

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GEORGETOWN COUNTY **S.C. Supreme Court**
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

On *Certiorari* to the Court of Appeals of South Carolina
Opinion No. 4874 (S.C. Ct. App. filed Aug. 24, 2011)

Wachovia Bank, National Association, Petitioner,

v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner;
Watson E. Felder; Gary F. Ownbey; and South Island Plantation
Association, Inc. are, Defendants,
Of Whom William E. Blackburn; Judith Blackburn are, Respondents,

v.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty, LLC, Third-Party Defendants.

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ARGUMENT

Respondents seek to avoid their valid jury waivers by simultaneously arguing that Petitioner's purchase-money loan has nothing to do with Respondents' purchase *and* that Petitioner was actively involved with Respondents' purchase for the purpose of making the purchase-money loan. Respondents should not have it both ways, but – either way – the allegations fall within the clear language of the waivers included in the Note and Guaranty. Moreover, it was error for the Court of Appeals to expand a far-reaching exception based in consumer arbitration standards by removing any requirement of outrageousness and, without precedent, apply the same to a knowing and voluntary commercial jury waiver. In its holding, the Court of Appeals effectively eviscerates long-standing South Carolina law upholding the rights of parties to waive their right to a jury trial, and Petitioner respectfully requests that this Court reverse that decision and affirm the Circuit Court's decision striking Respondents' jury demand.

I. THE PLAIN LANGUAGE OF THE JURY TRIAL WAIVERS EXPRESSLY COVERS ALL OF THE BLACKBURNS' COUNTERCLAIMS, AND THE COURT OF APPEALS ERRED BY HOLDING OTHERWISE.

South Carolina law is clear that jury waivers are enforceable according to their plain language. *See N. Charleston Joint Venture v. Kitchen's of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992) (enforcing jury waiver according to its plain terms); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (holding that jury waivers are construed according to their "plain, ordinary and popular meaning"); *see also S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (holding that releases are generally enforceable according to their

plain language). Respondents do not challenge the clarity of the subject jury waivers, nor did the Court of Appeals find them to be ambiguous in any way.

Despite having pled Petitioner's involvement as motivated by and directly linked to the Note and Mortgage (R. p. 73, Second Am. Answer p. 4.), Respondents now seek to create an artificial distinction between Petitioner's alleged actions with respect to the sale transaction and its alleged actions with respect to the loan transaction. Respondents ask this Court to ignore the obvious: Petitioner had nothing to gain from the Respondents' purchase of the subject property unless they borrowed the money from Petitioner to do so. Thus, all of Petitioner's actions with respect to the Respondents' purchase were inextricably intertwined with the subject Note and Mortgage.

Whatever Respondents' current theory of the case may be, the jury waivers encompass Respondents' counterclaims. Although Respondents purport to identify for the Court the types of documents defined as falling within the scope of the jury waivers, they fail to acknowledge that the definition of "Loan Documents" also includes "all documents executed in connection with *or related to*" the loan evidenced by the Note and Guaranty. (R. p. 15, Note. p. 2.; R. p. 39, Guaranty p. 5.) (emphasis added). The subject loan was a purchase-money loan. Despite the Court of Appeals's contrary holding, the sales transaction is clearly "related to" the Note and Guaranty because it is the very basis for the loan itself. Indeed, the Note states that the funds could only be used to "purchase investment property." (R. p. 14, Note. p. 1.) The waivers, therefore, expressly include the underlying sales transaction and, therefore, Respondents' counterclaims.

Thus, even if Respondents successfully persuade this Court to unnaturally distinguish Petitioner's course of dealing with respect to the sales transaction from its

course of dealing with respect to the loan transaction, the plain language of the jury waivers, strictly construed, is sufficiently clear and broad to encompass Respondents' counterclaims. The Circuit Court was correct in so holding. Because the Court of Appeals created and relied on a distinction between the sales transaction and the loan transaction that appears nowhere in the pleadings and defies the clear language of the jury waivers, its reversal of the Circuit Court conflicts with *North Charleston Joint Venture* and similar cases. *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866; *see also N. Charleston Joint Venture*, 307 S.C. at 535, 416 S.E.2d at 638.

II. CONSUMER ARBITRATION STANDARDS ARE NOT APPLICABLE TO COMMERCIAL JURY TRIAL WAIVERS, AND THE COURT OF APPEALS ERRED BY HOLDING OTHERWISE.

Respondents argue the Court of Appeals was justified in applying consumer arbitration standards to commercial jury waivers, despite the clear procedural differences between the two. Until this case, no South Carolina court had applied the *Aiken v. World Finance Corporation of South Carolina* exception outside the scope of an arbitration agreement. 373 S.C. 144, 644 S.E.2d 705 (2007). Although Respondents believe that "the standard for invalidating jury trial waivers should be much less stringent" than the standard for invalidating arbitration provisions, Respondents ignore the substantial differences between arbitrations and bench trials. Bench trials preserve all of a party's normal procedural rights except the right to a jury, whereas arbitrations deprive parties of the right to pre-trial discovery, the application of the rules of evidence, dispositive motions practice, written findings of fact and conclusions of law, appellate review, and other procedural safeguards mandated by the Due Process Clause and the Rules of Civil Procedure.

Consumer arbitration provisions and commercial jury waivers are not fungible. Indeed, South Carolina law has already defined the standards for determining the validity and boundaries of jury waivers in a simple and concise rule: Jury waivers are enforceable according to their plain language. *See N. Charleston Joint Venture*, 307 S.C. at 535, 416 S.E.2d at 638 (enforcing jury waiver according to its plain terms); *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866 (holding that jury waivers are construed according to their “plain, ordinary and popular meaning”); *see also S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (holding that releases are generally enforceable according to their plain language). And, as discussed above, Respondents’ jury trial demand is precluded by the plain language of the jury waivers they executed. The Court of Appeals’s contrary decision is inconsistent with this Court’s precedent and eviscerates parties’ confidence in what is frequently a specifically bargained-for aspect of a transaction.

III. THE COURT OF APPEALS FAILED TO ADDRESS WHETHER THE CONDUCT AT ISSUE WAS “OUTRAGEOUS,” AS AIKEN PLAINLY REQUIRES.

Respondents minimize this Court’s holding in *Aiken* that the exception applies only to “outrageous torts.” 373 S.C. at 151, 644 S.E.2d at 709. Limiting the scope of the *Aiken* exception is of critical importance in cases like this one, where a jury waiver was knowingly and voluntarily executed as consideration in a commercial loan transaction. The Court of Appeals failed to make a finding regarding whether Petitioner’s alleged conduct was outrageous. By doing so, the Court of Appeals has not only extended consumer arbitration standards to a commercial jury waiver, it has dramatically enlarged the scope of the *Aiken* exception. Such an omission conflicts with *Aiken*, *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007), and *Partain v. Upstate*

Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010), and warrants reversal to protect the integrity of the test set forth in those decisions.

IV. THE COURT OF APPEALS IGNORED THIS COURT'S WARNING IN *PARTAIN* THAT CREATIVE PLEADING SHOULD NOT EXCEPT ROUTINE CLAIMS FROM OTHERWISE VALID DISPUTE RESOLUTION PROVISIONS.

This Court has already acknowledged the danger in allowing artful pleading to defeat otherwise valid agreements about dispute resolution. *Partain*, 386 S.C. at 494, 689 S.E.2d at 605. Importantly, a claim may only be subject to the *Aiken* exception when it “was clearly not within the contemplation of the parties.” *Id.* at 494-96, 689 S.E.2d at 605. Respondents have used an unfounded conspiracy theory to snare Petitioner into a dispute between Respondents and the Developer. Indeed, the pleadings reference only one affirmative behavior by Petitioner: the Petitioner’s mere presence at a sales event. Moreover, Respondents were aware of Petitioner’s presence at the sales event before they executed the jury waivers. This case presents exactly the situation whereby creative pleading risks an otherwise valid commercial jury waiver that was part of Petitioner’s consideration for entering into the loan transaction.

V. THE LAW OF THE CASE IS THAT THE JURY WAIVERS ARE VALID, AND CONTRARY ARGUMENTS ARE BARRED FOR RESPONDENTS’ FAILURE TO PROPERLY APPEAL.

The Court of Appeals ruled against Respondents in holding that the jury waivers are valid, but Respondents seek to challenge that holding by recasting its reversal as “an additional sustaining ground” for this Court to consider. Such an end-run around the Appellate Court Rules is impermissible. *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000) (“[I]t was incumbent upon [the losing party] to seek rehearing and/or petition this Court for a writ of Certiorari or be bound by [the

Court of Appeals decision] as the law of the case.”). Because Respondents did not properly appeal the ruling by the Court of Appeals or even ask the Court of Appeals to reconsider its ruling on the validity of the jury waiver, the law of the case is that the jury waivers were made knowingly and voluntarily and are, therefore, valid.

VI. THERE IS A SIGNIFICANT RELATIONSHIP BETWEEN THE BANK’S ALLEGED INDUCEMENT OF THE NOTE AND THE NOTE ITSELF.

Respondents continue to butter both sides of their bread by arguing that the Bank’s alleged fraudulent inducement of the Note has no “significant relationship” with the Note. Their difficulty stems from well-settled South Carolina law holding that broadly worded contractual waiver clauses like the one at issue here cover any claims that have a “significant relationship” with the underlying contract, no matter how the claims are labeled. *Zabinski v. Bright Acre Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001), 346 S.C. at 597-98, 553 S.E.2d at 117-18 (holding that “significant relationship” test applies to arbitration clause that covered any claims “arising out of” the parties’ agreement); *Timmons v. Starkey*, 380 S.C. 590, 596, 671 S.E.2d 101, 105 (Ct. App. 2008) (same); *Hinson v. Jusco Co.*, 868 F. Supp. 145, 149-50 (D.S.C. 1994) (same). Here, though the plain text of the waiver provisions amply demonstrates that the Blackburns’ claims fall within their scope, it is worth noting that there is little question but that the Blackburns’ claims regarding Wachovia’s alleged pre-loan conduct are significantly related to the loan transaction. Indeed, according to the Blackburns, the very purpose of the alleged pre-loan conduct was to induce the Blackburns to enter into the loan. (R. pp. 73-83, Second Am. Ans. ¶¶ 22, 30, 45, 49, 60-63, 73.) It is well settled in South Carolina that claims arising out of promises allegedly made to induce one party to enter into a contract are subject to, and within the scope of, a broad waiver provision in that contract. *See*,

e.g., *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 553-54, 606 S.E.2d 752, 757 (2004) (holding that allegations of fraud in the inducement were subject to broadly worded arbitration clause and must be submitted to arbitration).

The Blackburns cite several out-of-state decisions for the proposition that their counterclaims lack a significant relationship with the Note and Guaranty, but all of them involved vastly different facts. For example, *Sutton v. Hollywood Intm't, Corp.*, 181 F. Supp. 2d 504 (D. Md. 2002), involved claims of false imprisonment and malicious prosecution after a video store employee wrongfully accused a customer of stealing. Plainly, those claims had nothing whatsoever to do with the customer's rental contract with the video store, which contained a broadly worded arbitration clause, and the Court so held. *Id.* at 511.

Similarly, in *Ford v. Nylcare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243 (5th Cir. 1998), the plaintiff physician sued the defendant HMO for competitive injuries allegedly resulting from the HMO stealing his customers through false advertising. That the physician and HMO also had a contractual relationship (whereby the physician was paid reduced rates for HMO patients) was immaterial to the case; thus, the arbitration clause in that contract did not apply. *Id.* at 252.

Likewise, in *Hersman, Inc. v. Fleming Cos.*, 19 F. Supp. 2d 1282 (M.D. Ala. 1998), the plaintiff and defendant—as co-developers of a commercial development project—had entered into an architectural services contract with a third-party architect. Not surprisingly, the Court held that the arbitration clause in this contract was unrelated to a dispute between the plaintiff and the defendant over the defendant's management of project as a whole. *Id.* at 1286.

In the same vein, *Leadertex, Inc. v. Morgantown Dyeing & Finishing Corp.*, 67 F.3d 20 (2d Cir. 1995), involved allegations that one party to a warehousing agreement defamed the other by spreading rumors that it was dishonest in its business practices, incapable of supplying good product, in the business of selling defective goods, and guilty of attempting to defraud a third party. Because these alleged defamatory statements were well outside the scope of the parties' contractual agreement (i.e., the allegedly defamed party was accused of much more than failing to comply with the parties' contract), the parties' arbitration agreement did not cover them. *Id.* at 28-29.

Finally, in *Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109 (11th Cir. 2001), the Court held that an arbitration provision in a circuit lease did not cover a tortious interference with contract claim that had nothing to do with the parties' lease or contractual relationship. *Id.* at 1116-17.

In short, all of these cases involved claims well outside the scope of the parties' agreement, whereas this case presents claims that center on promises allegedly made in and around the parties' contract. Moreover, none of these cases involved conduct covered by the express language of the arbitration agreement at issue, whereas this case focuses on Wachovia's "course of conduct," "course of dealing," "actions," and "statements" with respect to the loan. Accordingly, the out-of-state cases cited by the Blackburns are inapposite.

Because they cannot succeed on a plain-text argument, the Blackburns urge the Court to construe the jury waivers strictly. (Blackburns' Br. p. 13.) Under South Carolina law, strict construction "should not be applied so as to defeat the plain and obvious purpose of the instrument." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862,

864 (1998). That the terms of the waiver are broad is of no consequence because South Carolina courts recognize that a provision may be both broad and clear. *Abu-Shawareb v. S.C. State Univ.*, 364 S.C. 358, 363, 613 S.E.2d 757, 760 (Ct. App. 2005) (“Although the release is broad, it is not ambiguous.”). Here, the Blackburns’ counterclaims easily fit within the plain language of the waiver provisions at issue, and no plea for strict construction can alter that result. *Id.* Hence, this Court should hold that the jury waivers apply to all of the Blackburns’ counterclaims.

VII. THE JURY WAIVERS ARE NOT UNCONSCIONABLE.

The Blackburns also claim that the waivers are somehow unconscionable. Unconscionability is an affirmative defense that must be pleaded and proved by the party asserting it. *See Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116 (2001) (referring to unconscionability as a “general contract defense”); *Coble v. Coble*, 292 S.C. 233, 234, 355 S.E.2d 863, 863 (Ct. App. 1987) (“A party challenging a separation agreement as unconscionable or unfair has the burden of proof.”), *rev’d on other grounds*, 293 S.C. 434, 361 S.E.2d 339 (1987); *S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 239, 547 S.E.2d 871, 875 (Ct. App. 2001) (noting that affirmative defenses “must be pleaded and proved” by the party asserting them); *see also Tillman v. Comm. Credit Loans, Inc.*, 655 S.E.2d 362, 369 (N.C. 2008) (“[U]nconscionability is an affirmative defense, and the party asserting it has the burden of proof.”). Here, the Blackburns did not plead the defense in any of their three (3) Answers, including the one filed *after* Wachovia moved to strike their jury demand. (*See generally* R. pp. 53-55, Ans.; R. pp. 56-69, First Am. Ans.; R. pp. 70-84, Second Am. Ans.) Thus, the issue is waived.

If the Court considers the Blackburns’ unconscionability argument, South Carolina courts apply a two-pronged test to determine whether a contract is

unconscionable; a contract is unconscionable if: (1) one party lacks “meaningful choice . . . due to one-sided contract provisions,” and (2) the terms of the contract “are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Carolina Care Plan, Inc.*, 361 S.C. at 554, 606 S.E.2d at 757 (2004). As the Circuit Court concluded, the jury waivers at issue here satisfy neither prong.

A. Nothing in the Record Demonstrates that the Blackburns Lacked Meaningful Choice.

For purposes of determining whether a contract is unconscionable, a party only lacks meaningful choice when the agreement at issue is an adhesion contract, meaning that it is “presented on a take-it-or-leave-it basis.” *Herron v. Century BMW*, 387 S.C. 525, 531 (2010) (*vacated by Sonic Automotive v. Watts*, 131 S.Ct. 2872 (2011), *but reinstated by Herron v. Century BMW*, 395 S.C. 461 (2012)). Here, there is no evidence that the Note or Guaranty is an adhesion contract.

At most, the Blackburns state in their affidavit that, “[t]o [their] knowledge,” they had no right to negotiate the waiver clauses, but there is no evidence that they attempted to do so, nor is there evidence that anyone from Wachovia told them that any portion of the Note or Guaranty was non-negotiable. (R. p. 120, Blackburn Aff. p. 2.) Without that or similar evidence, a court cannot conclude that a contract is an adhesion contract. *See, e.g., Leeman v. Cook’s Pest Control*, 902 So.2d 641, 648 (Ala. 2004) (holding that party cannot demonstrate that contract is one of adhesion where party “did not attempt to negotiate any of the terms”); *Union Bank v. Ross*, 54 Cal. App. 3d 290, 296, 126 Cal. Rptr. 646, 650 (Cal. Ct. App. 1976) (holding that person who neither read nor attempted

to negotiate a contract will not be heard to argue after the fact that it was a contract of adhesion); *Dresser v. Cradle of Hope Adoption Ctr.*, 358 F. Supp. 2d 620, 638 (E.D. Mich. 2005) (same); *M/V Am. Queen v. San Diego Marine Const. Corp.*, 708-09 F.2d 1483, 1489 (9th Cir. 1983) (same). Thus, the Blackburns have not built a record sufficient to show the existence of an adhesion contract, and their unconscionability claim fails as a matter of law. *Herron*, 387 S.C. at 532-33.

Even if the Note and Guaranty were adhesion contracts, which they are not, the Blackburns still had meaningful choice. The mere fact that a contract is an adhesion contract does not mean that it is unconscionable; rather, “[f]inding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable.” *Id.* at 532. Indeed, the standardization of contracts is “a rational and economically efficient response to the rapidity of market transactions and the high cost of negotiations.” *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998) (internal citation and quotation marks omitted). To determine whether a party lacked meaningful choice, courts consider: “the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; the nature of the injuries suffered by the [claimant]; whether the [claimant] is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.” *Herron*, 387 S.C. at 532.

These factors militate against finding that the Blackburns lacked meaningful choice. *First*, the Blackburns’ injuries, if any, are purely commercial, as they do not allege any personal injuries. This is significant because, while South Carolina courts are skeptical of provisions that affect personal injury damages, no such doctrine applies to

purely commercial damages. *Cf. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1047 (D.S.C. 1993) (holding that exclusion of consequential damages was not unconscionable because all relevant damages were commercial).

Second, the Blackburns have failed to produce any evidence regarding their business activities, any purported disparity in the parties' bargaining power or the parties' relative sophistication. All that is apparent from this record is that the Blackburns were commercial investors, not consumers, who purchased a piece of investment property for more than \$500,000. (R. p. 14, Note p. 1.) As commercial investors taking part in a commercial transaction, the Blackburns are presumed to be sophisticated and capable of bargaining for an acceptable deal. *See, e.g., Chrysler Credit Corp. v. Kosal*, 518 N.Y.S.2d 162, 164 (N.Y. App. Div. 1987) (noting that commercial transactions are presumed not to be unconscionable); *see also Herron*, 387 S.C. at 533 and n.3 (drawing distinction between consumer and commercial transactions).

Third, the Blackburns cannot claim surprise at the jury waivers because, as held by the Court of Appeals, the law of the case is that the waivers in this case are conspicuous. *See Charleston Lumber Co.*, 338 S.C. at 175 (holding that if a party fails to petition for rehearing and/or certiorari, the findings of the appellate court become the law of the case); *Ross v. Medical University of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997) (noting that the law of the case doctrine applies to issues necessarily decided by the lower court); *see also, e.g., Smalls v. Advance Am.*, No. 07-3240, 2008 WL 4177297, at *16 (D.S.C. Sep. 5, 2008) (holding that arbitration agreement was not unconscionable because, *inter alia*, it was in all capital letters); *Myrtle Beach Pipeline Corp.*, 843 F. Supp. at 1048 (holding that disclaimer was conspicuous even though only a small portion

of it was in all capital letters); *see also Leasing Serv. Corp.*, 804 F.2d at 833 (enforcing jury waiver even though it was not conspicuous). The titles of the provisions were in bold, all capital letters, and the provisions themselves were in all capital letters. (R. p. 18, Note p. 5; R. p. 40, Guaranty p. 6.) Under these circumstances, there is no basis for holding that the Blackburns lacked meaningful choice. *Herron*, 387 S.C. at 532-33. Thus, the jury waivers are not unconscionable. *Id.*

B. The Jury Trial Waivers are Neither Unfair nor Oppressive.

Finally, and perhaps most importantly, the jury waivers are neither unfair nor oppressive. According to the South Carolina Supreme Court, the key issue in determining substantive unconscionability is whether the waiver provision “is geared towards achieving an unbiased decision by a neutral decision-maker.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007) (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). Here, there is no question but that a bench trial meets this standard. It favors neither side. Moreover, all parties are accorded even more procedural safeguards than arbitration, which is a favored dispute resolution method. *Id.* at 24, 644 S.E.2d at 668. For example, the discovery process, evidentiary rules, the requirement of written findings of fact and conclusions of law, and appellate review are all preserved in a bench trial, unlike in arbitration. Finally, the waivers themselves are not one-sided in that they apply equally to both sides.

As the Court is no doubt aware, parties to commercial contracts regularly select dispute resolution methods other than jury trial because of the cost and time savings that those methods provide. *See Lackey*, 330 S.C. at 396; 498 S.E.2d at 902-03 (recognizing

that parties often choose alternative dispute resolution for efficiency benefits). There is nothing about the parties' jury waiver that is unfair or oppressive.¹

The cases cited by the Blackburns are inapposite because they involve consumer contracts with automobile retailers, which are subject to heightened scrutiny. Under these cases, courts will analyze "contract[s] between a consumer and automobile retailer with 'considerable skepticism.'" *Simpson*, 373 S.C. at 27, 644 S.E.2d at 570 (quoting *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 866 (Ohio 1998)); *Knox v. Joe Gibson Autoworld, Inc.*, No. 07-4020, 2008 WL 20777361, at *3 (D.S.C. May 8, 2008) (emphasizing "the South Carolina Supreme Court's admonition that adhesion contracts between a consumer and an automobile retailer requiring arbitration . . . should be analyzed 'with considerable skepticism'"). This is because such contracts generally involve a "vehicle intended for use as [the consumer's] primary transportation, which is critically important in modern day society." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. However, the transaction at issue here is a commercial loan between sophisticated business parties, not a consumer purchasing a car. The Blackburns cite no law suggesting that investment property transactions raise the same critical consumer protection issues as

¹ The Blackburns argue that the jury waivers are unconscionable based on a footnote in *Aiken v. World Finance Corp.*, 373 S.C. 144, 644 S.E.2d 705 (2007), which suggests that an arbitration agreement that purported to bring in "every dispute imaginable between the parties" might be unconscionable. *Id.* at 150-51 & n.4; 644 S.E.2d at 708 & n.4. As discussed in more detail in the next section, the jury waivers at issue here do not purport to have that broad a scope, nor does Wachovia advocate interpreting them as such. Rather the Blackburns' counterclaims fall easily within the plain text of their jury waivers, so the *Aiken* footnote is inapplicable. Moreover, *Aiken* is also inapposite because the *Aiken* Court expressly reserved decision on the issue of unconscionability. 373 S.C. at 151 n.4, 644 S.E.2d at 709 n.4.

consumer automobile transactions, or that such transactions should be viewed with the same level of skepticism.

Simpson and *Knox* are also distinguishable on other grounds. First, unlike the waiver at issue here, *Simpson* and *Knox* involved arbitration provisions that were not conspicuous, being printed in normal type, not in bold or all capital letters. *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670 (noting that arbitration clause, unlike other provisions of contract, was printed in regular type); *Knox*, 2008 WL 2077361, at *1 (reproducing regular-type arbitration agreement). Furthermore, the *Simpson* and *Knox* courts focused on damage-limitation clauses that are not at issue here.² *Simpson*, 373 S.C. at 30, 644 S.E.2d at 671; *Knox*, 2008 WL 2077361, at *3. Finally, *Simpson* involved a unilateral arbitration provision that allowed the defendant to select either arbitration or trial, but bound the plaintiff to arbitration. 373 S.C. at 20, 644 S.E.2d at 666. Here, the jury waivers apply equally to all parties. (R. p. 19, Note p. 5; R. p. 40, Guaranty p. 6.)

A more instructive case than *Simpson* or *Knox* is *Herron*, which held, even in the context of a consumer automobile transaction, that an arbitration clause was enforceable

² In *Knox*, for example, the arbitration agreement gave the defendant self-help remedies that could effectively defeat the plaintiff's claim before the arbitrator rendered a decision. 2008 WL 2077361, at *3. In *Simpson*, the arbitration agreement precluded the arbitrator from awarding "double and treble damages," which could have prevented the plaintiff from obtaining statutory damages under the Dealers' Act and South Carolina Unfair Trade Practices Act. 373 S.C. at 29-30; 644 S.E.2d at 671. Here, the Note and Guaranty do not contain similar provisions. While they do limit the availability of punitive and exemplary damages, the Supreme Court has held that whether such a provision is permissible is an open question that need not be decided until and unless the claimant actually proves that he qualifies for such damages. *Carolina Care Plan, Inc.*, 361 S.C. at 557, 606 S.E.2d at 759 (2004). Thus, the propriety of that exclusion is not yet ripe for disposition. *Id.* Moreover, even if it were unconscionable (and it is not), the proper remedy would be to sever it based on the Note's and Guaranty's severability provisions, not to invalidate the jury waivers, which are in entirely different sections of the documents. *Herron*, 387 S.C. at 536 (holding that unconscionable waiver of class action rights is severable unless the party defending the contract prefers otherwise).

because it was conspicuous and fair. *Herron*, Op. No. 26805 (Shearouse Adv. Sh. No. 15 at 20-21). The jury waivers at issue here are likewise conspicuous and fair, and, therefore, they are not unconscionable. *Id.*

VIII. RULE 39 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE DOES NOT DEFEAT A VALID JURY TRIAL WAIVER.

The Blackburns argue that the Circuit Court had discretion under Rule 39(b), SCRPC, to order a jury trial notwithstanding the parties' contractual waiver. This interpretation of Rule 39(b) is incorrect. The Rule provides, in relevant part:

[N]otwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

Rule 39(b), SCRPC. By its terms, the Rule only applies when: (1) a party has "fail[ed] . . . to demand a jury"; and (2) the action is one "in which such demand might have been made of right." *Id.* Neither prong is satisfied here because the Blackburns *did* demand a jury trial, but they have no *right* to a jury trial because of their contractual waiver.

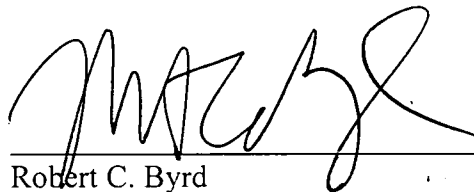
In keeping with the plain text of the Rule, South Carolina courts have only applied it in situations where a party otherwise entitled to a jury trial neglected to make a timely demand. *See, e.g., Patterson v. McNeill-Patterson & Assocs., Inc.*, 312 S.C. 471, 472, 441 S.E.2d 328, 329 (Ct. App. 1994) (affirming decision to allow jury trial when party made untimely demand). There are no reported cases interpreting the Rule to give the Circuit Courts discretion to order a jury trial despite the parties' valid contractual waiver.

To compensate for the lack of South Carolina case law supporting their position, the Blackburns cite an ALR article stating that some jurisdictions allow courts to order a jury trial despite a waiver by the parties. However, none of the cases cited in that article

appear to involve valid contractual jury waivers. At most, some states allow their trial courts, for good cause shown, to override a prior stipulation executed by counsel that waived the right to a jury trial. *See, e.g., Hackin v. Pioneer Plumbing Supply Co.*, 457 P.2d 312 (1969) (allowing party to move for relief from counsel's stipulation waiving right to jury trial). Even courts that follow this rule hold that it does not extend to pre-litigation contractual jury waivers. *See, e.g., Vista Centre Venture v. Unlike Anything, Inc.*, 603 So.2d 576, 578 (Fla. Dist. Ct. App. 1992) (holding that rule "does not apply to the situation where both parties have contracted for a non-jury trial on issues arising out of the contract. Waivers of the right to trial jury trial by contract are enforceable and will be upheld"). Thus, this Court should not adopt a strained interpretation of Rule 39(b) and should follow the Rule's plain language.

CONCLUSION

The Court of Appeals decision allows artful pleading and creative argumentation to avoid contractual jury trial waivers in virtually every case, and incorrectly equates arbitration clauses with jury trial waivers. Under the Court of Appeals decision and in contravention of this Court's precedent, it is no longer true that contractual jury trial waivers are generally valid in South Carolina. For these and the foregoing reasons, and any other reason supported by the Record, Wachovia respectfully requests that the Court REVERSE the Court of Appeals decision, and AFFIRM the Circuit Court's decision striking the Blackburns' jury demand.



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October 2, 2013

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

On *Certiorari* to the Court of Appeals of South Carolina
Opinion No. 4874 (S.C. Ct. App. filed Aug. 24, 2011)

Wachovia Bank, National Association, Petitioner,

v.

William E. Blackburn; Judith Blackburn; Tammy S. Winner;
Watson E. Felder; Gary F. Ownbey; and South Island Plantation
Association, Inc. are, Defendants,
Of Whom William E. Blackburn; Judith Blackburn are, Respondents,

v.

Winyah Bay Holdings, LLC; Source One
Properties, LLC; and Waterpointe Realty, LLC, Third-Party Defendants.

PROOF OF SERVICE

I certify that I have served the **Reply of Petitioner** on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on October 3, 2013, to the following addresses:

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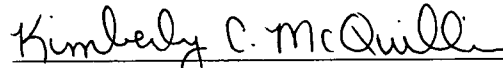
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