

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Lisa Lee Smith, Special Referee

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Appellate Case No. 2017-002608  
Case No. 2014-CP-32-02795  
Opinion No. 2020-UP-132

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**Jul 16 2020**

**SC Court of Appeals**

Federal National Mortgage Association("Fannie Mae"), a corporation organized and existing under the laws of the United States of America, Respondent,

v. .

D. Randolph Whitt and Pearce W. Fleming, Defendants.

Of whom D. Randolph Whitt is the Appellant.

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PETITION FOR REHEARING

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July 16, 2020

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## INTRODUCTION

This Court issued Opinion No. 2020-UP-132 which was filed May 6, 2020. However, Appellant was not notified of this decision, via email, or by any other means, until the Notice of Remittitur was emailed on June 11, 2020. Appellant asserts that the due process guarantees of the Constitutions of the United States and of South Carolina preclude commencement of the time for filing a petition for rehearing before Appellant is given notice of the decision. The 15 day time period provided under Rule 221 was extended by 20 days pursuant to The South Carolina Supreme Court's Order No. 2020-000447 dated March 20, 2020, in Item (L)(1).

## ARGUMENT FOR REHEARING

**The court overlooked or misapprehended the authority of *Johnson v. S.C. National Bank and Plantation Federal v. Gray* which hold that a counterclaim that affects the enforceability of a mortgage is compulsory and triable by jury.**

As to issue of whether the counterclaims are triable by a jury, there is no question that these are compulsory legal counterclaims. An action for breach of the mortgage contract that is the subject of the foreclosure, and claims related to Plaintiff's failures to meet its obligations in servicing the mortgage that is the subject of the foreclosure, and Plaintiff's failure to provide accurate information to the court in hearings related to the foreclosure as to the amount of its debt and status of the account are prototypical examples of claims which are so closely related to the foreclosure that they are compulsory legal counterclaims.

### The Gray Case

In *Plantation Federal Bank v. Gray*, 401 S.C. 507 (S.C. App. 2013) the Court of Appeals considered issues similar to the present case and found that the master in equity proceeding with a foreclosure sale of a vacant lot was erroneous. The Court of Appeals noted that the allegations of

Gray's counterclaims, which included a breach of contract claim, "involve questions of fact that will most certainly arise in the foreclosure action, especially when considered in light of Gray's defenses to the foreclosure action, including unclean hands.(emphasis added).

The Special Referee discounted the *Gray* case because "the compulsory nature of the mortgagee's counterclaims in *Gray* was not disputed". This assertion, which is not clear from a reading of the opinion, would still mean that each of the opposing attorney's had concluded that claims which were analogous to the counterclaims in this action were compulsory, and the appellate court adopted this conclusion without a caveat as to any doubts about its correctness.

In *Gray*, the attorneys and the court all recognized that application of the principles of *Johnson v. S.C. National Bank*, 292 S.C. 51, 354 S.E. 2d 895 (1987) to a counterclaim for breach of the mortgage contract was compulsory and required a trial by jury. It was error for the Special Referee to reach the opposite conclusion and it was erroneous for this Court to conclude that the counterclaims are permissive.

#### CONCLUSION

For the foregoing reasons, this Court should grant rehearing, and the Order of the Special Referee should be reversed and the case remanded to Lexington County, with instructions to transfer the case to the jury roster for trial of the Counterclaims first and then return the case to the Special Referee to hear the merits of the foreclosure case.

Respectfully submitted,



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I certify that I have served the Appellant's Petition for Rehearing on Respondents listed above by depositing a copy of it in the United States Mail, postage prepaid, on July 16, 2020, addressed to their attorney of record, Magalie A. Creech, Esq., PO Box 41489, Charleston, SC 29423. A copy was also mailed on January 19, 2016 to Pearce W. Fleming at 3723 Linwood Rd., Columbia, SC 29205-2545.



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**To:** South Carolina Court of Appeals **Fax No:** 803-734-1839

**From:** D. Randolph Whitt **Fax No:** \_\_\_\_\_

**Company:** \_\_\_\_\_

**Date:** July 16, 2020 **Re:** Petition for Rehearing in Appellate  
Case No. 2017-002608

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