IN THE SUPREME COURT OF FLORIDA
CASE NO.: 91,164
FROM THE
ELEVENTH CIRCUIT COURT OF APPEALS NO: 96-3075

GONZALO AGUILAR, M.D., DOROTEO C. AUDIJE, M.D.; DOROTEO M. BARNES, M.D.; JUAN BAUER, M. D.; LEONARDO DEL ROSARIO, M.D.; GONZALO A. C. ESPINO, JR., M.D.; HORTENCIA H. ESPINO, M.D.; FRANK LIN, M.D.; SAM NAJJAR, M. D.; ERLINDA. PEREZ, M.D.; and CERES ROXAS, M.D.

Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for Southeast Bank N.A., a national banking association, formerly known as First Federal Savings and Loan Association of Jacksonville

Appellee.

On Certification from the United States Court of Appeal for the Eleventh Circuit to the Supreme Court of Florida Pursuant to Article 5, Section 3(b) (6) of the Florida Constitution.

INITIAL BRIEF OF APPELLANTS ON CERTIFIED QUESTION

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument on the certified questions. This case presents a time-tortured past, having its inception in 1990 with the filing of state tort claims asserted by an original fourteen (14) plaintiffs against Southeast Bank, N.A. in the Circuit Court, Duval County, Florida.

Eleven of these plaintiffs suffered a summary judgment by the state trial judge. The basis for the summary judgment was that the plaintiffs' tort claims should have been asserted as compulsory counterclaims to a foreclosure of real property complaint previously brought by Southeast Bank, N.A. in the same state court.

Thereafter, Southeast Bank failed and the FDIC was substituted as the party defendant. A lengthy process of administrative procedures began, followed by a previous appeal to the United States Court of Appeal, Eleventh Circuit, which reversed a dismissal of plaintiffs' claims. This was followed by a District Court judgment from which a second appeal to the Eleventh Circuit was taken, followed by the Eleventh Circuit's certification presently pending.

Oral argument should aid this Court in gaining a full understanding of the status of these Appellants and their claims against SEB/FDIC and should materially assist this Court's review of the certified question now under review.

CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief is 14 point Times New Roman.

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STATEMENT OF JURISDICTION

This cause was first instituted in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida. These Appellants subsequently appealed an adverse summary judgment to the District Court of Appeals, First District of Florida.

On September 24, 1991, the FDIC removed this case from the state District Court of Appeals, to the United States District Court, Middle District of Florida, Jacksonville Division, pursuant to 12 U.S.C. §1819(b)(2)(B); *see* Jackson v. American Savings Mortgage Corporation, 924 F. 2d 195, 199 (11th Cir. 1991). While pending in the United States District Court, the case was dismissed by an order determining that the District Court did not have subject matter jurisdiction. That order became the subject of a new appeal and subsequent decision of the Eleventh Circuit Court of Appeals. Aguilar v. F.D.I.C., 63 F. 3d 1059 (11th Cir. 1995).

After remand with instructions to reinstate the proceedings, it was necessary that appellants here obtain a final order from the District Court, so as to place appellate jurisdiction with the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. §1291. A final summary judgment of the District Court was then entered and appeal taken.

After the issue was fully briefed before the Eleventh Circuit and oral argument held, the Eleventh Circuit certified a question to the Florida Supreme Court. Based on

the certified question, this Court has jurisdiction pursuant to Article 5, Section 3(b)(6) of the Florida Constitution and Fla.R.App.P. 1.150.

PRELIMINARY STATEMENT

All references in this brief to Plaintiffs/Appellants will be "the Doctors," "Plaintiffs," or "Appellants." All references to Defendant/Appellee, Southeast Bank, N..A., will be "SEB," "Defendant," or "Appellee."

Appellants include all of the Plaintiffs who brought the Complaint in the lower trial court with the exception of St. Jude Medical Center Pharmacy, Inc., Home Health Systems, Inc. and Morteza Yavari, M.D., in that the Final Summary Judgment did not preclude the claims of those Plaintiffs.

The Plaintiffs/Appellants now before this Court on the certified question are Gonzalo Aguilar, M.D., Doroteo C. Audije, M.D., Doroteo M. Barnes, M.D., Juan Bauer, M.D., Leonard Del Rosario, M.D., Gonzalo A. C. Espino, Jr., M.D., Hortencia H. Espino, M.D., Frank Lin, M. D., Sam Najjar, M.D., Erlinda A. Perez, M.D., and Ceres Roxas, M.D.

STATEMENT OF THE CASE

This case was commenced by the Doctors/Appellants filing a Complaint on October 3, 1990.

Appellants' Complaint consisted of two counts. Each count alleged tortious interference with business relationships. The first count related to the present parties before this Court, excepting Dr. Yavari. The second count related to claims by St. Jude Medical Center Pharmacy, Inc. and Home Health Systems, Inc. Their claim and Dr. Yavari's presently pend by a stay order in the U. S. District Court.

The bank, SEB, filed a motion for summary judgment as to Count I in the state court. SEB requested the state court to take judicial notice of certain proceedings involving a foreclosure suit[1] previously filed by SEB against the partnership ("GIPP") which developed the St. Jude Medical Center.

SEB's foreclosure complaint, as amended, joined the present appellants as defendants only for the purpose of foreclosing their interest in the real property which was the subject of SEB's mortgage. The interest of the Doctors in the foreclosed property were Deposit Purchase and Sale Agreements to buy medical practice condominium units in the St. Jude Medical Center.

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[1]First Federal Savings & Loan v. GIPP, Case No. 87-16375-CA, Division H, in the Circuit Court, in and for Duval County, Florida.

SEB's amended foreclosure complaint did not seek a money judgment against the Doctors. SEB alleged that each Doctor may have some right, title or interest in the property under a Deposit Receipt and Purchase and Sale Agreement (copies of which were attached to the amended foreclosure complaint), but that any such interest was inferior, subordinate and subject to the lien of SEB's mortgage.

SEB took defaults against Drs. Audije, Barnes, Del Rosario, Lin, Najjar, and Perez. Answers, either asserting lack of knowledge as to the superior interests of SEB in the property by virtue of its mortgage, or denying that such interest was superior, were filed by Drs. Aguilar, Bauer, Espino (2), and Roxas.

The amended foreclosure complaint against the makers and obligors on the note and mortgage, *i.e.* the GIPP Partnership (consisting of Dr. Illano, Dr. Gregorio, Dr. Patangan, Dr. Padolina, who are *not* parties to this case) resulted in GIPP filing affirmative defenses and counterclaims against SEB for breach of contract and the implied duty of good faith and fair dealing.

SEB's amended foreclosure complaint, the GIPP counterclaim and affirmative defenses were tried before a state court jury. During the course of the trial, a confidential settlement agreement was reached between the GIPP partners and SEB. Pursuant to that settlement GIPP, as the owner of the real property being foreclosed, consented to the entry of a judgment of foreclosure.

None of the Doctors attended that trial nor were they represented by counsel at that trial. In the judgment of foreclosure the only relief granted SEB as to these parties was a determination by the Court that their interest in the real property was inferior and subordinate to the lien of the SEB mortgage being foreclosed.

The Final Summary Judgment of Foreclosure found that Plaintiff (SEB):

> [H]olds a lien for the total sum specified in paragraph 1 above superior to any claim or estate of Defendants GIPP, the partners, Julian C. Gregorio, and all other defendants hereto and any one claiming by, through or under said Defendants.

Approximately six months later, Appellants filed their complaint against SEB for tortious interference with business relationships between themselves and the partnership, GIPP.

A hearing on SEB's motion as to Count I was held on March 26, 1991. The state trial court later requested counsel for SEB to prepare a proposed final summary judgment. Appellants filed Exceptions to the Proposed Order and a Memorandum of Law on May 1, 1991. Nevertheless, on the same day, the state trial court entered an order granting SEB's motion for summary judgment determining the claims were compulsory counterclaims and should have been asserted in the SEB foreclosure. A separate order was entered on the same day which continued St. Jude Medical Center Pharmacy, Inc., Home Health Systems, Inc. and Dr. Morteza Yavari as plaintiffs in the state trial court.

On May 29, 1991 the Doctors filed a Notice of Appeal to the District Court of Appeal, First District of Florida. On September 24, 1991, the FDIC as receiver for SEB removed the case from the First District to the United States District Court, Middle District of Florida.

Administrative proceedings pursuant to FIRREA requirements were commenced and relief to these Doctors administratively denied by the FDIC. Thereafter, the Eleventh Circuit entertained an appeal, Aguilar v. F.D.I.C., 63 F. 3d 1059 (11th Cir. 1995), by the parties now before this Court. By opinion, the Eleventh Circuit reinstated the claims and remanded the case to the District Court. That opinion reflects the case status at that time.

On October 11, 1991, Appellants filed a motion and memorandum to modify or vacate the summary judgment order of the Duval County Circuit Court so as to proceed with trial in the District Court with all 14 plaintiffs. Alternatively, Appellants asked the District Court for an order on which their appeal could proceed in this Court. That motion was renewed on November 28, 1995. On July 23, 1996, the District Court denied the motion and entered judgment against Appellants.

The Eleventh Circuit has now certified this matter to the Florida Supreme Court to provide an answer to a question which may affect significant matters of procedure in the foreclosure of real estate mortgages. The question is:

> WHETHER A DEFENDANT WHO IS NOT AN OBLIGOR ON THE ORIGINAL NOTE AND MORTGAGE IN AN *IN REM* FORECLOSURE ACTION IS REQUIRED TO BRING, AS A COMPULSORY COUNTERCLAIM, TORT CLAIMS ARISING OUT OF THE SAME OPERATIVE FACTS AS THOSE OF THE FORECLOSURE ACTION.

STATEMENT OF FACTS

This case begins with the foreclosure action by SEB. As to the Doctors, the SEB amended foreclosure complaint only alleged (and the trial court found) that the Doctors' interest in the property was subordinate and inferior to the lien of the SEB mortgage. The interests of Appellants, as alleged and foreclosed on, were whatever interests were represented by executed Deposit Receipt and Purchase and Sale Agreements, all of which were attached to the amended complaint to foreclose of SEB. To any reasonable eye, the claims were *in rem*, although personal jurisdiction was had over these Doctors.

In Count I of the state court complaint against SEB, each Doctor alleged that SEB had interfered with the Doctors' prospective financial and equity interest in the activities contemplated *on the first floor* of the St. Jude Medical facility. The interests consisted of anticipated profits from ambulatory surgery, physical therapy, radiology, emergency services, chemical and laboratory services. The condominium units which were to be purchased by each Doctor were located on the second, third, or fourth floor of the St. Jude Medical building, the purchase of which would form a pro rata basis for the first floor interests.

In November 1987, when SEB commenced foreclosure proceedings, the physical construction of the St. Jude Medical Center had reached approximately 90%

completion. At that time, the various pro rata interests of the Doctors in the first floor facilities owned by the GIPP Partnership were still prospective in nature; the representative business interests in the first floor facilities had not been formally granted the Doctors.

None of the Doctors had ever executed any agreement with SEB nor did they have any obligation to SEB on its note, mortgage or construction loan agreement. Appellants had no obligation to the GIPP Partnership to fund money for the purpose of keeping the SEB note/mortgage current.

SUMMARY OF ARGUMENT

This Court should not apply the compulsory counterclaim rule under the circumstances of this case. There are several reasons for not doing so.

First, foreclosure actions by nature do not lend themselves to tort counterclaims. A foreclosure is generally an expedited proceeding which allows a mortgagee to enforce its mortgage lien against a mortgagor. A tort counterclaim, by contrast, is a typical civil action in which a factfinder may award money damages.

Foreclosure is an equitable action in which there is no right to a jury trial. Tort counterclaims are actions at law in which jury trials are a constitutional right. Therefore, requiring tort counterclaims to be compulsory brings jury and non-jury trial rights into conflict. The conflict can be solved by severing counterclaims from the foreclosure action. However, this thwarts the goal of judicial efficiency the compulsory counterclaim rule is supposed to promote.

Second, Florida law does not prohibit an exception to the compulsory counterclaim rule under these circumstances. In fact, allowing an exception would be wise because it is difficult to adjudicate foreclosure and tort claims in the same suit. Judicial efficiency would be promoted, rather than discouraged, by allowing tort counterclaims to be brought in a separate action.

Third, appellants submit that their tort claims are not really compulsory counterclaims at all. Appellants had no contractual or business relationship with the foreclosing bank. Appellants' counterclaim allegations do not relate to the note and mortgage which the bank attempted to foreclose. Some of the damages suffered by Appellants occurred after the foreclosure, and therefore a compulsory counterclaim could not have been brought anyway.

Fourth, the "logical relationship" test should be measured between the complaint by the foreclosing party (the bank) and the claims of these Appellants. Here the 11th Circuit (and the District Court) appear to have measured the logical relationship test between the GIPP counterclaim and the claims of these Appellants. This is not the type of case in which a "logical relationship" exists if the test is applied properly under the facts, sub judice. Finding a logical relationship in this case would require a unjustified expansion of the logical relationship rule.

ARGUMENT

The question certified by the Eleventh Circuit in this case is:

> WHETHER A DEFENDANT WHO IS NOT AN OBLIGOR ON THE ORIGINAL NOTE AND MORTGAGE IN AN *IN REM* FORECLOSURE ACTION IS REQUIRED TO BRING, AS A COMPULSORY COUNTERCLAIM, TORT CLAIMS ARISING OUT OF THE SAME OPERATIVE FACTS AS THOSE OF THE FORECLOSURE ACTION.

For reasons that will be explained below, this Court should answer the certified question in the negative.[2]

I. THE SUBSTANTIAL DIFFERENCES BETWEEN TORTIOUS INTERFERENCE AND FORECLOSURE ACTIONS REQUIRE THAT THOSE ACTIONS BE ADJUDICATED SEPARATELY.

A. Trying foreclosure and tortious interference claims together would create conflict between jury and non-jury trial rights.

In considering whether a tortious interference claim should be considered a compulsory counterclaim to a foreclosure action, it is appropriate to look at the nature of each action.

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[2]For clarity, appellants have broken down their arguments into the several sections which appear below. These arguments are not necessarily listed in the order of their importance.

A foreclosure action "is a traditional equitable remedy over which the law side of the court has no jurisdiction." Adams v. Citizens Bank of Brevard, 248 So.2d 682, 684 (Fla. 4th DCA 1971). By statute, there is no right to a jury trial in a foreclosure action. §702.01, Fla. Stat. (1987); *see also* Norris v. Paps, 615 So.2d 735, 737 (Fla. 2d DCA 1993) (foreclosure is an equitable proceeding which does not provide the right to a jury trial).

On the other hand, an action for tortious interference with a business relationship is a common law tort action. *See* International Funding Corp. v. Krasner, 360 So.2d 1156 (Fla. 3d DCA 1978). Therefore, a tortious interference claim is made on the law side of the court.

The purpose of a foreclosure "is to fully subject the security pledged to the payment of the obligation." Bobby Jones Garden Apartments, Inc. v. Connecticut Mutual Life Insurance Co., 202 So.2d 226, 228 (Fla. 2d DCA 1967). Generally, a foreclosure action enforces "the mortgage lien against the title or interest of the mortgagor and those claiming under him." E.H.L. Page Properties v. Pinellas Groves, 170 So. 881, 882 (Fla. 1936).

An action for tortious interference with a business relationship is an action for money damages. Equitable relief is generally not available on a tortious interference claim standing alone. No such equitable relief by the Doctors was sought *sub judice*.

Like any other party making a legal (as opposed to an equitable) claim, one making a claim for tortious interference has the right to jury trial. This is a fundamental right guaranteed by the Florida Constitution. Art. 1, §22, Fla. Const.; *see also* Fla.R.Civ.P. 1.430 (stating "the right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate"). This is true even when a legal claim is brought as a counterclaim in an equitable proceeding. Hightower v. Bigoney, 156 So.2d 501, 508 (Fla. 1963); Norris v. Paps, *supra*, at 737.

Because one has a right to a jury trial on a tortious interference claim but does not on a foreclosure claim, a counterclaim for tortious interference in a foreclosure action creates conflict. If the foreclosure and tortious interference claim are tried together, one of two things must occur as to this singular point. Either the mortgagee loses its statutory right to a non-jury trial, or the defendant's right to a jury trial is impaired.

The legislature apparently recognized this problem. Section 702.01, Fla. Stat. (1987), provided that "[i]n a mortgage foreclosure action, the court shall sever for separate trial all counterclaims against the foreclosing mortgagee."

However, this Court found §702.01 unconstitutional for that reason. In Haven Federal Savings & Loan Assoc. v. Kirian, 579 So.2d 730 (Fla. 1991), this Court held that the statutory requirement that counterclaims be severed infringed on its exclusive

power to regulate practice and procedure in the Florida courts. Specifically, this Court held that §702.01 conflicts with Fla.R.Civ.P. 1.270(b), which leaves severance of counterclaims to the trial court's discretion.[3]

Given the holding in the Haven case, there is currently no *requirement* that a trial court sever counterclaims in a foreclosure action. Therefore, the possibility of conflict between the rights to a jury and non-jury trial is alive and well.

In fact, if a tort claim is considered a compulsory counterclaim to a foreclosure action, conflict is inevitable. Defendants to a foreclosure action, like the Appellants in this case, will have no choice but to bring the tort counterclaims in the foreclosure action.

Appellants acknowledge that one party or the other may waive their right to their trial of choice *in some cases*. In all other cases in which tort counterclaims are made, however, the trial court will have to address the jury/non-jury trial dilemma.

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[3]Rule 1.270(b) provides:

> The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, crossclaim, counterclaim, or third-party claim or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues.

B. Separate trials will always have to be held when a tort counterclaim is brought in a foreclosure proceeding.

As explained above, there will almost always be a jury/non-jury trial conflict when tort counterclaims are made in a foreclosure action. When that occurs, a court may impair the rights of at least one party if it holds a single trial. For example, a foreclosure trial, non-jury, could determine facts which could adversely impact a tort counterclaimant, as would be the case here. A finding of enforceability of a mortgage could cause collateral estoppel/res judicata issues to arise when the bank's conduct arises out of the intent to wrongfully impact a non-party to the mortgage who is named in the mortgage foreclosure at the discretion of the mortgagee.

If the court favors judicial efficiency and requires the foreclosure and counterclaims to be tried together, the court infringes on the right of one party to its trial of choice. Either the mortgagee loses its non-jury trial, or the tort counterclaimants may lose their jury trial.

The obvious solution to this example of a dilemma would be to sever the counterclaims and thereby preserve each party's trial rights. However, there is a drawback in doing so. Severance is less efficient because two trials will occur.

The FDIC argues that judicial efficiency requires appellants' claims to be deemed compulsory counterclaims to the foreclosure complaint. What the FDIC fails

to acknowledge is that judicial efficiency is simply *not achieved* whenever the rights to a jury or non-jury trial are in conflict.

When separate trials are compelled, the purpose of the compulsory counterclaim rule--judicial efficiency--is largely defeated. *See, e.g.,* Neil v. South Florida Auto Painters, Inc., 397 So.2d 1160, 1164 (Fla. 3d DCA 1981) (goal of the compulsory counterclaim rule is "to prevent multiplicity of actions and to achieve a just resolution in a single lawsuit of all disputes arising out of common matters"). Given that, it makes little sense to apply the rule rigidly to the circumstances *sub judice*. *See generally* Evans v. Green, 180 So. 753 (Fla. 1938) (rule of general application should be modified "when the justice of the cause resulting from changed conditions" requires it).

Furthermore, the compulsory counterclaim rule could actually hinder judicial efficiency by complicating foreclosure proceedings. The Eleventh Circuit recognized this in its certification opinion:

> [R]equiring torts claims of parties to the foreclosure who were not obligated in any way on the note or mortgage at issue in the foreclosure--even though they arise from the same operative facts--could transform ordinary routine foreclosures into protracted lawsuits, requiring juries for some claims of some parties and not for others. The Florida Supreme Court may decide that such a rule, while avoiding multiple lawsuits, would impede judicial efficiency, perhaps raising opportunities for parties to prolong and delay foreclosure proceedings.

Appellants respectfully suggest that a rule requiring tort claims to be brought as compulsory counterclaims simply because one or more of the loan documents are involved would be counterproductive. While it would end the judicial labor in this case by barring appellants' tort claims, it would create needless difficulties in foreclosure cases down the road.

Mortgagees could face a barrage of tort counterclaims which would complicate and delay otherwise straightforward foreclosure actions. This is particularly troublesome in cases where the foreclosure and counterclaims involve overlapping issues. As the Second District Court of Appeal explained in Dykes v. Trustbank Savings, F.S.B., 567 So.2d 958 (Fla. 2d DCA 1990); *rev. denied*, 577 So.2d 1330 (Fla. 1991):

> [W]here the compulsory counterclaim entitles the counter-claimant (upon timely demand) to a jury trial on issues which are sufficiently similar or related to the issues made by the equitable claim that a determination by the first fact finder would necessarily bind the later one, such issues may not be tried nonjury by the court since to do so would deprive the counter-claimant of his constitutional right to trial by jury.
> Id. at 959 (citing Adams v. Citizens Bank of Brevard, 248 So.2d 682, 684 (Fla. 4th DCA 1971).

Under the rule stated in Dykes, a mortgagee would often not be able to foreclose until a jury had heard its share of the issues.

Appellants acknowledge that this result may be unavoidable when an obligor makes tort counterclaims. However, there is no reason to extend the compulsory counterclaim rule to cases where a non-obligor makes counterclaims. This is particularly true where, as in this case, the tort counterclaims are only tangentially related to the foreclosure action.

II. THE CASE OF LONDONO V. TURKEY CREEK DOES NOT REQUIRE APPLICATION OF THE COMPULSORY COUNTERCLAIM RULE TO TORT CLAIMS BROUGHT IN A FORECLOSURE CASE.

The Eleventh Circuit concluded that the Appellants' counterclaims had a logical relationship to the operative facts of the foreclosure. In reaching this conclusion, the Eleventh Circuit relied on this Court's ruling in Londono v. Turkey Creek, 609 So.2d 14 (Fla. 1992). Therefore, appellants will review the facts and holding of Londono.

A. Facts and Procedural History of Londono

Turkey Creek, Inc., was a corporation that developed and sold land in a planned unit development (PUD) known as Turkey Creek. The litigation was between it and certain residents of the PUD. Over a period of time, Turkey Creek, Inc. and the

residents disagreed over interpretations of the PUD's governing regulations and over Turkey Creek's operation of the PUD.

In March 1982, the residents filed suit in state court against Turkey Creek, Inc. seeking declaratory relief and damages in connection with their dispute regarding Turkey Creek, Inc.'s operation of the PUD, specifically regarding Turkey Creek, Inc.'s amendment of the association's bylaws and declarations. Final judgment was entered in favor of Turkey Creek, Inc. in October, 1984.

Turkey Creek then brought suit against the residents who filed the declaratory judgment action. Turkey Creek's complaint alleged slander of title, malicious prosecution, tortious interference with contractual rights, tortious interference with an advantageous business relationship, and conspiracy to interfere. The trial court dismissed the slander of title claim on the ground that it was a compulsory counterclaim to the declaratory judgment action. Turkey Creek appealed.

The state appellate court acknowledged in Londono that both the slander of title action (asserted to be a compulsory counterclaim) and the previous declaratory judgment action "arose" from the ongoing disagreement between the parties relating to dissatisfaction over the management of the PUD and that the declaratory action and the slander of title claim both referred to the "marketability" of the land in Turkey Creek. The state appellate court then made a very pertinent and correct observation:

> "It does not follow, however, that an action is a compulsory counterclaim simply because it is relevant to the earlier action." Id. at 946.

The appellate court in Londono also considered the timing of events in a proper application of the logical relationship test, and noted that with respect to the defamatory statements involved, they began in January, 1982 and continued after the filing of the March, 1982 complaint for declaratory relief.

The Court acknowledged that the large portion of defamatory statements were made prior to January, 1984 at a time when the slander of title action would have technically accrued. The Court noted however, that:

> "The alleged damages, however, including the loss of $4,000,000.00 in anticipated profits resulted from the May, 1984 loss of the contract with OIDC and reduced home sales in the PUD through 1985, continued well beyond January, 1984." Id. at 947.

This case is similar in this critical respect. The primary and substantial part of the damages suffered by the Appellants for SEB's tortious interference with the business relationships involve losses which occurred as a result of, inter alia, the Appellants' inability to operate and reap the future profits from the operation of the first floor medical center.

In other words, the losses occurred *after* SEB effectively put a stop to the development activities. Appellants' claim against SEB for tortious interference involve losses well into the future.

The state appellate court in Londono concluded that differences between the slander of title case and the prior declaratory action, the fact that the assertion of slander of title and attendant damage had not fully materialized by January of 1984, together with *considerations of fairness and judicial economy*, militated against a finding that the slander of title claim was a compulsory counterclaim to the declaratory judgment action filed by the residents.

This Court affirmed the First District Court of Appeal. Londono v. Turkey Creek, Inc., 609 So.2d 14 (Fla. 1992). It adopted the logical relationship test as the "yardstick for measuring whether a claim is compulsory." Id. at 20. More importantly, however, this Court agreed that the slander of title claim brought by Turkey Creek was not compulsory.

B. Implications of the holding in Londono.

In sum, Londono supports the view that the Appellants' tortious interference claims are not compulsory counterclaims. Appellants acknowledge that Londono does say that the compulsory counterclaim rule should be given a "broad realistic

interpretation." However, when this Court actually *applied* the rule, it did not adopt the expansive view of the rule urged by the FDIC in this case.

There are two ways, then, to view the holding in Londono. First, one could find that while the tortious interference claims are logically related, there is good reason to make an exception to the compulsory counterclaim rule under these facts. Second, one could reasonably find that the Appellants' tortious interference claims in this case are not logically related to the foreclosure at all.

Appellants will discuss each of these possibilities in the following sections.

1. An exception to the compulsory counterclaim rule should be made under these facts.

The FDIC apparently believes Londono cannot be read to allow an exception to the compulsory counterclaim rule here. That view in incorrect. Londono did not purport to create a blanket rule applicable to all categories of cases.

Londono was not a foreclosure case. It did not address the difficulties caused by competing rights to jury and non-jury trials which can arise from foreclosure counterclaims, particularly where the counterclaim parties had no contractual privity with the lender/mortgagee. This Court did not, as the Eleventh Circuit recognized, implicitly hold that parties who are not obligors on a note or mortgage are subject to the compulsory counterclaim rule in a foreclosure action.

Finally, this Court in Londono did not have to consider whether the compulsory counterclaim rule might actually impair judicial efficiency. The ability of the counterclaiming parties "to prolong and delay foreclosure proceedings" was not an issue.

In sum, Londono does not support the FDIC's argument here. Actually, the facts of Londono even suggest the Eleventh Circuit itself has misapplied the logical relationship test in determining the existence of a logical relationship of operative facts. *See infra*. Even if the Eleventh Circuit did not, however, there is no reason to believe Londono forbids exceptions to the compulsory counterclaim rule. The unique nature of foreclosure proceedings was not an issue in Londono, so the case provides little guidance about whether an exception is appropriate.

2. This case does not fall within the logical relationship test.

The Eleventh Circuit's certification poses the question of whether there might be "exceptions to the compulsory counterclaim rule." Note, however, that the actual certified question is worded quite broadly:

> WHETHER A DEFENDANT WHO IS NOT AN OBLIGOR ON THE ORIGINAL NOTE AND MORTGAGE IN AN *IN REM* FORECLOSURE ACTION IS REQUIRED TO BRING, AS A COMPULSORY COUNTERCLAIM, TORT CLAIMS ARISING OUT OF THE SAME OPERATIVE FACTS AS THOSE OF THE FORECLOSURE ACTION.

The question is simply whether a non-obligor must bring a tort claim "as a compulsory counterclaim." Therefore, this Court is not limited to deciding whether this case is an exception to the compulsory counterclaim rule. Rather, this Court could find that the compulsory counterclaim rule is not applicable at all.

There is ample precedent for doing so. For example, in Whigum v. Heilig Myers Furniture, Inc., 682 So.2d 643 (Fla. 1st DCA 1996), a consumer brought a class action against a furniture store based on the store's collection practices. The furniture store counterclaimed against each consumer for unpaid debts.

The furniture store argued its counterclaims against each consumer were compulsory. Because the facts surrounding each unpaid debt was different and required an individualized inquiry, the furniture store argued the consumer's class could not be certified.

The First District rejected the compulsory counterclaim argument under the logical relationship standard of Londono:

> By this standard, an action to collect a consumer debt is not a compulsory counterclaim to an action under a statute regulating consumer collection practices. We recognize that the "transaction or occurrence" must be interpreted broadly under Londono, and that there is some overlap in the facts. Nevertheless, the actions do not "arise" out of the same aggregate set of operative facts. The debtor's action under the statute is based on the commission of prohibited debt collection practices, and the creditor's action on the debt is based on the failure to pay for consumer goods sold on credit. Furthermore, the filing of one action does not "activate" the

> filing of the other in a circumstance in which the second action might otherwise remain dormant. A retail sales company can pursue a collection suit for the recovery of a consumer debt whether the debtor complains about its presuit collection practices or not. The two actions do not depend on each other.
> Id. at 646.

In this case, the actions also do not depend on each other. Appellants in this case could have brought a tortious interference claim whether SEB brought a foreclosure action against GIPP or not.

This conclusion is inevitable when one examines the factual basis for each action. The factual basis for Appellants' claims against SEB was SEB's bad faith repudiation of a loan extension agreement with GIPP. SEB's bad faith repudiation of the loan extension agreement with GIPP, *not* any alleged breach of the note and mortgage by GIPP (failure to pay when due), gave rise, *inter alia*, to Appellants' tortious interference claims. As long as SEB breached the loan agreement by wrongful repudiation, it made no difference whether GIPP breached the note and mortgage by failing to pay.

The critical fact which would trigger SEB's foreclosure rights, on the other hand, would be GIPP's breach of the note and mortgage with SEB, *not* SEB's breach of the loan extension agreement with GIPP. There is some overlap in the operative facts,[4] of

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[4]At the same time, appellants point out that some of the misconduct alleged in their complaint does not arise from the loan extension agreement. For example,

course, but that does not make Appellants' counterclaims compulsory under the standard of Londono and Whigum.

In at least one respect, this case is stronger than Whigum. In Whigum, the furniture store and the debtors were in privity with one another. There is no privity in this case.

Another recent case, Cordero v. Capital Bank, 693 So.2d 720 (Fla. 3d DCA 1997), supports the conclusion that Appellants' counterclaims are not compulsory. In Cordero, a mortgagee brought various fraud and conspiracy claims after a bank foreclosed on his real estate project. The bank moved to dismiss, arguing the claims were compulsory counterclaims to the foreclosure action. The trial court granted the motion.

On appeal, the Third District Court of Appeal reversed:

> Under the "logical relationship test" set forth in Londono v. Turkey Creek, Inc., 609 So.2d 14, 20 (Fla.1992), the claims presently asserted by plaintiffs are not compulsory counterclaims that should have been raised in the prior mortgage foreclosure action. Although both actions involve business dealings with Capital and Old Cutler and there is some overlap in the events, the basis of both claims is not the same aggregate of operative facts, and the aggregate core of facts supporting the initial foreclosure action does not activate the requisite additional legal rights.

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appellants have alleged, *inter alia*, that (1) an SEB officer made racist and defamatory comments about the GIPP partners to a prospective GIPP lender, (2) SEB wrongfully concealed its financial insolvency from GIPP, and (3) that SEB refused to fund draw requests by GIPP's construction manager.

> The foreclosure action concerning Old Cutler's liability under the mortgage and the presently asserted claims as to Capital's wrongful conduct involve distinct facts and legal issues.
> Id.

The court also cited the Whigum case, *supra*, in support of its decision.

In Cordero, the mortgagee was the party bringing the counterclaims. In this case, the Appellants are not even mortgagees. They are not in contractual privity with the bank (SEB), and they had only a tangential interest in the foreclosed property. Therefore, this case is even stronger than Cordero.

Del Rio v. Brandon, 22 Fla.L.Weekly D1272 (Fla. 3d DCA May 21, 1997), a decision handed down on the same day as Cordero, is not to the contrary. In Del Rio, sellers of a home brought a foreclosure action against the buyers. The buyers counterclaimed, claiming that the sellers performed faulty repairs before the sale.

The Third District found that the counterclaims were compulsory. The court pointed out that the "buyers are going against the actual sellers who [allegedly] made the faulty repairs at issue." Id. This was enough to satisfy the logical relationship test.

This case, however, is not one between buyer and seller. The Appellants made no agreement with SEB and did not own the property subject to foreclosure. Furthermore, the Appellants' claims are not based on allegations of faulty repairs to a home. Rather, they are based on acts which occurred at least partially after the acts

which gave to SEB's foreclosure against GIPP.

The cases cited above make a forceful case for finding the counterclaims are not compulsory despite the Eleventh Circuit apparently finding there was a logical relationship between the foreclosure action and Appellants' counterclaims in this case.

Appellants respectfully submit that the Eleventh Circuit's reasoning is flawed in this respect. To support its finding of a logical relationship, the Eleventh Circuit said the validity of the loan extension agreement "was actually at issue in the foreclosure action." What the Eleventh Circuit failed to consider, however, is *why* the loan agreement was at issue.

The Eleventh Circuit recited the facts as follows:

> In 1987, the Bank initiated foreclosure proceedings against the St. Jude project...The GIPP Partnership filed a counterclaim against the Bank in the foreclosure, claiming that the Bank had breached an agreement to modify the construction loan agreement to extend the construction loan.

Clearly, the loan extension agreement was not put at issue by the SEB. SEB denied that the loan extension agreement ever existed. Instead, it was placed in issue by GIPP in a counterclaim against the SEB.

The logical relationship test examines the logical relationship between a *plaintiff's claim* and a counterclaim. Londono at 19-20. It does not examine the

relationship between a counterclaim of one defendant and possible counterclaims of other defendants.

Because SEB did not put the loan extension agreement at issue in the foreclosure action, it should not be considered in the logical relationship analysis. The loan extension agreement--which was not part of the foreclosure complaint--cannot be bootstrapped onto SEB's claim to make Appellants' counterclaims compulsory. If this were the case, defendants would be required to make counterclaims based on the counterclaims of their co-defendants. The law should not require this.

Finally, it is worth mentioning that the validity of the loan extension agreement was never adjudicated. As explained in the statement of the case, *supra*, the GIPP partners and SEB entered into a confidential settlement agreement during trial.

Entry of a judgment of foreclosure on a mortgage (separate document) was not the result of an adjudication. It was simply one of the items in the settlement agreement.

The Appellants did not attend the trial and were not parties to the settlement agreement. They were powerless to prevent a settlement between the SEB and the GIPP partners in any event. In no way could they assert their respective deposit purchase and sale agreements primed the mortgage of the bank. For that reason,

application of the compulsory counterclaim rule in these circumstances is particularly unjustified.

CONCLUSION

The courts below erred in finding the compulsory counterclaim rule bars Appellants' claims against SEB. This Court should answer the certified question in the negative.

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 1997, a true and correct copy of the foregoing was furnished by U.S. Mail to Juan A. Gonzalez, Esq. and Timothy Crutchfield, Esq., Haley, Sinagra & Perez, P.A., 100 S. Biscayne Boulevard, Suite 800, Miami, Florida 33131.

Respectfully submitted,

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