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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2020-000162

Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, Plaintiff,

v.

Anthony Whitfield and Cindy Whitfield, Defendants.

AND

Anthony Whitfield, Counterclaimant,

v.

David Swanson, Counterclaim Defendant,

Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court correctly ruled that Appellant was not entitled to a jury trial on his permissive counterclaim for civil conspiracy asserted in a foreclosure action.

2. Whether the trial court's order bifurcating Appellant's civil conspiracy claim was rendered moot by the dismissal with prejudice of all claims between Appellant and Pinnacle Bank.

3. Whether the trial court properly exercised its discretion in bifurcating Appellant's civil conspiracy claim against Respondent from the foreclosure-related claims and counterclaims between Appellant and Pinnacle Bank.

STATEMENT OF THE CASE

Appellant Anthony Whitfield appeals the trial court's orders granting Respondent David Swanson's motion to strike the jury demand and bifurcate the civil conspiracy counterclaim, and denying Appellant's motion to reconsider the same.

This action was commenced in the Charleston County Court of Common Pleas on September 7, 2012 as a foreclosure action filed by Harbor National Bank against Anthony M. Whitfield and Cindy Whitfield. (R. pp. 19-48). The Bank asserted a claim against Whitfield to collect on the Bank's April 23, 2007 note for $325,000 that matured on May 3, 2012, and a claim against Whitfield and Cindy Whitfield to foreclose on the mortgage securing the note. (R. pp. 19-48).

On April 1, 2013, Whitfield filed the first of five responsive pleadings. In his initial answer and first three amended answers filed on September 20, 2012, April 24, 2014 and August 27, 2014, Whitfield asserted counterclaims against the Bank. In his fourth amended answer filed on November 11, 2015, Whitfield added a crossclaim against Cindy Whitfield for equitable indemnity. In his fifth amended answer filed on January 8, 2016, Whitfield added claims for abuse of process and civil conspiracy against David Swanson as an additional counterclaim defendant. (R. pp. 153-175). Whitfield's fifth amended answer is the operative pleading for purposes of this appeal. Swanson answered the counterclaims on February 18, 2016. (R. pp. 189-194).

Whitfield's claims against Swanson were premised on allegations that Swanson and Bank employee Scott Warren conspired to provide false deposition testimony in this litigation for the purpose of manufacturing a defense to Whitfield's counterclaims against the Bank. (R. pp. 168-171). Specifically, the claims arose out of deposition testimony from Warren and Swanson about a phone call in which Swanson recommended that the Bank obtain a title endorsement before

proceeding with a scheduled closing to renew Whitfield's loan. Although the call was documented in a contemporaneous email that Warren sent to the closing attorney and was supported by sworn testimony from Swanson and Warren, (R. pp. 334-361), Whitfield alleged that the call never happened and that Swanson and Warren conspired after-the-fact to testify falsely in their depositions to manufacture a defense to Whitfield's counterclaims against the Bank. (R. pp. 153-175; R. pp. 362-373).

The trial court granted summary judgment for Swanson on Whitfield's abuse of process claim by order entered on November 8, 2017, leaving the civil conspiracy claim as Whitfield's sole claim against Swanson. (R. pp. 4-8). On March 8, 2019, Swanson moved to strike the jury demand, bifurcate the trial of the civil conspiracy counterclaim and refer the bifurcated civil conspiracy trial to the master in equity. (R. pp. 321-373). The motion was brought on grounds that Whitfield waived his right to a jury trial on the civil conspiracy counterclaim by asserting it as a permissive counterclaim in the foreclosure action, and that bifurcating the trial of the conspiracy claim from the complex and lengthy trial of the foreclosure claims and counterclaims would avoid prejudice and further the interests of convenience, expedience and judicial economy. (R. pp. 321-373).

Swanson's motion was heard by the Honorable Diane S. Goodstein on October 7, 2019. (R. pp. 1166-1201). At that time, the case was scheduled for a two-week date certain trial set to begin on October 21, 2019. (R. pp. 1166-1201). On October 16, 2019, Judge Goodstein entered an order granting Swanson's motion. (R. pp. 9-16). Judge Goodstein found that Whitfield waived his right to a jury trial on the civil conspiracy counterclaim by asserting it as a permissive counterclaim, and that bifurcation was appropriate under Rule 42(b), SCRCP. Judge Goodstein

ordered the civil conspiracy claim to proceed in a non-jury trial, but declined to refer the bifurcated claim to the master in equity. (R. pp. 9-16).

Whitfield filed a motion to reconsider on October 18, 2019. (R. pp. 381-420). Swanson filed a memorandum in opposition on November 9, 2019. (R. pp. 421-476.). Whitfield's motion to reconsider was denied by order entered on January 6, 2020. (R. pp. 17-18). Whitfield served a notice of appeal on February 3, 2020.

INTRODUCTION

The foreclosure action filed against Anthony M. Whitfield arose out of a loan that Pinnacle Bank, as successor in interest to Bank of North Carolina, previous successor in interest to Harbor National Bank, ("Bank") extended to Whitfield in 2007. The loan was secured by real property located in Charleston County, South Carolina, referred by the parties as the "Black Rush Property." (R. pp. 19-48).

When the loans were originated in 2007, Whitfield owned the Black Rush Property by himself in fee simple. (R. pp. 19-48). As the 5-year balloon note began maturing in 2012, Whitfield and the Bank negotiated renewal terms, and a closing was scheduled to take place on June 28, 2012. (R. pp. 153-175.). Scott Warren was the Bank's primary point of contact for the Whitfield loans.

Two days prior to closing, Whitfield's closing attorney brought to the attention of the Bank that subsequent to the origination of the loan in 2007, Whitfield had deeded a one-half interest in the Black Rush Property to his ex-wife, Cindy Whitfield. (R. pp. 334-361). The closing attorney's office initially indicated that Cindy Whitfield would need to sign the mortgage on the Black Rush Property, and then asked if the Bank was okay with keeping the existing lender's title insurance policy in place rather than issuing a new policy. (R. 334-361).

Thereafter, the Bank investigated whether the transfer of interest in the Black Rush Property would impact its collateral in the Black Rush Property. Warren contacted the Bank's counsel, David Swanson, who recommended that the Bank secure a title endorsement to protect its security interest. (R. pp. 523-526; R. pp. 619-626). On June 27, 2012, the Bank's representative, Scott Warren, sent an email to the closing attorney's office stating "I called bank council [sic] to get some advice on how to handle it. (a) we need a title endorsement on Black Rush only...We can rely on your title opinion and existing policies for the others." (R. pp. 334-361).

As a result of Cindy Whitfield's fifty percent ownership interest in the Black Rush Property, and to ensure protection of its security interest in the entirety of the Black Rush Property, the Bank sought either a title endorsement from the title insurer or Cindy Whitfield's signature on the mortgage as a condition of renewing the loan. Neither a title endorsement nor Cindy Whitfield's signature was obtained, and ultimately, the loan was not renewed. (R. pp. 79-88).

Subsequently, the Bank initiated foreclosure proceedings against Whitfield. (R. pp. 19-48). In response, Whitfield counterclaimed against the Bank for various causes of action sounding in fraud and unfair trade practices. As it relates to those allegations relevant to this Appeal, Whitfield alleged in his third amended answer and counterclaims, filed on August 27, 2014:

> 32. In reliance upon Mr. Warren's June 26, 2012 commitment letter, Mr. Whitfield attended a scheduled closing at attorney Mark Weeks' law office. At the closing, Mr. Warren informed Mr. Whitfield that a signed endorsement from a title company was needed so that Mr. Whitfield's ex-spouse Cindy Whitfield would not be required to sign the loan documents for the Black Rush Property, the home that Cindy Whitfield resided in. At a certain point, Mr. Whitfield was informed by the closing attorney that the endorsement could not be procured, that Mrs. Whitfield was refusing to sign the mortgage to the Black Rush Property, and Mr. Warren proposed that it would only be possible to close two of the subject properties...but that if the Black Rush Property ultimately couldn't be closed, all properties...would have to be foreclosed

> upon.
>
> 33. Despite Harbor National Bank's representations that a title endorsement was required to renew the Black Rush Property, Mr. Whitfield has subsequently learned that no such endorsement was required from the title company. Moreover, Harbor National Bank failed to renew any of the loans listed in the June 26, 2012 commitment letter despite agreeing to do so, willfully breaching their agreements.

(R. pp. 68-69).

In response to these allegations in the Third Amended Answer and Counterclaims, the Bank stated:

> 14. Plaintiff admits the Plaintiff attended a scheduled closing at the office of attorney Mark Weeks, that it was discovered that Defendant had transferred an interest in the Black Rush property to his ex-wife, Cindy Whitfield, and that it was required as a condition of the closing either that Mrs. Whitfield sign the new mortgage or that a title endorsement be obtained.

(R. pp. 82).

On November 13, 2013, Scott Warren was deposed and was questioned about the email he sent prior to closing in which he informed the closing attorney's office that he "called bank council [sic] to get some advice on how to handle it. . . We need a title endorsement . . . ." (R. pp. 348-349). Warren identified David Swanson as the bank counsel he was referring to in the email and testified that Swanson recommended that the Bank obtain a title endorsement on the Black Rush Property. (R. pp. 348-349).

Whitfield subsequently deposed David Swanson, who testified that he received the call from Scott Warren and recommended that the Bank obtain a title endorsement. (R. pp. 619-526). Swanson testified that "[Mr. Warren] asked me my advice as to whether he should do [the loan renewal] without—with or without [an endorsement], I told him he should get a title endorsement." (R. p. 623).

Following David Swanson's deposition, Whitfield decided that he did not believe the telephone conversation between Swanson and Warren actually occurred, and that Swanson and Warren must have conspired to give false deposition testimony about the existence of the call to justify the Bank's demand for a title endorsement, *i.e.* to create an "advice of counsel" defense. (R. pp. 168-171.).

Whitfield then amended his pleadings a fifth time to allege that Swanson and the Bank engaged in a civil conspiracy by providing false deposition testimony about the existence of the subject phone call[1]. In particular, Whitfield alleged:

> 66. Mr. Scott Warren claims he called Mr. David Swanson for the advice to procure a title endorsement to renew the loan for the Black Rush Property.
>
> 67. Mr. Swanson claims that Mr. Scott Warren called him regarding the anticipated closing between Mr. Whitfield and Harbor National Bank, said closing to occur on June 28, 2012.
>
> 68. Despite providing such **sworn testimony** by each Mr. Scott Warren and Mr. David Swanson that this advice was given and received before the June 28, 2012 closing, there is **no evidence of any such phone call** as the phone records from Mr. David Swanson's cell phone and his office line show no records of a phone call from Mr. Scott Warren cell phone or office line in June of 2012.
>
> 69. Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, when in fact evidence shows it was not made at the time, 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.

(R.p. 168) (emphasis in original pleading).

[1] Although the merits of this counterclaim are not the subject of this appeal, it is Respondent's position that South Carolina does not recognize a civil cause of action for alleged conspiracy to suborn perjury.

At his deposition, Whitfield detailed his allegations against Swanson. Whitfield testified that Swanson was "a fool" and he believed Swanson rendered negligent advice to the Bank[2]. Whitfield further testified:

> The bank - - Harbor National Bank - - claimed the reason for backing out of the deal a year later, in the lawsuit (Warren depo 11/13/13), to close my nine loan renewals on 6/28/12 was because of advice it got—the bank got—from a "mystery lawyer," who never appeared in the pleadings or on a witness list until that time.

(R. p. 869).

Further clarifying his position, Whitfield testified:

> Q: Your position is that the phone call between Scott Warren and David Swanson never occurred
>
> A: Correct

(R. p. 881).

> Q: And you believe that they concocted this notion that the phone call occurred after the closing didn't go forward?
>
> A: Oh. Yeah. When Harbor National Bank got real concerned, then they had to bring in some other guns, they had to convince somebody to lie for the bank to get them out of the hole they were in, and Mr. Swanson volunteered.

(R. p. 881).

> Q: And is it your testimony as well that Mr. Swanson and the bank conspired sometime after June 28, 2012?
>
> A: Yeah, I guess that would be a good way to define it.

(R. p. 1061).

---

[2] Whitfield cannot pursue a claim against Swanson for providing the alleged "bad advice" to the Bank because there was no attorney-client relationship between Whitfield and Swanson. Whitfield's counsel has acknowledged on the record that they cannot hold Swanson liable for the failure of the loan renewal. (R. pp. 1149-1152).

As alleged throughout Whitfield's pleadings and described in his deposition testimony, Whitfield's claim against Swanson for civil conspiracy is based on Swanson's deposition testimony that corroborated the testimony of Scott Warren—testimony that occurred *after* the Bank initiated the foreclosure proceeding. Whitfield alleges that the testimony was false, that Swanson conspired with the Bank to offer the false testimony, and that offering the false testimony amounted to a civil conspiracy.

Prior to trial, Swanson filed a motion to strike Whitfield's jury demand on the civil conspiracy counterclaim and to bifurcate the civil conspiracy counterclaim, arguing that the counterclaim was permissive under Rule 13(b), SCRCP, and therefore the claim was not entitled to a jury trial as of right. (R. pp. 321-373).

A hearing was held on Swanson's motion on October 7, 2019, at which counsel for Whitfield conceded that "we don't believe it [the civil conspiracy counterclaim] relates to the foreclosure action." (R. pp. 1177).

The trial court entered an order on October 16, 2019 granting Swanson's motion. In the order, the court held:

> Here, the civil conspiracy counterclaim has no logical relationship to Pinnacle Bank's right to enforce the note and foreclose on the mortgage. The alleged facts supporting the civil conspiracy counterclaim—that Swanson and Harbor National Bank conspired to give false testimony for the purpose of providing an *after-the-fact* justification for Harbor National Bank's request for a title endorsement—relate to activity that occurred after Mr. Whitfield's loans were not renewed. Accordingly, the outcome of the civil conspiracy counterclaim will not affect the enforceability of the note and mortgage, will not affect whether Harbor National Bank had an obligation to renew Mr. Whitfield's [] loans, and will not affect Whitfield's other counterclaims alleging improper acts against the bank with respect to the original loans the failed alleged loan renewals.

(R. pp. 9-16).

The trial court also found that "bifurcation of the civil conspiracy will simplify the evidence and issues presented before the jury [of the primary trial], will avoid the inconvenience of forcing those witnesses and parties only material to the civil conspiracy claim to attend a length trial regarding the other counterclaims asserted by Whitfield, and will aid in avoiding jury confusion over which facts are relevant to the claims that are to be decided by the jury rather than by the Court." (R.pp. 9-16).

STANDARD OF REVIEW

"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). 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). Appellate courts may decide questions of law with no particular deference to the circuit court's findings. *Id.* at 15, 772–73.

A motion seeking bifurcation under Rule 42(b), SCRCP is addressed to the sound discretion of the trial court. *Senter v. Piggly Wiggly Carolina Co., Inc.*, 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000). Thus, an appellate court will review a trial judge's order on a motion to bifurcate under an abuse of discretion standard. *Creighton v. Coligny Plaza Ltd. Partnership,* 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998).

ARGUMENT

I. The trial court correctly struck the jury demand for Whitfield's civil conspiracy counterclaim.

a. The trial court had authority to strike the jury demand.

Whitfield leads with the argument that Judge Goodstein had no authority to strike the jury demand on the civil conspiracy claim because both he and Swanson demanded jury trials in their

initial pleadings. According to Whitfield, the analysis stops at Rule 38(d), SCRCP because Whitfield did not consent to withdrawal of the jury demand. Stated differently, Whitfield suggests that the trial court has no power to order a non-jury trial once a party has demanded a jury trial, regardless of whether or not the claim is entitled to a jury trial as of right.

However, Rule 38 does not create a right to a jury trial where one does not exist. Rather, it provides the mechanism for demanding a jury trial on "issue[s] triable of right by a jury . . ." and is limited to "issues so triable" by jury. Here, the permissive counterclaim for civil conspiracy was not a claim triable of right by a jury.

Furthermore, any contention that a party's demand under Rule 38 usurps the trial court's authority to strike that demand is dispelled by Rule 39, SCRCP, which provides that "[w]hen a trial by jury had been demanded as provided in Rule 38 . . . [t]he trial of all issues so demanded shall be by jury, unless . . . *the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.*" (emphasis added).

Accordingly, the trial court had the authority to order a non-jury trial of the civil conspiracy counterclaim, and properly did so.

b. The trial court correctly ruled that Whitfield's civil conspiracy counterclaim was permissive.

"The constitutional declaration that a right to trial by jury shall remain inviolate does not apply to cases within the equitable jurisdiction of the court." *Defender Properties, Inc. v. Doby*, 307 S.C. 336, 338, 415 S.E.2d 383, 384 (1992). "In equity the parties are not entitled, as a matter of right, to a trial by jury." *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975).

A foreclosure action is an action in equity, and a party has no right to trial by jury. *Gardner v. Travis,* 316 S.C. 315, 317, 450 S.E.2d 54, 56 (Ct. App. 1994) ("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.");

Wachovia Bank, Nat'l Ass'n. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014) ("If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.").

"By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *Blackburn*, 407 S.C. at 331, 755 S.E.2d at 442 (citing *Wells Fargo Bank, N.A. v. Smith,* 398 S.C. 487, 495, 730 S.E.2d 328, 332-33 (Ct. App. 2012)); *see also* Rule 13(a), SCRCP. Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are instead, permissive. Rule 13(b), SCRCP.

Under South Carolina law, whether a counterclaim is compulsory or permissive is viewed through the logical relationship test, which the Supreme Court has explained:

> Under this test, "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. If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory.

Blackburn, 407 S.C. at 330 n.7, 755 S.E.2d at 442 n.7 (internal citations omitted).

Here, there is no dispute between the parties that Whitfield prevailing on the civil conspiracy counterclaim would not impact the enforceability of the Bank's note and mortgage in any manner. Indeed, Whitfield's counsel conceded at oral arguments that the civil conspiracy counterclaim "does not relate to the foreclosure." (R. pp. 1177).

Likewise, the factual allegations, Whitfield's testimony, and his counsel's open court statements unequivocally demonstrate that the actions making up the alleged civil conspiracy occurred *after* commencement of the foreclosure action. (R. pp. 168-171, pp. 1149-1152). Thus,

there is no outcome of the civil conspiracy counterclaim that could ever call into question the enforceability of the note and mortgage that originated in 2007.

Whitfield's civil conspiracy counterclaim confirms as much. Paragraph 69 alleges:

> Because the telephone records show the phone call never occurred, the sworn testimony that the call was made, <u>when in fact evidence shows it was not made at the time</u>, 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.

(R. p. 168) (emphasis in original).

Here, it is clear from Whitfield's own allegations that the alleged ulterior motive of the civil conspiracy was to create an after-the-fact, false "legal defense for the bank's failure to renew its contractual obligations to renew Mr. Whitfield's loans." (R. p. 168). All of the alleged activity underpinning the alleged civil conspiracy, therefore, occurred after the failure of the loan renewal.

Nonetheless, in an attempt to frame the civil conspiracy counterclaim as compulsory, Whitfield now suggests that "Mr. Swanson's alleged advice is the only reason that Plaintiff Bank did not close on Mr. Whitfield's loan renewals." (Brief of App. p. 10). This argument, however, is directly at odds with the unambiguous allegations of the civil conspiracy counterclaim, and the prior open court statements of Whitfield's counsel.

In a hearing on March 21, 2018, counsel for Whitfield engaged in the following exchange with Judge Goodstein:

> The Court: But other than being a witness to the – and a participant in the coverup and all of the problems that that would then create for this attorney [Swanson], okay, is he then responsible for the underlying damages of Mr. Whitfield with regards to the failure of the bank to fund the loans?
>
> Whitfield's Counsel: I got you. I understand your question, Your Honor. The answer is no.

(R. pp. 1149-1152).

In other words, for purposes of attempting to gain an advantage in this appeal, Whitfield now takes a position directly contrary to the position he has maintained throughout the entirety of this litigation, *i.e.* that the phone call never occurred. Whitfield cannot have it both ways, and the allegations of his civil conspiracy claim are clear and unequivocal—Whitfield alleges that the phone call never happened and was made-up after-the-fact to provide cover for the Bank[3].

In all respects, the civil conspiracy counterclaim has no relationship to the enforceability of the Bank's note and mortgage. Therefore, the trial court correctly held that the civil conspiracy counterclaim was permissive and was not entitled to a jury trial as of right.

II. The appeal of the order bifurcating the civil conspiracy counterclaim is moot in light of Appellant's settlement with the Bank.

Appellant also avers that the trial court erred in bifurcating the civil conspiracy counterclaim from the remainder of the claims asserted in the lawsuit. However, Whitfield and the Bank have settled all of their claims against each other. (R.p. 477). Thus, there is no trial to be had between the Bank and Whitfield.[4]

Accordingly, Whitfield's appeal of the trial court's order bifurcating the trial of the civil conspiracy counterclaim is now moot.

III. To the extent the bifurcation order is not moot, the trial court properly exercised its discretion in bifurcating the civil conspiracy counterclaim.

Rule 42(b), SCRCP provides that "the court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a

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[3] Notwithstanding Whitfield's inexplicable change of position, to the extent that Whitfield argues Swanson did in fact advise the Bank to obtain a title endorsement on the phone call, Swanson was an attorney for the Bank, and his advice to obtain a title endorsement would constitute legal advice to a client that is not actionable by Whitfield, a non-client.

[4] Whitfield's crossclaim against his ex-wife sought only equitable indemnification "to the extent Mr. Whitfield is held liable to the [Bank] in this action." (R. pp. 172-173.).

separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State." Bifurcation is proper by the trial court where the issues in the case are complex, and bifurcation helps to clarify or simplify the issues. *Durham v. Vinson*, 360 S.C. 639, 645 n.2, 602 S.E.2d 760, 763 n.2 (2004).

Here, a trial between the Bank and Whitfield would be long and complex, with eight causes action unrelated to the civil conspiracy counterclaim and an estimated ten expert witnesses and fifteen to twenty fact witnesses who would testify to issues only relevant to the foreclosure and counterclaims regarding enforcement of the note and mortgage. (R. pp. 321-373, pp. 1166-1201).

To the contrary, as it relates to the civil conspiracy claim against Swanson, the witnesses will be limited, and the trial will address only one issue—whether the testimony of David Swanson and Scott Warren was truthful, or as Whitfield alleges, was fabricated to allegedly bolster the Bank's position in this litigation. (R. pp. 321-373, pp. 1166-1201).

The introduction of the claims against Swanson—which do not impact the foreclosure, loan enforcement, or Whitfield's counterclaims related to alleged unfair lending practices—would unnecessarily complicate the primary trial and cause blurring of the issues in the claim against Swanson. Thus, forcing the narrow counterclaim against Swanson to be tried along with a lengthy and complex trial between the Bank and Whitfield would unnecessarily complicate the issues and prejudice Swanson's defense, and would be inefficient for the trial court and parties and inconvenient for those witnesses relevant to the civil conspiracy counterclaim.

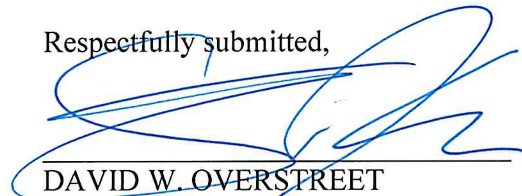
Accordingly, to the extent that this Court does not rule that Whitfield's appeal of the trial court's bifurcation order is now moot, the trial court did not abuse its discretion in determining

that the civil conspiracy counterclaim should be bifurcated from the remainder of the claims, counterclaims and cross-claim in the litigation.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that the trial court's order be affirmed in its entirety.

Respectfully submitted,



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v.

Anthony Whitfield and Cindy Whitfield,	Defendants.

AND

Anthony Whitfield,	Counterclaimant,

v.

David Swanson,	Counterclaim Defendant,

Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent.

CERTIFICATE OF COUNSEL

I certify that the *Final Brief of Respondent David Swanson* complies with Rule 211(b), SCACR.

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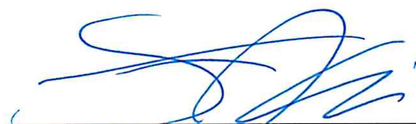

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Of whom, Anthony Whitfield is the Appellant and David Swanson is the Respondent.

PROOF OF SERVICE

I certify that on the date indicated below, I served the *Final Brief of Respondent David Swanson* upon Appellant via email on December 14, 2020, addressed to counsel of record as follows:

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