THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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Lower Court Case No. 2019-CP-23-0049

Appellate Case No. 2020-000023

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James Bennet Schwiers, ……Respondent,

v.

Gene Baxley Schwiers, …… Appellant.

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# REPLY BRIEF OF APPELLANT

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## RULES

Predictably, the Respondent's brief follows the same line of argument that caused the circuit court to commit legal error below—arguing that the phrase "transaction or occurrence" found in Rule 13(a) has a literal interpretation that looks only to the events where the debt was created. The Supreme Court has already rejected this argument. A counterclaim arises from the same "transaction or occurrence" in a foreclosure action when there is a "logical relationship between the counterclaim and the enforceability" of the debt. That test is met here. Accordingly, this Court should issue an opinion reversing the circuit court, and remanding Appellant's legal counterclaims for a jury trial.

## I. REPLY TO ARGUMENTS RAISED IN RESPONDENT'S BRIEF

### A. Narrowly focusing on the event where the debt was created is a plain misapplication of on-point precedent.

The circuit court erred when it ruled that a counterclaim made in a foreclosure action can only be compulsory if the liability triggering conduct occurred when the debt was created. That is not the law. The Supreme Court has made clear that the inquiry is broader. *Carolina First Bank v. BADD, LLC*, 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015) (articulating the logical relationship test).

The circuit court erred because Respondent did a good job of focusing the circuit court's attention on the literal meaning of the phrase "transaction or occurrence." The Respondent's sleight of hand through use of the phrase "transaction or occurrence" is on full display once again. (Respondent's Brief, p. 5-6). Superficially this phrase naturally directs attention to the conduct that occurred when the debt was created. But "transaction or occurrence" is a term of art, with a meaning informed by a legal test articulated by the Supreme Court. "Transaction or occurrence" is not a phrase with a literal meaning.

In foreclosure cases, the Supreme Court has made clear that a counterclaim meets the compulsory "transaction or occurrence" test "when there is a 'logical relationship' between the counterclaims and the enforceability" of the debt. *BADD*, 414 S.C. at 295, 778 S.E.2d at 109. The legal inquiry for this Court is not to myopically focus on conduct at the time the debt was created. Instead, the question is whether there is a "logical relationship" between the conduct complained of in the counterclaims and the enforceability of the debt. Answering that question here yields an unambiguous, yes.

The Respondent repeatedly seeks to ignore this test by focusing only upon the issuance of the debt in 2005. According to Respondent, the only place to look for a transaction or occurrence is the time when the debt was issued. "The 'transaction or occurrence' that forms the basis of [Respondent's] foreclosure action is the execution of the Note and Mortgage [in] 2005. Appellant's counterclaims . . . do not arise from the execution of the original 2005 loan documents." (Respondent's Brief, at 6). But Respondent's repeated effort to focus on the "transaction or occurrence" in the literal sense is not the test. Rather, (and again), the test is whether there is a logical relationship between the counterclaims and the enforceability of the debt. There is no question that there is a logical relationship between Respondent seeking to enforce a debt and Appellant seeking to hold Respondent liable for doing the same because she claims the debt is unenforceable.

In announcing the "logical relationship" rule of interpretation in *BADD*, the Supreme Court approvingly cited its previous holding in *North Carolina Federal Savings & Loan Association v. DAV Corporation*, 298 S.C. 514, 381 S.E.2d 903 (1989). The parenthetical summary of that case demonstrates that the circuit court erred. The *BADD* Court summarized the holding as follows: "finding a foreclosure defendant was entitled a jury trial because his counterclaims that the bank

breached ***subsequent oral contracts*** to arrange additional financing were compulsory because they bore a logical relationship to the enforceability of the note." *BADD*, 414 S.C. at 295, 778 S.E.2d at 109 (emphasis added). Compare that parenthetical to the circuit court's order: "I find that the counterclaims asserted by the Defendant are legal but permissive in that Defendant alleges breach of a 2006 agreement as opposed to the underlying 2005 Note and Mortgage." (Order). The two statements are irreconcilable.

Like the litigant in *N.C. Federal*, Appellant alleges that Respondent breached a "subsequent oral contract" that relates directly to the enforceability of the note. (R. p. 26, Answer & Counterclaim, ¶45 ("JB specifically forgave all further payments due and owing by Gene Baxley to him on the Note in the fall of 2006."). The breach of this subsequent oral contract bears a logical relationship to the enforceability of the note that Respondent is now suing over. Accordingly, Appellant's counterclaims are compulsory under the logical relationship test.

B. Respondent's comments on the merits are a distraction from the circuit court's failure to apply on-point precedent.

The Respondent apparently seeks to shore up its legal argument by attempting to undermine the merits of Appellant's claims. (Respondent's Brief, at p. 7 (noting that while "Appellant contends that an alleged subsequent oral agreement rendered the 2005 Note and Mortgage unenforceable, that fact is not supported by the evidence."). While this Court is not tasked with analyzing the merits, a response is in order. According to Respondent, the allegations in the Answer & Counterclaim really show that Respondent agreed to forego interest and late fees. While this line of argument is (again) not before the Court, it is also wrong.[1]

[1] The Respondent's claim that Appellant's "credit history" precluded her from obtaining a loan for the subject premises is also wrong. (Respondent's Brief, p. 2). Indeed, the paragraph cited by Respondent states no such thing. The empty claim just exemplifies the type of treatment Appellant has endured from Respondent.

The Appellant's counterclaims plainly allege that Respondent forgave the obligation to repay the debt in exchange for Appellant providing for their mother. (*See, e.g.*, R. p. 26, Answer & Counterclaims, ¶45 ("During this meeting in the fall of 2006, JB told Gene Baxley that she no longer had to worry about the 2005 Promissory Note because he had plenty of money. JB further told Gene Baxley that she should not worry about the Note and just take care of their mother, and everything would be fine. JB specifically forgave all further payments due and owing by Gene Baxley to him on the Note in the fall of 2006."); R. p. 28, ¶49 ("Since the fall of 2006, Gene Baxley has reasonably relied on her agreement with JB that the balance due and owing under the terms of the 2005 Promissory Note was forgiven, and JB reasonably relied on Gene Baxley's agreement to be their mother's primary caregiver.").

The Appellant's counterclaim also makes clear that as late as 2017 (eleven (11) years after the forgiveness), Respondent continued to confirm in writing that he would not enforce the Note. (R. p. 29, Answer & Counterclaim, ¶55). For example, Respondent noted the selling prices for homes in her neighborhood ($620,000.00), and opined that if she sold her home, then she might get more than she owed and could put some money in her pocket. *Id.* To be sure, the words written by Respondent in 2017 are contrary to the agreement that Appellant believes was reached in 2006—total forgiveness of the debt. But these words plainly contradict Respondent's actions in this case wherein he seeks to collect accrued interest and other costs totaling $791,644.14, **plus** a deficiency judgment. (R. p. 10, Complaint, ¶18, 20).

If Respondent's exercise in arguing his view of the pleadings demonstrates anything, it is that there is a dispute about the enforceability of the Note. Under binding precedent, this dispute should be resolved by a jury.

C. Respondent's argument that the counterclaims are equitable has been waived.

The respondent devotes an entire section of his brief in support of the argument that Respondent's counterclaims for breach of contract and intentional infliction of emotional distress are not legal, but instead equitable. (Respondent's Brief, at pp. 9-11). This argument is not before the Court, for it has been waived.

The circuit court held that Respondent's counterclaims for breach of contract and intentional infliction of emotional distress were "legal" as opposed to equitable. (Order). "I find that the counterclaims asserted by the Defendant are **legal** but permissive . . ." (Order) (emphasis added). The Respondent did not appeal that ruling. Therefore, respondent has waived the right to challenge this ruling on appeal. *Ex Parte Morris*, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) (noting that an unappealed ruling is the law of the case and "requires affirmance"); *Charleston Lumber Co. v. Miller housing Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (same). Accordingly, the Court should reject Respondent's argument.

Even if Respondent's argument is not considered waived, it fails on the merits. The Respondent argues that Appellant's counterclaims are equitable because she essentially seeks specific performance of Respondent's obligation to recognize the debt forgiveness.[2] (Respondent's Brief, at p. 10-11). The Appellant, however, does not seek specific performance, she seeks to recover the damages inflicted upon her by Respondent's conduct, both the damages incurred from breach of the contract and for the intentional infliction of emotional distress. (R. pp. 31, 34-35, Answer & Counterclaim, ¶¶60-63, 71-74). To be clear, the parties reached an agreement

[2] This argument requires the Court to ignore the existence of the intentional infliction of emotional distress claim.

in 2006. The Appellant reorganized her life because of this agreement. Twelve years later, Respondent decided to renege.

It is worth noting, however, that in addition to recovery of damages from the above two counterclaims, Appellant also has a third counterclaim for promissory estoppel. This counterclaim seeks, in part, the equivalent of specific performance. Appellant seeks a finding that "JB is estopped from failing to honor his 2006 promise to his sister Gene Baxley, under which he agreed to relinquish Gene Baxley's obligations under the 2005 Promissory Note . . ." (R. p. 31, Answer & Counterclaim, ¶69). The promissory estoppel counterclaim is, of course, equitable and therefore not relevant to this appeal. *West v. Newberry Elec. Co-op*, 357 S.C. 537, 542, 593 S.E.2d 500, 502 (Ct. App. 2004) ("The doctrine of promissory estoppel is equitable in nature.").

D. Respondent's resort to a public policy argument should be rejected out of hand.

The Respondent's public policy argument essentially asks this Court to eschew application of Supreme Court precedent to prevent the sky from subsequently falling, or to borrow from Respondent's word choices, the levy from breaking. (Respondent's Brief, at p. 11 (noting that "it would be inviting a flood of frivolous actions")). The sky is falling argument also asks the Court to ignore the ethical obligations a lawyer must always execute prior to making a claim in the first place. (Respondent's Brief, at p. 11 ("There would be nothing preventing a debtor from filing a counterclaim, ***whether factually sound or not*** . . . (emphasis added)). These arguments should be rejected out of hand.

The proper application of precedent to the facts alleged dictates that Appellant receive a jury trial for her counterclaims.

## II. CONCLUSION

The Respondent loaned Appellant money to purchase a home. A year later, Respondent agreed to forgive Appellant's obligations under the loan in exchange for her agreement to provide continuing care for their mother. For twelve (12) years (and still today) Respondent complied with the agreement that Appellant alleges the two made. The Appellant alleges that Respondent reneged on the agreement by instituting this foreclosure action wherein he seeks not only repayment of the debt, but interest, other costs, and a deficiency judgment. Based on the facts alleged, Appellant is entitled to a jury trial on her counterclaims.

The Appellant respectfully requests that this Court issue an opinion reversing the circuit court's order and remanding this action for a jury trial on Appellant's counterclaims.

Respectfully submitted,

October 20, 2020

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