

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2011-CP-10-1550

TD Bank, N.A., successor by merger of Carolina First  
Bank, ..... Respondent,

v.

Farm Hill Associates, LLC, John H. Hofford, Michael  
R. Bennett, Hofford-Ocean Green, LLC, and Bennett-  
Ocean Green, LLC ..... Defendants,

Of whom, Farm Hill Associates, LLC, John H. Hofford  
and Hofford-Green, LLC are .....

Appellants,

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**SC Court of Appeals**

**Return of Respondent TD Bank  
To Appellants' Petition for Rehearing**

In its order of March 27, 2013, the Court did not reach the merits of Appellants' arguments. Rather, the Court - correctly—concluded that it lacked jurisdiction over Appellants' appeal because the order of the circuit court appealed did not meet the criteria for appealability set forth in S.C. Code Ann. § 14-3-330. As noted by the Court, neither the circuit court nor the master-in-equity have entered any order ruling one way or the other on the issue of whether Appellants have a right to a

jury trial in this case. Appellants have claimed – incorrectly—that they have such a right. Until some judge or master rules that claim invalid on the merits—and none has to date—there is no right of immediate appeal. The Court correctly dismissed Appellants’ appeal as interlocutory.

Appellants raise what are essentially merits arguments as their basis for rehearing without addressing the antecedent issue that no court at any level has ever held—at this point in time—that they are not entitled to a jury trial.<sup>1</sup> Each is briefly addressed in turn.

In the first argument, Appellants cite two cases. *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997) did not involve a reference to a master. Rather, the circuit court simply denied a motion requesting a jury trial, placed the matter on the court’s non-jury roster, and decided the case without a jury. *Id.* at 265, 491 S.E.2d at 241. There was – unlike in this case—an express order denying a jury trial. While *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) involved a reference to a master, it was decided prior to the substantial revision of SCRCP 53. It involved a reference in which the master found facts and made a report to the circuit judge who then reviewed the master’s report and entered judgment based on the report on a cause of action subject to jury fact finding. In that case—unlike this case—the order of reference under the old rule structure necessarily involved a denial of the right to jury trial. Here, no denial of jury trial rights has occurred. On the contrary, the order of the circuit court explicitly states that all such rights that exist – none do—are preserved.

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<sup>1</sup> As set forth in TD Bank’s brief, particularly in Argument III, Appellants waived all such rights and, presumably, at some point in the future, a court will be called upon to rule upon the question.

Appellants' second argument is that the Court's order mistakenly assumes that the matter involves only a foreclosure. The order makes no such statement. The Court does cite a case, *N.C. Fed. Sav. & Loan Ass'n v. Twin State Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986), for the general proposition that an order of reference in a foreclosure action is not immediately appealable. It does not ground its holding in this case, however, but rather in S.C. Code Ann. § 14-3-330, the principal statute governing appealability. Interestingly, the last sentence in Appellants' second argument succinctly summarizes why, as the Court correctly held, there is no jurisdiction over the appeal: "The appellants asserted this right [right to jury trial] in their Answer in the caption and in the plea in compliance with Rule 38 SCRPC and there has never been a determination of this right." (Appellants' Pet. Rhr'g, p. 3)(emphasis added). Until there is such a determination, there is no right of immediate appeal. The petition should be denied.

Finally, Appellants' third argument faults the Court for not citing a case identifying denial of a particular mode of trial as a denial of a "substantial right" within the meaning of S.C. Code Ann. § 14-3-330(2). No one disputes that an adverse determination with regard to jury trial rights has, by judicial interpretation, been deemed to fall within the language of that code subsection. *See Lester*, 327 S.C. at 266, 491 S.E.2d at 241. The problem, as admitted by Appellants' in their petition, is that "there has never been a determination of this right." (Appellants' Pet. Rhr'g, p. 3)(emphasis added). No court has entered any order denying or affirming the claimed right to a jury trial. Until such an order is entered, or some other order is entered

falling within the classes of immediately appealable orders listed in S.C. Code Ann. § 14-3-330 and in case law, this Court, as it correctly held, has no appellate jurisdiction.

### Conclusion

For the reasons set forth above, the petition for rehearing should be denied and the appeal dismissed for lack of jurisdiction.

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CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for TD Bank, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **Return of Respondent TD Bank  
To Appellants' Petition for Rehearing**

Counsel Served:

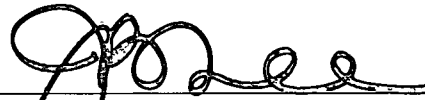
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4-24, 2013