THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

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SC Court of Appeals

Case No. 2014-CP-18-0358
Case No. 2014-CP-18-1792
Case No. 2014-CP-18-1793

Appellate Case No. 2016-002193

Bank of North Carolina, Respondent,

v.

Anthony M. Whitfield and Cindy Whitfield, Defendants

Of whom Anthony Whitfield is the Appellant and Cindy Whitfield is a Respondent.

Anthony Whitfield, Appellant,

v.

David Swanson, Respondent.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Appellant Anthony M. Whitfield ("Appellant" or "Whitfield") submits this reply brief to address errors of law and citation of improper or unavailing authority in the Brief of Respondents filed by the Respondents David Swanson and Bank of North Carolina ("Swanson" or "BNC", respectively, or collectively "the Respondents").

LEGAL ARGUMENT

REPLY TO RESPONDENT SWANSON'S ARGUMENT I:

Defendant Swanson clearly fails to grasp the thrust of Appellant's argument: Respondent's conduct in connection with their false testimony cannot be limited solely to the Charleston County foreclosure cases. Respondent Swanson tries to emphasize that the deposition testimony occurred years after the initial closing, and was part of only the Charleston County case.[1] The distance in time between Respondent Swanson's tortious conduct and the date of the breach does not matter, and this argument is nothing short of a distraction. Rather, Respondent's Swanson's conduct amounted to nothing more than attempt to aid and abet Respondent BNC's manufacture of a wholly false and meritless legal defense—a defense interjected not only in the Charleston action, but in each and every one of the underlying cases filed by BNC.[2]

Appellant alleges that the sworn testimony proffered by Respondent Swanson was given "with the ulterior purpose of fabricating a legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans." *See*, *Defendant's Amended Answer*,

[1] It is worth noting that all parties have agreed that the Charleston County case was to be tried first, and accordingly, the bulk of discovery in this matter has been conducted under the Charleston County case number. There is no doubt that Respondent BNC intends to utilize this testimony by Swanson in support of its reliance of counsel in each of the six lawsuits as evidenced by its statement of the case. See Respondent BNC's Brief, p. 4.

[2] The "advice of counsel" defense has been interposed in all of the suits filed by the Respondent BNC.

BNC v. Whitfield, Case No. 2014-CP-18-0358. Appellant's assert that by affirmatively acting in concert with the Respondent BNC to manufacturer a false legal defense, Respondent Swanson has harmed the appellant and aided and abetted Respondent BNC's abuse of process six different times.

Respondent Swanson's misunderstanding of this fact is illustrated by his illustrative example contained within his brief:

> Just as a car accident plaintiff who received treatment from different providers in different counties cannot sue the same defendant multiple times for the same tort, Whitfield cannot sue Swanson six times on the same claims for the same alleged conduct by claiming property-specific damages piecemeal.

See, Respondent Swanson's Brief at p. 10, f. 3.

Swanson is correct that a Plaintiff could not sue in six different venues for the same wreck. However, Swanson's false sworn testimony and his actions in concert with Respondent BNC have resulted in the **manufacture of a false and improper legal defense which has been pled six (6) different times in six (6) different lawsuits**. Swanson's actions have, and will continue to, incur damages to Appellant in all six (6) lawsuits, if for nothing else, the legal fees associated with each lawsuit.

RESPONSE TO RESPONDENT SWANSON'S ARGUMENT II:

Respondent Swanson is incorrect in their assertions that "Whitfield argues … that S.C. Code Ann. § 15-7-10 and Rule 13 require[d] that Whitfield assert … claims against Swanson in each of the separate suits." *See, Respondent Swanson's Brief*, p. 10 First, the references to S.C. Code Ann § 15-7-10 are simply provided as a general framework for the Court to understand the nature of this case: specifically, to highlight the fact that six (6) separate lawsuits have been filed against the Appellant in three (3) different counties arising out of one (1) failed transaction.

As for Respondent Swanson's argument regarding Rule 13—Respondent blatantly misstates the facts of the case. If Respondent will kindly recall, when Appellant first filed his Motion to Amend to include Respondent Swanson as a Counterclaim Defendant, it was under the framework of Rule 13, 19 and 20, and further, that the trial court ruled upon this Motion and issued an Order in favor of the Appellant dated December 18, 2015. *See*, "*Defendant's Motion to Amend*", *BNC v. Whitfield*, 2012-CP-10-5887, June 25, 2015; "*Order Granting Motion to Amend*", *BNC v. Whitfield*, 2012-CP-10-5887, December 18, 2015.

If Respondent Swanson desired to argue against Appellant's right to bring this claim under Rule 19, his opportunity to litigate same has come and past, and is now the law of the case. The question before the Court now is whether such claims may be maintained as a matter of law under Rule 12(b)(8) and the Appellant contends the answer to that question is most assuredly in the affirmative.

Swanson argues that Whitfield is precluded from arguing that a Motion to Amend is would be proper in the present matter, citing Commercial Credit Loans for the proposition that "a party cannot raise an issue for the first time…". The Supreme Court held in Pye v. Estate of Fox that an issue may be properly preserved where it is raised at a hearing on a Rule 59(e) motion:

> The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits. … As one authority has noted, "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised."

369 S.C. at 564, 633 S.E.2d 505 (2006) (internal citations omitted). Appellant's raised this issue in response to the Court's comments regarding damages from other suits being presented at trial. This issue was not a part of the Court's previous Order, and Counsel's arguments regarding amendment were properly raised at the time the Court interjected the

issue at the hearing. The Court had ample opportunity to rule on the issue of amendment, and ruled that dismissal was proper. Accordingly, this issue has been preserved for review of the appellate court.

Further, the other issue which was raised by Swanson relate to Appellant's constitutional arguments, which include the right to bring these claims. These issues of "fundamental fairness" and "right to bring a claim" were both raised by Defendant in his Memorandum in Opposition to Swanson's Motion to Dismiss. The arguments concerning due process under the law, equal protection, and the ability to bring claims were implicated by Counsel for Appellant, thus preserving these issues for Appellate review. *See*, *State v. Russell*, 345 S.C. 128, 134, 546 S.E.2d 202, 204 (Ct.App.2001) (holding that a party need not use the exact name of a legal doctrine in order to preserve an argument, but it must be clear that the argument has been presented on that ground).

Respondents only other arguments against amendment are that such an amendment would be futile as it does not cure the fact that "another action was pending between the same parties for the same claims arising out of the same alleged conduct." *See*, *Respondent Swanson's Brief* at p. 11, f. 4. This is nothing more than circular logic—it assumes that an amendment is improper because dismissal was proper. Rather, if dismissal is premised upon the language in the pleadings, along with the Court's concern that improper damages may be factored into a jury's decision, then amendment would be the proper remedy.

REPLY TO RESPONDENT BNC'S ARGUMENT

Respondent BNC has elected to submit a brief for the sole purpose of providing their own statement of the case. They have further elected to join in and support all of the arguments of Respondent Swanson. Accordingly, Appellant hereby reincorporates by

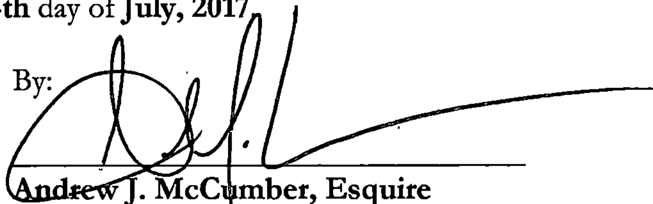
reference all of its preceding reply arguments to Respondent Swanson as if the same were fully restated herein.

CONCLUSION

Based on the foregoing arguments and citation to authority, along with Appellant's previous arguments submitted, this Court should reject the erroneous positions advanced in the Brief of Respondent, and REVERSE the trial court's Order dismissing Appellant's Claims.

Respectfully submitted this **24th** day of **July, 2017**.

By:



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PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief upon the Respondents Bank of North Carolina, Cindy Whitfield, and David Swanson by depositing a copy of same in the United States Mail, postage prepaid, on July 24, 2017 addressed to their attorney of record, as follows:

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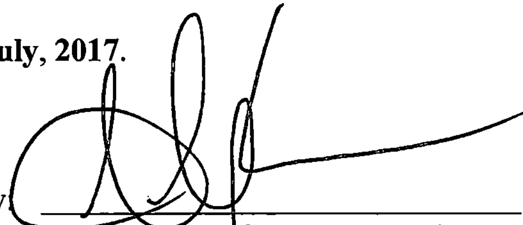
Respectfully submitted this **24th** day of **July, 2017**.



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Appellate Case No.: *2016-002193*
Case Nos.: *2014-CP-18-0358; 2014-CP-18-1792; 2014-CP-18-1793*

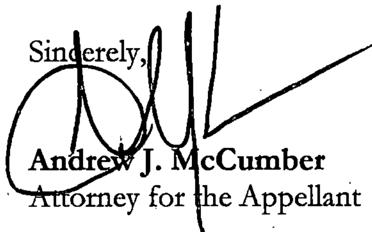
Dear Ms. Kitchings:

Enclosed you will please find two (2) copies of the Appellant's Reply Brief, along with two (2) copies of the Certificate of Service with regard to same for filing. Please return one clocked copy to my office using the self-addressed, postage-paid envelope you will also find enclosed.

Please note that I have copied all counsel of record to this correspondence pursuant the South Carolina Appellate Rules.

I thank you in advance for your time and attention to this matter, and please do not hesitate to let me know if the Court requires anything further from us in this regard.

Sincerely,



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Enclosure(s) as stated.

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