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The State of South Carolina
In the Court of Appeals

APPEAL FROM
THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT,
COUNTY OF GREENVILLE

Letitia H. Verdin, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2021-000333
Civil Action No. 2020-CP-23-01663

NATIONSTAR MORTGAGE LLC,

Plaintiff,

v.

LOUISE M. DOYLE,
JUNE MCGAHEE,
BANK OF AMERICA, N.A. and
DOROTHY RABON

Defendants,

Of Which NATIONSTAR MORTGAGE LLC is the *Appellant,*

And

LOUISE M. DOYLE, JUNE MCGAHEE, BANK OF AMERICA, N.A. and DOROTHY RABON are the *Respondents.*

PETITION FOR REHEARING
UNDER RULE 221(a)

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INTRODUCTION

This appeal's dismissal merits rehearing under Rule 221(a), SCACR, because the dismissal order overlooked or misapprehended that the *substance* of the appealed order—rather than its *form*—determines whether that order is appealable. The dismissal order addressed a single basis for dismissal: that the appealed order was, *in form*, the denial of a motion for an order of reference. That approach—judging the book by its cover—conflicts with this Court's holding that it is "the nature and effect of the order, not merely its label," that makes an order appealable under S.C. Code Ann. § 14-3-330. *Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017). The dismissal order truncated the appealability determination before the necessary "case-by-case" inquiry into appealability, *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019), and thus overlooked the compelling reasons—never rebutted or even addressed by the respondent—why the nature and effect of the order make it immediately appealable.

This appeal is from an order denying Nationstar Mortgage LLC ("Nationstar") the mode of trial to which it is entitled to by right. In substance, the trial court's order denies Nationstar a "substantial right" under § 14-3-330(2) because it strips Nationstar of the right to non-jury adjudication of its foreclosure action and the legal permissive counterclaims asserted by Respondents Louise M. Doyle and June McGahee (collectively "Respondents"). The trial court's refusal to apply the binding South Carolina law in *Wachovia Bank, Nat. Association v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014)* – that a defendant who asserts legal permissive counterclaims

in a foreclosure action has waived his right to a jury trial – is also like other appealable orders that effectively deny the mode of trial to which a party is entitled. This Court should grant rehearing and address the merits of the trial court's order, which flouts the South Carolina Supreme Court's holding that a party waives its right to a jury trial by bringing a legal permissive counterclaim in an equitable action, such as Nationstar's foreclosure. *See Blackburn*, 407 S.C. at 330, 755 S.E.2d at 441-42.

BACKGROUND

On August 27, 2007, Louise M. Doyle ("Respondent Doyle") executed a promissory note (the "Note") in the principal amount of $70,000.00 in favor of Bank of America, N.A. ("BANA") to finance the purchase of certain real property located at 4 Coligny Court, Greenville, South Carolina (the "Property"). Cutler Aff. Ex. A ¶ 7. On the same day, Respondent Doyle executed a mortgage in relation to the Property (the "Mortgage," together with the Note, the "Loan") to secure the debt evidenced by the Note. The Mortgage was recorded in the Greenville County Register of Deeds on August 28, 2007 in book 4840 at page 107. Cutler Aff. Ex. A ¶¶ 8, 9. BANA assigned the Mortgage to Nationstar on October 17, 2012 and recorded the assignment in the Greenville County Register of Deeds on October 31, 2012 in book 5185 at page 1543. Cutler Aff. Ex. A ¶ 12.

Respondent has been in default on payments on the Loan since the May 1, 2013 installment. Cutler Aff. Ex. A ¶ 15. Due to the continued default on the Loan, Nationstar, as holder of both the Note and Mortgage, exercised its remedy granted in the Mortgage and filed the Complaint to foreclose on the Property on or about

September 17, 2015. On January 5, 2016, Respondents filed their Answer and Counterclaims ("Counterclaims" or "Counter."). Despite a lack of factual support, Respondents asserted the following claims for relief: (1) violation of the Real Estate Settlement Practices Act ("RESPA"), 12 U.S. Code § 2605; (2) negligence; (3) breach of contract/conversion; and (4) violations of the South Carolina Unfair Trade Practices Act ("SCUTPA"). Cutler Aff. Ex. B pp. 4-7. Respondents demanded a jury trial in the Counterclaim. Cutler Aff. Ex. B p. 1.

On June 8, 2020, Nationstar filed a Motion for Non-Jury Adjudication of Action and for Order of Reference (the "Motion"). Cutler Aff. Ex. C. While the Motion did request an order of reference to the Master-In-Equity, that request was tangential and secondary to the request for non-jury adjudication of both Nationstar's foreclosure claim and Respondents' counterclaims.

On February 23, 2021, the Honorable Letitia Verdin entered an order denying the "Motion to Refer to Master-In-Equity" Cutler Aff. Ex. D. The Honorable Letitia Verfin found the counterclaims were legal and intertwined with Nationstar's foreclosure. Cutler Aff. Ex. D. Therefore, she concluded that the counterclaims were compulsory and Respondents were entitled to a jury trial. Cutler Aff. Ex. D.

Nationstar filed a Notice of Appeal of the Trial Court Order on March 24, 2021 in the Trial Court and the Notice of Appeal was filed in this Court on or about March 25, 2021.

On April 7, 2021, this Court requested that counsel serve and file a memorandum addressing the issue of appealability of the Trial Court's Order.

Pursuant to this Court's request, on April 15, 2021, Nationstar filed a supplemental memorandum addressing the appealability of the Trial Court's Order. Respondents filed a memorandum the same day.

On May 6, 2021, this Court entered an Order dismissing the Appeal holding that the appeal was from the Trial Court's order denying the "motion to refer this foreclosure action to a master-in-equity" and that such an order is not immediately appealable. However, the basis for Nationstar's appeal is not specifically the denial of the Motion for Order of Reference. Instead, the basis for Nationstar's appeal is the denial of the Motion for Non-Jury Adjudication of Action. Because the denial of this motion effects the mode of trial, it is immediately appealable.

ARGUMENT

By dismissing this appeal, this Court overlooked the rule that an order's "nature and effect," not its label, determine its appealability. *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. Because of that threshold error, the Court also overlooked or misapprehended the reasons why the trial court's order is immediately appealable. Rehearing should be granted because the trial court's decision granting Respondents a jury trial on both Nationstar's equitable foreclosure action and their legal permissive counterclaims is unsupported by controlling case law. Rehearing is

warranted to address whether Nationstar is entitled to non-jury adjudication of its equitable foreclosure and the Respondents' legal permissive counterclaims.

I. The dismissal order overlooks that an order's substance, rather than its label, makes an order appealable.

South Carolina courts decide whether an order is immediately appealable by examining "the nature and effect of the order" to determine whether the order fits S.C. Code Ann. §14-3-330's parameters. *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. That provision grants this Court jurisdiction over appeals from:

> (1) Any intermediate judgment, order or decree in a law case involving the merits . . . .; [and]
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

Nothing in the text or application of § 14-3-330 excludes any one procedural variety of order from its scope. Instead, the statute's terms look to an order's *substance*—whether the order "affect[s] a substantial right" and is thus immediately appealable. *Id.* Because the appealability of an order hinges on its "nature and effect" rather than on its title, *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760, "the question of whether an order is immediately appealable is determined on a case-by-case basis." *Stone*, 426 S.C. at 295, 826 S.E.2d at 870. Courts must evaluate "the particular circumstances" of each order and case to decide an order's appealability. *See id.*

This Court overlooked these guiding principles by substituting a truncated inquiry based on the label assigned to the trial court's order. The Court treated orders

denying motions for orders of reference as a categorical exclusion from § 14-3-330's jurisdiction. And so it did not even ask the required question: whether the Counterclaims were permissive or compulsory.

Section 14-3-330's case-by-case inquiry does not permit such blanket treatment based on the label assigned to an underlying order. *Stone*, 426 S.C. at 295, 826 S.E.2d at 870. That label cannot and does not decide appealability under §14-3-330—the specific nature and circumstances of the trial court's order do. *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. Even if the denial of certain motions is presumptively not appealable, *see Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 167, 785 S.E.2d 595, 598 (2016) ("The denial of a motion to dismiss is *ordinarily* not immediately appealable[.]" (emphasis added)), § 14-3-300 requires analyzing whether the nature and effect of any *particular* order rebuts that presumption. Rehearing should be granted because the dismissal order here overlooked that necessary analysis.

II. The dismissal order's threshold error caused it to overlook why the nature and effect of the trial court's order make it appealable.

Because the dismissal order overlooked and misapprehended the relevant appealability inquiry of *substance* rather than *form*, it further overlooked why the nature and effect of the trial court's order make it appealable. Three aspects of the

decision require this Court to exercise its jurisdiction over this appeal. The dismissal order's failure to evaluate these case-specific issues warrants rehearing.

A. The trial court's decision allowing a jury trial on Respondents' permissive counterclaims denies Nationstar's substantial right to non-jury adjudication of its equitable foreclosure.

The dismissal order overlooked that the trial court's order is immediately appealable because it impacts a substantial right. By determining that the foreclosure and counterclaims are intertwined, the trial court stripped Nationstar of its right to a non-jury trial. That decision deprives Nationstar of the substantial right to control its own litigation and to the mode of trial to which it is entitled.

It is well settled in South Carolina that "Orders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330 (2) and must, therefore, be appealed immediately." *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554,565, 511 S.E.2d 372, 377 (Ct. App. 1998). As the Supreme Court has explained, "[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable. The failure to timely appeal the interlocutory order of the trial court effects a waiver of appeal rights." *Foggie v. CSX Transp. Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) (internal citations omitted) (dismissing the appellant's argument regarding mode of trail because the issue was not preserved for appeal review); *Union Nat'l Bank of S.C.*, 333 S.C. at 565, 511 S.E.2d at 377-78 (holding that the appellant's failure to appeal the denial of a motion for a jury trial precluded the Court of Appeal from addressing the issue).

In *Creed v. Stokes,* 285 S.C. 542, 331 S.E.2d 351 (1985), the Supreme Court recognized that an order affecting the mode of trial is immediately appealable. There, the trial court granted an order of reference filed by respondent and appellant lost her right to a trial by jury. The appellant "failed to appeal" the order of reference. *Id.* at 542-43, 331 S.E.2d at 352. That order, the Supreme Court explained, "should have been appealed immediately because it affected the mode of trial, a substantial right." *Id.* at 543, 331 S.E.2d at 352. Because the appellant did not appeal, that order "became the law of the case." *Id.; see also Soden,* 333 S.C. at 566, 511 S.E.2d at 378 ("Failure challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, *right or wrong,* is the law of the case and requires affirmance." (emphasis added)).

Nationstar must seek redress from the Court of Appeals or it will forever waive its right to contest the denial of its Motion. Therefore, the immediate dismissal was premature and rehearing is necessary to address the rulings in the trial court's order, which render it appealable.

B. Respondents have no right to a jury trial for their counterclaims because they are permissive.

Respondents' counterclaims, all of which stem from an alleged violation of RESPA for failure to respond to a Qualified Written Request ("QWR"), are permissive and by asserting them in the foreclosure action, Respondents have waived their right to a jury trial. The Trial Court therefore erred in denying Nationstar's Motion.

Under South Carolina law, a party waives its right to a jury trial by bringing a legal and permissive counterclaim in an equitable action. *See Wachovia Bank, Nat.*

Ass'n v. Blackburn, 407 S.C. 321, 330, 775 S.E.2d 437, 441-42 (2014). A foreclosure action is an action in equity. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 288, 489, S.E.2d 472, 475 (1997). "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). However, counterclaims, including those raised in equitable actions, may or may not, at times, be entitled to a jury trial. *Blackburn*, 407, S.C. at 328, 755 S.E.2d at 441.

As articulated in *Blackburn,*

> (1) If both the complaint and the counterclaim are equitable, the entire matter is triable by the court.
>
> (2) If both [the complaint and the counterclaim] are at law, the issues are triable by a jury.
>
> (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
>
> (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim.

Id., 407 at 330, 755 S.E.2d at 441-42.

Here, as the Counterclaims are legal and permissive, Respondents waived their right to a jury trial by bringing them in this equitable foreclosure action. *See C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301-02, 350 S.E.2d 191, 193 (1986) (holding that defendant had no right to a trial by jury on permissive counterclaims filed in foreclosure action); *John D. Hollingsworth on Wheels, Inc. v. Arkon Corp.*, 273 S.C. 461, 257 S.E.2d 165 (1979) (holding that because defendant

elected to assert permissive counterclaim in response to Plaintiff's equitable action, Defendant waived its right to a jury trial). By denying the Motion, the Trial Court has deprived Nationstar of the mode of trial to which it is entitled.

The first step in an analysis on whether a party has a waived their right to a jury trial is to determine whether the counterclaim is equitable or legal. *See Mortgage Elec. Sys. Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) ("Therefore, in order to analyze the merits of the [plaintiffs'] contention, we must determine if the [] fraud counterclaim was: (1) compulsory or permissive, and (2) legal or equitable in nature.").

"Whether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought." *RIM Associates v. Blackwell*, 359 S.C. 170, 177-78, 597 S.E.2d 152, 156 (Ct. App. 2004); *Clark v. Hartgrave*, 323 S.C. 84, 86, 473 S.E.2d 474, 476 (Ct. App. 1996). Thus, "an action sounding in law may be transformed to one in equity because equitable relief is sought." *Ins. Fin. Servc. Inc. v. S. Carolina Ins. Co.*, 271 S.C. 289, 294, 247 S.E.2d 315, 318 (1978). Accordingly, "an appellate court is not bound by a party's characterization of the actions" and may disregard such labels. *RIM Associates*, 359 S.E. at 177-78, 597 S.E.2d at 156; *Ariail v. Ariail*, 295 S.C. 486, 491, 369 S.E.2d 146, 149 (Ct. App. 1988) (disregarding the label given by the parties to a cause of action and analyzing the claim based on the relief sought). Additionally, even though a counterclaim may be compulsory as it arose out of the "same transaction or occurrence as the opposing party's claim," *Blackburn*, 407 S.C. at 330, 755 S.E.2d at 441, where the main purpose

of the counterclaim is equitable relief, the counterclaim is properly regarded as sounding in equity, *see Mortgage Elec. Sys. Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009) (holding no right to jury trial of a *compulsory* counterclaim where the relief sought was equitable).[1]

Respondents have waived their right to a jury trial because their claims are permissive. "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. at 442 (*citing Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 495, 730 S.E.2d 328, 332-33 (Ct. Ap. 201)); *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, each of Respondents' counterclaims, which all stem from Nationstar's alleged failure to respond to a QWR, in violation of RESPA, are permissive.

[1] Respondents will concede that the counterclaims asserted by the Respondents are legal in nature.

Therefore, any order that compels Nationstar to a jury trial is in error. See *Alston v. Limehouse*, 61 S.C. 1, 39 S.E.2d 192 (1901) (holding that the order of the lower court denying a compulsory reference of the issues affects the mode of trial and that "it is well settled beyond controversy in this state that it is error, from which an appeal will lie, to deny a party a mode of trial to which it is entitled by law").

In fact, the plain language of RESPA renders Respondents' counterclaims permissive under the logical relationship test because alleged violations of RESPA do not affect the "validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage or lien made or arising in connection with a federally related mortgage loan." *See* 12 U.S.C. § 2615. Therefore, any claims that stem from an alleged RESPA violation cannot affect the validity and enforceability of the note and/or mortgage as well.

The Sixth Circuit addressed a similar issue concerning whether RESPA claims concerning QWRs bear a logical relationship to a foreclosure action. In *Marias v. JP Morgan Chase Bank*, 676 Fed. Appx. 509, 514 (6th Cir. 2017), the court held that a lack of commonality precluded a defendant's foreclosure claim from being a Rule 13(a) compulsory counterclaim to a plaintiff's RESPA action because the two actions were not logically related. The defendant's foreclosure claim was a contract claim governed by state law, whereas the plaintiff's RESPA claim required an interpretation of federal statutory law. There was virtually no factual or legal overlap between the elements of QWR claims for violations of RESPA and the elements of foreclosure claims for breach of a note and mortgage. Whether the defendant followed the

procedures required for responding to a QWR was a very different question from whether the defendant had a right to foreclose.[2]

Simply put, the Order does not simply deny Nationstar an order of reference to which it is entitled; it also grants Respondents a jury trial that they are not entitled to. In doing so, the Trial Court Order affects mode of trial, a substantial right of Nationstar, and is immediately subject to appellate review.

CONCLUSION

For these reasons, this Court should grant this Petition for Rehearing under Rule 221(a), review the merits of this appeal, and reverse the trial court's order with instructions to strike the jury demand of the Respondents and refer this matter to the Master-in-Equity for final adjudication.

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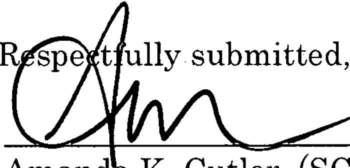
[2] The Sixth Circuit cautioned against finding a logical relationship between RESPA-QWR litigation and foreclosure, holding that such a finding would be "against public policy because it would contravene the consumer-protection purposes of the QWR provisions of RESPA. If foreclosure is a compulsory counterclaim in response to claims brought by borrowers under federal consumer-protection statutes … then every act of a consumer to vindicate her rights under those laws come could with the risk of losing her home in the process." The Order in this case, if not addressed by this Court, could place the same risk upon consumers in South Carolina.

Dated: May 19, 2021

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

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v.

Louise M. Doyle, June McGahee, Bank of America, N.A. and Dorothy Rabon... Respondents,

Of whom Nationstar Mortgage LLC is the ....Appellant.

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This the 19th day of May, 2021.

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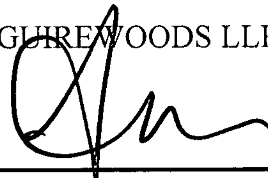

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