contention that the statute must authorize jury trials expressly is not accurate.

There is no contention that the statutes merely codify or reproduce actions at common law. However, the inquiry does not end there. Significantly, the analysis does not require that the statutory action be precisely equivalent to an action at common law. Indeed, as the South Carolina Supreme Court said in *MIMS Amusement v. Law Enforcement Division*, "The right to a jury trial encompasses forms of action that have arisen since the adoption of the Constitution in those cases where the later actions are of like nature to actions which were triable at common law at the time of the adoption of the

Constitution." 366 S.C. 141, 149 (2005) (finding that the right to a jury exists in a civil forfeiture action). The Defendant's right to a jury trial if his second and third counterclaims are viewed as statutory, will turn upon the second branch of the *C.W. Matthews* analysis, that is to say, whether the statutory action is in the nature of a common-law suit.

A.

Two considerations support the conclusion that an action under the SCCPC satisfies the second step of the inquiry. Because suits triable in the English courts of law were tried to juries, it is useful to consider whether the statutory action and remedy are analogous to actions and remedies of which the English common law courts took cognizance. See *Tull v. United States*, 481 U.S. 412 (1987). We first examine the nature of the remedy sought and then turn to nature of the statutory basis of liability.

It is appropriate to look to the remedy sought because it often is repeated that an action to recover money damages is a legal remedy, and so it was at common law. See, e.g., *Cooper v. Poston*, 326 S.C. 46 (1997) ("Under the common law, legal actions for the recovery of money were triable by a jury."). The basic recovery authorized under § 37-10-105(A) is actual damages caused by the creditor's failure to comply with Chapter 10 of the SCCPC. The nature of the recovery under this section, then, is in the nature of the recovery allowed for a legal action under common law. Because the statutory remedy in this case is identical to the remedy at common law, the statutory action is, under the terms of the current inquiry, in the nature of a common law suit triable to a jury.

B.

Turning to the nature of the statutory action, it is generally true that the right to a jury depends upon whether the action is legal or equitable. *Lester v. Dawson*, 327 SC 263, 267 (1997). Case law in South Carolina provides scant guidance for determining how similar a statutory action must be to a common law analogue, but guidance may be sought from the U.S. Supreme Court. Interpreting the Seventh Amendment's guarantee to a jury trial, that Court has stated more than once that a statutory action comes within the amendment's guarantee "so long as the claims can be said to 'soun[d] basically in tort' and seek legal relief." *Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 709 (1998) (citing *Curtis v. Loether*, 415 U.S. 189, 195-196 (1974)).

The nature of the claims herein are in the nature of common law tort actions. Specifically, to impose liability under § 37-10-105(A) requires a showing akin to that of the typical negligence action. Hence, the Defendant can pursue damages for the negligent breach of the statutory duty (negligence per se) as well as for the statutory penalties. Likewise, the second counterclaim is one for negligence. The Plaintiff's characterization of it as a statutory claim is misplaced. However, the same analysis applies.

Of course a negligence action itself is a modernized form of the common law action of trespass on the case. See, e.g., *Jenkins v. North Carolina Department of Motor Vehicles*, 244 N.C. 560, 563, 94 S.E.2d 577 (1956) ("Negligence, . . . , is an outgrowth of the action of trespass on the case . . ."); 57A Am. Jur. 2d Negligence § 18 (1989) ("Under common-law practice, trespass on the case is the proper remedy for . . . negligence").

1.

One mode of analysis that will demonstrate the tort nature of the action under consideration is to determine what action, if any, an aggrieved party could pursue in the

absence of the statutory remedy. Had the Legislature not established a statutory action to remedy violations of SCCPC, a consumer-debtor would be able to bring a negligence action against any creditor that violates the statutory duty. When a statute creates a right and corresponding duty but does not also grant an accompanying remedy, a cause of action may be implied under the test set out in *Rayfield v. SC Dep't of Corr.*, 297 S.C. 95 (1988). In that case, the Supreme Court said that a duty created by statute would sustain a cause of action for negligence where two elements are present. First, the statute's essential purpose must be to protect the party against the kind of harm suffered, and, second, the party must be a member of the class the statute is intended to protect. *Id.* at 103.

It is clear from the provisions of South Carolina's Consumer Protection Code (SCCPC) that a common law action based on the duties found therein, may be implied under both branches of the *Rayfield* analysis. As to the first part, one underlying purpose of Title 37, and particularly the unconscionability and attorney preference provisions, is to protect consumers against any unfair practices by suppliers of consumer credit. S.C. Code Ann. § 37-1-102(2)(d); *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 86 (1997). Thus, SCCPC was intended to protect persons such as the Defendant in this case.

Turning to the second part of the test, the party asserting the claim, here the Defendant, undoubtedly is a member of the class that the statute intends to protect. Under the SCCPC, a "consumer" is a debtor to whom credit is extended in a consumer credit transaction. S.C. Code Ann. § 37-1-301(10). A consumer credit transaction, in turn, means a consumer loan as set forth under § 37-3-104. S.C. Code Ann. § 37-1-301(11). Primarily, a consumer loan is defined as debt incurred for personal, family, or

household purposes where the debt either is less than \$25,000 or secured by an interest in land. S.C. Code Ann. § 37-3-104. Clearly, the defendant debtor in this case is a consumer under the plain meaning of the SCCPC, and, as such, he is a member of the class that the SCCPC intends to protect. Therefore, under the Plaintiff's expression of the counterclaims as statutory or under the Defendant's expression of the counterclaims as negligence, the Defendant is entitled to a jury trial for the violation of § 37-10-102(a) based on the *Rayfield* test. The relevance of the foregoing analysis stems from its demonstration that the counterclaims are in the nature of actions recognized under the common law and merely implied tort actions codified by SCCPC.

2.

Additional support for the tort-like nature of the statutory action is evident from a comparison of the elements that must be shown to impose liability both under a statutory action and an action for negligence. Actionable negligence requires proof of the traditional common law elements of a legal duty, the breach of which proximately causes the plaintiff's injuries. *Montgomery v. CSX Transportation*, 656 S.E.2d 20, 25 (2008). The elements of proof under § 37-10-105(A), similarly, require a showing that the opposing party breached a duty imposed by Chapter ten (10) of the SCCPC thereby causing harm to the claimant.

The foregoing considerations have shown that the Plaintiff's characterization of the counterclaims as statutory action does not entitle it to an order from the Court denying the defendant in this case a jury trial on the counterclaims. The dispositive question, as stated above, is whether the defendant's counterclaims are "in the nature of a suit triable at common law." *C.W. Matthews Contracting Co., Inc.*, 267 S.C. 548, 553

(1976). The nature of the actions under consideration sound in tort, specifically, the tort of negligence, which is the modern cause of action that grew out of the common law action of trespass on the case. Furthermore, § 37-10-105(A) creates a cause of action for money damages, which is in the nature of a tort remedy, and § 37-10-102 creates a duty that, absent a statutory remedy, could form the basis of a negligence action. The statutory action and remedy, then, are in the nature of an action at law triable to a jury. As such, the defendant is entitled to a jury trial on the factual issue of whether or not the plaintiff breached duties outlined in the provisions of the SCCPC, and the plaintiff's motion to strike the jury demand should be denied accordingly.

II.

To show that the Defendant is entitled to a jury trial in this case exhaustively addresses the face of the plaintiff's objection as argued in its motion to strike. However, the plaintiff also contended at oral argument that the defendant waives any right to a jury trial because the counterclaim is permissive and not compulsory. In the interest of thoroughness, the defendant now addresses that issue briefly.

Only where the counterclaim is permissive does the defendant waive his right to demand a jury trial. *Johnson v. South Carolina National Bank*, 292 S.C. 51, 55 (1987) (per curiam). The distinction between permissive and compulsory is vital because where a counterclaim is not asserted, it may be forever barred by the doctrine of res judicata from being litigated in the future. See *Jaynes v. City of Fairfield*, 303 S.C. 434, 438 (Ct. App. 1991). Aware of the significance of this question, the Court of Appeals has adopted the rule that a party does not waive his right to a jury trial where it is unclear whether or not his legal counterclaim is permissive or compulsory. *Keels v. Pierce*, 315 S.C. 339,

342 (Ct. App. 1993) (per curiam). Where uncertainty exists, the court will decide the status of any ambiguous counterclaim and then may order a separate trial if such a counterclaim proves to be permissive rather than compulsory. Nevertheless, the § 37-10-105(a) counterclaim herein is compulsory for the following reasons.

SC Rule of Civil Procedure 13(a) defines a compulsory counterclaim as one that arises out of the transaction or occurrence that is the subject matter of the dispute. The test used when determining the compulsory nature of a counterclaim requires a consideration of whether there is a "logical relationship" between the claim and the counterclaim. *North Carolina Savings and Loan Association v. DAV Corp.*, 298 S.C. 514 (1989).

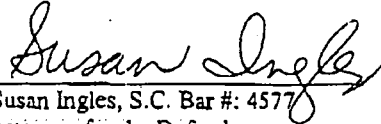
South Carolina case law is sparse regarding specifically how closely related a counterclaim must be to a corresponding claim to create a logical relationship. In contrast, the federal courts often have analyzed Rule 13(a) under the logical relationship test. Case law applying the test in the federal courts generally looks to whether the two claims share issues of law or fact. See, e.g., *Sue & Sam Mfg. Co. v. B-L-S Const. Co.*, 538 F.2d 1048, 1053 (4th Cir.1976) (finding a counterclaim for negligence is compulsory to a third party claim for indemnity where the claims both arise out of the same transaction and share common issues of fact); *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3rd Cir. 1961) (Describing claims as logically related if factual issues of both claims are offshoots of the same basic controversy). It appears, too, that neither South Carolina nor the federal courts have given the words "logical relationship" a purely legal or specific meaning.

What state level cases there are that address compulsory counterclaims tend just to mention the test and draw conclusions from it without further elaborating on what the "logical relationship" test specifically seeks to measure. However, the decisions can be considered as acknowledging the federal understanding. For example, in *DAV Corp.*, the plaintiff sued the defendant to foreclose on a note and mortgage. The defendant counterclaimed alleging breach of a subsequent oral contract (modifying the terms of the note), breach of a joint venture agreement, breach of fiduciary duty, wrongful dissolution of a joint venture, violation of the S.C. Unfair Trade Practices Act, and breach of two oral contracts to purchase DAV Corp.'s interest in the venture. 298 S.C. 514, 517. The Supreme Court stated that it would apply the "logical relationship" test and then held that all of defendant DAV's counterclaims were logically related to the foreclosure action except for the claims based on the two subsequent oral contracts, which were unrelated to the transaction that created or modified the note and mortgage. *Id.* at 518-519.

The defendant's counterclaims under examination in this brief alleges breach of a statutory duty, which claim is logically related to the plaintiff's action based on the plain meaning of the word "logical" as well as the plain language of S.C. Rule Civ. Pro. 13(a). The defendant's counterclaims, as summarized above in the first section, clearly rise out of the transaction that is the subject of the current dispute. Additionally, the counterclaim shares issues of fact with the foreclosure action. The entire basis for the plaintiff's claim depends upon the defendant's due execution of certain loan documents, namely, the promissory note and the mortgage. The substance of the defendant's counterclaim, too, rests upon the plaintiff's compliance with the attorney preference provision of the SCCPC, which itself is a document executed in connection with the loan transaction.

Because the foregoing shows that the defendant's claim clearly is encompassed by the language of Rule 13(a) as measured by the "logical relationship" test, it is a compulsory counterclaim, and the defendant should receive a jury trial of the factual issues contained therein.

SOUTH CAROLINA LEGAL SERVICES



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Attorney for the Defendant

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3 - 5, 2009
Greenville, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE 2008-CP-23-6833

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
MAR 23 2009

WELLS FARGO BANK, NA,

Plaintiff,

V.

DEFENDANT MICHAEL SMITH'S MOTION
PURSUANT TO SCRPC RULE 59

MICHAEL SMITH, et al,

Defendant(s).

The Defendant Michael Smith moves for reconsideration of the Order of the Court dated March 12, 2009 in the particulars set forth below and requests that the Court deny the Motion to Strike Jury Demand:

1. The Court's Order is premised on incorrect reasoning and analysis for determining the nature (compulsory or permissive) of the Defendant's counterclaim for violation of the Plaintiff's duty to ascertain the Defendant's attorney preference. Insofar as the Court concluded that, in an action for foreclosure, only those counterclaims affecting the enforceability of the Note or Mortgage are compulsory under the "logical relationship" test of *N.C. Federal Savings & Loan Assn. v. DAV Corp.*, 298 S.C. 514 (1989), the Court unduly restricted the scope of that test. See *Order* at p. 9

- a. No appellate court in South Carolina has directly held that the question of a "logical relationship" in the context of a mortgage foreclosure only means "affects the enforceability" of the Note and Mortgage. There are only two South Carolina cases that address the question of what constitutes a compulsory counterclaim in the context of a foreclosure action. These are *N.C. Fed. S & L Assn.*, and *Advance International, Inc. v. N.C. Nat. Bank of S.C.*, 316 S.C. 266 (Ct. App. 1994) *vacated on other grounds by* 320 S.C. 532 (1996). Though both cases hold that a counterclaim challenging the enforceability of a Note is compulsory, they do not hold that counterclaims that do not allege a defective Note or Mortgage are *per se*

~~not compulsory. Such a rule would divert attention away from the relevant inquiry of the logical relationship test, which is whether or not the claim and counterclaim "arise out of the same transaction or occurrence."~~
S.C. Rule Civ. Pro. 13(a).

- b. Under Rule 13(a) and the logical relationship test, the Court should undertake a comparison of the issues of law and fact that will be necessary to support both the claim and counterclaim. If the Court finds that the factual and legal issues are overlapping or are offshoots of the same basic controversy, then the counterclaim is compulsory. *See, eg., Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3rd Cir. 1961) (explaining the "logical relationship" test as used under federal jurisdiction); *Central States Underwater Contracting Inc. v. R.L. Morrison & Sons, Inc.*, 45 F.3d 425 (4th Cir. 1995) (applying SC law and analyzing the relationship between the facts and issues of plaintiff's claim to determine whether it would have been a compulsory counterclaim in a prior action by defendant).
- c. In the case at hand, the defendant's counterclaim arises out of a transaction which is the same transaction as the one creating the alleged rights upon which the plaintiff has brought its cause. All of the documents that form the basis of the plaintiff's claim and the defendant's counterclaim were executed at the same time on the same day by the same parties. The South Carolina Supreme Court, in *N.C. Federal Savings & Loan Assn. v. DAV Corp.*, stated, "The 'logical relationship' test is by far the most widely accepted because of *its flexibility*." 298 S.C. 514, 518 (1989) (emphasis added). Similarly, the D.C. Circuit noted, in a case cited with approval in *N.C. Fed. S & L Assn.*, that "'Transaction' is a word of flexible meaning." *Columbia Plaza Corp. v. Security Nat. Bank*, 525 F.2d 620, 625 (1979).

Simply put, the rule that a counterclaim is compulsory in a foreclosure action only if it affects the enforceability of the note affronts the very purpose of having a flexible test, one which should be applied by considering the nature of the claims and the evidence to be presented and not simply the effect that the counterclaim has on the plaintiff's rights under contract.

2. The Court's determination that § 37-10-105 commits the trial of the defendant's action for damages to the court misreads that statute. The Court found that the language "If the court finds as a matter of law that . . ." settles the question of liability in an

action brought by § 37-10-105(A) squarely with the court. *Order p. 9* However, the cited language appears nowhere in the part of the statute expressly creating the cause of action upon which the defendant has counterclaimed. That section reads, in relevant part,

If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.

§ 37-10-105(A).

The language quoted in the Order does appear in the statute, but in a completely different subsection, which commits to the Court the determination of whether or not the contract entered into was unconscionable. S.C. Code § 37-10-105(C). This subsection has no relevance to the question of the defendant's right to a jury trial under § 37-10-105(A).

3. Furthermore, the Court did not adequately analyze whether the Defendant's third counterclaim entitles the Defendant thereunder to a jury trial as preserved by the South Carolina Constitution. Specifically,

- a. The question is not whether borrowers had a right to have their attorney preference ascertained in 1868, but rather, whether the statutory cause of action is "in the nature" of an action triable at common law in 1868. *C.W. Matthews Contracting Co., Inc. v. South Carolina Tax Commission*, 267 S.C. 548, 553 (1976). It is clear that a statutory action need not be a cause of action recognized in 1868. *Medlock v. 1985 Ford F-150 Pick Up VIN 1FTDF15YGFNA22049*, 308 S.C. 68 (Finding owner of property subject to forfeiture action proceeding in rem enjoys a right to a jury even though common law forfeiture proceeded only in personam). *MIMS Amusement v. Law Enforcement Division*, 366 S.C. 141, 149 (2005) ("The right to a jury trial encompasses forms of action that have arisen since the adoption of the Constitution in those cases where the later actions are of like nature to actions which were triable at common law at the time of the adoption of the Constitution.")

b. The question of whether a statutory cause of action is similar to a cause of action triable to a jury in 1868 requires consideration of the characterization of the action as one at law or in equity. *Lester v. Dawson*, 327 S.C. 263, 267 (1997) ("Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable). Such an inquiry will lead the Court to inquire into the nature of the recovery sought. Where money damages are sought, the cause of action traditionally has been legal, and actions at law were entitled to a jury trial under the Constitution. See *Cooper v. Poston*, 326 S.C. 46, (1997) ("Under the common law, legal actions for the recovery of money were triable by a jury."). Section 37-10-105(A) authorizes the recovery of actual damages separate and apart from the recovery of a statutory penalty.

c. Moreover, the South Carolina Supreme Court, for well over a century, has recognized the rule that statutory actions which substitute for common law actions are triable to a jury by right. See *Frazee v. Braton*, 26 S.C. 348 (1887). Quoting from *Frazee*, "The great right of trial by jury has existed from time immemorial in all those forms of actions at common law. . . such as. . . case, etc., and no doubt such right exists in the actions provided by the Code as a substitute for these common law actions." (emphasis added).

The statutory action under consideration here shares many characteristics with the common law action of trespass on the case and with its more familiar common law descendent, the negligence action. *Jenkins v. North Carolina Dept. of Motor Vehicles*, 244 N.C. 560, 563, 94 S.E.2d 577 (1956) ("Negligence, . . . is an outgrowth of the action of trespass on the case . . ."); 57A Am. Jur. 2d Negligence § 18 (1989) ("Under common-law practice, trespass on the case is the proper remedy for . . . negligence.").

d. The Defendant's analysis of *Rayfield v. SC Dep't of Corr.*, 297 S.C. 95 (1988) in its previous memorandum demonstrates that the statutory obligation imposed by § 37-10-102 and sued upon under § 37-10-105(a) would support an implied right of action in negligence, which clearly is a cause of action triable to a jury. Thus, that analysis was intended to show that the cause of action authorized under § 37-10-105(a) is in the nature of a tort action, not that it is a tort action recognized at common law in 1868. Article I, Section 14 of South Carolina's Constitution requires no more.

4. This Court exceeded its jurisdiction by ruling on the plaintiff's motion to strike the defendant's jury demand. The Reporter's Note appended to the 2002 amendment to Rule 53 of the Rules of Civil Procedure explains that a case in which a jury demand has been made will be returned to the circuit court.¹ This Court has no discretion to rule on the motion. The Court confirmed the order of reference filed on September 24, 2008. The Court to which the case was referred has no jurisdiction to confirm that order. Any ruling on thereon is for the Circuit Court from which it was referred or to which it should have been transferred upon the filing of the jury demand. This case should be returned to the circuit court for a determination of the issue of the defendant's right to a jury trial.

5. The Court inappropriately and unnecessarily made findings of facts, not admitted or decided by the pleadings nor introduced into evidence. As such, the Court contradicted the rule cited in its own order that "Whether a party is entitled to a jury trial is *determined by the pleadings*." See Order at p. 3 (emphasis added).

Generally, the first two paragraphs under the **Facts** section of the Court's Order (p. 1-2) and the final paragraph of Part three of the Court's **Conclusions of Law** (Order at p. 10-11) erroneously make findings of fact that are unnecessary to a ruling on the Motion to Strike Jury Demand.

Specifically, findings set forth in the Order include but are not limited to the following:

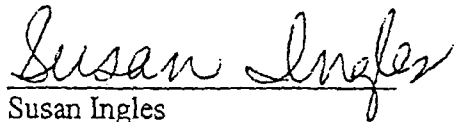
- a. Smith's counterclaim has no merit. Order at p. 10
- b. On April 10, 2003, at the time Smith applied for the loan, he signed a form entitled "Attorney/Insurance Preference Check List". Order at p. 10
- c. On this form, he selected Harvey Breland, Esquire, as his attorney. Order at p. 11
- d. Because Smith would not be entitled to relief as against Wells Fargo on his counterclaim, it can hardly be said he would be entitled to a jury trial on it. Order at p. 11
- e. Smith is in default on his loan payments as of June 1, 2008. Order at p. 2

¹SCRCF Rule 53, Note to 2002 Amendment states, "If there are counterclaims requiring a jury trial, any party may file a demand for a jury under Rule 38 and the case will be returned to the circuit court."

- f. Smith still owes \$77,460.63 on the debt, with interest from May 1, 2008, advances, late charges, and also for the costs and disbursements of this action, including attorneys fees. *Order* at p. 2
- g. On April 29, 2003, Smith gave a Fixed Rate Note ("Note") to Wells Fargo Home Mortgage, in the principal sum of \$83,000. *Order* at p. 1
- h. That the defendant gave Wells Fargo Home Mortgage, Inc., a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road, Greenville, SC 29617, as well as a 2003 Fleetwood mobile home. *Order* at p. 1
- i. Wells Fargo is the successor by merger to Wells Fargo Home Mortgage, Inc." *Order* at p. 1

These unnecessary and unsupported findings of fact should be removed from the Order.

Respectfully submitted,



Susan Ingles
Attorney for the Defendant

March 27, 2009

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF GREENVILLE) COURT OF COMMON PLEAS
3
4 Wells Fargo Bank, NA,) Case No.: 08-CP-23-6833
5 Plaintiff,)
6 vs.) TRANSCRIPT OF TESTIMONY
7 Michael Smith, et al.,) February 23RD, 2009
8 Defendant(s),) Greenville, South Carolina
9)

10
11 B E F O R E:

12 The Honorable Charles B. Simmons, Jr.
13 Master in Equity for Greenville County

14 A P P E A R A N C E S:

15 Sean M. Foerster, Esquire
16 Attorney for Plaintiff

17 Susan Ingles, Esquire
18 Attorney for Defendant
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Ann Dickey Campbell, CVR
Court Reporter

GREENVILLE COUNTY COURTHOUSE

1 MR. FOERSTER: Your Honor, this case number is 08-6833.

2 This is Wells Fargo Bank versus Michael Smith.

3 This is a contested foreclosure case. Mr. Smith gave a
4 fixed rate note to Wells Fargo Home Mortgage back in 2003 for
5 \$83,000 that was secured by a real estate mortgage on the
6 property in Greenville.

7 On June 1st, 2008, Mr. Smith defaulted on the payments. We
8 filed this foreclosure action September 9th, 2008.

9 On November 7, 2008, Mr. Smith filed an Answer and
10 Counterclaim and demanded a jury trial.

11 He asserted three counterclaims, the first one for an
12 accounting where he seeks an accounting of all payments credited
13 and charges assessed to his account. He seeks a setoff for any
14 overcharges or unsubstantiated charges now.

15 The second counterclaim is for unconscionability. He is
16 claiming that Wells Fargo knew or should have known his
17 inability to protect his own interests and his inability to
18 repay the loan. He is also claiming that the ultimate amount of
19 the debt bears no reasonable relationship to the amount of value
20 received by Mr. Smith in the loan transaction.

21 The final counterclaim is claiming that there was a
22 violation of the Attorney Preference Statute back during the
23 origination of his loan. That's South Carolina Code §37-10-102,
24 and he's seeking the statutory penalty on that claim.

25 Your Honor, my argument on my Motion to Strike his jury

GREENVILLE COUNTY COURTHOUSE

1 demand here is that first and foremost, a foreclosure is an
2 action in equity. Normally, a party has no right to a jury trial
3 of issues raised in a foreclosure action.

4 Within a foreclosure action, however, they can get a jury
5 trial, but only if the counterclaim is legal and compulsory. In
6 the foreclosure context, the test of whether a counterclaim is
7 compulsory is whether there is a logical relationship between
8 the enforceability of the note and the counterclaim. I am citing
9 North Carolina Federal Savings & Loan v. D.A.V. Corporation,
10 Your Honor. If the counterclaim is permissive, however, the jury
11 trial was waived by Mr. Smith asserting it in his foreclosure
12 action.

13 Turning to each of those counterclaims, first, on his
14 accounting counterclaim, simply put, the claim for an accounting
15 is an equitable claim, and I'm citing Laughon v. O'Braitis for
16 that as well as Historic Charleston Holdings v. Gerard Mallon,
17 and also, Your Honor, I argue that his accounting counterclaim
18 is permissive. It challenges only application of mortgage
19 payments made and charges put onto that accounting. It's not
20 challenging whether this mortgage and note is enforceable in
21 general. Therefore, Your Honor, I claim that he has no right to
22 a jury trial on that accounting counterclaim.

23 Moving on to the unconscionability counterclaim, under the
24 Consumer Protection Code, this is a matter for the Court to
25 decide as a matter of law, not for a jury. If you look at the

GREENVILLE COUNTY COURTHOUSE

4
1 language of the unconscionability statute, §37-5-108(1), it
2 says, "If the court as a matter of law finds the agreement or
3 transaction unconscionable, the court may refuse to enforce the
4 agreement." Further down in that statute, Your Honor, Subsection
5 (3), it says, "If it is claimed or appears to the court that the
6 agreement or transaction is unconscionable, the parties shall be
7 afforded a reasonable opportunity to present evidence to aid the
8 court in making the determination." Finally, in §37-10-105(c),
9 it says, "If the court finds as a matter of law that the
10 agreement or transaction is unconscionable the court may grant
11 relief or damages."

12 Your Honor, I understand that The Restatement is not
13 mandatory authority in your court, but it is persuasive and it
14 also supports my argument on this issue. The Restatement
15 (Second) of Contracts, §208, cmt. f says that, "The
16 determination that a contract is unconscionable is made by the
17 Court in light of all material facts. Incidental findings of
18 fact are made by the court rather than by a jury."

19 Therefore, Your Honor, I am arguing that he is not entitled
20 to a jury trial on his unconscionability counterclaim.

21 Finally, the Attorney Preference Statute Violation
22 counterclaim, first and foremost, this is a statutory claim, and
23 that statute does not expressly give a right to a jury trial on
24 it. I've got case law here saying that if the case is a
25 statutory action, a jury will be allowed only if the action is

GREENVILLE COUNTY COURTHOUSE

5
1 in the nature of a suit triable at common law in 1868 at the
2 time of our Constitution, and that is C. W. Matthews Contracting
3 Company v. South Carolina Tax Commission.

4 Your Honor, the Attorney Preference Statute is not really
5 grounded in any common law cause of action that was in existence
6 in 1868. I've got case law from 2003, Tilley v. Pacesetter
7 Corporation, which basically holds that an Attorney Preference
8 Statute violation is not grounded in fraud, and I can't think of
9 any other common law cause of action in which it would be
10 grounded, Your Honor.

11 Second, the language of the enforcement provision of that
12 statute, §37-10-105, also has a similar type language saying
13 that it is up to the court to decide the amount of the penalty
14 in that statute.

15 Third, Your Honor, I argue that the Attorney Preference
16 counterclaim is a permissive counterclaim. It has no logical
17 relationship to the enforceability of the note and mortgage. He
18 can only get statutory penalties. He cannot seek rescission or
19 to void the mortgage on that counterclaim. Therefore, the
20 counterclaim is permissive and Mr. Smith has waived his right to
21 a jury trial by asserting it in this foreclosure action.

22 And finally, Your Honor, ~~I've got to bring this up.~~ I am
23 holding in my hand a signed copy of the Attorney Preference -- I
24 mean, a checklist right here where Mr. Smith chose Harvey
25 Breland as his attorney. I don't think he can lay on his

GREENVILLE COUNTY COURTHOUSE

1 counterclaim, much less be entitled to a jury trial on it.

2 MS. INGLES: May I see a copy?

3 MR. FOERSTER: Yes.

4 BY THE COURT: All right, anything else, then, from the
5 Plaintiff on the Motion to Dismiss ---

6 MR. FOERSTER: No, Your Honor, that's my argument.

7 BY THE COURT: --- or the Motion to Strike? All right,
8 Ms. Ingles, focus with me just on the substance of the
9 counterclaims. What authority is there that these counterclaims
10 entitle one to a jury trial?

11 MS. INGLES: Well, I think you go back to what Mr.
12 Foerster cited, which is whether or not these represent actions
13 that might have been triable at common law, and I think they
14 have been couched as really -- I don't know why that's not a
15 negligence action, starting with the Attorney Preference
16 Statute. They are required by statute to give the mortgagor an
17 opportunity to choose an attorney. They are supposed to do that
18 prior to the closing. I haven't had an opportunity to compare
19 the date on this to see if it was prior to the closing.

20 BY THE COURT: All right, but assume that what your
21 client says is 100% correct. How does that entitle them to a
22 jury trial on a statutory violation?

23 MS. INGLES: Well, because the statute doesn't preclude
24 a jury trial, and I think that I've made the demand for the jury
25 trial. There is nothing in the statute that precludes it, so I

GREENVILLE COUNTY COURTHOUSE

1 don't think that you can say that it's required to be no jury
2 trial at all.

3 BY THE COURT: All right, how about on the accounting
4 issue?

5 MS. INGLES: Well, I think that the accounting issue, I
6 don't disagree with necessarily, but I think that it should be
7 also tried by a jury as far as the amounts that are owed and
8 whether or not they are owed. Those are questions of fact.

9 BY THE COURT: I understand, but what authority -- and
10 I have not researched this, but it's always been my
11 understanding that an accounting was a non-jury equitable type
12 of issue and I'm just not aware of any authority to ---

13 MS. INGLES: And I'm not either, but on the other two,
14 I think there's no question. On the two statutory causes of
15 action, because the jury trial is not precluded, and I think if
16 you go with the -- you know, the statute on the Consumer
17 Protection Code is not just for statutory damages, but also for
18 actual damages, and if you go to the Rayfield -- I think the
19 Rayfield case was the one that set out the two parts of an
20 analysis as to whether or not there is an action that could be
21 tried by a jury that's created in the statute. I think clearly
22 negligence is -- you're talking about a per se violation of the
23 statute, and clearly that's at least negligence if not more.

24 The first part of the Rayfield analysis is the underlying
25 purpose of the statute, and I think on the Attorney Preference

GREENVILLE COUNTY COURTHOUSE

1 requirement, clearly, that's to protect consumers from unfair
2 practices of consumer predator. And it was certainly intended to
3 protect -- the statute is intended to protect those individuals,
4 so it meets that part of the test.

5 The second would be whether or not the Defendant is a
6 member of that class. That's clearly the case here. And in fact,
7 this is not a traditional foreclosure in that it's a piece of
8 land and a mobile home, and part of the action is asking that
9 the mobile home be de-titled, which apparently it wasn't at the
10 time of the closing, and this goes back to one of the very
11 reasons that you are entitled to choose your own attorney.

12 I've done many real estate closings in the past, and I've
13 been asked to, you know, present an Attorney Preference form to
14 someone at the time of closing. I don't think that's something
15 that is allowed under the statute, and if it's done that way, I
16 don't know how you can say that that's not connected to the very
17 heart of what the foreclosure is all about, whether or not the
18 note and mortgage and the closing was done properly, and the
19 choice of an attorney and the fact that we have a statute that
20 clearly allows you to have that disclosed to you prior to, I
21 think it's two or three days prior to the closing, that that's
22 ~~going to be disclosed to you, so you have the right to choose an~~
23 attorney, so that the person is -- that you have an actual
24 choice, not as something to sign once the person has already
25 been chosen for you. Clearly, in our counterclaim, we said that

GREENVILLE COUNTY COURTHOUSE

9
1 he was not given that opportunity. He may have signed the
2 document at closing that said he was given an opportunity, but
3 unless it's dated prior to the closing, it's not effective.

4 MR. FOERSTER: Your Honor ---

5 BY THE COURT: Well, I'm going to give Ms. Ingles ten
6 days to come up with authority that provides the right to a jury
7 trial on these issues, unconscionability, accounting and
8 attorney preference, and then once I receive that, I will rule.
9 I'm not aware of any law that's out there, Ms. Ingles, but I am
10 absolutely open to considering any of those authorities.

11 MS. INGLES: Yes, sir.

12 MR. FOERSTER: Thank you, Your Honor.

13 BY THE COURT: All right, thank you.

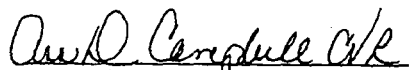
14 ----- END OF TRANSCRIPT -----
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GREENVILLE COUNTY COURTHOUSE

1 I, the undersigned Ann D. Campbell, Court Reporter, Office
2 of Master in Equity for Greenville County, South Carolina, do
3 hereby certify that the foregoing is a true, accurate and
4 complete transcript of record of all the proceedings had and
5 evidence introduced in the hearing of the captioned case,
6 relative to appeal, before The Honorable Charles B. Simmons,
7 Jr., as Master in Equity for Greenville County, South Carolina,
8 on the 23RD day of February, 2009.

9 I do further certify that I am neither of kin, counsel, nor
10 any interest to any parties hereto.

11 May 1ST, 2009

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14 Ann Dickey Campbell, CVR
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GREENVILLE COUNTY COURTHOUSE

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr.
Master in Equity

Case No. 2008-CP-23-6833

Wells Fargo Bank, N.A.

Respondents,

v.

Michael Smith; South Carolina
Department of Motor Vehicles; M&T
Properties, Inc.; State of South Carolina;
Arthur State Bank; South Carolina
Department of Probation, Pardon and
Parole Services

Of Whom Michael Smith is the
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

11-23, 2009

Susan Ingles
Susan Ingles
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr.
Master in Equity

Case No. 2008-CP-23-6833

Wells Fargo Bank, N.A.

Respondents,

v.

Michael Smith; South Carolina
Department of Motor Vehicles; M&T
Properties, Inc.; State of South Carolina;
Arthur State Bank; South Carolina
Department of Probation, Pardon and
Parole Services

Of Whom Michael Smith is the
Appellant.

FINAL BRIEF OF APPELLANT

Susan Ingles
South Carolina Legal Services
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STATEMENT OF ISSUES ON APPEAL

1. Did the Master in Equity err in making findings of fact and concluding the third counterclaim had no merit based on documents and information not in evidence when the question of right to jury trial is to be determined from the pleadings?
2. Did the Master in Equity err in holding the counterclaims to be permissive and denying Appellant's jury demand?
3. Did the Master in Equity err in characterizing the counterclaims ones not entitled to a jury trial?
4. Did the Master in Equity in holding that in a foreclosure case, the test for whether counterclaims are compulsory or permissive is whether the counterclaims have a "logical relationship" to the mortgage company's right to enforce the promissory note?
5. Did the Master in Equity err in refusing to acknowledge that Defendant may recover actual damages for negligence associated with its statutory duty under 37-5-108 and 37-10-102 as well as statutory damages thereunder?
6. Did the Master in Equity exceed his jurisdiction by ruling on the Respondent's motion to strike the Appellant's jury demand?

STATEMENT OF THE CASE

This action commenced on September 9, 2008 with the filing of an unverified Lis Pendens, Summons and Complaint for a declaratory judgment (neither legal nor equitable) and foreclosure of a mortgage (equitable). The Appellant was served on September 9, 2008. Appellant served his Answer and Counterclaim on November 7, 2008, late by consent. The Respondent filed and served a Motion to Strike Jury Demand.

By order entered March 12, 2009, the Honorable Charles B. Simmons, Jr. granted the Motion to Strike Jury Demand. Appellant filed a Motion pursuant to SCRCP Rule 59 March 27, 2009 and by order entered June 3, 2009, the Honorable Charles B. Simmons, Jr. denied the Rule 59 Motion. There were no other proceedings or hearings held in the lower court. This appeal followed.

STATEMENT OF FACTS

This appeal involves the Master in Equity's denial of Appellant's right to a jury trial of two counterclaims in a foreclosure case. More importantly, the Order made findings of fact where no evidence was presented or entered in the record, conclusively ordered that the Third Counterclaim had no merit and virtually eliminated the opportunity for Appellant to contest the facts alleged in the unverified complaint.

The Second Counterclaim alleges that, if the Appellant entered into the agreement alleged in the Complaint, it was unconscionable at the time it was made because the Plaintiff knew or should have known that the Appellant was unable to reasonably protect his own interest and was financially unable to make payment on any such arrangement. Appellant further asserted that the ultimate amount of debt that has been and is being accrued bears no reasonable relation to any value that may have been obtained by the Appellant if there was a contract between the parties as described in the Complaint, which is denied. The Appellant requested the following relief: That the Plaintiff be required to pay actual and punitive damages, and/or penalties to which the Plaintiff is entitled in an amount to be determined by a jury.

The Third Counterclaim alleges that the lenders made no efforts whatsoever to determine Smith's attorney preference in the transaction referred to in the Complaint. Instead, they set up a closing without properly informing Smith of his right to choose or providing him any opportunity to state his preference. Appellant asserted that the failure to ascertain his preference as to legal counsel prior to closing is a violation of South Carolina Code Section 37-10-102. Appellant alleged he had been damaged by the failure to ascertain his preference as to legal counsel prior to closing in an amount of actual

damages to be determined, plus the total amount of the loan finance charge, double the amount of the excess loan finance charge or other charges or fees paid by Smith and statutory damages. The Counterclaim also sought not less than one thousand five hundred (\$1,500.00) dollars and not more than seven thousand five hundred (\$7500.00) dollars, for each violation of the South Carolina Consumer Protection Code.

The Motion to Strike Appellant's jury demand asserted that 1) the counterclaim that the loan was unconscionable is a matter of law for the Court to decide, not a jury, 2) the counterclaim for violation of the attorney preference statute is a statutory claim, and the statute itself does not expressly grant the right to a jury trial. The Master held that there is no right to a jury trial for any of Appellant's counterclaims.

Rule 38(a) of the South Carolina Rules of Civil Procedure provides that the right of a trial by jury will be preserved inviolate. This rule codifies the right as established under Article I, Section 14 of the South Carolina Constitution. And when the right to a jury has been invoked by a party, the issues demanded to be tried shall be tried by a jury unless the judge determines that the right to a jury trial of some or all the issues does not exist. See SC Rule Civil Procedure 39(a). Thus, the Court should have denied Respondent's motion to strike the demand for a jury trial based on the pleadings, should not have made findings of fact as a result of a non-evidentiary motion hearing and should not have essentially granted judgment on the third counterclaim by concluding it had no merit.

STANDARD OF REVIEW

The Order granting the Motion to Strike Jury Demand had the effect of granting judgment and making findings of facts based on speculation related to an unverified complaint and no evidence. For the purpose of the unwarranted judgments rendered therein, the Order should be reviewed as to whether there was any evidence to support it in the light most favorable to the Appellant. Judgment is only proper when the parties have notice and an opportunity to present evidence, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; Adamson v. Richland County Sch. Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998). To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). There was no evidence at all and no notice other than that of a non-evidentiary motion hearing. An Order on a Motion to Strike Jury Demand should not be affirmed to the extent it makes findings of fact and, as here, rules that a cause of action is meritless.

The counterclaims should be liberally construed in favor of the Appellant as the pleader. Burns v. Wannamaker, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct. App. 1985). A court should not strike a cause of action merely because the court doubts the plaintiff will prevail in the action. McCormick, at 633, 494 S.E.2d at 434. However, the matter of striking from a pleading is largely within the discretion of the trial judge. Brown v. Coastal States Life Ins. Co., 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). Thus, the grant of a motion to strike will not be reversed except for an abuse of discretion or error of law. Id. at 194-95, 213 S.E.2d at 728. Under the South Carolina Rules of Civil

Procedure a party may move to strike a jury demand based on unavailability of a the right to a trial by jury of a particular claim. The appellate court applies the same standard of review as the trial court in reviewing the denial of the right to trial by jury. It is so important that such denial is immediately appealable. In considering such a motion, the trial court must base its ruling solely on the allegations set forth in the complaint. Denial of a jury trial should not be sustained if the facts alleged and inferences reasonably deducible therefrom would entitle the party to a jury trial on any theory of the case.

Thus, in this case, the question is whether, in the light most favorable to the Appellant, and with every doubt resolved in his behalf, the complaint states a valid claim for a jury to hear.

ARGUMENT

1. Did the Master in Equity err in making findings of fact and concluding the third counterclaim had no merit based on documents and information not in evidence when the question of right to jury trial is to be determined from the pleadings?

Whether a party is entitled to a jury trial is determined by the pleadings. National Bank of South Carolina 283 S.C. 438, 322 S.E. 2d 689 (1984). In ruling on the Motion to Strike Jury Demand, the Court inappropriately and unnecessarily made findings of facts, not admitted or decided by the pleadings, nor based on anything introduced into evidence. As such, the Court contradicted the rule cited in its own order that "Whether a party is entitled to a jury trial is *determined by the pleadings*." (R. p. 5 ¶ 2) (emphasis added). More importantly, the Court ruled that the third counterclaim had no merit without any evidence having been entered, no motion for summary judgment having been made and no notice given. The Order is, therefore, extremely prejudicial to the Appellant even if this Court affirms the denial of the right to a jury trial.

Generally, the first two paragraphs under the Facts section of the Court's *Order* (R. pp. 3-4 ¶¶ 2-3) and the final paragraph of Part three of the Court's Conclusions of Law (R. pp.12-13 ¶ 4) erroneously make findings of fact that are unnecessary to a ruling on the Motion to Strike Jury Demand and prejudice Appellant by granting judgment on the third counterclaim and making res judicata facts essential to Appellant's defense of the Respondent's complaint.

The Court's Order includes the following findings of fact:

- a. Smith's counterclaim has no merit. (R. p. 12 ¶ 34)
- b. On April 10, 2003, at the time Smith applied for the loan, he signed a form entitled "Attorney/Insurance Preference Check List". (R. p. 12 ¶ 34)
- c. On this form, he selected Harvey Breland, Esquire, as his attorney. (R. p. 13 ¶ 34)
- d. Because Smith would not be entitled to relief as against Wells Fargo on his counterclaim, it can hardly be said he would be entitled to a jury trial on it. (R. p. 13 ¶ 34)
- e. Smith is in default on his loan payments as of June 1, 2008. (R. p. 4 ¶ 3)
- f. Smith still owes \$77,460.63 on the debt, with interest from May 1, 2008, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees. (R. p. 4 ¶ 3)
- g. On April 29, 2003, Smith gave a Fixed Rate Note ("Note") to Wells Fargo Home Mortgage, in the principal sum of \$83,000. (R. p. 3 ¶ 2)
- h. That the defendant gave Wells Fargo Home Mortgage, Inc., a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road, Greenville, SC 29617, as well as a 2003 Fleetwood mobile home. (R. p. 3 ¶ 2)
- i. Wells Fargo is the successor by merger to Wells Fargo Home Mortgage, Inc." (R. p. 3 ¶ 2)

These unnecessary and unsupported findings of fact were improper and prejudicial.

They were relied on to support the court's rulings on the allegations of the Complaint and the counterclaims. The Order should be reversed and remanded for trial of the facts and issues set forth in the pleadings in the normal course.

2. Did the Master in Equity err in holding the counterclaims to be permissive and denying Appellant's jury demand?

The character of an action as legal or equitable depends on the relief sought. When equitable relief is sought in an action in tort the action is one in equity. Culler v. Blue Ridge Elec. Coop., Inc., 309 S.C. 243, 422 S.E. 2d 91 (1992); Perry v. Heirs at Law and Distributees of Gadsden, 313 S.C. 296, 437 S. E. 2d 174 (Ct. App. 193) aff'd as modified 316 S.C. 224, 449 S.E. 2d 250 (1994).

The question here is which form of relief is sought. "The character of an action is determined by the complaint in its main purpose and broad outlines and not merely by allegations that are merely incidental." Alford v. Martin et al., 176 S. C. 207, 180 S.E. 13, 15. "Allegations not in harmony with the theory of the pleading will be considered surplusage." Speizman v. Guill, 202 S. C. 498, 25 S.E.2d 731, 737. "If the character of the action appears with sufficient clearness in the body of the complaint, it must control, unaffected by the prayer for relief or the intention or characterization of the pleader." Speizman v. Guill, *supra*. While the prayer constitutes no part of the plaintiff's cause of action, Daniel, Attorney General et al. v. Conestee Mills, 183 S. C. 337, 191 S.E. 76, it "is an element which may properly be considered in determining the legal or equitable character of an action, and, where the complaint states facts which would support either a legal or an equitable action, the relief demanded will ordinarily determine its character." 1 C. J. S., Actions, § 54, page 1155.

The proper analysis for determining the mode of trial of legal and equitable issues in complaints and counterclaims is summarized as follows:

- (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 legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim. In that case the proper procedure 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," Beacon Theatres, Inc. v. Westover, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. (2d) 988 (1959), 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.(fn1)

(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.

Johnson v. South Carolina National Bank, 292 S.C. 51; 354 S.E.2d 895.

Only where the counterclaim is permissive does the defendant waive his right to demand a jury trial. Johnson v. South Carolina National Bank, 292 S.C. 51, 55 (1987) (per curiam). The distinction between permissive and compulsory is vital because where a counterclaim is not asserted it may be forever barred by the doctrine of res judicata from being litigated in the future. See Jaynes v. City of Fairfield, 303 S.C. 434, 438 (Ct. App. 1991). Aware of the significance of this question, the Court of Appeals has adopted the rule that a party does not waive his right to a jury trial where it is unclear whether or not his legal counterclaim is permissive or compulsory. Keels v. Pierce, 315 S.C. 339, 342 (Ct. App. 1993) (per curiam). Where uncertainty exists, the court will decide the status of any ambiguous counterclaim and then may order a separate trial if such a counterclaim proves to be permissive rather than compulsory. Nevertheless, the § 37-10-105(a) counterclaim herein is compulsory for the following reasons.

SC Rule of Civil Procedure 13(a) defines a compulsory counterclaim as one that arises out of the transaction or occurrence that is the subject matter of the dispute. The test used when determining the compulsory nature of a counterclaim requires a

consideration of whether there is a "logical relationship" between the claim and the counterclaim. North Carolina Savings and Loan Association v. DAV Corp., 298 S.C. 514 (1989).

South Carolina case law has not often discussed specifically how closely related a counterclaim must be to a corresponding claim to create a logical relationship. In contrast, the federal courts often have analyzed Rule 13(a) under the logical relationship test. Case law applying the test in the federal courts generally looks to whether the two claims share issues of law or fact. *See, e.g., Sue & Sam Mfg. Co. v. B-L-S Const. Co.*, 538 F.2d 1048, 1053 (4th Cir.1976) (finding a counterclaim for negligence is compulsory to a third party claim for indemnity where the claims both arise out of the same transaction and share common issues of fact); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3rd Cir. 1961) (Describing claims as logically related if factual issues of both claims are offshoots of the same basic controversy). It appears, too, that neither South Carolina nor the federal courts have given the words "logical relationship" a purely legal or specific meaning.

South Carolina case law that addresses compulsory counterclaims tends to simply refer to the test and draw conclusions from it without further elaborating on what the "logical relationship" test specifically seeks to measure. However, the decisions can be considered as acknowledging the federal understanding. For example, in *DAV Corp.*, the plaintiff lender sued the defendant joint venture to foreclose on a note and mortgage. The defendant joint venture counterclaimed alleging breach of a subsequent oral contract (modifying the terms of the note), breach of a joint venture agreement, breach of fiduciary duty, wrongful dissolution of a joint venture, violation of the S.C. Unfair Trade

Practices Act, and breach of two oral contracts to purchase DAV Corp.'s interest in the venture. The S.C. Supreme Court adopted the "logical relationship" test and held that all of defendant DAV's above counterclaims were logically related to the foreclosure action except for the claims based on the two subsequent oral contracts, which were unrelated to the transaction that created or modified the note and mortgage. *Id.* at 518-519.

The Appellant's counterclaims under examination herein are logically related to the Respondent's action based on the plain meaning of the word "logical" as well as the plain language of S.C. Rule Civ. Pro. 13(a). The counterclaims, as summarized above, clearly arise out of the transaction that is the subject matter of the current dispute, i.e. the loan transaction represented by the Note and Mortgage. Additionally, the counterclaim share issues of fact with the foreclosure action. The entire basis for the Respondent's foreclosure claim depends upon the Appellant's due execution of certain loan documents, namely, the promissory note, mortgage and related documents. The substance of the counterclaims rests upon the Respondent's compliance with the S.C. Consumer Protection Code, such as the attorney preference which itself is a document executed in connection with the loan transaction. Because the foregoing shows that the counterclaims clearly are encompassed by the language of Rule 13(a) as measured by the "logical relationship" test, they are compulsory counterclaims, and the Appellant should receive a jury trial of the factual issues contained therein.

3. Did the Master in Equity err in characterizing the counterclaims as ones not entitled to a jury trial?

The purpose of the S.C. Consumer Protection Code is to clarify the law governing consumer credit and to protect consumer buyers against unfair practices by suppliers of

consumer credit. Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc. 322 S.C. 399, 472 S.E.2d 242 (1996). It includes prohibitions against unconscionable conduct and provides for mortgagors to state their preference for an attorney to close their mortgage loan.

Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Jones Leasing v. Gene Phillips and Assoc., 282 S.C. 327, 318 S.E.2d 31 (Ct. App. 1984).

The Respondent did not claim that the counterclaims were not sufficiently pled as jury claims, but merely sought to prevent the transfer of the case to the jury docket from the Master in Equity court where the mortgage foreclosure cause of action would remain until completion of the jury trial. The Court ruled on the Motion to Strike Jury Demand as if it were essentially a Motion to Dismiss for failure to state a claim that entitles Appellant to a jury trial. Viewed in the light most favorable to Appellant, the counterclaims do state causes of action on which Appellant is entitled to a jury trial.

4. Did the Master in Equity err in holding that in a foreclosure case, the test for whether counterclaims are compulsory or permissive is whether the counterclaims have a "logical relationship" to the mortgage company's right to enforce the promissory note?

~~The Court's Order is premised on incorrect reasoning and analysis for~~
determining the nature (compulsory or permissive) of the Appellant's counterclaim for violation of the Plaintiff's duty to ascertain the Appellant's attorney preference. Insofar as the Court concluded that, in an action for foreclosure, only those counterclaims affecting the enforceability of the Note or Mortgage are compulsory under the "logical

relationship” test of N.C. Federal Savings & Loan Assn. v. DAV Corp., 298 S.C. 514 (1989), the Court unduly restricted the scope of that test. (R. p. 11 ¶ 30)

No appellate court in South Carolina has directly held that the question of a “logical relationship” in the context of a mortgage foreclosure only means “affects the enforceability” of the Note and Mortgage. Two South Carolina cases address the question of what constitutes a compulsory counterclaim in the context of a foreclosure action. These are N.C. Fed. S & L Assn., and Advance International, Inc. v. N.C. Nat. Bank of S.C., 316 S.C. 266 (Ct. App. 1994) *vacated on other grounds by* 320 S.C. 532 (1996). Though both cases hold that a counterclaim challenging the enforceability of a Note is compulsory, they do not hold that counterclaims must affect the enforceability of the Note or Mortgage to be compulsory. Such a rule would divert attention away from the relevant inquiry of the logical relationship test, which is whether or not the claim and counterclaim “arise out of the same transaction or occurrence.” S.C. Rule Civ. Pro. 13(a). The Court’s reliance on this case was misplaced.

Under Rule 13(a) and the logical relationship test, the Court should undertake a comparison of the issues of law and fact that will be necessary to support both the claim and counterclaim. If the Court finds that the factual and legal issues are overlapping or are offshoots of the same basic controversy, then the counterclaim is compulsory. *See, eg.,* Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631,634 (3rd Cir. 1961) (explaining the “logical relationship” test as used under federal jurisdiction); Central States Underwater Contracting Inc. v. R.L. Morrison & Sons, Inc., 45 F.3d 425 (4th Cir. 1995) (applying SC law and analyzing the relationship between the facts and issues of

plaintiff's claim to determine whether it would have been a compulsory counterclaim in a prior action by defendant).

In the case at hand, the Appellant's counterclaim arises out of a transaction which is the same transaction as the one creating the alleged rights upon which the plaintiff has brought its cause. The documents that form the basis of the Respondent's claim and the Appellant's counterclaims were required as part of the loan transaction. The South Carolina Supreme Court, in N.C. Federal Savings & Loan Assn. v. DAV Corp., stated, "The 'logical relationship' test is by far the most widely accepted because of *its flexibility*." 298 S.C. 514, 518 (1989) (emphasis added). Similarly, the D.C. Circuit noted, in a case cited with approval in N.C. Fed. S & L Assn., that "'Transaction' is a word of flexible meaning." Columbia Plaza Corp. v. Security Nat. Bank, 525 F.2d 620, 625 (1979).

Simply put, the rule that a counterclaim is compulsory in a foreclosure action only if it affects the enforceability of the note affronts the very purpose of having a flexible test, one which should be applied by considering the nature of the claims and the evidence to be presented and not simply the effect that the counterclaim has on the plaintiff's rights under contract.

~~5. Did the Master in Equity err in refusing to acknowledge that Defendant may recover actual damages for negligence associated with its statutory duty under 37-5-108 and 37-10-102 as well as statutory damages thereunder?~~

Section 37-5-108(7) of the S.C. Consumer Protection Code states "the remedies of this section are in addition to remedies available for the same conduct under law other than this title". Whether the breach of a duty outlined in the statutory law proximately caused Appellant's injuries is a question of fact for the jury. Madison ex rel. Bryant v.

Babcock Center 370 S.C. 42, 634 S.E.2d 275 (2006). The factfinder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case.

The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines. See e.g. Steinke v. S.C. Dept. of Labor, Licensing & Regulation, 336 S.C. 373, 387-89, 520 S.E.2d 142, 149-50 (1999) (affirmative legal duty may be created by statute which establishes the standard of care); Clifford v. Southern Ry. Co., 87 S.C. 324, 69 S.E. 513 (1910) (statute may create special duty of care and breach of that statute may constitute negligence per se); Steeves v. U.S., 294 F.Supp. 446, 455 (D.S.C.1968) (violation of a rule or regulation which is designed primarily for the safety of hospital patients will constitute negligence if the violation proximately results in the injury); Restatement (Second) of Torts § 285 (1965) (standards of conduct of reasonable man may be established by statute, regulation, court's interpretation of statute or regulation, judicial decision, or as determined by trial judge or jury under facts of a case).

Respondent's position confuses the existence of a duty with standards of care establishing the extent and nature of the duty in a particular case, standards by which a fact finder may judge whether a duty was breached. Such standards are grounded in the common law, statutes, regulations, etc. Appellant's counterclaims sought actual and punitive damages, in addition to damages under the Code. In MERS, Inc. v. Daniel P. White, et al., S.C. Court of Appeals Opinion 4589 July 13, 2009, in considering the issue of a jury trial, this Court found it significant that the Whites' counterclaim included a prayer for actual and punitive damages, but held the damages claimed were those of

another party who, though he may have been entitled to a jury trial, had not appealed the denial of right to a jury trial.

5. Did the Master in Equity err in refusing to acknowledge that Defendant can recover damages for negligence associated with its statutory duty under 37-5-108 and 37-10-102 statute as well as statutory damages thereunder?

The Court did not adequately analyze whether the Appellant's third counterclaim entitles the Appellant to a jury trial as preserved by the South Carolina Constitution. Specifically, the question is not whether borrowers had a right to have their attorney preference ascertained in 1868, but rather, whether the statutory cause of action is "in the nature" of an action triable at common law in 1868. C.W. Matthews Contracting Co., Inc. v. South Carolina Tax Commission, 267 S.C. 548, 553 (1976). It is clear that a statutory action need not be a cause of action recognized in 1868. Medlock v. 1985 Ford F-150 Pick Up VIN 1FTDF15YGFNA22049, 308 S.C. 68 (Finding owner of property subject to forfeiture action proceeding in rem enjoys a right to a jury even though common law forfeiture proceeded only in personam). MIMS Amusement v. Law Enforcement Division, 366 S.C. 141, 149 (2005) ("The right to a jury trial encompasses forms of action that have arisen since the adoption of the Constitution in those cases where the later actions are of like nature to actions which were triable at common law at the time of the adoption of the Constitution.")

The question of whether a statutory cause of action is similar to a cause of action triable to a jury in 1868 requires consideration of the characterization of the action as one at law or in equity. Lester v. Dawson, 327 S.C. 263, 267 (1997) ("Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable). Such an inquiry will lead the Court to inquire into the nature of the recovery

sought. Where money damages are sought, the cause of action traditionally has been legal, and actions at law were entitled to a jury trial under the Constitution. See Cooper v. Poston, 326 S.C. 46, (1997) ("Under the common law, legal actions for the recovery of money were triable by a jury."). Section 37-10-105(A) authorizes the recovery of actual damages separate and apart from the recovery of a statutory penalty.

Moreover, the South Carolina Supreme Court, for well over a century, has recognized the rule that statutory actions which substitute for common law actions are triable to a jury by right. See Frazee v Braton, 26 S.C. 348 (1887). Quoting from *Frazee*, "The great right of trial by jury has existed from time immemorial in all those forms of actions at common law. . . *such as* . . . *case*, etc., and no doubt such right exists in the actions provided by the Code as a substitute for these common law actions." (emphasis added).

The statutory action under consideration here shares many characteristics with the common law action of trespass on the case and with its more familiar common law descendent, the negligence action. Jenkins v. North Carolina Dept. of Motor Vehicles, 244 N.C. 560, 563, 94 S.E.2d 577 (1956) ("Negligence, . . . , is an outgrowth of the action of trespass on the case . . ."); 57A Am. Jur. 2d Negligence § 18 (1989) ("Under common-law practice, trespass on the case is the proper remedy for . . . negligence.").

The Defendant's analysis of Rayfield v. SC Dep't of Corr., 297 S.C. 95 (1988) in its previous memorandum demonstrates that the statutory obligation imposed by § 37-10-102 and sued upon under § 37-10-105(a) would support an implied right of action in negligence, which clearly is a cause of action triable to a jury. Thus, that analysis was intended to show that the cause of action authorized under § 37-10-105(a) is in the nature

of a tort action, *not that it is a tort action recognized at common law in 1868*. Article I, Section 14 of South Carolina's Constitution requires no more.

6. Did the Master in Equity exceed his jurisdiction by ruling on the Respondent's motion to strike the Appellant's jury demand?

This Court exceeded its jurisdiction by ruling on the plaintiff's motion to strike the defendant's jury demand. The Reporter's Note appended to the 2002 amendment to Rule 53 of the Rules of Civil Procedure explains that a case in which a jury demand has been made will be returned to the circuit court.¹ This Court has no discretion to rule on the motion. The Court confirmed the order of reference filed on September 24, 2008. The Court to which the case was referred has no jurisdiction to confirm that order; nor to rule on the issue of a right to trial by jury. SCRCP Rule 53 Any ruling on thereon is for the Circuit Court from which it was referred or to which it should have been transferred upon the filing of the jury demand. This case should be returned to the circuit court for a determination of the issue of the defendant's right to a jury trial.

CONCLUSION

The orders issued by the Master in Equity in this case and the erroneous findings of facts and conclusions of law therein should be reversed and the case remanded for continuation of the case under the South Carolina Rules of Civil Procedure.

2 - 5, 2010


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¹SCRCP Rule 53, Note to 2002 Amendment states, "If there are counterclaims requiring a jury trial, any party may file a demand for a jury under Rule 38 and the case will be returned to the circuit court."

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr.
Master in Equity

Case No. 2008-CP-23-6833

Wells Fargo Bank, N.A. Respondent,

v.

Michael Smith; South Carolina
Department of Motor Vehicles; M&T
Properties, Inc.; State of South Carolina;
Arthur State Bank; South Carolina
Department of Probation, Pardon and
Parole Services Defendants,

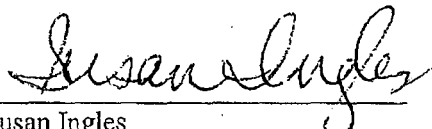
Of Whom Michael Smith is the.....Appellant.

PROOF OF SERVICE

I certify that I have served a the Final Brief of the Appellant on Wells Fargo Bank, N.A.
by depositing a copy of same in the United States Mail postage prepaid on February 5, 2010
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE MASTER ERR IN FINDING AS A MATTER OF LAW THAT SMITH WAS NOT ENTITLED TO A JURY TRIAL?
- II. DID SMITH PROPERLY PRESERVE FOR APPEAL HIS CHALLENGE TO THE MASTER'S JURISDICTION TO HEAR AND RULE ON WELLS FARGO'S MOTION TO STRIKE JURY DEMAND WHERE IT WAS RAISED FOR THE FIRST TIME BY WAY OF A RULE 59(E) MOTION?

STATEMENT OF THE CASE

Respondent Wells Fargo Bank, NA ("Wells Fargo") filed this foreclosure action against Appellant Michael Smith ("Smith") on September 9, 2008. (R. pp. 15-28.) The circuit court referred the case to the Master in Equity for Greenville County ("Master") by Order of Reference entered September 24, 2008. (R. pp. 1-2.) Smith filed a Motion to Allow Late Filing of Responsive Pleadings on October 17, 2008. Wells Fargo consented to an extension of time to file a late Answer. Smith filed an Answer and Counterclaim containing a jury trial demand on November 7, 2008. (R. pp. 29-33.) Wells Fargo filed a Reply on December 12, 2008. (R. pp. 34-38.) Wells Fargo filed a Motion to Strike Jury Demand on January 9, 2009. (R. pp. 39-40.) The Master held a hearing on Wells Fargo's Motion to Strike Jury Demand on February 23, 2009. Sean M. Foerster, Esquire, appeared on behalf of Wells Fargo, and Susan Ingles, Esquire, attended the hearing on behalf of Smith and argued against the motion. The Master entered an Order on March 12, 2009, granting Wells Fargo's Motion to Strike Jury Demand and confirming the Order of Reference. (R. pp. 3-13.) Smith filed a Rule 59(e) Motion on March 27, 2009, requesting that the Master reconsider the Order granting Wells Fargo's Motion to Strike Jury Demand. (R. pp. 54-59.) The Master entered an Order denying Smith's Rule 59(e) Motion on April 15, 2009. (R. p. 14.) On April 15, 2009, Smith served a Notice of Appeal from the Master's Order of March 12, 2009, granting Wells Fargo's Motion to Strike Jury Demand.

STATEMENT OF THE FACTS

This appeal involves the Master-in-Equity's striking of a foreclosure defendants' demand for a jury trial on two counterclaims brought within a mortgage foreclosure action after an Order of Reference had already been entered.

Wells Fargo's foreclosure complaint alleged that on April 29, 2003, Smith gave a Fixed Rate Note ("Note") to Wells Fargo Home Mortgage, Inc., in the principal sum of \$83,000.00. (R. p. 25 ¶ 22.) To secure repayment of the Note, Smith gave Wells Fargo Home Mortgage, Inc., a real estate mortgage ("Mortgage") covering his real property and mobile home. (R. p. 25 ¶ 23.) Wells Fargo is the successor by merger to Wells Fargo Home Mortgage, Inc. (R. p. 25 ¶ 24.)

Wells Fargo alleged that Smith defaulted on his loan payments under the Note and Mortgage on June 1, 2008, and still owes \$77,460.63 on the debt, with interest from May 1, 2008, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees. (R. p. 26 ¶ 27.)

In his Answer and Counterclaim, Smith asserted, along with various defenses, the following counterclaims against Wells Fargo: 1) accounting (R. p. 31 ¶¶ 19-20), 2) unconscionability (Smith failed to specify whether he was alleging statutory unconscionability under S.C. Code Ann. § 37-5-108 or common law unconscionability) (R. p. 32 ¶¶ 22-23), and 3) violation of S.C. Code Ann. § 37-10-102, the Attorney Preference Statute Violation (R. pp. 32-33 ¶¶ 25-28). None of the counterclaims challenged the enforceability of the Note and Mortgage. (R. pp. 31-33 ¶¶ 19-28). Smith demanded a jury trial. (R. p. 29.)

Wells Fargo motioned to strike Smith's demand for a jury trial and to confirm the Order of Reference on grounds that a right of trial by jury simply does not exist in an action for the foreclosure of a mortgage and none of the counterclaims that Smith asserted entitled him to a jury trial. (R. pp. 39-40.) At the hearing on Wells Fargo's Motion to Strike Jury Demand, Smith did not challenge the Master's jurisdiction to hear the motion. (R. pp. 60-68.) Smith also failed to challenge the Master's jurisdiction in his Memorandum of Law that he submitted to the Master in the days after the hearing. (R. pp. 41-53.) Furthermore, Smith conceded that he was not entitled to a jury trial on his counterclaim for an accounting. (R. p. 66, lines 5-14.)

The Master granted Wells Fargo's Motion to Strike Jury Demand, correctly concluding that "a right of trial by jury does not exist in an action for the foreclosure of a mortgage and there is no right to a jury trial for any of Smith's counterclaims." (R. p. 13.) Specifically, the Master struck Smith's demand for a jury trial on all three counterclaims because

- 1) an accounting counterclaim is equitable and permissive, and Smith "waived any right to a jury trial he may have had on that counterclaim by asserting it in this foreclosure action" (R. p. 8),
- 2) a common law unconscionability counterclaim "is an equitable claim that only allows for relief in the form of rescission of the contract" and a statutory unconscionability claim "under § 37-5-108 is a matter of law for the Court to decide, not a jury" (R. p. 8), and
- 3) a counterclaim for "a violation of the attorney preference statute is simply not grounded in any common law cause of action, much less

one that was in existence at the time of the Constitution, and the statute itself does not expressly grant the right to a jury trial" (R. p. 12).

Smith thereafter filed a Rule 59(e) motion in which he, among other things, challenged for the first time whether the Master had jurisdiction to hear Wells Fargo's Motion to Strike Jury Demand. (R. p. 58 ¶ 4.) Smith then appealed from the Master's Order of March 12, 2009, granting Wells Fargo's Motion to Strike Jury Demand.

STANDARD OF REVIEW

The Court may affirm for any ground appearing in the record. Rule 220(c), SCAR; see also *Mortgage Elec. Sys., Inc. v. White*, 2009 S.C. App. LEXIS 294, at *7 n. 2 (S.C. Ct. App. July 13, 2009; *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)).

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). In an appeal from an action in equity, tried by a judge alone, the Court may find facts in accordance with its own view of the preponderance of the evidence. *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

"Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id.* at 38788, 544 S.E.2d at 623.

Additionally, "[a] legal question in an equity case receives review as in law." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003).

~~Because questions of law may be decided with no particular deference to the trial court,~~
the Court may correct errors of law in both legal and equitable actions. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Code Ann. § 14-8-200 (Supp. 1998)).

ARGUMENT

I. THE MASTER DID NOT ERR IN FINDING AS A MATTER OF LAW THAT SMITH WAS NOT ENTITLED TO A JURY TRIAL.

The Master did not err in striking Smith's demand for a jury trial because a right of trial by jury does not exist in an action for the foreclosure of a mortgage and there is no right to a jury trial on any of Smith's counterclaims. The record contains several grounds on which this Court could affirm the Master's Order of March 12, 2009, granting Wells Fargo's Motion to Strike Jury Demand.

The right to a jury trial "shall be preserved to the parties inviolate" as 1) "declared by the Constitution" or 2) "given by a statute of South Carolina." Rule 38(a), SCRC. "Any party may demand a trial by jury of any issue triable of right by a jury ..." Rule 38(b), SCRC (emphasis added). "Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury ..." Rule 53(b), SCRC (emphasis added). However, "[t]he 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." *Bateman v. Rouse*, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct. App. 2004) (citing *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)).

Whether a party is entitled to a jury trial is determined by the pleadings. *Nat'l Bank of S.C. v. Daniels*, 283 S.C. 438, 440, 322 S.E.2d 689, 690 (1984).

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Mortgage Elec. Sys., Inc. v. White*, 2009 S.C. App. LEXIS 294, at *7-8 (S.C. Ct. App. July 13, 2009) (citing *Lester*, 327 S.C. at 267, 491 S.E.2d at 242).

Wells Fargo's complaint was for the foreclosure of Smith's mortgage. (R. pp. 25-26 ¶¶ 20-30.) A mortgage foreclosure is an equitable proceeding. *Cont'l Mortgage Investors v. Quail Run Assocs.*, 280 S.C. 409, 412, 312 S.E.2d 272, 274 (Ct. App. 1984). "Because a foreclosure action is an action in equity, a party has no right to a jury trial of the issues raised in a foreclosure action." *Gardner v. Travis*, 316 S.C. 315, 317, 450 S.E.2d 54, 56 (Ct. App. 1994).

Smith's Answer and Counterclaim contained various foreclosure defenses. (R. pp. 29-31 ¶¶ 1-16.) However, there is no right to a jury trial on defenses to an equitable cause of action such as foreclosure. *Farley v. Matthews*, 168 S.C. 294, 301-302, 167 S.E. 502, 505 (1933) (citing *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691, 693 (1912)) ("Where a defendant sets up, as a defense to an equitable cause of action, facts which grow out of that cause of action, or the transaction which gave rise to it, and are so interwoven with it as to be inseparable from it, the defense partakes of the nature of the cause of action and is equitable, and not triable by jury, as of right."). "[E]quitable defenses are equitable issues for determination by the court." *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389 (Ct. App. 2004) (citing *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 526, 167 S.E.2d 420, 424 (1969)).

Finally, Smith's Answer and Counterclaim contained three counterclaims against Wells Fargo, none of which entitled him to a jury trial. (R. pp. 29-31 ¶¶ 17-28.)

- a. **Smith was not entitled to a jury trial on his counterclaim for violation of the Attorney Preference Statute.**

The Master did not err in holding that Smith was not entitled to a jury trial on his counterclaim for violation of the Attorney Preference Statute. (R. p. 13.) Smith's claim fails to meet the threshold test of being "triable of right by a jury" under Rule 38,

SCRCP—it is not a claim for which a right to a jury trial is “declared by the Constitution” or “given by a statute of South Carolina.”

i. The Attorney Preference Statute does not expressly create a right to a jury trial.

The Master did not err in finding that “the [attorney preference] statute itself does not expressly grant the right to a jury trial.” (R. p. 12.)

Neither the Attorney Preference Statute nor its enforcement provision grants claimants a right to a jury trial. *See* S.C. Code Ann. § 37-10-102; § 37-10-105. If the Legislature had intended a certain result in a statute, it would have said so. *See Estate of Guide v. Spooner*, 318 S.C. 335, 338, 457 S.E.2d 623, 624 (Ct. App 1995). Furthermore, the language of the enforcement provision evidences a legislative intent that such a claim be determined by the court as a matter of law. *See* § 37-10-105 (“[T]he debtor has a cause of action ... to recover ... a penalty in an amount determined by the court...”).

Because Smith’s counterclaim is not “given by a statute of South Carolina,” there is no right to a jury trial on this claim under Rule 38(a) unless such a right is “declared by the Constitution.”

ii. Smith is not entitled to a jury trial on his claim for violation of the Attorney Preference Statute under the South Carolina Constitution.

~~Because a right of action under the Attorney Preference Statute is a purely~~
statutory creature, and the statute itself does not expressly grant the right to a jury trial, Smith only had a right to a jury trial on this claim if “declared by the Constitution.” Rule 38(a), SCRCP. The South Carolina Constitution has been interpreted by the Supreme Court “as securing the right to a jury only in cases in which that right existed at the time of the adoption of the constitution in 1868; if the case is a statutory action, a jury will be

allowed only if the action is in the nature of a suit triable at common law in 1868." *C. W. Matthews Contracting Co., Inc. v. S.C. Tax Comm'n*, 267 S.C. 548, 553, 230 S.E.2d 223, 225 (1976) (emphasis added) (finding no right to a jury trial for "[t]he right to recover taxes from the State" because the right was created by statute after the adoption of the state constitution, the right was not in the nature of a common law action, and the statutory recovery of taxes paid to the government is a unique proceeding); *see also McGlohon v. Harlin*, 254 S.C. 207, 216, 174 S.E.2d 753, 757 (1970) (finding no right to a jury trial under Family Court Act child support statute where, prior to the enactment of the statute, there was no provision by which a mother could institute a civil action against the father of her illegitimate child to require him to contribute to such child's support); *State v. Gibbes*, 109 S.C. 135, 140, 95 S.E. 346, 348 (1918) (finding no right to a jury trial for a proceeding in *quo warranto* where no South Carolina cases were found in which a jury trial was permitted and where the statute on which the action was based made no provision for trial by jury); *Medlock v. 1985 Ford F-150 Pick Up*, 308 S.C. 68, 70, 417 S.E.2d 85, 86 (1992) (finding that a right to a jury trial existed under the forfeiture statute only because there was evidence that as early as 1835 a cause of action for forfeiture existed and entitled a claimant to a jury trial).

"[T]he right to a jury trial encompasses forms of action that have arisen since the adoption of the Constitution," but only "in those cases where the later actions are of like nature to actions which were triable at common law at the time of the adoption of the Constitution." *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) (emphasis added). "It is well-settled that art. I, § 14, secures the right to a jury trial only in cases in which that right existed at the time of the adoption

of the constitution in 1868.” *Unisys Corp. v. S.C. Budget and Control Bd. Div. Of ...*, 346 S.C. 158, 172, 551 S.E.2d 263, 271 (2001).

Smith is therefore only entitled to a jury trial on his attorney preference counterclaim upon a showing that:

- 1) the counterclaim is of like nature to a cause of action recognized at common law in 1868, and only then if
- 2) the cause of action in which the counterclaim is grounded entitled a claimant to a jury trial in 1868.

1. Smith’s claim for violation of the Attorney Preference Statute is not of like nature to any common law cause of action in existence at the time of the adoption of South Carolina Constitution.

The Master did not err in finding that “[a] claim for a violation of the attorney preference statute is simply not grounded in any common law cause of action, much less one that was in existence at the time of the Constitution ...” (R. p. 12.)

The Attorney Preference Statute is simply a notice statute intended by the South Carolina Legislature “to protect borrowers by requiring in the credit application clear and prominent disclosure of the information necessary to ascertain the borrower’s preference as to the legal counsel employed to represent the debtor in all matters relating to the closing of the transaction...” ~~*Davis v. Nationscredit Fin. Servs. Corp.*, 326 S.C. 83, 86,~~ 484 S.E.2d 471, 472 (1997).

Before its enactment, there was no recognized common law cause of action for a mortgage lender’s failure to ascertain a borrower’s preference as to legal counsel at the time of the loan application. Neither is a claim for violation of the Attorney Preference Statute “of like nature” to any common law cause of action in existence in 1868. Though

seemingly grounded in fraud, the Supreme Court has specifically held that the Attorney Preference Statute is not grounded in common law fraud. *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 378, 585 S.E.2d 292, 301 (2003). In *Tilley*, the court reasoned that

Neither § 37-10-102 nor the penalty section, § 37-10-105, refer to violation of the statutory preference requirements in terms of unfairness, fraud, or deceit. Whether or not a cause of action for violation of the attorney/insurance preference statute amounts to an action brought on a theory of fraud and deceit is an issue of first impression for the court. The Buyers' claims here are based on a simple violation of a statutory requirement; the penalties for violating the statutory preference provisions of § 37-10-102 are absolute and do not depend on actual fraud. Further, the Consumer Protection Code, within which the preference provisions are contained, does not define fraud. For these reasons, we hold that the claims presented here are not grounded in fraud and deceit ...

If not grounded in common law fraud, Wells Fargo can think of no other common law cause of action in existence in 1868 in which the Attorney Preference Statute could be grounded. Because a claim for violation of the Attorney Preference Statute is not in the nature of any claim in existence in 1868, Smith is not entitled to a jury trial on this counterclaim.

2. The classification of Smith's claim for violation of the Attorney Preference Statute as a "legal" claim because it seeks money damages does not alone create a right to a jury trial.

~~The classification of an attorney preference claim as "legal" because it seeks~~
money damages is not enough to create a right to a jury trial where Smith cannot show that his claim was in the nature of a common law cause of action in existence in 1868 and that a right to a jury trial existed in that type of action.

Smith attempts to bypass the fact that the Attorney Preference Statute is not "in the nature of" any common law cause of actions in existence in 1868 by jumping straight

into an analysis of the type of relief provided by the statute. (Appellant's Br. p. 19 - 20.) Smith argues that he is entitled to a jury trial simply because he is seeking money damages under the Attorney Preference Statute, as opposed to equitable relief. (Appellant's Br. p. 19- 20.)

First, Smith's reliance on *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997), is misplaced because *Lester* did not even involve a statutory cause of action. *Id.* Rather, *Lester* dealt with an action to recover attorneys' fees under a fee agreement between an attorney and client, which the court found to be in the nature of a breach of contract suit—an action undoubtedly in existence in 1868 and one traditionally recognized as an action at law for damages. *Id.*

Second, under Smith's "money or not" analysis, every statutory cause of action for the recovery of money would entitle the claimant to a jury trial. This is obviously not a true statement of the law. See *C. W. Matthews Contracting Co., Inc. v. S.C. Tax Comm'n*, 267 S.C. 548, 553, 230 S.E.2d 223, 225 (1976). In *C. W. Matthews Contracting Company*, the court held that a construction company was not entitled to a jury trial in its statutory action against the State for recovery of taxes it had paid under protest. 267 S.C. at 554, 230 S.E.2d at 226. Even though the construction company was seeking the recovery of money, the court reasoned that the right to recover taxes from the sovereign was not recognized at common law in 1868, the right was created by statute after adoption of the constitution, and the right was "not in the nature of a common law action" at all. *Id.*

Smith understands that his "money or not" analysis does not end the issue of whether he is entitled to a jury trial on this attorney preference claim, otherwise he would

not have proceeded to argue that an attorney preference claim is grounded in trespass or negligence. (Appellant's Br. p. 20.) Wells Fargo fails to understand how a claim under the Attorney Preference Statute could possibly be "of like nature" to either trespass or negligence, and agrees with the Master that such an argument is "problematic because 1) if Smith wanted to bring a negligence claim against Wells Fargo, he should have pled negligence directly and 2) Smith cites no authority whatsoever that directly supports the proposition that the attorney preference statute sounds in negligence." (R. p. 12.)

Because a right of action under the Attorney Preference Statute does not expressly grant the right to a jury trial and is not of like nature to any cause of action in existence in 1868, the Master did not err in striking his demand for a jury trial on this counterclaim.

iii. Smith's claim for violation of the Attorney Preference Statute is not a compulsory counterclaim entitling him to a jury trial.

Putting aside the fact that Smith's counterclaim for violation of the Attorney Preference Statute does not meet the threshold test for the right to a jury trial under Rule 38, SCRCP, the Master did not err in finding that this counterclaim was permissive and that Smith waived his right to a jury trial by asserting it in this foreclosure action. (R. p. 12.)

A defendant in a foreclosure action only has a right to a jury trial on counterclaims that are legal (rather than equitable) and compulsory (rather than permissive). *C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 193 (1986), *modified*, *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987).

In a mortgage foreclosure action, the test for whether the counterclaims are compulsory or permissive is whether the counterclaims have a "logical relationship" to the mortgage company's right to enforce the promissory note. *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989). That determination is made by asking whether the counterclaims would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269, 449 S.E.2d 580, 582 (Ct. App 1994), affirmed in this holding but other parts deemed dicta and vacated, 320 S.C. 532, 466 S.E.2d 367 (1996).

In *Advance International*, the holder of a second mortgage asserted a counterclaim alleging that the plaintiff first mortgagee had assured the second mortgagee that the borrower could pay the loan amount. *Id.* at 268, 449 S.E.2d at 582. The Court of Appeals held that the counterclaim was not compulsory because the counterclaim did not challenge the enforceability of the note or the lender's right to foreclose it. *Id.* at 269, 449 S.E.2d at 582. Hence, the Court of Appeals found that the counterclaim was permissive rather than compulsory and that the Defendant had waived his right to a trial by jury on that counterclaim by asserting that claim as a counterclaim rather than as a separate lawsuit. *Id.*

Smith's counterclaim for violation of the Attorney Preference Statute has no logical relationship to the enforceability of the Note and Mortgage because if a violation of the statute were found, Smith would only be entitled to actual damages and possibly a penalty of between \$1500 and \$7500, but not rescission of the Note and Mortgage. S.C. Code Ann. § 37-10-105(a). Therefore, this counterclaim is permissive and Smith waived his right to a jury trial by asserting it in this foreclosure action.

b. Smith was not entitled to a jury trial on his unconscionability counterclaim.

Although Smith's counterclaim for unconscionability failed to specify whether it was a claim for common law unconscionability or statutory unconscionability under S.C. Code Ann. § 37-5-108, the Master did not err in finding that he was not entitled to a jury trial under either version of the counterclaim. (R. p. 8.) If Smith is claiming common law unconscionability, Smith is not entitled to a jury trial because this is an equitable claim that only allows for relief in the form of rescission of the contract. If he is claiming statutory unconscionability, Smith is not entitled to a jury trial because it is in the nature of an equitable cause of action for which no right to a jury trial existed in 1868 and because the statutory language makes the issue of whether an agreement is unconscionable under § 37-5-108 a matter of law for the court to decide.

i. No right to a jury trial exists for a claim of unconscionability under common law.

The Master did not err in finding that Smith was not entitled to a jury trial on a counterclaim for common law unconscionability because this is an equitable claim that only allows for relief in the form of rescission of the contract. (R. p. 8.)

"Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996).

Jurisdictions throughout the country agree that common law unconscionability is an equitable cause of action that allows only for equitable relief such as rescission. See

Doe v. SexSearch.com, 551 F.3d 412, 419 (6th Cir. 2008) ("At common law, unconscionability is a defense against enforcement, not a basis for recovering damages."); *Bennett v. Behring Corp.*, 466 F. Supp. 689, 700 (S.D. Fla. 1979) ("[T]he equitable theory of unconscionability has never been utilized to allow for the affirmative recovery of money damages."); *Johnson v. Long Beach Mortg. Loan Trust 2001-4*, 451 F. Supp. 2d 16, 36 (D.D.C. 2006) ("Plaintiff cannot recover compensatory damages under the common law doctrine of unconscionability."); *Cowin Equip. Co. v. GM Corp.*, 734 F.2d 1581, 1582 (11th Cir. Ala. 1984) ("[T]he cases which have addressed the issue have consistently rejected the theory that damages may be collected for an unconscionable contract provision."); *Super Glue Corp. v. Avis Rent a Car Sys., Inc.*, 517 N.Y.S.2d 764 (N.Y. App. Div. 1987) ("The doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery."); *see also* 8 Williston on Contracts § 18:1 (4th Ed.) ("Equity recognized unconscionability as a ground for refusing its aid to a party alleging breach of contract long before the Uniform Commercial Code formulated its provision making 'unconscionable' agreements unenforceable.").

Because the only remedies available for common law unconscionability are equitable, there is no right to a jury trial on this claim. *See Brown v. Greenwood School Dist. 50 Board of Trustees*, 344 S.C. 522, 524, 544 S.E.2d 642, 643 (Ct. App. 2001) ("There is no right to a jury trial for equitable remedies such as rescission and restitution.").

Furthermore, whether an agreement is unconscionable is for a court to decide, not a jury. *See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1046

(D.S.C. 1993) ("Whether an exclusion is unconscionable is a matter of law reserved for determination by the court.")

The Restatement reinforces the argument that unconscionability is a matter of law determinable by only the Court. Restatement (Second) of Contracts § 208 cmt. f (1981) ("A determination that a contract or term is unconscionable is made by the court in the light of all the material facts...[i]ncidental findings of fact are made by the court rather than by a jury, but are accorded the usual weight given to such findings of fact in appellate review."). South Carolina courts have relied on this section of the Restatement in determining whether an agreement is unconscionable. *Hardee v. Hardee*, 348 S.C. 84, 95-96, 558 S.E.2d 264, 269-70 (Ct. App. 2001) (citing the Restatement for the proposition that "[i]n determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed.").

For these reasons, the Master did not err in finding that Smith was not entitled to a jury trial on a counterclaim for common law unconscionability.

ii. No right to a jury trial exists for a statutory unconscionability claim.

The Master also did not err in finding that Smith was not entitled to a jury trial on counterclaim for statutory unconscionability under § 37-5-108. (R. p. 8.) First, while ~~statutory unconscionability is of like nature to an equitable cause of action in existence in~~ 1868—common law unconscionability—a right to jury trial would not have existed on such a cause of action in 1868. Second, the language of § 37-5-108 makes the issue of whether an agreement is unconscionable a matter of law for a court to decide.

statutory interpretation and the court has no right to look for or impose another meaning.”
Tilley v. Pacesetter Corp., 333 S.C. 33, 38, 508 S.E.2d 16, 18 (1998).

The language of the South Carolina unconscionability statute confirms that this issue is one for the Court alone to decide. S.C. Code Ann. § 37-5-108(1) (“[I]f the *court* as a matter of law finds the agreement or transaction to have been unconscionable ... the *court* may refuse to enforce the agreement.”); § 37-5-108(3) (“If it is claimed or appears to the *court* that the agreement or transaction or any term or part thereof may be unconscionable ... the parties shall be afforded a reasonable opportunity to present evidence ... to aid the *court* in making the determination.”); *see also* § 37-10-105(C) (“If the *court* finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the *court* may [grant relief or damages].”).

Neither § 37-5-108 nor § 37-10-105 mention the right to a jury trial. If the Legislature had intended a certain result in a statute, it would have said so. *See Estate of Guide v. Spooner*, 318 S.C. 335, 338, 457 S.E.2d 623, 624 (Ct. App 1995).

For these reasons, the Master did not err in finding that Smith was not entitled to a jury trial under a counterclaim for either common law unconscionability or statutory unconscionability.

II. SMITH'S CHALLENGE TO THE MASTER'S JURISDICTION TO HEAR AND RULE ON WELLS FARGO'S MOTION TO STRIKE JURY DEMAND WAS NOT PROPERLY PRESERVED FOR APPEAL WHERE IT WAS RAISED FOR THE FIRST TIME BY WAY OF A RULE 59(E) MOTION.

Smith failed to preserve for appeal the issue of whether the Master had jurisdiction to hear and rule upon Wells Fargo's Motion to Strike Jury Demand.

Issues must have been raised to and ruled upon by the circuit court to be preserved before being heard on appeal. *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (citing *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000); *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000)). “If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). This preservation requirement “prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” *Id.*

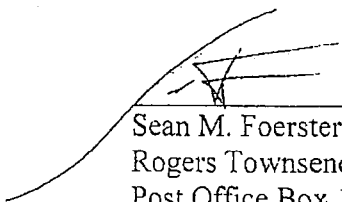
However, “[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990); *see also Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (“A party [sic] cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.”); *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control*, 380 S.C. 349, 380, 669 S.E.2d 899, 915 (Ct. App. 2008) (“If an issue could have been initially presented to the trial court, a party cannot raise that issue for the first time in a post-trial motion.”); *Mailsources, LLC v. M. A. Bailey & Assocs.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) (“A party cannot raise an issue for the first time in a Rule 59(e), SCRPC motion which could have been raised at trial.”).

Smith raised this jurisdictional challenge for the first time in his Rule 59(e) motion after failing to raise it either at the motion hearing or in his memorandum of law in opposition to Wells Fargo's motion. (R. p. 58 ¶ 4.) Therefore, this issue has not been properly preserved for appeal. The Court should affirm the Master's Order on this ground.

CONCLUSION

Based on the foregoing and any additional sustaining grounds appearing in the record, Wells Fargo would respectfully submit that the Master-in-Equity's Order on March 12, 2009, granting Wells Fargo's Motion to Strike Jury Demand should be affirmed.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr.
Master in Equity

Case No. 2008-CP-23-6833

Wells Fargo Bank, N.A. Respondent,

v.

Michael Smith; South Carolina Department
Of Motor Vehicles; M&T Properties, Inc.;
State of South Carolina; Arthur State Bank;
South Carolina Department of Probation,
Pardon and Parole Services.....Defendants,

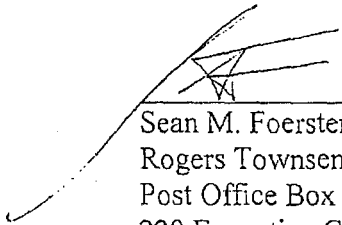
Of Whom Michael Smith is the.....Appellant.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served I HEREBY CERTIFY that I have served
the Final Brief of the Respondent on December 18, 2009, by depositing a copy of each in
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THE STATE OF SOUTH CAROLINA
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Wells Fargo Bank, N.A.

Respondents,

v.

Michael Smith; South Carolina
Department of Motor Vehicles; M&T
Properties, Inc.; State of South Carolina;
Arthur State Bank; South Carolina
Department of Probation, Pardon and
Parole Services

Of Whom Michael Smith is the
Appellant.

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Appellant respectfully submits this Brief in reply to the Brief of Respondent and in support of his appeal of the Order of the Master in Equity ("Master") in this case. The Brief of Respondent does not argue against Appellant's assertion that the Master committed error when he made evidentiary findings on the merits of the case in response to the Respondent's Motion to Strike Jury Demand. The Master committed error when he found that the Appellant was not entitled to a jury trial on his second and third counterclaims on the basis they are not "in the nature of" tort causes of action that were recognized at common law in 1868. Finally, the Master committed error in holding that claims under the state Consumer Protection Code directed at the mortgage transaction do not bear a logical relationship to a foreclosure action and thus are permissive, their inclusion thereby constituting a waiver of the right to trial by jury.

ARGUMENT

I. The Master committed error when he made evidentiary findings and conclusions of law on the merits of the case.

The case was not before the Master for the making of findings of fact and conclusions of law on the merits of the case. However, the Court made findings of fact as outlined below, despite the Appellant's denial in his Answer:

- a) Smith's counterclaim has no merit. (R. p. 12 ¶ 34)
- b) On April 10, 2003, at the time Smith applied for the loan, he signed a form entitled "Attorney/Insurance Preference Check List". (R. p. 12 ¶ 34)
- c) On this form, he selected Harvey Breland, Esquire, as his attorney. (R. p. 13 ¶ 34)
- d) Because Smith would not be entitled to relief as against Wells Fargo on his counterclaim, it can hardly be said he would be entitled to a jury trial on it. (R. p. 13 ¶ 34)

- e) Smith is in default on his loan payments as of June 1, 2008. (R. p. 4 ¶ 3)
- f) Smith still owes \$77,460.63 on the debt, with interest from May 1, 2008, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees. (R. p. 4 ¶ 3)
- g) On April 29, 2003, Smith gave a Fixed Rate Note ("Note") to Wells Fargo Home Mortgage, in the principal sum of \$83,000. (R. p. 3 ¶ 2)
- h) That the defendant gave Wells Fargo Home Mortgage, Inc., a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road, Greenville, SC 29617, as well as a 2003 Fleetwood mobile home. (R. p. 3 ¶ 2)
- i) Wells Fargo is the successor by merger to Wells Fargo Home Mortgage, Inc." (R. p. 3 ¶ 2)

Appellant denied these allegations in his Answer and Counterclaim. In its Brief, Respondent gives no explanation and points to no evidence in the record that supports why the Master made these findings of fact or why they should be allowed to stand. Nor is any such evidence to be found in the transcript of the motion hearing. Respondent does not defend the factual findings contained in the Order.

A motion to strike that challenges a theory of recovery is akin to a motion to dismiss. Thus, the Court is limited to the four corners of the pleading. *Hackworth v. Greywood At Hammett, LLC*, Op. No. 4608 Court of Appeals of South Carolina, August 12, 2009. Here the Court went beyond the matters raised in Respondent's motion to strike and made findings of fact and conclusions of law on the ultimate issues of the merits of the case. This was done without evidence of any kind entered in the record.

That part of the Order of the Master setting forth these unnecessary and unsupported findings of fact and conclusions of law should be reversed and the case remanded for a full trial on the merits of all causes of action alleged.

II. The Appellant is entitled to a trial by jury because the counterclaims are
"in the nature of" an action that was entitled to a jury trial in 1868.

The Respondent suggests that, in order to warrant a jury trial, the counterclaims must mirror (as opposed to be in the nature of) a cause of action that existed in 1868 and which carried the right to a jury trial. This is an inaccurate analysis.

For example, the Respondent contends that, before enactment of the attorney preference statute, there was no "recognized common law cause of action for a mortgage lender's failure to ascertain a borrower's preference as to legal counsel at the time of the loan application". Respondent goes on to contend that it can think of no common law cause of action other than fraud in which the statute could be grounded.

That is precisely why the Court must determine if there was a cause of action existing in 1868 that was "in the nature of" the right to recover for a violation of a duty to another (such as common law negligence as propounded by the Appellant). The Respondent's argument would dispense with the need for the determination of whether the counterclaim is "in the nature of" an action at common law that carried the right to a jury trial. Under its theory, you can only get a jury trial on attorney preference if the duty outlined in the attorney preference statute existed in 1868.

Obviously, this is not the analysis that was intended by the Court in *C.W. Matthews Contracting Co., Inc. v. South Carolina Tax Commission*, 267 S.C. 548, 553 (1976). The Court's analysis in that case suggests that the question is not whether borrowers had a right to have their attorney preference ascertained in 1868, but rather, whether the statutory cause of action is "in the nature" of an action triable at common law

in 1868. It is clear that a statutory action need not be a cause of action recognized in 1868 that has now been codified. *Medlock v. 1985 Ford F-150 Pick Up VIN 1FTDF15YGFNA22049*, 308 S.C. 68, 417 S.E. 2d 85 (1992) (Finding owner of property subject to forfeiture action proceeding in rem enjoys a right to a jury even though common law forfeiture proceeded only in personam). *MIMS Amusement v. Law Enforcement Division*, 366 S.C. 141, 149 (2005) ("The right to a jury trial encompasses forms of action that have arisen since the adoption of the Constitution in those cases where the later actions are of like nature to actions which were triable at common law at the time of the adoption of the Constitution.")

The existence of the duty codified in the attorney preference statute and the breach thereof is "in the nature of" negligence. In fact, the failure to ascertain attorney preference is negligence per se. Therefore, the Appellant is entitled to a jury trial on the second and third counterclaims.

III. The Appellant did not waive his right to a jury trial by bringing these counterclaims in the foreclosure action because the claims are compulsory, not permissive.

If the Appellant counterclaimed with claims that do not bear a "logical relationship" to the foreclosure action, then the claims are permissive and the Appellant has waived his right to a jury trial. A claim under the attorney preference statute is logically related to a foreclosure action. *Bobo v. Vanderbilt Mortgage and Finance, Inc. (In re Bobo)* No. 07-01120 Adv. Pro. No. 07-80057 (Bankr. D.S.C. Jan. 17, 2008). In *Bobo*, Judge Burris thoroughly analyzed the case law and concluded that "the state Consumer Protection

Code claims bear a logical relationship to the foreclosure action". In holding an attorney preference claim to be compulsory, the Court did not limit the logical relationship test to enforceability of the note. It held that the "claims concern . . . whether the Plaintiff is entitled to void the mortgage or recover damages due to the violation of the co-signer notice, attorney preference and unconscionability provisions of the state Consumer Protection Code."

Respondent relies on *N.C. Federal Savings & Loan Assn. v. DAV Corp.*, stated, 298 S.C. 514, 381 S.E. 2d 903 (1989) and *Advance International, Inc. v. North Carolina National Bank of South Carolina*, 316 S.C. 266, 449 S.E. 2d 580 (Ct.App 1994), affirmed in this holding but other parts deemed dicta and vacated, 320 S.C. 532, 466 S.E. 2d 367 (1996) for the proposition that no cause of action bears a logical relationship to a foreclosure unless it affects the enforceability of the Note. However the holdings in those cases did not limit the bounds of logical relationship to foreclosure to enforceability of the note. It simply recognized it as one instance of a logical relationship. Therefore, the Respondent's argument that the counterclaims are permissive due to the lack of a logical relationship to the foreclosure action fails. This Court should therefore reverse the Master's Order that the state Consumer Protection Code claims are permissive.

CONCLUSION

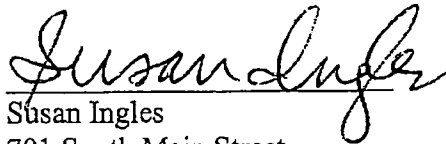
For the foregoing reasons and those outlined in his Brief, the Appellant is entitled to

- 1) An Order that the findings of fact a-i hereinabove be stricken and that part of the Order vacated;
- 2) Reversal of the Master's grant of the motion to strike Appellant's claim for jury trial;
- 3) Remand the case to be placed on the Circuit Court jury trial docket and proceed pursuant to the S.C. Rules of Civil Procedure;¹

February 5, 2010

Respectfully submitted,

S.C. LEGAL SERVICES



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¹ Any ruling by the S.C. Court of Appeals in this case should not be deemed to lift the stay issued in the Administrative Order of the S.C. Supreme Court dated 5-22-2009.

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Respondents,

v.

Michael Smith; South Carolina
Department of Motor Vehicles; M&T
Properties, Inc.; State of South Carolina;
Arthur State Bank; South Carolina
Department of Probation, Pardon and
Parole Services

Of Whom Michael Smith is the

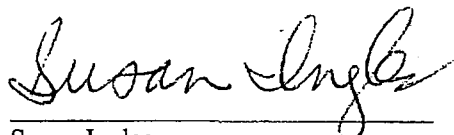
Appellant.

PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant on Wells Fargo Bank, N.A.
by depositing a copy of same in the United States Mail postage prepaid on February 5, 2010
addressed to their attorney of record at the following address:

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February 5, 2010



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wells Fargo Bank, NA, Respondent,

v.

Michael Smith; South Carolina Department of Motor Vehicles; M & T Properties, Inc.; State of South Carolina; Arthur State Bank; South Carolina Department of Probation, Pardon and Parole Services, Defendants, of whom Michael Smith is the Appellant.

Appellate Case No. 2009-125666

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 4988
Submitted March 1, 2011 – Filed June 13, 2012

**AFFIRMED IN PART, REVERSED IN PART, and
REMANDED**

Susan P. Ingles, of South Carolina Legal Services, of Greenville, for Appellant Michael Smith.

Sean Matthew Foerster, of Rogers Townsend & Thomas, PC, of Columbia, for Respondent Wells Fargo Bank.

WILLIAMS, J.: Michael Smith ("Smith") appeals the Master-in-Equity's ("Master") grant of Wells Fargo Home Mortgage, Inc.'s¹ ("Wells Fargo") motion to strike the jury demand. We affirm in part, reverse in part, and remand for further proceedings.

FACTS/PROCEDURAL HISTORY

On April 29, 2003, Smith gave a Fixed Rate Note ("Note") to Wells Fargo in the amount of \$83,000. To secure payment of the Note, Smith gave Wells Fargo a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road in Greenville, South Carolina, as well as a 2003 Fleetwood mobile home.

Wells Fargo filed this action for foreclosure, alleging Smith defaulted on his loan payments under the Note and Mortgage and owed \$77,460.63 on the debt. After the Greenville County Clerk of Court filed an order of reference, Smith filed a motion to allow late filing of responsive pleadings, and Wells Fargo consented to an extension of time. Smith filed an answer and counterclaim with a jury trial request and asserted, along with other various defenses, the following counterclaims: 1) accounting; 2) unconscionability; and 3) violation of section 37-10-102 of the South Carolina Code (Supp. 2010).² Wells Fargo filed a motion to strike the jury demand ("motion to strike"). The Master heard the motion to strike and asked Smith to submit additional authority to support his position.

On March 12, 2009, the Master issued an order granting Wells Fargo's motion to strike and confirming the order of reference. Smith timely filed a Rule 59(e), SCRCP, motion seeking to alter or amend the final order, and by order entered April 15, 2009, the Master denied Smith's Rule 59(e) motion. This appeal followed.

STANDARD OF REVIEW

"The matter of striking from a pleading, and the matter of admissibility of evidence is largely within the discretion of the trial judge." *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). "The granting or refusal of a [m]otion to strike . . . will not be reversed except for an abuse of discretion or

¹ Wells Fargo, NA is the successor by merger to Wells Fargo Home Mortgage, Inc.

² Section 37-10-102 of the South Carolina Code (Supp. 2010) is also referred to as the Attorney Preference statute.

unless the action of the trial judge was controlled by an error of law." *Id.* at 194-95, 213 S.E.2d at 728 (internal citation omitted); *see also Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 70 (1993) (holding absent an abuse of discretion, the trial court's ruling on a motion to strike will not be reversed).

Additionally, "[w]hether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the trial court." *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

LAW/ANALYSIS

A. Subject Matter Jurisdiction

On appeal, Smith asserts the Master exceeded his jurisdiction in ruling on Wells Fargo's motion to strike. As a result, Smith contends the matter should have been transferred to the circuit court when he initially filed the jury demand as part of the answer and counterclaim. We disagree.

Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by an order of reference. *Smith v. Ocean Lakes Family Campground*, 315 S.C. 379, 381, 433 S.E.2d 909, 910 (Ct. App. 1993). When a case is referred to a master under Rule 53, the master is given the power to conduct hearings in the same manner as the circuit court unless the order of reference specifies or limits the master's powers. *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). Specifically, Rule 53(c), SCRCP, states "[o]nce referred, the master or special referee shall exercise all power and authority which a circuit court judge sitting without a jury would have in a similar matter."

As a basis for this claim, Smith cites the Reporter's Note appended to the 2002 Amendment to Rule 53, SCRCP. This note states, "If there are counterclaims requiring a jury trial, any party may file a demand for a jury under Rule 38 and the case will be returned to the circuit court." However, the order of reference in this case authorized the Master "to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP, and all matters arising from or reasonably related to such action. The Master in Equity shall retain jurisdiction to perform all necessary acts incident to this foreclosure action" Thus, once the case is referred to the Master, he has subject matter jurisdiction to resolve the action to the extent the order of reference provides, and with the authority a circuit court judge

would have in a similar matter. *See* Rule 53(c), SCRCF; *Hayes*, 311 S.C. at 360, 428 S.E.2d at 902. Accordingly, we find the Master had subject matter jurisdiction to rule on Wells Fargo's motion to strike the jury demand as the matter was properly before the Master pursuant to the order of reference and our rules of civil procedure.

B. Smith's Counterclaims

Smith contends the Master erred in determining Smith's counterclaims for unconscionability and a violation of the Attorney Preference statute were not entitled to a jury trial. We disagree.

The South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. "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). Additionally, Rule 38(b), SCRCF, provides, in pertinent part:

Any party may demand a trial by jury of any issue *triable of right by a jury* by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(emphasis added). Smith demanded a jury trial in his answer and counterclaim when he asserted counterclaims of accounting³, unconscionability, and a violation of the Attorney Preference statute against Wells Fargo.

³ Smith conceded at the non-evidentiary hearing he was not entitled to a jury trial on his counterclaim for accounting and subsequently abandoned this argument on appeal. *See* Rule 208(b)(1)(D), SCACR (stating each "particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority"); *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal).

"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). If a complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim. *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986), *modified by Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). "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). As Wells Fargo's foreclosure allegation is equitable in nature, Smith has the right to a jury trial only if his counterclaim is both legal and compulsory. *See C & S Real Estate Servs., Inc.*, 290 S.C. at 302, 350 S.E.2d at 193.

Characterization of an "action as equitable or legal depends on the appellant's 'main purpose' in bringing the action." *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citations omitted).⁴ "The main purpose of the action should generally be ascertained from the body of the complaint." *Id.* (citation omitted). "However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (citation omitted). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. *Bell v. Mackey*, 191 S.C. 105, 119-20, 3 S.E.2d 816, 822 (1939) (citations omitted).

For Smith's counterclaims to be entitled to a jury trial, each counterclaim must be both legal and compulsory.

1. Unconscionability

Smith argues the Master erred in finding he was not entitled to a jury trial on his unconscionability counterclaim. We disagree.

⁴ "[T]he 'main purpose' rule evolved from a determination that where a plaintiff has prayed for money damages in addition to equitable relief, characterization of the action as equitable or legal depends on the plaintiff's 'main purpose' in bringing the action." *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991) (citations omitted).

a) Common Law Unconscionability⁵

Although Smith's counterclaim for common law unconscionability is compulsory, he is not entitled to a jury trial because this is an equitable claim that does not create a cause of action for damages.

"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. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); see also Rule 13(a), SCRCF. 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). In *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), our supreme court adopted the "logical relationship" test and held DAV's counterclaim was compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." In essence, the "logical relationship" determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Intern., Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994), *aff'd in part, vacated in part*, 320 S.C. 532, 466 S.E.2d 367 (1996).

Here, there is a "logical relationship" between the enforceability of the Note, which is the subject of the foreclosure action, and the allegation that the Mortgage between Wells Fargo and Smith is unconscionable. If Smith prevails on his unconscionability claim, it will affect Wells Fargo's right to enforce the Note and foreclose the Mortgage. Therefore, Smith's common law unconscionability counterclaim is compulsory under the "logical relationship" test.

Even though Smith's common law unconscionability counterclaim is compulsory, because common law unconscionability only provides an equitable relief, Smith is not entitled to a jury trial on his counterclaim. Jurisdictions throughout the country

⁵ Smith's counterclaim for unconscionability failed to specify whether it was a claim for common law unconscionability or statutory unconscionability under section 37-5-108 of the South Carolina Code (Supp. 2010). We analyze this issue under both and hold the Master was correct in finding Smith was not entitled to a jury trial under either version of the counterclaim.

agree that common law unconscionability is an equitable cause of action with corresponding relief that is only equitable in nature. *See Doe v. SexSearch.com*, 551 F.3d 414, 419 (6th Cir. 2008) ("At common law, unconscionability is a defense against enforcement, not a basis for recovering damages."); *Super Glue Corp. v. Avis Rent a Car Sys., Inc.*, 517 N.Y.S.2d 764, 766 (N.Y. App. Div. 1987) ("The doctrine of unconscionability is used as a shield, not a sword, and may not be used as a basis for affirmative recovery."); *see, e.g.*, Restatement (Second) of Contracts § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."). Despite Smith's request for actual and punitive damages for unconscionability in the body of his pleadings, the primary relief sought is to have the mortgage declared void. Accordingly, Smith seeks relief from a jury that cannot be granted. *See Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) ("In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.") (emphasis added); *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009) ("Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed."); *Loyola Fed. Sav. Bank v. Thomasson Props.*, 318 S.C. 92, 93, 456 S.E.2d 423, 424 (Ct. App. 1995) ("If the claim is equitable, there is no right to a jury trial."). Because the only remedies available for common law unconscionability are equitable, there is no right to a jury trial on this claim. *See Brown v. Greenwood Sch. Dist. 50 Bd. of Trs.*, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001) ("There is no right to a jury trial for equitable remedies such as rescission and restitution."). Accordingly, Smith's common law unconscionability-counterclaim-is-not-entitled-to-a-jury-trial.

b) Statutory Unconscionability

Applying the same "logical relationship" test, we find Smith's counterclaim for statutory unconscionability is also compulsory. In addition to arising out of the same transaction or occurrence as Wells Fargo's foreclosure action, Smith's counterclaim bears a "logical relationship" to the enforceability of the Note and Mortgage. Accordingly, Smith's statutory unconscionability counterclaim is compulsory under the "logical relationship" test.

Although the statutory unconscionability counterclaim is compulsory, section 37-5-108 of the South Carolina Code (Supp. 2010) requires the determination of whether an agreement is unconscionable to be a matter of law for the court. *See Tilley v. Pacesetter Corp.*, 333 S.C. 33, 38, 508 S.E.2d 16, 18 (1998) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."). In section 37-5-108, the General Assembly explicitly chose the use of the term "court" to unequivocally demonstrate that the matter is not to be resolved by a jury, but by the court. *See* § 37-5-108(1) ("[I]f the *court* as a matter of law finds . . . the agreement or transaction to have been unconscionable . . . the *court* may refuse to enforce the agreement.") (emphasis added); *see also* § 37-5-108(3) ("If it is claimed or appears to the *court* that the agreement or transaction or any term or part thereof may be unconscionable . . . the parties shall be afforded a reasonable opportunity to present evidence . . . to aid the *court* in making the determination.") (emphasis added). Therefore, section 37-5-108 does not provide a right to a jury trial for a statutory unconscionability cause of action. Accordingly, we affirm the Master's decision to strike Smith's unconscionability counterclaim.

2. Violation of the Attorney Preference Statute

Petition ~~of~~ for
Rehearing

To determine whether Smith is entitled to a jury trial on his allegation that Wells Fargo violated the Attorney Preference statute, we again must determine if this counterclaim is both legal and compulsory. *See C & S Real Estate Servs., Inc.*, 290 S.C. at 302, 350 S.E.2d at 193. We conclude Smith's counterclaim is permissive because a violation of the Attorney Preference statute would not affect the enforceability of the Note and Mortgage.

Section 37-10-102(a) of the South Carolina Code (Supp. 2010) provides, in pertinent part:

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose . . . [t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction

To secure payment of his Note, Smith gave Wells Fargo a real estate Mortgage covering his real property as well as a mobile home. As a result, Smith was entitled to choose an attorney of his preference for the closing of the transaction pursuant to section 37-10-102(a). A violation of the Attorney Preference statute is enforced by section 37-10-105(A) of the South Carolina Code (Supp. 2010). The enforcement provision of the Attorney Preference statute provides, in pertinent part:

If a creditor violates a provision of this chapter, the debtor has a cause of action . . . to recover actual damages and also a right in an action . . . to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.

S.C. Code Ann. § 37-10-105(A) (Supp. 2010). A review of this statute demonstrates Smith's counterclaim has no "logical relationship" to the enforceability of the Note and Mortgage. Moreover, even if a violation of the statute occurred, Smith would only be entitled to actual damages and a possible penalty between \$1,500 to \$7,500. The statute, however, does not permit rescission of the Note and Mortgage for its violation. See § 37-10-105(A). As Smith's counterclaim bears no "logical relationship" to the enforceability of the Note and Mortgage, we conclude Smith's counterclaim is permissive. Therefore, Smith waived his right to a jury trial by asserting it in the foreclosure action. See *N.C. Fed. Sav. & Loan Ass'n*, 294 S.C. at 30, 362 S.E.2d at 310 ("[W]here a defendant in an action begun in equity asserts a permissive counterclaim that is legal in nature, the defendant is deemed to have waived the right to a jury trial on the issues raised by the counterclaim."). Accordingly, we affirm the Master's decision to strike Smith's counterclaim for a violation of the Attorney Preference statute.

C. Scope of Motion to Strike Jury Demand

Smith contends the Master exceeded the scope of Wells Fargo's motion to strike by making findings of fact and conclusions of law based on documents and information not in evidence. We agree.

A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner*, 257 S.C. 544, 549-50, 186 S.E.2d 523, 526 (1972).

After a brief non-evidentiary motion hearing, the Master requested Smith submit authority to support his assertion he was entitled to a jury trial. A review of the Master's order demonstrates his ruling went beyond the permissible scope of Wells Fargo's motion. The order granting Wells Fargo's motion to strike had the effect of granting judgment and making findings of fact based on information not admitted or decided by the pleadings. In short, the Master's order on the motion to strike the jury demand makes findings of fact and rules that a cause of action is meritless without evidentiary support, constituting an abuse of discretion.⁶ See *Edwards v. Edwards*, 384 S.C. 179, 183, 682 S.E.2d 37, 39 (Ct. App. 2009) ("The [trial] court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law."). We conclude these impermissible findings of fact and conclusions of law are prejudicial to Smith, thus warranting reversal. See *Watts v. Bell Oil Co. of Ocean Drive, Inc.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976) (holding a trial court will only be reversed when the record shows not only error but also prejudice).

CONCLUSION

In summary, the Master had subject matter jurisdiction to rule on Wells Fargo's motion to strike the jury demand. Additionally, the Master's ruling on Smith's unconscionability and attorney preference statute counterclaims is affirmed. The Master's order, to the extent that it details specific findings of fact and conclusions of law, is reversed and the case remanded to the Master for a bench trial on the merits of all causes of action alleged.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

⁶ The Master made certain findings of fact that go to the substance and merits of Smith's claims and well beyond the scope of the motion to strike, including: "Smith's counterclaim has no merit," and "[b]ecause Smith would not be entitled to relief as against Wells Fargo on his counterclaim, it can hardly be said he would be entitled to a jury trial on it."

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master-in-Equity

Appellate Case No. 2009-125666

Wells Fargo Bank, NA,

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Of Whom Michael Smith is the Appellant

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellant, Michael Smith, seeks rehearing of the court's opinion in the case above filed on June 13, 2012 for clarification and revision as set forth in Sections I and II hereof. Appellant's Petition for Rehearing also asserts that the points outlined in Section III hereof regarding the Attorney Preference statute were overlooked or misapprehended by the Court.

I.

THE REHEARING IS NECESSARY TO ADDRESS STATEMENTS IN THE DECISION WHICH ARE SET FORTH AS UNQUALIFIED FACTUAL FINDINGS THAT MAY PREJUDICE APPELLANT ON REMAND REGARDING ALLEGATIONS THAT DEFENDANT DENIED IN HIS RESPONSIVE PLEADINGS

In its decision, the Court assumed facts that are not yet in evidence and that were denied by Appellant in his responsive pleadings. These statements of fact in the decision may be thereby rendered the law of the case in the trial on remand. Therefore, Appellant requests that the Court revise those parts of the decision to reflect that these statements are not findings of fact but merely allegations still to be proven at a trial on the merits. The statements in the decision are as follows:

Facts/Procedural History

On April 29, 2003, Smith gave a Fixed rate Note ("note") to Wells Fargo in the amount of \$83,000. To secure payment of the Note, Smith gave Wells Fargo a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road in Greenville, South Carolina, as well as a 2003 Fleetwood mobile home.

Violation of the Attorney Preference Statute

To secure payment of his Note, Smith gave Wells Fargo a real estate Mortgage covering his real property as well as a mobile home.

In his Answer and Counterclaim, the Appellant asserted a general denial as to the allegations in the Complaint regarding the execution and effect of the Note and Mortgage referred to therein. He will testify to facts that dispute the validity of the Note and Mortgage. Therefore, the above statements are mere allegations of which proof will be required at a trial on the merits. The Appellant requests that the Court replace these statements with the following:

Facts/Procedural History

The Complaint alleges that on April 29, 2003, Smith gave a Fixed rate Note ("note") to Wells Fargo in the amount of \$83,000. The Complaint further alleges that to secure payment of the Note, Smith gave Wells Fargo a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road in Greenville, South Carolina, as well as a 2003 Fleetwood mobile home.

Violation of the Attorney Preference Statute

The Complaint alleges that to secure payment of this Note, Smith gave Wells Fargo a real estate Mortgage covering his real property as well as a mobile home.

II.

THE REHEARING IS NECESSARY TO CLARIFY THOSE PARTS OF THE DECISION THAT MISTAKENLY STATED THAT APPELLANT'S COUNTERCLAIMS WERE TO BE STRICKEN RATHER THAN MERELY AFFIRMING THE LOWER COURTS ORDER STRIKING APPELLANT'S JURY DEMAND AS TO THOSE COUNTERCLAIMS

The Court affirmed the Master's decision on Respondent's Motion to Strike jury demands as to Appellant's counterclaims but remanded for a "bench trial on the merits of all causes of action alleged". Presumably, this reference in

the conclusion refers to the Appellant's counterclaims as well. However, in the body of the decision the Court states:

As to statutory unconscionability: "Accordingly, we affirm the Master's decision to strike Smith's unconscionability counterclaim." Appellant requests that this statement be clarified to say: *Accordingly, we affirm the Master's decision to strike Smith's request for a jury trial on his unconscionability counterclaim.*

As to violation of the Attorney Preference statute: "Accordingly, we affirm the Master's decision to strike Smith's counterclaim for a violation of the Attorney Preference statute." Subject to the request for rehearing as outlined in Section III hereof, Appellant requests that this statement be clarified to say: *Accordingly, we affirm the Master's decision to strike Smith's request for a jury trial on his counterclaim for a violation of the Attorney Preference statute.*

III.

THE REHEARING IS NECESSARY BECAUSE THE COURT OVERLOOKED THE LANGUAGE OF THE ATTORNEY PREFERENCE STATUTE AND APPLIED THE LOGICAL RELATIONSHIP TEST TOO NARROWLY IN AFFIRMING THE MASTER'S FINDING THAT THE COUNTERCLAIM FOR VIOLATION OF THE ATTORNEY PREFERENCE STATUTE WAS NOT COMPULSORY

The Court held that the Appellant's counterclaim for violation of the Attorney Preference statute "has no logical relationship to the *enforceability of the Note and Mortgage* (emphasis added)" and therefore it is not compulsory. In so holding, this Court overlooked the language contained in the statute that states the

Attorney Preference statute can be raised as a defense to foreclosure at any time¹ and also misconstrued the scope of the logical relationship test pertaining to compulsory counterclaims in a foreclosure action.

In the case of Bobo v. Vanderbilt Mortgage and Finance, Inc. (In re Bobo) No. 07-01120 Adv. Pro. No. 07-80057 (Bankr. D.S.C. Jan. 17, 2008), cited in Appellant's Reply Brief, the U.S. Bankruptcy Court for the District of South Carolina made an analysis that specifically found a claim under the Attorney Preference statute² to be logically related to a foreclosure action. Following the case of North Carolina Federal Sav. & Loan Asso. v. DAV Corp., 298 S.C. 514, 381 S.E.2d 903, 1989 S.C. LEXIS 147 (S.C. 1989) hereinafter referred to as "DAV Corp.", (where our Supreme Court adopted the logical relationship test) the Court dismissed the mortgagor's claim for, inter alia, violation of the Attorney Preference statute because it *was* compulsory by virtue of its logical relationship to the foreclosure action.

In that case, the sale of the home had been halted by the Mortgagor's filing of bankruptcy and the Mortgagor brought an adversary proceeding asserting these claims that it had not asserted in the foreclosure action. The Court held that

¹ This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action. SECTION 37-10-105 (A)

² Mr. Bobo filed the Adversary Complaint against the mortgage company alleging causes of action based on the South Carolina homestead exemption, the federal Truth In Lending Act, 15 U.S.C. §§ 1601-1667f (TILA) for failure to provide right of rescission (15 U.S.C. § 1635(a)), and under the state Consumer Protection Code, S.C. Code Ann. §§ 37-1-101 to 37-25-80, for "overreaching," unconscionability, and violation of the attorney preference provision.

Plaintiff's claims "concern whether Plaintiff is entitled to rescind that very contract under TILA and whether Plaintiff is entitled to void the mortgage or recover damages due to violation of the co-signer notice, attorney preference and unconscionability provisions of the state Consumer Protection Code." The Court concluded Plaintiff's claims were matters properly included in the foreclosure action. Accordingly, the Court granted summary judgment in favor of the mortgage company as to the TILA and state Consumer Protection Code claims.

DAV Corp.

The Court's decision in the case at bar should have likewise concluded the Attorney Preference counterclaim was compulsory under In re Bobo and the statute itself. However, the Court disregarded these clear authorities and applied the logical relationship test too narrowly in affirming the Master's finding that Appellant's counterclaim for violation of the Attorney Preference statute was permissive. The logical relationship test is applied to determine if a counterclaim arises out of the same transaction or occurrence for purposes of Rule 13(a) SCRPC. Under this test, a counterclaim is compulsory if it bears a logical relationship to the claim asserted. Here the claims to which the counterclaims must be logically related are for 1) Declaratory Judgment that Mobile/Manufactured Home is subject to the lien of Plaintiff's Mortgage and 2) Foreclosure of Mortgage.

In its decision of June 13, 2012, this Court relied on DAV Corp when it ruled that the compulsory counterclaim analysis in a foreclosure action is limited to whether a counterclaim affects the enforceability of the Note and Mortgage.

The Supreme Court's holding in DAV Corp. does not support this conclusion. Rather the Court's particular holding on one counterclaim in that case was specific to those facts and did not purport to limit the compulsory counterclaim analysis to the sole issue of whether a counterclaim affects the enforceability of the Note and Mortgage. As background DAV Corp. was a foreclosure action against a joint venture. The Court held that the following counterclaims were compulsory 1) breach of a subsequent oral contract to arrange additional financing for interest payments and construction costs; 2) breach of the joint venture agreement as parent company of joint venturer NCF by bringing foreclosure action; 3) breach of fiduciary duty to co-joint venturers; 4) wrongful dissolution of the joint venture by failing to voluntarily refrain from foreclosure as agreed; 5) violation of the Unfair Trade Practices Act by breaching the oral agreement. The S.C. Supreme Court found only one counterclaim not to be compulsory. That counterclaim was for breach of two later oral agreements between the joint venture parties unrelated to the foreclosure and the underlying note and mortgage (they were related to subsequent oral contracts between the joint venture parties for purchase of an interest in the joint venture). DAV. Corp.

Indeed, as has long been recognized by South Carolina Courts and federal courts within the Fourth Circuit following this test, the logical relationship test is a flexible one and the analysis should be broad in scope so as not to separate claims that arise out of the same transaction or occurrence. Accordingly, the question of whether a counterclaim in a foreclosure case affects the enforceability of the Note and Mortgage should not be, and is not the end of the analysis. In the

case at bar, this Court applied an analysis intended to be flexible too stringently, rather than broadly as was intended when it was adopted by our Supreme Court and as it is applied in cases both in South Carolina and across the Fourth Circuit.

In its opinion, this Court stated that, after reviewing S.C. Code Ann. § 37-10-102(a) and 37-10-105(A) (Supp. 2010), “we conclude that Smith’s counterclaim is permissive because a violation of the Attorney Preference statute would not affect the enforceability of the Note and Mortgage.” Not only does this conclusion fail to explain how the Court’s review of the statute results in its determination, it also improperly limits the analysis. The Court frames the logical relationship test in a foreclosure case as limited to whether the counterclaim asserted affects the enforceability of the Note and Mortgage. Though that language was used by the Court in DAV Corp. in connection with unrelated oral agreements, it is apparent from that decision that the Court did not intend to limit the broad and flexible logical relationship test in situations beyond the specific facts of that one counterclaim in that one case.

Indeed, such a circumscribed application of the test was not utilized by the court as to the other counterclaims at issue in that case. Applying the traditional logical relationship test, the Court easily determined that counterclaims arising out of and relating to the initial loan transaction, the subsequent oral contracts between the S&L and the joint venture and the alleged wrongful acts of the parties to the original mortgage transaction were compulsory. Accordingly, the Court held that, asserting those five counterclaims in the foreclosure did not waive the right to a jury trial. DAV Corp.

As indicated by the foregoing, the analysis of whether a counterclaim may defeat a foreclosure action is only one of several ways to establish a logical relationship between a claim and a counterclaim. To limit the determination of whether a counterclaim is compulsory to this sole circumstance type of analysis contravenes the purpose of Rule 13(a) SCRPC requiring the counterclaims to arise out of the same transaction or occurrence in order to be deemed compulsory. That is not the way the logical relationship test was intended to be interpreted or applied when it was adopted by the South Carolina Supreme Court.

In interpreting the logical relationship test, the Court in DAV Corp. relied on Kolb v. Naylor, 658 F. Supp. 520 (N.D. Iowa 1987) which held that a counterclaim for a lender's breach of fiduciary duty is compulsory in a foreclosure action. In Kolb, the Iowa Supreme Court relied on the logical relationship test for the determination of compulsory counterclaims, similarly to the court in DAV Corp. Citing Harrington v. Polk Co. Fed. S. & L. Ass'n, the Iowa Supreme Court held that a claim by borrowers asserting wrongful conduct and fraudulent practices against a savings and loan was a compulsory counterclaim to an earlier suit by the savings and loan for foreclosure on a mortgage, and failure to assert the same as a counterclaim in the foreclosure action precluded the bringing of a later separate action for damages. Kolb v. Naylor, 658 F. Supp. 520, 526, 1987 U.S. Dist. LEXIS 5104 (N.D. Iowa 1987), Harrington v. Polk Co. Fed. S. & L. Ass'n, 196 N.W.2d 543, 546 (Iowa 1972). Since it relied on the analysis found in Kolb, the DAV Corp. case cannot not be read to limit the logical relationship analysis to the narrow application used in that one counterclaim in that one case.

Indeed, the Court in DAV Corp. used factors such as the documents being executed on the same day and provisions of the documents prohibiting certain actions and allowing other actions in order to expressly state how the logical relationship test was satisfied by the allegations of the five counterclaims it did find to be compulsory.

In interpreting the logical relationship test, courts within the 4th Circuit have relied on Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S. Ct. 367, 70 L. Ed. 750, (1926). Moore stresses the nature and flexibility of the logical relationship test by stating,

"Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their *logical relationship*...It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim.

Id. at 609-610, 46 S. Ct. 367, 70 L. Ed. 750.

Courts look more towards whether the evidence would overlap, whether the claims literally arise from the same transaction, do they share a core interest and, is it in the interest of judicial economy to have this claimant litigate their counterclaim in an independent judicial action. See cases collected in 6 Wright & Miller, *supra*, at § 1410 n. 45.

Of particular relevance is Sue & Sam Mfg. Co. v. B-L-S Constr. Co., 538 F.2d 1048 (4th Cir. 1976), which not only lists the factors for determining a compulsory claim, but may also serve as an example on the application of the

logical relationship test. For the example the court states, "Differences in time, the causes of action, the cause of the damage, the proof of facts, and the issues would rule out a logical relation between the claim for indemnity on account of the rain damage and the counterclaim on account of the snow damage." Id. at 538 F.2d 1048, 1053.

Similar to our federal courts, South Carolina state courts have similarly held that 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." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 62, 566 S.E.2d 863, 2002 S.C. App. LEXIS 116 (S.C. Ct. App. 2002). The Court should focus on the facts and evidence that would be presented as to the counterclaims in its application of the test. That is, would the facts and evidence surrounding the counterclaims be substantially similar and relevant to the facts and evidence that would support the claim itself.

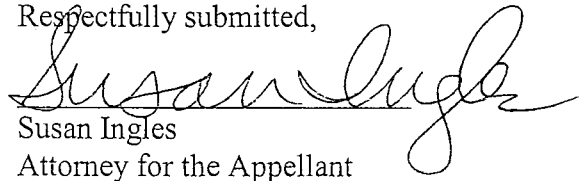
In the case at bar, the attorney preference violation claim arises out of the alleged failure to properly conduct the closing of a mortgage loan under South Carolina law. The probative facts and circumstances regarding state and federal statutes regulating a mortgage closing are the same facts and circumstances surrounding the execution of a Note and Mortgage at the closing. This is particularly true where, as with the Attorney Preference statute, the language of the statute specifically states that its violation can be raised as a defense to a collection action such as foreclosure.

For if the closing of the mortgage loan was not conducted in accordance with state and federal law, all claims relating to the conduct of the parties in closing the mortgage loan in compliance with the law are logically related. See In re Bobo analysis of counterclaim for Truth in Lending Act violation as compulsory. Id. p. 11, 12 The evidence of what transpired at the closing where the note and mortgage come into existence encompasses all claims arising out of the closing transaction including, but not limited to, those that affect the enforceability of the note and mortgage. Though here compliance with the statute does affect the enforceability of the note and mortgage, that fact is not the sole circumstance creating a logical relation of the counterclaims to the claims contained in the Complaint. The holding in the case at bar should not serve to limit analysis in this case or future analysis in other foreclosure cases under the logical relationship test to whether they affect the enforceability of the note and mortgage.

CONCLUSION

For the reasons set forth herein, the Appellant requests that the rehearing be granted, oral argument be held and that the Court grant the requests for clarification and revision set forth in Sections I and II, as well as reverse the Master's decision to strike the jury demand as to the Attorney Preference statute violation as set forth in Section III.

Respectfully submitted,


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Attorney for the Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr.
Master in Equity

Case No. 2008-CP-23-6833

Wells Fargo Bank, N.A.....Respondent,

v.

Michael Smith; South Carolina Department
Of Motor Vehicles; M&T Properties, Inc.;
State of South Carolina; Arthur State Bank;
South Carolina Department of Probation,
Pardon and Parole Services.....Defendants,

Of Whom Michael Smith is the.....Appellant.

RETURN TO PETITION FOR REHEARING

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ARGUMENT

I. THE COURT CORRECTLY CONSTRUED *DAV CORP.* IN DETERMINING THAT THE ATTORNEY PREFERENCE STATUTE COUNTERCLAIM IS PERMISSIVE.

Smith asks this Court to ignore the plain language of the Supreme Court's opinion in *North Carolina Federal Sav. and Loan Ass'n v. DAV Corp.* holding that a counterclaim is compulsory to a foreclosure action only if it is logically related to the enforceability of the note and mortgage. 298 S.C. 514, 381 S.E.2d 903 (1989). Smith asks this Court to ignore its own prior interpretation of that case as well. *Advance Int'l, Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269, 449 S.E.2d 580, 582 (Ct. App. 1994)(construing *DAV Corp.* in finding that counterclaims were permissive because they would not affect the lender's right to enforce the note and foreclose the mortgage), *aff'd in this holding but other parts deemed dicta and vacated*, 320 S.C. 532, 466 S.E.2d 367 (1996).

Rather, Smith would have the Court construe *DAV Corp.* to mean that any counterclaim "arising out of and relating to the initial loan transaction" is compulsory to a foreclosure action (Smith's Pet. Rehr'g p. 7), despite that language appearing nowhere in the opinion. *DAV Corp.*, 298 S.C. 514, 381 S.E.2d 903.

The Court should reject Smith's strained reading of *DAV Corp.* The Supreme Court made clear in that case that the only reason the first five counterclaims were compulsory to the foreclosure action was because the outcome of those claims would affect the bank's ability to enforce the note and mortgage and prevail on its foreclosure cause of action. *Id.* at 518, 381 S.E.2d at

905 ("All of DAV's first five counterclaims allege North Carolina Federal's right to bring suit on the note were modified by its oral agreement to provide additional financing as contemplated in the joint venture agreement ... [c]learly, there is a logical relationship between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture.") (emphasis added).

Further, Smith's interpretation of *DAV Corp.* does not work when applied to the facts of that case because it fails to explain why a counterclaim for breach of a subsequent oral contract to arrange additional financing for interest payments and construction costs was compulsory to the foreclosure. The oral agreement did not *arise out of* the initial loan transaction because it was made some time after the closing of the original loan. The oral agreement did not *relate to* the initial loan transaction because it concerned either a refinancing or making of a brand new loan—a new transaction altogether. The only reasonable explanation for the Supreme Court's finding that the counterclaim concerning that oral contract was compulsory was that it would have avoided the default and was therefore logically related to the enforceability of the original promissory note.

II. EVEN UNDER SMITH'S INCORRECT CONSTRUCTION OF *DAV CORP.*, THE COURT COULD FIND THAT THE ATTORNEY PREFERENCE STATUTE COUNTERCLAIM IS STILL PERMISSIVE.

Even if the Court were to adopt Smith's construction of *DAV Corp.*, it could still find that an attorney preference statute counterclaim is permissive to a foreclosure action. Smith claims that "the attorney preference violation claim

arises out of the alleged failure to properly conduct the closing of a mortgage loan under South Carolina law.” (Smith’s Pet. Rehr’g p. 10.) This is not correct.

A claim for violation of the attorney preference statute arises out of the failure to inform a borrower of his right to choose his own closing attorney and then obtain the borrower’s preference for a closing attorney at the time of the initial loan application or within three days of the initial loan application. S.C. Code Ann. § 37-10-102(a). An initial loan application is typically submitted 20 to 45 days prior to the loan transaction.

If Smith’s compulsory counterclaim test is whether the counterclaim arises out of and relates to the “initial loan transaction,” (Smith’s Pet. Rehr’g p. 7), and if the Court were to construe “loan transaction” as meaning the loan closing itself (when the note and mortgage are actually executed and the loan extended), then the Court could find that the failure to make the attorney preference disclosure at the time of the loan application does not arise out of or relate to the closing transaction itself. In that case, an attorney preference statute violation claim would still be a permissive counterclaim to a foreclosure action.

III. CONTRARY TO SMITH’S ASSERTION, THE COURT’S STRIKING OF THE JURY DEMAND ON THE ATTORNEY PREFERENCE STATUTE COUNTERCLAIM PROMOTES JUDICIAL ECONOMY.

Smith argues that the Court should reverse its finding that the attorney preference statute counterclaim is permissive because “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.’” (Smith’s Pet. Rehr’g p. 10.) This argument is sterile because the Court’s decision to strike Smith’s jury demand

achieves that desired goal of judicial efficiency. Smith's counterclaim will now stay with the Master in Equity to be decided at a final foreclosure hearing rather than face the possibility¹ of being severed and sent back to the circuit court for its own separate jury trial.

The version of the logical relationship test that Smith urges the Court to adopt would actually undermine judicial economy. The Supreme Court has acknowledged the heavy toll that the backlog of foreclosure cases has taken on the resources of this state's court system.² Smith's strained reading of *DAV Corp.* would further add to the court system's burden by permitting foreclosure defendants to use the Attorney Preference Statute to indefinitely delay a foreclosure action for a jury determination³ on an issue that has no impact on the bank's right to foreclose.

IV. *IN RE BOBO* IS NOT MANDATORY AUTHORITY AND IS DISTINGUISHABLE FROM THIS CASE.

Smith asks the Court to reverse its finding that the attorney preference statute counterclaim was permissive based on an unpublished bankruptcy court

¹ "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." *Johnson v. South Carolina Nat. Bank*, 292 S.C. 51, 56, 354 S.E.2d 895, 897 (1987). In all likelihood, the circuit court judge would likely refer the foreclosure cause of action back to the Master in Equity upon disposition of the jury trial on the counterclaim.

² *In re Mortgage Foreclosure Actions*, Administrative Order 2011-05-02-01, 396 S.C. 209, 210, 720 S.E.2d 908, 908 (2011) ("[T]he number of foreclosure actions filed in this State have continued to increase ... the number of unresolved foreclosure actions has increased, with a resulting burden on the resources of the Court before which the action is pending.");

³ Assuming a trial court would determine that there is a right to a jury trial on an attorney preference statute claim (which Wells Fargo still disputes), "the 'at law' claim must be tried first." *Johnson v. South Carolina Nat. Bank*, 292 S.C. 51, 56, 354 S.E.2d 895, 897 (1987).

order entered in the adversary proceeding of *Bobo v. Vanderbilt Mortg. & Fin., Inc. (In re Bobo)*, 2008 Bankr. LEXIS 165 (Bankr. D.S.C. Jan. 17, 2008).

Even if *Bobo* were mandatory authority, it is easily distinguishable from this case. In *Bobo*, the debtor's adversary complaint jumbled the mortgagee's alleged violation of the Attorney Preference Statute into a single claim along with alleged violations of several other provisions of the South Carolina Consumer Protection Code. See Adversary Complaint ¶¶ 46-55, *In re Bobo, Adv. Pro. # 07-80057-hb* (Bankr. D.S.C. Apr. 26, 2007)⁴. The claim itself was labeled "Third Claim for Relief – SC Code 37-1-101 et seq. – SCCPC" and, in addition to alleging a violation of the Attorney Preference Statute (Adv. Compl. ¶ 48), it alleged unconscionability (Adv. Compl. ¶ 53), overreaching (Adv. Compl. ¶ 49), and violation of S.C. Code Ann. § 37-2-303 ("co-signor notice statute") (Adv. Compl. ¶ 47).

While the debtor sought damages for the various violations of the South Carolina Consumer Protection Code (Adv. Compl. ¶¶ 51, 55), the main purpose of this claim was to seek the rescission of the real estate mortgage. See (Adv. Compl. ¶ 52) ("Plaintiff seeks to reform the financing, specifically to void the mortgage, pursuant to SC Code 37-10-102 and 105."); (Adv. Compl. ¶ 50) ("Plaintiff seeks to void the mortgage recorded on his property in REM Book 3225, Page 606."); (Adv. Compl. ¶ 47) ("The subject mortgage is not enforceable pursuant to SC Code 37-2-303.").

⁴ Wells Fargo respectfully requests that the Court take judicial notice of the filings in *In re Bobo, Adv. Pro. # 07-80057-hb* (Bankr. D.S.C. Apr. 26, 2007), available through <https://ecf.scb.uscourts.gov/>

Because the debtor failed to separate out the violation of the attorney preference statute from his general claim for violation of the South Carolina Consumer Protection Code, the bankruptcy court did not do so either in its analysis of whether the claim would have been a compulsory counterclaim to the mortgagee's prior foreclosure action. *Bobo*, 2008 Bankr. LEXIS 165, at *13-22. The bankruptcy court lumped together the debtor's allegations of unconscionability, overreaching, violation of the attorney preference statute, and violation of the co-signor notice statute and referred to them collectively throughout the opinion as the "state Consumer Protection Code claim." *Bobo*, 2008 Bankr. LEXIS 165, at *6, 13, 16, 18, 20.

After conceding that its "research has revealed no South Carolina case involving whether a ... state Consumer Protection Code counterclaim is compulsory as to a foreclosure action," *Id.* at *18, the bankruptcy court concluded that the "state Consumer Protection Code claim" as a whole was compulsory to the mortgagee's foreclosure action. *Id.* at *22. The bankruptcy court reasoned that because the mortgagee's prior foreclosure action concerned "whether it was entitled to foreclose on Plaintiff's mortgage under the terms of the contract," and because the "state Consumer Protection Code claims" concerned whether the debtor was "entitled to void the mortgage or recover damages due to violation of the co-signer notice, attorney preference and unconscionability provisions of the state Consumer Protection Code," the claim was logically related and therefore compulsory. *Id.* at *21.

Unlike the debtor in *Bobo*, however, Smith asserted a counterclaim based solely on a violation of the attorney preference statute. (R. pp. 32-33 ¶¶ 24-28.) Unlike the debtor in *Bobo*, Smith did not seek rescission of the note or mortgage under this counterclaim; he sought only the statutory damages. (R. p. 33 ¶¶ 27-28.) It would not have mattered if Smith had asked for rescission on this counterclaim because, without bootstrapping the attorney preference statute violation allegations to a claim that did provide for rescission, the remedy of rescission is unavailable to Smith on this counterclaim. S.C. Code Ann. § 37-10-105(A).

In addition to being factually distinguishable, *In re Bobo* actually hurts Smith's argument because the bankruptcy court, like the Court did in this case, construed *DAV Corp.* to mean that, in a mortgage foreclosure action, the test for whether a counterclaim is compulsory depends on whether the counterclaim has a "logical relationship" to the mortgage company's right to enforce the promissory note and foreclose the mortgage. *Bobo*, 2008 Bankr. LEXIS 165, at *18 n. 7 ("The South Carolina case with the closest facts appears to be *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.* ... [t]he court held that these particular counterclaims were compulsory: 'there is a logical relationship between the enforceability of the note . . . and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture.'"); at *21 ("Vanderbilt's foreclosure action concerned whether it was entitled to foreclose on Plaintiff's mortgage under the terms of the contract.").

Had the debtor in *Bobo* separated the allegations of violation of the attorney preference statute into its own claim for damages, or had the bankruptcy court done so on its own initiative, the bankruptcy court likely would have reached the same conclusion as this Court did: that an attorney preference statute claim has no logical relationship to the enforceability of the note and mortgage and is a permissive counterclaim to a foreclosure action.

V. THE LANGUAGE OF S.C. CODE ANN. § 37-10-105(A) IS IRRELEVANT TO THE ANALYSIS OF WHETHER SMITH'S COUNTERCLAIM IS COMPULSORY OR PERMISSIVE.

Smith accuses the Court of overlooking the language of S.C. Code Ann. § 37-10-105(A) in finding that the counterclaim for violation of the attorney preference statute is permissive. However, the language he cites is irrelevant for several reasons.

“This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.” S.C. Code Ann. § 37-10-105(A).

First, this language is not specific to a defense based on the attorney preference statute—it applies to any violation of Chapter 10 of the South Carolina Consumer Protection Code. *Id.* Smith’s argument that this language evidences that an attorney preference claim is logically related to the enforceability of the note and mortgage only works if this language is unique to the attorney preference statute.

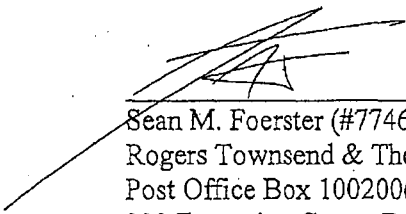
Second, it only concerns the use of the violation as a defense by recoupment⁵ or set-off⁶ to a debt collection action, not a total bar or a defense to the enforcement of the underlying loan instruments.

Finally, Smith did not plead the violation of the attorney preference statute as a defense for recoupment or set-off—he pleaded it as a counterclaim seeking affirmative money damages against Wells Fargo. (R. pp. 32-33 ¶¶ 24-28.)

CONCLUSION

Based on the foregoing, the Court must deny Smith's petition for rehearing.

Respectfully submitted,



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⁵ Recoupment is defined as a "[r]eduction of a plaintiff's damages because of a demand by the defendant arising out of the same transaction." *Black's Law Dictionary* 1280 (7th Ed. 1999).

⁶ Set-off is defined as "[a] debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor." *Black's Law Dictionary* 1376 (7th Ed. 1999).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr.
Master in Equity

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Wells Fargo Bank, N.A. Respondent,

v.

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South Carolina Department of Probation,
Pardon and Parole Services.....Defendants,

Of Whom Michael Smith is the.....Appellant.

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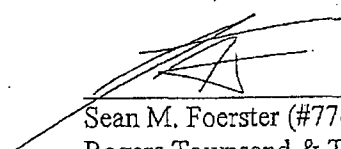
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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Charles B. Simmons, Jr., Master-in-Equity

Case No. 2008-CP-23-6833

Appellate Case No. 2009-125666

Wells Fargo Bank, NA,

Respondents,

v.

Michael Smith; South Carolina
Department of Motor Vehicles; M&T
Properties, Inc.; State of South Carolina;
Arthur State Bank; South Carolina
Department of Probation, Pardon and
Parole Services,

Of Whom Michael Smith is the Appellant

REPLY TO THE RESPONDENT'S RETURN
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In his Petition for Rehearing, the Appellant seeks a review of the Court's affirmance of the lower court in striking the Appellant's jury trial claim as to the Attorney Preference statute contained in S.C. Code 37-1-102 (hereinafter referred to as AP). Appellant also sought clarification and restatement of certain factual findings. Appellant reiterates that the scope of the logical relationship test is expansive rather than restrictive and submits the following in response to the Return of Respondent:

I.

THE REQUESTS SET FORTH IN SECTIONS I AND II OF THE PETITION FOR REHEARING SHOULD BE GRANTED BECAUSE THEY ARE APPROPRIATE AND THE RESPONDENT DID NOT CHALLENGE THEM AND THEREFORE WAIVED ANY OBJECTIONS TO THE CHANGES.

The Respondent's Return to the Petition for Rehearing did not object to nor address in any way the relief requested in Sections I and II. Issues not argued in the brief are deemed abandoned and precluded from consideration on appeal. Jinks v. Richland Cty., 355 S.C. 341; 585 S.E.2d 281(2003). Therefore, the Appellant is entitled to the revisions requested in Section I of the Petition for Rehearing and the clarification requested in Section II of the Petition for Rehearing

II.

THE EXPANSIVE NATURE OF THE LOGICAL RELATIONSHIP TEST PROHIBITS CARVING OUT A SEPARATE RULE UNIQUE TO FORECLOSURE CASES

The Court's decision herein carves out a special exception solely for foreclosure cases that fails to comport with the statute itself as well as the

applicable S.C. Supreme Court case law. The Respondent would have this Court decline the reconsideration of its decision that a cause of action for the violation of attorney preference does not bear a logical relationship to the loan transaction represented by the Note and Mortgage, i.e. that they do not arise from the same transaction or occurrence. Respondent bases its Return on arguments that ignore the expansive scope of the logical relationship test.

The decision on whether Appellant is entitled to a jury trial on the issue of his counterclaim pursuant to the AP statute is a simple one. In addition to the arguments previously offered, the Appellant cites the cases set forth below as further support warranting the conclusion that a violation of the AP statute bears a logical relationship to the causes of action set forth in the foreclosure complaint.

In Tuloka Affiliates v. Moore, 275 S.C. 199, 268 SE2d 293 (S.C. 1980), the S.C. Supreme Court found an argument such as the one offered herein by Respondent to be unpersuasive. The Moores bought a mobile home under an installment plan and gave a purchase money mortgage to secure the transaction to the seller. Tuloka asserted that the Moores could not raise Truth In Lending Act (TILA) violations as an affirmative defense and counterclaim because the one year statute of limitation had expired. In holding that the counterclaim was in the nature of recoupment and would stand, the Court stated:

Respondent's argument that the contract executed by the appellants and duties of disclosure imposed by TILA do not form part of the same transaction are unpersuasive. The duties imposed on the lender arise out of the loan transaction itself and effectively become part of the contract.

Under this reasoning, a duty of disclosure imposed on the lender in a real estate transaction (as with both TILA and the AP) arises out of the loan transaction itself and effectively becomes part of the contract under Tuloka. The disclosures required by TILA and AP are indistinguishable duties in their relationship to a loan transaction. Therefore, as with TILA, the AP duty arises out of the loan transaction and becomes a part of the contract.

III.

A FINDING THAT THE CLAIM AFFECTS THE ENFORCEABILITY OF THE NOTE AND MORTGAGE IS NOT MANDATED BY DAV.CORP

The Court in the case at bar erred in interpreting N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514;; 381 S.E.2d 903, 905 (1989) (hereinafter DAV Corp) as a holding meant to limit the logical relationship test. Finding that the AP violation must affect the enforceability of the Note and Mortgage in order to arise out of the same transaction or occurrence is not mandated by DAV Corp. This decision serves to narrow an area where the Supreme Court intended to be expansive.

When the S.C. Supreme Court adopted the logical relationship test, it chose the most flexible and expansive of the four options being utilized by courts around the country to determine what is compulsory under federal law. The causes of action need only arise out of the same transaction or occurrence. The analysis in DAV Corp contained an expansive interpretation of this logical relationship test when it found all but one counterclaim logically related. No language, analysis or discussion therein indicates that the Court intended to limit

application of the logical relationship test as has been done here. In that case, the Court did not say that the requirement of affecting the enforceability of the Note and Mortgage was the *only* test of a logical relationship in a foreclosure case. The Court in the case at bar disregards the Supreme Court's expansive view, and narrows the logical relationship test as it applies to foreclosure cases. As the Supreme Court found in DAV Corp., the Court of Appeals view is too stringent here as well.

The Court's interpretation of the attorney preference statute in the case at bar reverses the direction of the analysis to a more narrow view that does not comport with the intent of the Legislature, nor the Supreme Court's view of the logical relationship test. In Davis v. Nationscredit Financial Services Corp., 326 S.C. 83; 484 SE2d 471 (S.C. 1997) the Supreme Court found the intention of the Legislature in crafting Section 37-1-102(2)(d) was to protect borrowers by requiring in the credit application clear and prominent disclosure of the information necessary to ascertain the borrower's preference as to the legal counsel *employed to represent the debtor in all matters relating to the closing of the transaction* (emphasis added). This language clearly places the AP violation in the same transaction with the Note and Mortgage representing the loan.

IV.

RESPONDENT'S ARGUMENTS AS TO JUDICIAL ECONOMY ARE MISPLACED

The inquiry into whether this particular case might require additional court time due to bifurcation is not the relevant question. The development of the compulsory counterclaim was intended to avoid additional lawsuits being

separately filed. Here, there is one case bifurcation of which does not result in two separate cases, simply the possibility of a separate jury trial on the jury issues.

The idea of judicial economy serves to keep related claims in one case but does not negate the entitlement to a jury trial within that one case of those issues triable by a jury.

Certainly it is true that if one or more of the counterclaims entitle Appellant to a jury trial, the rules require a bifurcation and a separate trial of the jury issues. But that is already contemplated by the rule. The focus of the judicial economy factor is on a party raising separate issues in later, separate lawsuits and indicates that it is to be avoided. The fact that there might be a bifurcation of the trial of jury claims in a SINGLE case does not render the case overwhelming to the judiciary. But the right to a jury trial is to be preserved inviolate. Therefore, the clerk of court would surely rather administer a SINGLE case than administer multiple cases that have issues logically related to one another.

V.

WELLS FARGO MISCONSTRUES THE HOLDING OF IN RE BOBO

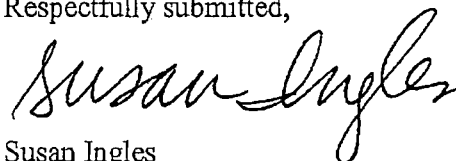
The case of In re Bobo exemplifies the application of the logical relationship test. Wells Fargo mischaracterizes the holding of In Re Bobo by emphasizing the fact that the counterclaims were grouped together with rescission of the contract being the Plaintiff's main claim. The Court acknowledged that, as in DAV Corp., counterclaims that affect the enforceability of the Note and Mortgage are compulsory. But neither DAV Corp., Tuloka, In Re Bobo, or Advance International, Inc. v. NCNB, 320 S.C. 532; 466 S.E. 2d 367 (S.C.

1996), nor any other cases cited by the Respondent stand for the proposition that affecting the enforceability of the Note and Mortgage is the only way a counterclaim can be compulsory in a foreclosure case. To do so would single out the application of the logical relationship test to foreclosure cases in a way that opens the door to a restrictive rather than expansive application in other areas. This contravenes the Supreme Court's intent in adopting the logical relationship test that it be expansive.

CONCLUSION

Appellant requests that the revisions and clarification be made in the Order and the Petition for Rehearing be granted and the Appellant be granted a jury trial on the issue of the Attorney Preference statute violation.

Respectfully submitted,

A handwritten signature in cursive script, reading "Susan Ingles".

Susan Ingles
Attorney for the Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wells Fargo Bank, NA, Respondent,

v.

Michael Smith; South Carolina Department of Motor Vehicles; M & T Properties, Inc.; State of South Carolina; Arthur State Bank; South Carolina Department of Probation, Pardon and Parole Services, Defendants, of whom Michael Smith is the Appellant.

Appellate Case No. 2009-125666

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 4988

Submitted March 1, 2011 – Filed June 13, 2012

Withdrawn, Submitted and Refiled August 8, 2012

**AFFIRMED IN PART, REVERSED IN PART, and
REMANDED**

Susan P. Ingles, of South Carolina Legal Services, of Greenville, for Appellant Michael Smith.

Sean Matthew Foerster, of Rogers Townsend & Thomas, PC, of Columbia, for Respondent Wells Fargo Bank.

WILLIAMS, J.: Michael Smith ("Smith") appeals the Master-in-Equity's ("Master") grant of Wells Fargo Home Mortgage, Inc.'s¹ ("Wells Fargo") motion to strike the jury demand. We affirm in part, reverse in part, and remand for further proceedings.

FACTS/PROCEDURAL HISTORY

The complaint alleges that on April 29, 2003, Smith gave a Fixed Rate Note ("Note") to Wells Fargo in the amount of \$83,000. The Complaint further alleges that to secure payment of the Note, Smith gave Wells Fargo a real estate mortgage ("Mortgage") covering his real property at 1 Anchor Road in Greenville, South Carolina, as well as a 2003 Fleetwood mobile home.

Wells Fargo filed this action for foreclosure, alleging Smith defaulted on his loan payments under the Note and Mortgage and owed \$77,460.63 on the debt. After the Greenville County Clerk of Court filed an order of reference, Smith filed a motion to allow late filing of responsive pleadings, and Wells Fargo consented to an extension of time. Smith filed an answer and counterclaim with a jury trial request and asserted, along with other various defenses, the following counterclaims: 1) accounting; 2) unconscionability; and 3) violation of section 37-10-102 of the South Carolina Code (Supp. 2010).² Wells Fargo filed a motion to strike the jury demand ("motion to strike"). The Master heard the motion to strike and asked Smith to submit additional authority to support his position.

On March 12, 2009, the Master issued an order granting Wells Fargo's motion to strike and confirming the order of reference. Smith timely filed a Rule 59(e), SCRPC, motion seeking to alter or amend the final order, and by order entered April 15, 2009, the Master denied Smith's Rule 59(e) motion. This appeal followed.

STANDARD OF REVIEW

"The matter of striking from a pleading, and the matter of admissibility of evidence is largely within the discretion of the trial judge." *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). "The granting or refusal of a

¹ Wells Fargo, NA is the successor by merger to Wells Fargo Home Mortgage, Inc.

² Section 37-10-102 of the South Carolina Code (Supp. 2010) is also referred to as the Attorney Preference statute.

[m]otion to strike . . . will not be reversed except for an abuse of discretion or unless the action of the trial judge was controlled by an error of law." *Id.* at 194-95, 213 S.E.2d at 728 (internal citation omitted); *see also Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 70 (1993) (holding absent an abuse of discretion, the trial court's ruling on a motion to strike will not be reversed).

Additionally, "[w]hether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the trial court." *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

LAW/ANALYSIS

A. Subject Matter Jurisdiction

On appeal, Smith asserts the Master exceeded his jurisdiction in ruling on Wells Fargo's motion to strike. As a result, Smith contends the matter should have been transferred to the circuit court when he initially filed the jury demand as part of the answer and counterclaim. We disagree.

Pursuant to Rule 53, SCRCF, a master has no power or authority except that which is given to him by an order of reference. *Smith v. Ocean Lakes Family Campground*, 315 S.C. 379, 381, 433 S.E.2d 909, 910 (Ct. App. 1993). When a case is referred to a master under Rule 53, the master is given the power to conduct hearings in the same manner as the circuit court unless the order of reference specifies or limits the master's powers. *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). Specifically, Rule 53(c), SCRCF, states "[o]nce referred, the master or special referee shall exercise all power and authority which a circuit court judge sitting without a jury would have in a similar matter."

As a basis for this claim, Smith cites the Reporter's Note appended to the 2002 Amendment to Rule 53, SCRCF. This note states, "If there are counterclaims requiring a jury trial, any party may file a demand for a jury under Rule 38 and the case will be returned to the circuit court." However, the order of reference in this case authorized the Master "to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCF, and all matters arising from or reasonably related to such action. The Master in Equity shall retain jurisdiction to perform all necessary acts incident to this foreclosure action" Thus, once the case is referred to the Master, he has subject matter jurisdiction to resolve the action to the

extent the order of reference provides, and with the authority a circuit court judge would have in a similar matter. *See* Rule 53(c), SCRCP; *Hayes*, 311 S.C. at 360, 428 S.E.2d at 902. Accordingly, we find the Master had subject matter jurisdiction to rule on Wells Fargo's motion to strike the jury demand as the matter was properly before the Master pursuant to the order of reference and our rules of civil procedure.

B. Smith's Counterclaims

Smith contends the Master erred in determining Smith's counterclaims for unconscionability and a violation of the Attorney Preference statute were not entitled to a jury trial. We disagree.

The South Carolina Constitution provides "[t]he right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. "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). Additionally, Rule 38(b), SCRCP, provides, in pertinent part:

Any party may demand a trial by jury of any issue *triable of right by a jury* by serving upon the other parties a demand therefor[e] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(emphasis added). Smith demanded a jury trial in his answer and counterclaim when he asserted counterclaims of accounting³, unconscionability, and a violation of the Attorney Preference statute against Wells Fargo.

³ Smith conceded at the non-evidentiary hearing he was not entitled to a jury trial on his counterclaim for accounting and subsequently abandoned this argument on appeal. *See* Rule 208(b)(1)(D), SCACR (stating each "particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority"); *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal).

"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). If a complaint is equitable and the counterclaim legal and compulsory, the defendant has the right to a jury trial on the counterclaim. *C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986), *modified by Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987). "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). As Wells Fargo's foreclosure allegation is equitable in nature, Smith has the right to a jury trial only if his counterclaim is both legal and compulsory. See *C & S Real Estate Servs., Inc.*, 290 S.C. at 302, 350 S.E.2d at 193.

Characterization of an "action as equitable or legal depends on the appellant's 'main purpose' in bringing the action." *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (citations omitted).⁴ "The main purpose of the action should generally be ascertained from the body of the complaint." *Id.* (citation omitted). "However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (citation omitted). The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable. *Bell v. Mackey*, 191 S.C. 105, 119-20, 3 S.E.2d 816, 822 (1939) (citations omitted).

For Smith's counterclaims to be entitled to a jury trial, each counterclaim must be both legal and compulsory.

1. Unconscionability

Smith argues the Master erred in finding he was not entitled to a jury trial on his unconscionability counterclaim. We disagree.

⁴ "[T]he 'main purpose' rule evolved from a determination that where a plaintiff has prayed for money damages in addition to equitable relief, characterization of the action as equitable or legal depends on the plaintiff's 'main purpose' in bringing the action." *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991) (citations omitted).

a) Common Law Unconscionability⁵

Although Smith's counterclaim for common law unconscionability is compulsory, he is not entitled to a jury trial because this is an equitable claim that does not create a cause of action for damages.

"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. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); *see also* Rule 13(a), SCRPC. 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). In *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), our supreme court adopted the "logical relationship" test and held DAV's counterclaim was compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture." In essence, the "logical relationship" determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage. *Advance Intern., Inc. v. N.C. Nat'l Bank of S.C.*, 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct. App. 1994), *aff'd in part, vacated in part*, 320 S.C. 532, 466 S.E.2d 367 (1996).

Here, there is a "logical relationship" between the enforceability of the Note, which is the subject of the foreclosure action, and the allegation that the Mortgage between Wells Fargo and Smith is unconscionable. If Smith prevails on his unconscionability claim, it will affect Wells Fargo's right to enforce the Note and foreclose the Mortgage. Therefore, Smith's common law unconscionability counterclaim is compulsory under the "logical relationship" test.

Even though Smith's common law unconscionability counterclaim is compulsory, because common law unconscionability only provides an equitable relief, Smith is not entitled to a jury trial on his counterclaim. Jurisdictions throughout the country

⁵ Smith's counterclaim for unconscionability failed to specify whether it was a claim for common law unconscionability or statutory unconscionability under section 37-5-108 of the South Carolina Code (Supp. 2010). We analyze this issue under both and hold the Master was correct in finding Smith was not entitled to a jury trial under either version of the counterclaim.

agree that common law unconscionability is an equitable cause of action with corresponding relief that is only equitable in nature. See *Doe v. SexSearch.com*, 551 F.3d 414, 419 (6th Cir. 2008) ("At common law, unconscionability is a defense against enforcement, not a basis for recovering damages."); *Super Glue Corp. v. Avis Rent a Car Sys., Inc.*, 517 N.Y.S.2d 764, 766 (N.Y. App. Div. 1987) ("The doctrine of unconscionability is used as a shield, not a sword, and may not be used as a basis for affirmative recovery."); see, e.g., Restatement (Second) of Contracts § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."). Despite Smith's request for actual and punitive damages for unconscionability in the body of his pleadings, the primary relief sought is to have the mortgage declared void. Accordingly, Smith seeks relief from a jury that cannot be granted. See *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) ("In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.") (emphasis added); *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009) ("Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed."); *Loyola Fed. Sav. Bank v. Thomasson Props.*, 318 S.C. 92, 93, 456 S.E.2d 423, 424 (Ct. App. 1995) ("If the claim is equitable, there is no right to a jury trial."). Because the only remedies available for common law unconscionability are equitable, there is no right to a jury trial on this claim. See *Brown v. Greenwood Sch. Dist. 50 Bd. of Trs.*, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (Ct. App. 2001) ("There is no right to a jury trial for equitable remedies such as rescission and restitution."). Accordingly, Smith's common law unconscionability counterclaim is not entitled to a jury trial.

b) Statutory Unconscionability

Applying the same "logical relationship" test, we find Smith's counterclaim for statutory unconscionability is also compulsory. In addition to arising out of the same transaction or occurrence as Wells Fargo's foreclosure action, Smith's counterclaim bears a "logical relationship" to the enforceability of the Note and Mortgage. Accordingly, Smith's statutory unconscionability counterclaim is compulsory under the "logical relationship" test.

Although the statutory unconscionability counterclaim is compulsory, section 37-5-108 of the South Carolina Code (Supp. 2010) requires the determination of whether an agreement is unconscionable to be a matter of law for the court. *See Tilley v. Pacesetter Corp.*, 333 S.C. 33, 38, 508 S.E.2d 16, 18 (1998) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."). In section 37-5-108, the General Assembly explicitly chose the use of the term "court" to unequivocally demonstrate that the matter is not to be resolved by a jury, but by the court. *See* § 37-5-108(1) ("[I]f the *court* as a matter of law finds . . . the agreement or transaction to have been unconscionable . . . the *court* may refuse to enforce the agreement.") (emphasis added); *see also* § 37-5-108(3) ("If it is claimed or appears to the *court* that the agreement or transaction or any term or part thereof may be unconscionable . . . the parties shall be afforded a reasonable opportunity to present evidence . . . to aid the *court* in making the determination.") (emphasis added). Therefore, section 37-5-108 does not provide a right to a jury trial for a statutory unconscionability cause of action. Accordingly, we affirm the Master's decision to strike Smith's request for a jury trial on his unconscionability counterclaim.

2. Violation of the Attorney Preference Statute

To determine whether Smith is entitled to a jury trial on his allegation that Wells Fargo violated the Attorney Preference statute, we again must determine if this counterclaim is both legal and compulsory. *See C & S Real Estate Servs., Inc.*, 290 S.C. at 302, 350 S.E.2d at 193. We conclude Smith's counterclaim is permissive because a violation of the Attorney Preference statute would not affect the enforceability of the Note and Mortgage.

Section 37-10-102(a) of the South Carolina Code (Supp. 2010) provides, in pertinent part:

Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose . . . [t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction

The complaint alleges that to secure payment of this Note, Smith gave Wells Fargo a real estate Mortgage covering his real estate property as well as a mobile home. As a result, Smith was entitled to choose an attorney of his preference for the closing of the transaction pursuant to section 37-10-102(a). A violation of the Attorney Preference statute is enforced by section 37-10-105(A) of the South Carolina Code (Supp. 2010). The enforcement provision of the Attorney Preference statute provides, in pertinent part:

If a creditor violates a provision of this chapter, the debtor has a cause of action . . . to recover actual damages and also a right in an action . . . to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.

S.C. Code Ann. § 37-10-105(A) (Supp. 2010). A review of this statute demonstrates Smith's counterclaim has no "logical relationship" to the enforceability of the Note and Mortgage. Moreover, even if a violation of the statute occurred, Smith would only be entitled to actual damages and a possible penalty between \$1,500 to \$7,500. The statute, however, does not permit rescission of the Note and Mortgage for its violation. *See* § 37-10-105(A). As Smith's counterclaim bears no "logical relationship" to the enforceability of the Note and Mortgage, we conclude Smith's counterclaim is permissive. Therefore, Smith waived his right to a jury trial by asserting it in the foreclosure action. *See N.C. Fed. Sav. & Loan Ass'n*, 294 S.C. at 30, 362 S.E.2d at 310 ("[W]here a defendant in an action begun in equity asserts a permissive counterclaim that is legal in nature, the defendant is deemed to have waived the right to a jury trial on the issues raised by the counterclaim."). Accordingly, we affirm the Master's decision to strike Smith's request for a jury trial on his counterclaim for a violation of the Attorney Preference statute.

C. Scope of Motion to Strike Jury Demand

Smith contends the Master exceeded the scope of Wells Fargo's motion to strike by making findings of fact and conclusions of law based on documents and information not in evidence. We agree.

A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner*, 257 S.C. 544, 549-50, 186 S.E.2d 523, 526 (1972).

After a brief non-evidentiary motion hearing, the Master requested Smith submit authority to support his assertion he was entitled to a jury trial. A review of the Master's order demonstrates his ruling went beyond the permissible scope of Wells Fargo's motion. The order granting Wells Fargo's motion to strike had the effect of granting judgment and making findings of fact based on information not admitted or decided by the pleadings. In short, the Master's order on the motion to strike the jury demand makes findings of fact and rules that a cause of action is meritless without evidentiary support, constituting an abuse of discretion.⁶ *See Edwards v. Edwards*, 384 S.C. 179, 183, 682 S.E.2d 37, 39 (Ct. App. 2009) ("The [trial] court abuses its discretion when factual findings are without evidentiary support or a ruling is based upon an error of law."). We conclude these impermissible findings of fact and conclusions of law are prejudicial to Smith, thus warranting reversal. *See Watts v. Bell Oil Co. of Ocean Drive, Inc.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530 (1976) (holding a trial court will only be reversed when the record shows not only error but also prejudice).

CONCLUSION

In summary, the Master had subject matter jurisdiction to rule on Wells Fargo's motion to strike the jury demand. Additionally, the Master's ruling on Smith's unconscionability and attorney preference statute counterclaims is affirmed. The Master's order, to the extent that it details specific findings of fact and conclusions of law, is reversed and the case remanded to the Master for a bench trial on the merits of all causes of action alleged.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

⁶ The Master made certain findings of fact that go to the substance and merits of Smith's claims and well beyond the scope of the motion to strike, including: "Smith's counterclaim has no merit," and "[b]ecause Smith would not be entitled to relief as against Wells Fargo on his counterclaim, it can hardly be said he would be entitled to a jury trial on it."

The South Carolina Court of Appeals

Wells Fargo Bank, NA, Respondents

v.

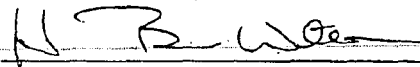
Michael Smith; South Carolina Department of Motor Vehicles; M & T Properties, Inc.; State of South Carolina; Arthur State Bank; South Carolina Department of Probation, Pardon and Parole Services Defendant(s) of whom Michael Smith is the, Appellant.

Appellate Case No. 2009-125666

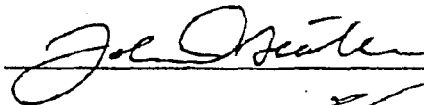
ORDER

ORDER DENYING PETITION FOR REHEARING AND SUBSTITUTING OPINION

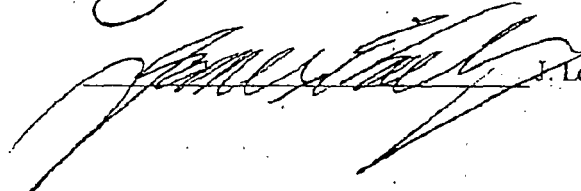
PER CURIAM: After a careful consideration of the Petition for Panel Rehearing, the Court has decided to issue a substituted opinion. It is, therefore, ordered that the Petition for Panel Rehearing be denied and the earlier opinion, Op. No. 4988, be withdrawn and substituted with the attached opinion.



J. Williams



J. Geathers



J. Lockemy

Columbia, South Carolina

cc:
Sean Matthew Forester
Susan P. Ingles

FILED

August 8, 2012