**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2016-CP-40-07662
Appellate Case No. 2018-001797

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Nicholas L. Pettit, as Personal Representative of the Estate of Charles A. Pettit, Deceased,.....Appellant,

V.

Audrey E. Volonis and Ryan D. Volonis,.....Respondents.

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# INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

Respondents would restate the issues on appeal as:

I. Did the Trial Court properly deny the Plaintiff's motion to refer this foreclosure action to the Master because the Defendants are entitled to a jury trial on their counterclaims?

A. Did the Trial Court correctly conclude that the Defendants seek legal remedies in their counterclaims challenging the viability/validity/enforceability of the debt?

B. Did the Trial Court correctly conclude that the Defendants counterclaims for slander of title and liability for failure to satisfy the mortgage are compulsory?

II. Did the Trial Court abuse its discretion in ordering a single trial of all the issues?

## STATEMENT OF THE CASE

On December 30, 2016, Plaintiff filed a Lis Pendens and Summons and Complaint (R.p.____) for foreclosure of the note and mortgage and demanded a deficiency judgment against Defendant, Ryan D. Volonis. On February 21, 2017, Defendants filed an Answer and Counterclaim (R.p._____) and demanded a jury trial. On February 24, 2017, Plaintiff filed a Reply. (R.p._____).

On April 30, 2018, Defendants filed a Second Amended Answer and Counterclaim (R.p._____) and asserted three counterclaims: (1) Declaratory Judgment; (2) Liability for Failure to Satisfy the Mortgage; and (3) Slander of Title.[1] On December 18, 2018, Plaintiff filed a Reply to Defendants' Second Amended Answer and Counterclaim. (R.p.____)

On May 10, 2018, Plaintiff filed a Notice of Motion and Motion for Order of Reference (R.p.____) requesting that the matter be referred to the Master-in-Equity. By Order Denying Plaintiff's Motion to Refer to Master in Equity filed on September 6, 2018 (the "Order") (R.p.____), Plaintiff's motion was denied, and the court held that Defendants filed compulsory

[1] On September 12, 2017, Plaintiff filed its Motion to amend its Answer and First Amended Answer and Counterclaim, however, due to an administrative error, that First Amended Answer was not filed and therefore, Defendants filed a Consent Order to allow Defendants to file their Second Amended Answer and Counterclaims

counterclaims that sought a remedy at law and therefore the Counterclaims should be tried before a jury.

On October 5, 2018, Plaintiff filed a notice of Appeal. (R.p.____)

## STATEMENT OF FACTS

On June 15, 2004, Defendant Audrey Volonis purchased the property located at 802 Huntington Avenue, situated in Richland County, South Carolina. On April 1, 2008, Defendant Audrey Volonis conveyed the property to both herself, and her son, Defendant Ryan D. Volonis. On April 17, 2008, Defendants took out a mortgage in the amount of $55,000 on the property, secured by a promissory note payable to the lender, Charles A. Pettit. This note was scheduled to mature on April 1, 2014.[2]

On January 6, 2016, Charles A. Pettit died as a result of injuries he received from a motor vehicle accident in late 2015. Charles Pettit's brother, Nick Pettit, was appointed as the Personal Representative of his brother's estate. (R.p. ___). On December 30, 2016, Plaintiff/Lender filed a Lis Pendens and Summons and Complaint alleging a mortgage foreclosure and demanding a deficiency judgment against Ryan D. Volonis alleging that no payments were made on the note. (R.p. ___). In their Answer, Defendants/Debtors included the defenses of Payment, Setoff/Credit as well as Accord and Satisfaction arguing that the underlying security interest was no longer enforceable. Defendants/Debtors further brought Counterclaims seeking a declaratory judgment on the enforceability of the mortgage and damages for legal causes of action for Slander of Title and for the failure of Plaintiff to satisfy the mortgage once Defendant had properly demanded it be satisfied in violation of S.C. Code Ann. §29-3-320.

[2] As contained in Paragraph 53 of the Plaintiff's Second Amended Answer and Counterclaim, this property was and is the primary residence of Defendant Ryan D. Volonis.

## STANDARD OF REVIEW

"When a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, the order is immediately appealable." *Stone v. Thompson,* 418 S.C. 599, 606, 795 S.E.2d 49, 53 (Ct. App. 2016).

Whether 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 circuit court's findings." *Wachovia Bank Nat'l Ass'n v. Blackburn,* 407 S.C. 321, 328, 755 S.E.2d 437, 341 (2014).

In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. *Green v. Lewis Truck Lines, Inc.,* 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994).

## I. WHEN DEBTORS RAISE LEGAL AND COMPULSORY COUNTERLCAIMS IN A FORECLOSURE, THEY ARE ENTITLED TO A JURY TRIAL ON THE LEGAL CLAIMS.

A mortgage foreclosure is an action in equity. *Collier v. Green,* 244 S.C. 367, 370, 137 S.E.2d 277, 279 (1964). However, "[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). While a foreclosure is an action in equity, counterclaims—including those counterclaims raised in equitable actions—may be entitled to a jury trial. *Wachovia Bank Nat'l Ass'n v. Blackburn,* 407 S.C. 321, 329—30. 755 S.E.2d 437, 441—42 (2014).

The proper analysis in determining whether a foreclosure involving counterclaims may be tried in front of a jury or by the judge depends on whether the remedy sought by the counterclaims is in law or in equity and whether the counterclaims are permissive or compulsory.

*Id.* If this can be shown, the "trial judge may, pursuant to Rule 42(b)[SCRCP], order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding." *Id.*

Generally, equitable relief is only available when no adequate remedy at law exists. *Santee Cooper Resort, Inc., v. S.C. Pub. Serv. Comm'n,* 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate' remedy at law is one which is as certain, practical, complete, and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.* Defendants alleged three counterclaims which are: (1) Liability for Failure to Satisfy Mortgage; (2) Slander of Title and (3) A Declaratory Judgment. All three of these counterclaims seek a legal remedy.

**A. Liability for Failure to Satisfy Mortgage – S.C. Code Ann. §29-3-320.**

The creation of a statute will most certainly provide a remedy at law. *Key Corp. Capital Inc., v. Cnty of Beaufort,* 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007) (citing *S.C. Pub. Serv. Comm'n,* 298 S.C. at 185, 379 S.E.2d at 123 (1989)). Indeed, a court's equitable powers must yield to an unambiguously worded statute providing relief. *Id.* Simply put, when a statute provides a party with proper relief, there is no reason for a court to resort to equity principles. *Id.*

Here, Debtors included in their Second Amended Answer, a counterclaim alleging Lender's liability due to its violation of S.C. Code Ann. §29-3-320. (R.p.___). Specifically, Debtors refer to Exhibit A, B and C of their Second Amended Answer and Counterclaims and allege that the Lender is liable under §29-3-320 because he failed to enter a satisfaction in the Register of Deeds office after being notified of the requirement to do so. (R.p.___). This statute provides a legal remedy as follows:

> Any holder of record of a mortgage having received such payment, satisfaction or tender as aforesaid who shall not . . . enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less,

> plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State.

*S.C. Code Ann.* §29-3-320 (2006). Again, the plain language of this statute provides a legal monetary remedy to the Debtors.

Plaintiff Creditor wishes to discredit the Debtors' counterclaims because they did not assert that he received ***full payment*** of the debt. Indeed, the Creditor erroneously points to the language of the preceding statute and cites *Dykeman v. Wells Fargo Home Mortgage., Inc.*, 381 S.C. 333, 340, 673 S.E.2d 804, 807 (2009). However, the *Dykeman* Court's opinion dealt strictly with the issue of whether or not a debtor makes the proper "request by certified mail or other form of delivery that the mortgage be satisfied of record." *Id.* Indeed, the *Dykeman* Court spells out four elements which must be met in order for liability to attach under §29-3-320 when a loan is paid in full. *See id.* While the *Dykeman* court recites the elements to a factual scenario where a debtor makes full payment to a creditor, the controversy at bar surrounded how the debtor notified the creditor of the requirement to enter the mortgage satisfaction. Ultimately, the *Dykeman* Court ruled that liability did not attach to the defendants "[b]ecause the Dykemans failed to establish the ***element of request*** under section 29-3-310 and 320." *Id.* at 808 (emphasis added).

Here, the Debtors have raised the defenses of Accord and Satisfaction, Payment and Setoff/Credit. (R.p.____). Indeed, Debtors specifically allege that they are entitled to the appropriate satisfaction of the underlying mortgage based on a subsequent agreement and conduct of the parties. (R.p.____). While the Debtors have not alleged full payment under the original terms of the note and mortgage, this does not mean that this mortgage shall never be satisfied.

Satisfying a mortgage when a discounted or altered amount is negotiated is common and simply no different than any other loan forbearance, loan modification or short sale.[3]

### 1. "Full Payment" and "Satisfaction" Are Not Synonymous

Full payment and satisfaction are not synonymous. While payment is a kind of satisfaction, satisfaction is not limited to payment. In other words, payment will almost certainly constitute satisfaction under any circumstances, but satisfaction may be accomplished in ways other than by payment. Certainly, satisfaction includes "the discharge of an obligation by paying a party what is due to him or the performance of a substituted obligation in return for the discharge of the original obligation." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC,* 374 S.C. 483, 496, 649 S.E.2d 494, 501 (Ct. App. 2007) (internal quotations omitted). Payment, however, is just the most common form of satisfaction, not the only one. Satisfaction necessarily embraces discharge that occurs for reasons other than payment.

Some dictionary definitions of these words illustrate that these concepts overlap but are not fully congruent: in the fifth edition of Black's Law Dictionary, a definition of "pay" is given as "to discharge a debt by tender of payment due"; however, the definition of "satisfy," while including payment, also includes "to answer or discharge" and "to extinguish[.]" *Black's Law Dictionary* 1016, 1205 (5th ed.1979). Webster's New Universal Unabridged Dictionary 1705 (New York 2d ed. 2003) gives both "to pay (a creditor)" and "to discharge fully (a debt, obligation, etc.)" among several definitions of the word satisfy. The 2014 edition of Black's Law Dictionary provides the following definition:

> **satisfaction** n. (14c) 1. The giving of something with the intention, express or implied, that it is to extinguish some existing legal or moral obligation. • Satisfaction differs from performance because it

[3] A "short sale" is, by definition, the sale of a house in which the proceeds fall short of what the owner owes on the mortgage and by accepting the short sale, a lender avoids the costly process of foreclosure, and the owner is able to pay off the loan for less than what is owed. (https://www.law.cornell.edu/wex/short_sale)

> is always something given as a substitute for or equivalent of something else, while performance is the identical thing promised to be done. — Also termed satisfaction of debt. 2. The fulfillment of an obligation; esp., the payment in full of a debt. See accord and satisfaction. — satisfy, vb.

*Black's Law Dictionary* (10th ed. 2014).

Pomeroy's Equity Jurisprudence states that "[s]atisfaction may be defined, in a general manner, to be the donation of a thing, with the intention, either expressed or implied, that it is to be taken either wholly or in part in extinguishment, by way of substitution, of some prior claim in favor of the donee." II Pomeroy's Equity Jurisprudence *Certain Distinctive Doctrines of Equity Jurisprudence* § 527.

That satisfaction under S.C. Code Ann. §§ 29-3-310 and -320 embraces things other than only payment appears to have been expressly contemplated by the General Assembly in the drafting of those statutes with language of alternatives:

> Any holder of record of a mortgage who has received full payment ***or satisfaction*** or to whom a legal tender has been made of his debts, damages, costs, and charges secured by mortgage of real estate shall, at the request by certified mail or other form of delivery with a proof of delivery of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage and on tender of the fees of office for entering satisfaction, within three months after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.

*S.C. Code Ann.* § 29-3-310 (emphasis added).

> Any holder of record of a mortgage having received ***such payment, satisfaction, or tender*** as aforesaid who shall not, by himself or his attorney, within three months after such certified mail, or other form of delivery, with a proof of delivery, request and tender of fees of office, repair to the proper office and enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the

> mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State. ****

*S.C. Code Ann.* § 29-3-320 (emphasis added).

By listing both payment and satisfaction in these statutes, the General Assembly provided for these statutes to apply when a mortgage has been satisfied by means other than payment. "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *In re: Decker,* 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). "Our courts are constrained to avoid a statutory construction that would have the effect of reading a provision out of a statute." *Protection & Advocacy for People with Disabilities, Inc. v. Buscemi,* 417 S.C. 267, 274, 789 S.E.2d 756, 760 (Ct. App. 2016).

### 2. Administrative Order: In re: Mortgage Foreclosure Action

Our courts have routinely contemplated that borrowers and creditors would need resolution in certain mortgage situations where the amount paid might not equal the amount that could have been owed. *In re: Mortgage Foreclosure Action,* 396 S.C. 209, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01). Among the reasons for issuing this Administrative Order, the Court stated:

> [I]n order to insure that eligible homeowners and lender-servicers have been afforded the benefits of loan modification or other loss mitigation where possible, and to insure that the procedures for handling issues relating to such efforts are handled uniformly throughout the State, so that mortgage foreclosure actions are not unnecessarily dismissed, delayed or inappropriately concluded while loan modification or other loss mitigation efforts are being pursued[.]

*Id.* at 210.

The position that Full Payment and Satisfaction are not synonymous seems consistent with what a statute closely related to S.C. Code Ann. §29-3-310 and -320 indicates is meant. Titled an "[a]lternative procedure for rule to show cause against satisfaction[,]" S.C. Code Ann. §29-3-390, which appears to have been enacted originally in 1933, allows the application for an order "directing that the mortgage or record of the mortgage be satisfied and cancelled of record" and speaks of its application when "the debt or any other obligation secured by any mortgage on real estate has been fully paid, released, satisfied, discharged, or extinguished or when the lien of any mortgage on real estate has been released, discharged, or extinguished[.]"

This statute and S.C. Code Ann. §29-3-310 and -320 are all within Article 5 (entitled "Satisfaction and Release") of Chapter 3 of Title 29 of the South Carolina Code of Laws. In construing terms in statutes, our Supreme Court has stated that "[i]t is well-settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Grant v. City of Folly Beach,* 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001). Indeed, harmony in definition among terms in statutes dealing with the same subject matter usually trumps disharmonious definitions, even when they come from dictionaries. *See Williams v. Lexington Cnty. Bd. of Zoning Appeals,* 413 S.C. 647, 654-55, 776 S.E.2d 749, 753-54 (Ct. App. 2015). Harmony among S.C. Code Ann. § 29-3-390 and S.C. Code Ann. § 29-3-310 and 320 supports a reading that the latter statutes apply where a mortgage has been "has been fully paid, released, satisfied, discharged, or extinguished[.]" S.C. Code Ann. § 29-3-390.

Reading the statute that includes discharge by operation of law within the meaning of satisfaction is also consistent with public policy, as "the legislative intent in enacting these statutes was to provide an incentive for the mortgagee, once it no longer has a monetary interest in the

mortgage loan, to promptly record the ***extinguishment*** of the lien." *Kinard v. Fleet Real Estate Funding Corp.,* 319 S.C. 408, 412, 461 S.E.2d 833, 835 (Ct. App. 1995) (emphasis added). "Once the mortgage has been satisfied and the mortgagor expresses this desire, it is incumbent upon the mortgagee 'to promptly record the ***extinguishment*** of the lien.'" *Bostic v. Am. Home Mortgage Servicing, Inc.,* 375 S.C. 143, 154, 650 S.E.2d 479, 485 (Ct. App. 2007) (quoting *Kinard,* 319 S.C. at 412) (emphasis added).

Here, Defendants filed an Answer and included a Counterclaim alleging the Plaintiff's liability under S.C. Code Ann. § 29-3-320. Specifically, Defendants allege Plaintiff is liable for failure to enter into the Richland County Register of Deeds a satisfaction on the mortgage when properly notified to do so. Defendants provided the necessary supporting documents in the form of Exhibits A, B and C to their Second Amended Answer and Counterclaims. This liability is provided by state statute. Therefore, Defendants seek a legal remedy and they are entitled to have a jury decide that cause of action.

**B. Slander of Title**

South Carolina law, through its incorporation of the common law of England, recognizes a cause of action for slander of title, thus providing a remedy at law. *Huff v. Jennings,* 319 S.C. 142, 148, 459 S.E.2d 886, 890 (Ct. App. 1995). In order to prevail on a slander of title claim, a claimant "must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to [claimant's] title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." *Id.*, S.C. at 149, S.E.2d at 891. Special damages recoverable are the pecuniary losses that result from the effect of the conduct of third persons, including "impairment of vendibility of value caused by disparagement, and the expense of

measure reasonably necessary to counteract the publication, including litigation." *See Id.* (citing 50 Am. Jur.2d Libel & Slander §560).

Here, Defendants again allege that through a combination of payments, accord and satisfaction and setoff or credits, the loan was extinguished. As evidenced by the Exhibits accompanying the Counterclaims, Defendants demanded that the recording at the Richland County Register of Deeds occur to remove the effect of the lien. (R.p.____). Failing to remove the lien constituted a false publication that affected the vendibility of the property. Furthermore, failing to remove the lien when given a specific demand and the adequate satisfaction filing costs further constitutes reckless disregard for the truthfulness of the publication, or malice.

Plaintiff incorrectly asserts that for this action to survive a party must wrongfully record an unfounded claim. In their counterclaim, Defendants allege that the loan was paid, that there was an accord and satisfaction and that certain setoffs and credits rendered the lien satisfied and that demand was made for Plaintiff to record a satisfaction. Failing to record the satisfaction rendered a defect on the title and hindered the vendibility of the real estate.

Plaintiff further incorrectly asserts its position by somehow justifying a false lien because Defendants claimed that the amount owed is "above and beyond what is actually owed." (Appellant's Initial Brief p.7). Any amount owed that is more than a previous amount does qualify as "above and beyond" and that any amount above zero is also "above and beyond" zero. Moreover, for arguments' sake, Plaintiff would have the court believe that if Defendant admits to owing some number less than that which is truly owed, then Defendants counterclaims are invalid. Plaintiff's Complaint alleged that no payments were made ever.

### C. The Declaratory Judgment Follows the Underlying Legal Issues

Defendants also asserted a counterclaim seeking a declaratory judgment holding that Plaintiff no longer holds a note on the property and that the mortgage to the property must be satisfied. Essentially, this declaratory judgment seeks for the court to rule in its favor on the underlying issues of the slander of title and the liability for failure to satisfy the mortgage and to declare the mortgage void.

A Declaratory Judgment can seek a remedy in equity or in law and depends on the underlying issues of the matter. *Auto-Owners Ins. Co. v. Rhodes,* 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013) (citing *Felts v. Richland Cnty,* 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). Simply put, the posture of the Declaratory Judgment follows the same result of the analysis of the additional claims. *See id.* Put differently, if an issue is one at law, it will not be "transformed into one in equity simply because declaratory relief is sought." *Felts v. Richland Cnty,* 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) (citing *Legette v. Smith,* 226 S.C. 403, 85 S.E.2d 576 (1995)). The *Felts* Court specifically held that a declaratory judgment action sought a legal remedy because the underlying action was one looking to "construe an employment contract and, therefore, at law." *Id.*

"An issue that is essentially one at law is not transformed into an equitable one by virtue of the fact that declaratory, rather than investitive, relief is sought. *Legette v. Smith,* 226 S.C. 403, 415, 85 S.E.2d 576, 581 (1955) (citing *Aetna Casualty & Surety Co. v. Quarles,* 92 F.2d 321, 325 (4th Cir. 1937)). Here, Defendants clearly sought a legal remedy through the counterclaims of liability for failure to satisfy the mortgage as well as slander of title. As such, Defendants' third counterclaim, seeking declaratory relief, should not be transformed to seek equitable relief. The Trial Court's Order referring to the Declaratory Judgment essentially states the same. Specifically,

the Order does not go through an in-depth analysis because the Trial Judge stated in the Order that the remedy depends on the underlying issue. (R.p.____). Plaintiff correctly asserts in his brief that the declaratory judgment must also follow the underlying issues. Plaintiff, however, incorrectly arrives at the conclusion that this seeks equitable relief rather than legal relief.

## II. DEFENDANTS' COUNTERCLAIMS ARE COMPULSORY

"A pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP (emphasis added). Such claims are usually referred to as compulsory counterclaims. "A pleading *may* state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(b), SCRCP (emphasis added). Such claims are usually referred to as permissive counterclaims.

### A. Same Transaction or Occurrence – Logical Relationship Test

Our Supreme Court has developed a test to determine what "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" and is, thus, a compulsory counterclaim. Rule 13(a), SCRCP. In *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), a foreclosure action with counterclaims, the Supreme Court adopted the "logical relationship" test for determining whether a counterclaim is compulsory. The Court held that most of DAV's counterclaims were 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[.]" *Id.* The Court made clear the reason for doing so: of the four tests considered by

the Court for whether a counterclaim is compulsory, the Court settled on the "logical relationship test," which is "by far the most widely accepted because of its flexibility." *Id.*

In the *DAV* case, the plaintiff's claim was for foreclosure of a mortgage, and the Court's described of DAV's counterclaims as follows:

> 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 the 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;
>
> 6) breach of two subsequent oral contracts to purchase DAV's interest in the joint venture.

*Id.* at 517.

The Court held that all but the sixth counterclaim on this list was compulsory. *Id.* at 518. The logical relationship that each of those counterclaims had to the plaintiff's foreclosure claim was that each counterclaim arose out of the parties' relationship that was the subject of the foreclosure claim, dealt with the manner in which the loan was administered, or both. *Id.* Simply put, the counterclaims ***did not*** deal with the execution of the underlying instruments. *See id.*

In *Carolina First Bank v. BADD, L.L.C.*, our Supreme Court, citing the rule that a counterclaim is compulsory if it has a "logical relationship" to the transaction or occurrence subject of the opposing party's claim, held that a counterclaim is compulsory in a foreclosure action if it arises out of the execution of the documents that form the basis of the plaintiff's claim. 414 S.C.

289, 295—96, 778 S.E.2d 106, 109—10 (2015). In *BADD,* the defendants brought a counterclaim alleging a civil conspiracy based upon the corporation's changing of a board member two years after the execution of the loan agreement. *See id.* Simply put, if the counterclaims were deemed true, it would have no effect on the enforceability of the loan documents.

The Court there found that the counterclaims were not compulsory where they assumed the enforceability of the guaranty agreements subject of the plaintiff's claim and were based on events that occurred years after the execution of the guaranty documents. *Id.* The Court stated that the claims did "not arise out of the underlying transaction or occurrence because [they do] not affect the execution or enforceability of the guaranty agreements." *Id.*

Only one reported case since *BADD* has discussed that decision in the context of whether a counterclaim is compulsory. In *S.C. Community Bank v. Salon Proz, LLC*, 420 S.C. 89, 97, 800 S.E.2d 488, 492 (Ct. App. 2017), this court determined a claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, was compulsory, relying on *BADD* as authority.

> For example, the UTPA claim is an action at law seeking treble damages. The substance of Salon's UTPA claim alleges Bank "engaged in a pattern of reneging upon promises to modify or otherwise restructure loans, including, but [not] limited to, the loan subject of this case." Were this allegation true, it could affect the loan's enforceability. *Cf. BADD*, 414 S.C. at 296, 778 S.E.2d at 109 (holding a counterclaim was permissive when its allegations, if true, would not have rendered the guaranty agreements unenforceable). Therefore, we find the UTPA claim was both legal and compulsory. *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518-19, 381 S.E.2d 903, 904-05 (1989) (holding a counterclaim alleging violation of the UTPA by breach of an oral agreement was both legal and compulsory).

*Salon Proz,* 420 S.C. at 97.

### B. Two Recognized Ways for Asserting a Compulsory Counterclaim in a Mortgage Foreclosure Action

*DAV Corp.*, *BADD*, and *Salon Proz* may be boiled down to this: there are at least two recognized ways a counterclaim may be compulsory in a mortgage foreclosure. If a counterclaim arises out of the same set of facts as the plaintiff's claim, it is compulsory. *BADD*, 414 S.C. at 295, 296; *DAV Corp.*, 298 S.C. at 518-19; *Salon Proz*, 420 S.C. at 97. If success on a counterclaim could affect the enforceability of the plaintiff's claim, it is compulsory. *Id.*

There are also cases beyond the *DAV Corp.-BADD-Salon Proz* trinity that reveal the compulsory counterclaim rule is not as narrow as Plaintiff contends. In *Jaynes v. County of Fairfield*, 303 S.C. 434, 401 S.E.2d 183 (1991), the Jaynes were defendants in an earlier road-closing action brought by Fairfield County that concerned, *inter alia*, whether a road was public property – a case that Fairfield County lost. 303 S.C. at 435-36, 438 & n. 1. This court held that the Jaynes' later inverse condemnation action against the county about that road was barred *by res judicata*, since the claims were about the same road and bore a logical relationship to one another. *Id.* The claims did not have elements that mirrored one another; rather, they arose out of a common matter: the road and who owned it. *Id.*

In *First-Citizens Bank & Trust Co. v. Hucks,* a case in which the compulsory or permissive nature of a counterclaim was put in issue by a jury demand on the counterclaim, the Supreme Court did not examine whether the plaintiff's and the defendants' claims had any mirroring elements; rather, the Court's analysis was as follows:

> In the instant case, the trustee's equity action seeks a declaration of rights arising in the administration of a trust. The legal counterclaim alleges that the trustee has breached its contractual agreement and fiduciary duty. We find that there is a logical relationship between the counterclaim and the claim. Hence the counterclaim is compulsory, and appellants are entitled to a jury trial on their counterclaim.

305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). Again, the claims arose out of a common matter or set of transactions: the trust and its administration.

### C. Accepting Plaintiff's Argument Would Create Conflicting and Inconsistent Outcomes and Multiplicity of Actions

Plaintiff's argument sets the stage for inconsistency. To demonstrate it, all one must do is to take the argument to its logical conclusion. If Plaintiff's foreclosure claim and Defendants' counterclaims did not bear a compulsory relation to one another, as Plaintiff argues they do not, then it would have been possible for Defendants to prevail on their counterclaims and obtain a judgment declaring the note and mortgage to be unenforceable, and yet still be exposed to Plaintiff possibly prevailing on a claim to foreclose that note and mortgage in a separate action. That is absurd. Rule 13(a) was designed to prevent "'the scandal and absurdity' of a circuity of action[.]" Herbert Broom *Legal Maxims* 259 (6th Am ed., Philadelphia 1868) (originally published 1845).

The purpose of the compulsory counterclaim rule 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, 865 (Ct. App. 2002). If the scope of what is a compulsory counterclaim were instead limited to a counterclaim that mirrors one or more of the elements of the plaintiff's claim or limited to a claim that would of necessity preclude success on the opposing claim, *Jaynes* and *Hucks* could not have been decided in the way that they were. *Hucks,* 305 S.C. at 298; *Jaynes,* 303 S.C. at 435-36, 438 & n. 1.

### D. To Summarize

There are at least two recognized ways a counterclaim may be compulsory in a mortgage foreclosure. If a counterclaim arises out of the same set of facts as the plaintiff's claim, it is compulsory. If success on a counterclaim could affect the enforceability of the plaintiff's claim,

it is compulsory. Here, Defendants' counterclaims are based on damages incurred from Plaintiff's failure to satisfy the mortgage when properly demanded. Defendants assert that by the defenses of payment, accord and satisfaction and setoff and credits that the note and mortgage are not enforceable. Plaintiff asserts in its foreclosure action that the note and mortgage are enforceable. Thus, Defendants counterclaims are compulsory because they affect the enforceability of the underlying note and mortgage.

## III. THE CIRCUIT COURT ACTED WITHIN ITS DISCRETION IN ORDERING A SINGLE TRIAL OF ALL ISSUES.

If a complaint is equitable and a counterclaim is legal and compulsory then a 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. *Wachovia Bank Nat'l Ass'n v. Blackburn,* 407 S.C. 321, 328, 755 S.E.2d 437, 341 (2014). Additionally, when the claims are to be tried in a single proceeding, the jury shall first determine the legal issues and the jury's determination of the common factual issues shall be binding upon the court. *Id.*

Here, the trial judge heard the Plaintiff's motion to have the entire matter referred to the Master-in-Equity. Based on the trial judge's determination and subsequent Order, the matter was determined to be tried in a single preceding – "in toto." (R.p.___). The trial judge did exercise the inherent authority to rule that the issues of the counterclaims shared common factual issues and therefore would be binding on the trial court in ruling on the equitable issues if the foreclosure proceeds. Indeed, the trial judge exercised the inherent power to rule on the matter before the court.

Plaintiff wishes for another bite at the apple by asking this Court to demand that the Master determine issues of the foreclosure. However, one circuit court judge does not have the authority

to set aside an order of another. *See Enoree Baptist Church v. Fletcher,* 287 S.C. 602, 602, 340 S.E.2d 546, 546 (1986); *see also Cook v. Taylor,* 272 S.C. 536, 536, 252 S.E.2d 923, 923 (1979) (holding that one circuit judge does not have the power to review the action of another circuit judge in granting an order of reference to the master in equity because that judge disagreed with the proper mode of trial). Since the factual items common to all claims and defenses are rooted in the enforceability of the note, there is no logical scenario where the Master could determine a question of fact that is not already decided by a jury. As such, the trial judge properly determined that the legal factual matters are to be decided by a jury, and IF the note is found to still be enforceable and the Debtors are in default, THEN any foreclosure can later be referred to the Master to proceed with process of selling the property and entering any deficiency judgment if applicable.

## CONCLUSION

The applicable law and the pleadings of record support the trial court's conclusion that the Defendants/Debtors' counterclaims seek legal remedies and are compulsory. The law further supports the holding that the Defendants counterclaims are to be tried before a jury and that because the mortgage foreclosure and the counterclaims share common issues, the jury's determination of the issues at the heart of the counterclaims will ultimately, by operation of law, decide the ability of the foreclosure action to proceed in equity.

For the reasons stated, this Court should affirm the Order Denying Plaintiff's Motion to Refer to Master and remand this matter for trial in the Circuit Court.

Respectfully submitted,

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**Attorney for Respondent**

April 5, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2016-CP-40-07662
Appellate Case No. 2018-001797

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Nicholas L. Pettit, as Personal Representative of the Estate of Charles A. Pettit, Deceased,.....Appellant,

V.

Audrey E. Volonis and Ryan D. Volonis,.....Respondents.

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CERTIFICATE OF MAILING

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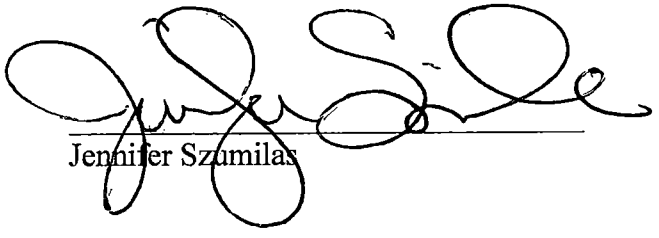
I, Jennifer Szumilas, of Reeves & Lyle, LLC, attorney for the Respondents, Audrey E. Volonis and Ryan D. Volonis, hereby certify that I have, this 5th day of April, 2019, served copies of the attached [Initial] Brief of Respondent upon Leonard R. Jordan, Jr., Esquire, Attorney for the Appellants, Nicholas L. Pettit, as Personal Representative of the Estate of Charles A. Pettit, Deceased, by mailing a copy thereof, postage prepaid, to the address indicated below:

Leonard R. Jordan, Jr., Esquire
Jordan Law Firm
211 Veterans Road, Suite D
Columbia, SC 29209



Jennifer Szumilas

# Reeves & Lyle

ATTORNEYS AT LAW

April 5, 2019



**VIA HAND DELIVERY**
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Nicholas L. Pettit, as Personal Representative of the Estate of Charles A. Pettit, Deceased v. Audrey E. Volonis and Ryan D. Volonis
Appellate Case No.: 2018-001797

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the *Initial Brief of Respondents Audrey E. Volonis and Ryan D. Volonis* in connection with the above-referenced matter. Respondents to not have any additional items to add to the Appellant's Designation of Matter. Also enclosed is a Proof of Service. Please return the additional filed copy to me via courier.

I appreciate your assistance in this matter. Should you have any questions, I can be reached directly at 803-223-6944 or you may reach me by email at Todd@ReevesandLyle.com.

Very Respectfully,

Todd R. Lyle
Attorney at Law

TRL:jrs