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SC Court of Appeals

**APPEAL FROM THE COURT OF COMMON PLEAS
THE STATE OF SOUTH CAROLINA**

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Marvin H. Dukes, III Circuit Court Judge

Case No. 2025-000189

RED TARGET, LLC dba SCJ COMMERCIAL
FINANCIAL SERVICES,

Respondent,

v.

ANDREW M. SMITH,

Appellant..

FINAL BRIEF OF APPELLANT

June 27, 2025

/s/ Paul L Held
Paul L Held
Post Office Box 521
Sumter, South Carolina
29150
(803) 233-3431
Attorney for Appellant

Other Counsel of Record continued next page:

Other Counsel of Record continued from page one:

Lucas S. Fatua, Esq.

Melissa Tullis Smith

Smith Debnam

PO Box 22795

Charleston, SC 29413

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN FAILING IN FINDING THERE WAS NO ISSUE OF FACT EVEN THOUGH APPELLANT ARGUED THAT HIS PERSONAL LIABILITY WAS EXTINGUISHED BY A NOVATION OF THE ORIGINAL AGREEMENT.

STATEMENT OF THE CASE

Defendant Andrew Smith on behalf of himself and Wateree Site Systems LLC (WSS) approached Financial Pacific Leasing (FPL predecessor in interest re: Red Target) in October 2021 and entered into the contract in order to “rescue” him (Andrew Smith) from a previous leasing agreement that was actually a thinly veiled purchase security agreement. The original lease agreement binds WSS, LLC and consequently Andrew Smith as guarantor to “lease” payments of 60 months. His intent was to return the collateral early, hoping that it would relieve him of the debt completely or at least reduce same drastically. (see ROA affidavit Andrew Smith) The new agreement allowed Wateree Site Services, LLC to reduce an \$89,000.00 balance on the business equipment by selling same to a third party. The sale to a new party to reduce payment before the end of the contract term was completely new. The agreement changed substantially the terms of the contract upon which Plaintiff is seeking judgment, and was titled AUTHORIZATION TO RECOVER & SELL CONTRACTED ASSETS PRIOR TO EXPIRATION OF CONTRACT TERM..Rather than FPL picking up and selling the property Andrew Smith was granted authority to sell, The agreement asked him to indemnify the FPL for losses from transaction NOT guarantee the balance as the original contract did. The original

financing was initially written under Priority Capital before being immediately transferred to Financial Pacific Leasing . Financial Pacific Leasing through its representative created the novation agreement. Appellant argues that the new contract (novation) not only changed the financing agreement which was written like a lease (definite term, no ammortization) but ultimately the liable parties therein, in that Andrew Smith was no longer expressly identified as a personal guarantor of WSS' obligation to FPL. At the Summary Judgment hearing, the Respondent argued that personal guaranties carry through to a subsequent agreement and that there was no issue of genuine fact.. The Honorable Marvin H. Dukes, III found that there was no issue of genuine fact and issued final judgment signed December 30, 2024, filed December 30, 2024. Appellant received written notice of entry of judgment on December 31, 2024. Appellant subsequently filed Notice of Appeal on January 29, 2025, serving same on all Counsel.

STANDARD OF REVIEW

"In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRPC: summary judgment is proper when *216 there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005); *Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 622 S.E.2d 733 (Ct.App.2005); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Medical Univ. of South*

Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005).¹

ARGUMENTS

I. APPELLANT IS NO LONGER A GUARANTOR AFTER EXECUTION OF THE NOVATION.

Financial Pacific Leasing (FPL) and Wateree Site Services, LLC entered into a novation of the original contract on October 27, 2021. Said Novation was titled **AUTHORIZATION TO RECOVER & SELL CONTRACTED ASSETS PRIOR TO EXPIRATION OF CONTRACT TERM** (ROA p. 99) The complaint does not reference the second agreement. This omission even if not deliberate certainly benefits Plaintiff/Respondent. The Complaint does not seek redress against Andrew Smith as a member of the LLC. Likewise, there is no attempt to pierce the “corporate veil”. Plaintiff/Respondent Red Target targets Andrew Smith solely as a guarantor of the first agreement and this makes sense in that Appellant/Defendant will argue that the joint and several liability was extinguished by the subsequent contract. Appellant argues that the novation relieved Andrew Smith as personal guarantor and the novation substantially changed the principal’s defenses under the UCC, accordingly compromising Andrew Smith, if he was deemed to remain liable. Additionally, the novation transforms Andrew Smith into an indemnifier, a surety rather than a guarantor. This new agreement referenced the original contract and contract date but further identified the Customer (the sole party liable) as **Wateree Site Services, LLC. And not Andrew Smith.** There was no language indicating that Andrew Smith, as a member or president of Wateree Site Services, LLC was still personally

¹ Full text lifted from *Moore v. Weinberg*. 644 S.E.2d 740, 373 S.C. 209, 2007.

guaranteeing the original debt of Wateree Site Services, LLC. FPL agreed to allow a sale to a third party of the collateral, substantially changing their duty under the original contract to pick up the property upon default and dispose of same in a commercially reasonable manner. This was not a mere modification of the original terms. Throughout this matter, as it will be seen, Defendant/Appellant referenced the original agreement of the parties as a lease even though the complaint or references to same by the Plaintiff/Respondent merely point to a Secured financing agreement.

II. UNCONSCIONABILITY ARGUED THROUGHOUT THIS MATTER

Appellant counsel argued the original contract was unconscionable throughout this matter. but admittedly imperfectly. The first page of the finance agreement (ROA #1 exhibit attached to complaint) reads as a lease or a contract of sale, no amortization is included. Appellant does not know how much the financing will cost him, The Debtor does have ownership but he takes the property and depending on the date of the month he pays a prorata share for that month. All in all he pays for 60 months. The price of the equipment is not disclosed even though it is disclosed that he is financing the equipment... However, Respondent suing on the Guaranty only need not address this, nor did they have to.

Note however, that the secured transaction which Appellant originally guaranteed, waives UCC rights, which is not permissible before a default. (see below and SC Code Ann. § 36-9-604) The Guaranty with this unconscionable language is part of the record. (ROA contract attached to Summons complaint, ROA p.18.) These have been interpreted by the Courts as contracts of adhesion. The reason this language could stand therefore is because it was disguised as a lease or a sale contract and therefore perhaps permissible under Washington State or even South Carolina law...ostensibly. This language was always there for all to see, however, counsel did

not note this particular defect in the answer or in the memorandum in opposition to motion for Summary Judgment.

In *Wells Fargo Bank, NA v. Smith*, 398 SC 487, 730 SE2d 328, this Court allowed a full analysis of unconscionability even though the Appellant subsequently abandoned the argument on appeal and even though the unconscionability argument was imperfectly framed. In this case the Court also discussed the statutory duty of the Court pursuant to SC Code §37-5-108(1) to fully explore unconscionability in the contract in dispute. Appellant argued that In this contract, unlike typical commercial loans, the interest rate was not disclosed and the loan was not subject to amortization.² There is no reference as to term or interest rate to be had from the original or subsequent agreement(s). Appellant did complain that his rights under the UCC were waived.

III. THE NOVATION SUBSTITUTED WATEREE SITE SERVICES, LLC AS THE SOLE RESPONSIBLE PRIMARY PARTY

The New agreement removed FPL's obligation to sell the property³ and account for a deficiency under the code. This waiver was either for the first time, if the novation is viewed as a new contract, or merely modified an already unconscionable agreement. As this Court stated in *Moore v. Weinberg*, 644 S.E.2d 740, 373 S.C. 209, 2007 “A novation is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent

² FPL caused this loan to be initially written under Priority Capital before being immediately transferred to Financial Pacific Leasing. The original contract clearly identifies and delineates Andrew Smith as the personal Guarantor and in simple terms serves to notify him of same. The subsequent novation document of FPL accepted by Red Target WITH NOTICE, does not. Therefore the enforcement of this unconscionable agreement should have any terms strictly construed and any ambiguity should inure to the benefit of the defendant.

³ The new contract allowed Andrew Smith to sell the property NOT FPL, a substantial change of Creditor's duty under the UCC..

to extinguish the old obligation.” *Wayne Dalton Corp. v. Acme Doors, Inc.*, 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct. App. 1990) (citing *Ophuls & Hill Inc. v. Carolina Ice & Fuel Co.*, 160 S.C. 441, 158 S.E. 824 (1931))

Continuing with Moore, the Court added “A novation may be broadly defined as a substitution of a new obligation for an old one, thereby extinguishing the old debt. More specifically, novation is the substitution by mutual agreement of one debtor or one creditor for another, whereby the old debt is extinguished. It is a mode of extinguishing one obligation by creating another; the substitution, not of a new paper or note, but of a new obligation in lieu of an old one, with the effect of paying, dissolving, or otherwise discharging it.” *id* at 212.

“Consequently, a novation may be accomplished in three ways:

- (1) By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;
- (2) *By the substitution of a new debtor in the place of the old one, with intent to release the latter;*
- (3) By the substitution of a new creditor in the place of an old one, with intent to transfer the rights of the latter to the former.”

Moore v. Weinberg, 644 S.E.2d 740, 373 S.C. 209 at 212. (*emphasis added*)

“ Novation means substitution. It may be either the substitution of a new obligation for an old one between the same parties with intent to displace the old obligation with the new”... *Sutter v. Moore Inv. Co.*, 30 Wash. 333, 336, 70 P. 746, 747 (1902) (*emphasis added*). “In a novation “[t]he subsequent contract becomes a substitute for the earlier contract, and is the only agreement between the parties upon that subject.” 25 Wash. Prac., Contract Law And Practice §

11:3 (2d ed.) (citing *Higgins v. Stafford*, 123 Wn.2d 160, 866 P.2d 31 (1994)). In the event of a breach, any action would have to be brought on the substituted agreement. *Id* (citing Restatement (Second) of Contracts, § 279(2) (1981)).

The new instrument authorized the acceptance of the collateral for resale and said authorization also waived FPL's obligation to provide the individual defendant notification of right of redemption. These are rights which can not be waived initially in a contract 36-9-604, but they were waived, illegally from the onset.. Yet the same waiver language appears again in the second agreement . If the second agreement is a mere modification , then the 2nd agreement is also unconscionable even though a waiver of UCC rights is permissible after an initial default.

In paragraph 3 of the Novation, *the Customer* who is specifically identified as Wateree Site Services, LLC and NOT Andrew Smith, *acknowledges that despite its exercises of this option⁴, it will remain liable to FPL for any amounts remaining due under the terms of the Contract after application of all due proceeds of sale of the deficiency balance of the contract.* The parties to the agreement and signature lines identified Secured Party: Financial Pacific Leasing, Inc. and Customer : Wateree Site Services, LLC . **WSS, LLC only!!** The signature for the secured party: Financial Pacific Leasing, Inc *by* Curt Suelzle on the signature line.. and Customer: Wateree Site Services, LLC *by* Andrew Smith unambiguously show the individuals signed as representatives of the respective named entities and not as guarantors.⁵

⁴This is not an option under the original instrument. Respondent argued at the Summary Judgment Hearing that FPL picked up and disposed of the collateral in commercially reasonable manner per the code, but this is not what happened as FPL never reclaimed possession of the collateral which was sold to a third party directly by Wateree Site Services, LLC with the proceeds from sale going to FPL.

⁵Uniform Commercial Code § 3-402; adopted by Washington State RCW 62A.3-402(b)(1) (Washington is listed as choice of law State in the original contract)

The Defendant/Appellant proposed the sale to a third party in the belief that he would or could satisfy the original \$89,000.00 financed. He had made several payments thereon and the sale netted \$44,000.00. This \$44,000.00 is noted in an attachment on Plaintiff's/ Respondent's original summons and complaint. (ROA p.11) Red Target therefore knew of this transaction and took the assignment with notice of same..

Defendant/Respondent argued that the agreement was not a novation in that it merely modified the original agreement. The **new agreement** attached to Defendant/Appellant's Answer was as follows:

1. Authorization by Wateree Site Services LLC, Andrew Smith allows FPL or an authorized agent thereof to Obtain possession for the purpose of resale the assets detailed, on the attached equipment list.
2. Authorization by Wateree Site Services LLC further waives FPL's obligation to provide Andrew Smith with notification of its right to redemption.
3. By signature below, **the Customer** acknowledges that despite its exercises of this option, it will remain liable to FPL for any amounts remaining due under the terms of the Contract after application of all due proceeds of sale to the deficiency balance of the contract.
4. Wateree Site. Services LLC, Andrew Smith agrees to **indemnify** and hold harmless FPL from and against any and all claims, damages, losses and actions, including reasonable attorney fees resulting from and arising out of or with respect to the authorizations detailed herein.

Paragraph 4 of the 10/27/2021 agreement attached hereto states as follows: *Wateree Site Services, LLC, Andrew Smith agrees to **indemnify** and hold harmless FPL from and against any and all claims, damages, losses and actions, including reasonable attorney fees resulting from and arising out of or with respect to the authorizations detailed herein.* [emphasis added]

Indemnification is not the same as guaranty. Guaranty is a primary and equal liability which can be sued upon separately as Plaintiff/Respondent did in this case, Indemnification is a secondary liability and it does not come into play until remedies against the principal have been fully explored. As noted, Red Target went straight for Andrew Smith consistent with its view as Appellant as guarantor. So the agreement to indemnify based on the transaction which anticipated flaws per UCC requirements in the disposition of the collateral does **NOT** bind Andrew Smith personally as a guarantor of the new agreement and new balance. This was a new provision that only came about because of the new agreement. Further, the Principal must be sued along with the surety. This was not done here.

The original “lease” bound Wateree Site Services, LLC with obligation, guaranteed by Andrew Smith to 60 months and same were always liquidated damages under the original contract. Respondent argued that paragraph 4 of the **novation** was a saving paragraph that preserved Andrew Smith’s status as a guarantor but actually said paragraph 4 is a standard clause designed to immunize the original Creditor from defenses and claims regarding transactional liability accrued from divergence from UCC requirements, involving acceptance of collateral in full or

partial payment of the loan, transfer, and/ or disposition of collateral under UCC article 9⁶.

Additionally, it does not reference the obligation on the note. There is no reference, no contract terms attached to complaint. Also, as stated numerous times, the new agreement states that Andrew Smith is to **indemnify** and hold harmless FPL for [failures to comply with UCC] (SEE NOVATION AUTHORIZATION TO RECOVER & SELL CONTRACTED ASSETS PRIOR TO EXPIRATION OF CONTRACT TERM). Again under a true lease, traditionally, these UCC articles are in-apposite. (Agreement/ "Novation"-ROA p.99).

IV. NOT A MERE MODIFICATION

The Court noted that the original agreement per argument of Respondent and the subsequent agreement required the Creditor to give Andrew Smith credit for the sale (disposition) of the collateral which FPL did in fact do, (ROA transcript p.11) Therefore, the argument to and of the Court was that there was only a modification and therefore the contract could not be deemed a novation. (ROA_{tr} p.114-119) But what changed Appellant argues is that agreement changed from a disguised lease to secured transaction, the manner of sale/disposition and party handling the sale changed from the Creditor to Andrew Smith. Andrew Smith at best turned into an indemnifying party rather than guarantor, and he was stripped of claiming his UCC defenses either for the first time or a second-first time.⁷ As will be seen below this was either for the first

⁶ Generally UCC 9-625, (RCW 62A.9A-625), South Carolina Code § 36-9-625, as amended 2008.

⁷South Carolina Code of Laws 2004 §36-9-622 (a) *A secured party's acceptance of collateral in full or partial acceptance of the obligation it secures :...(1) discharges the obligation to the extent consented to by the debtor:* But not in this case as the new agreement requires the Debtor to pay back- indemnify or hold harmless any loss that the Creditor realizes. The code allows a waiver of these UCC defenses to a great extent but not during the original guaranty. Only after a default, S.C. Code Ann. § 36-9-609 -614 (possession, commercially reasonable sale, notice),

time as a secured transaction or reaffirmed an initial waiver in a secured transaction (not permitted initially by 36-9-624).. §36-9-624 allows waiver of UCC defenses after a default and admittedly Courts have determined this waiver to be a mere modification. But as noted in the footnote, under the code, waiver of the defenses only can occur **after a default**. A new agreement can be reached regarding waivers and same will be viewed as a modification. But these UCC waivers are only valid as to a guarantor **AFTER A DEFAULT**. Note that throughout, Counsel for Appellant has been referencing the initial agreement as a lease and not Secured transaction. Admittedly, (as Counsel has just realized) there is little in record to establish this lease argument. Framing this financing agreement with lease or contract of sale language arguably diverts customers from identifying the true cost of their purchase. Throughout, Counsel for Appellant argued that changing the lease to a secured transaction was more than a mere modification. But Respondent has represented throughout and presented the case as a guaranty of a secured transaction (SEE ROA p.7, ROA p. 11, summons, complaint, and ROA p. 27-89, DISCOVERY REQUESTS and answers).

Therefore consider the original contract (2nd page) (ROA contract attached to complaint) as follows:

PERSONAL GUARANTY

IN CONSIDERATION OF SECURED PARTY ENTERING INTO THIS AGREEMENT, THE UNDERSIGNED ("YOU") UNCONDITIONALLY AND IRREVOCABLY GUARANTEE CUSTOMER'S TIMELY PAYMENT AND PERFORMANCE OF ALL OBLIGATIONS UNDER THIS AGREEMENT. YOU AGREE THAT WE MAY PROCEED DIRECTLY AGAINST YOU WITHOUT FIRST PROCEEDING AGAINST CUSTOMER OR PURSUING OTHER REMEDIES. YOU **WAIVE ALL SURETYSHIP DEFENSES AND ANY RIGHT TO NOTICES, INCLUDING NOTICE OF ACCEPTANCE, DEMAND, DEFAULT, AND EQUIPMENT DISPOSITION**. YOU CONSENT TO ANY ASSIGNMENTS, MODIFICATIONS OR COMPROMISES TO THIS AGREEMENT. YOU AGREE TO PAY ALL AMOUNTS WE INCUR IN ENFORCING OUR RIGHTS UNDER THIS AGREEMENT, INCLUDING COSTS AND ATTORNEY FEES. IF THERE IS MORE THAN ONE GUARANTOR, EACH AGREES THAT THEIR LIABILITY IS JOINT AND SEVERAL YOU AUTHORIZE US AND OUR AFFILIATES TO OBTAIN YOUR CONSUMER CREDIT REPORTS, MAKE CREDIT INQUIRIES FROM TIME TO TIME, AND OFFER YOU FUTURE CREDIT PRODUCTS AND SERVICES. YOU AGREE THAT THIS AGREEMENT SHALL BE GOVERNED BY WASHINGTON STATE LAW, YOU CONSENT TO THE JURISDICTION OF ANY COURT IN WASHINGTON, AND YOU WAIVE THE RIGHT TO A JURY TRIAL. THIS GUARANTY MAY BE SIGNED IN COUNTERPARTS AND TRANSMITTED ELECTRONICALLY WITH THE SAME FORCE AND EFFECT AS DELIVERY OF AN ORIGINAL. **[Emphasis Added]**

Here is an initial Secured Transaction contract (the original contract) with an initial waiver of

all those aforementioned UCC defenses which is permitted by §36-9-624 only AFTER a default, but not in the initial contract. This contract viewed as a secured transaction is an unconscionable one. This is clearly an initial waiver. It is a contract of adhesion and is *per se* unconscionable and Appellant's liability should accordingly be extinguished. The first agreement being deemed unconscionable, Plaintiff/Respondent would have to argue that the "savings language" of the second agreement is not a continuation (mere modification) of the initial unconscionable agreement, but a novation. However, that dooms the argument that the guaranty carries over to the modified agreement.

V. ECHOES OF LEASE ON SECOND PAGE

Andrew Smith acquired (either leased or bought) the equipment from Priority Capital who subsequently assigned same to FPL the agreement was modified upon financing. Andrew Smith did not know he had an ownership interest in the property and this is because initially the transaction was sold to him as a lease. That is his understanding. In the contract attached to Respondent's complaint (ROA) he is granted ownership with FPL having a priority secured position but there is still some indicia that this contract was represented as a lease during the initial "sale" This standard agreement has likely seen several iterations and the legacy language is as follows: Paragraph 4 "**PAYMENT: SECURITY DEPOSIT**"- This is a landmark feature of a lease. In the agreement it indicates that the security deposit funds remain separate from the payment on the contract. "at the end of the term of this Agreement, including any extension or renewal, provided you have fully performed your obligations under this agreement, we will

return the balance of this security agreement to you.” **ASSIGNMENT** (see paragraph 12) “YOU HAVE NO RIGHT TO SELL, PLEDGE, **SUBLEASE**, TRANSFER, OR ASSIGN ANY RIGHTS IN THE EQUIPMENT OR THIS AGREEMENT WITHOUT OUR PRIOR WRITTEN CONSENT” [emphasis Added]. In the context of a security agreement this wording of *sublease* is at the very least curious. Under a secured Financing agreement, Andrew Smith would own the equipment subject to a lien and as such he normally could lease the property to anyone he chose. The term sublease normally references one who is leasing from an individual who is leasing from the owner. In this case, the owner would be Financial Pacific Leasing, then by assignment Red Target and the lessee would be Andrew Smith. Additionally the contract is for a definite TERM and consistent equal payments. There is no amortization. Andrew Smith received no credit for paying off a significant portion of the loan/term/whatever early---ahead of schedule which normally reduces the remaining balance. This effort did not. The wording of AUTHORIZATION TO RECOVER & SELL CONTRACTED ASSETS PRIOR TO EXPIRATION OF CONTRACT TERM is also curious. If a pure secured transaction, why not just rely on the Code’s remedies after a default? As Washington State also has adopted the UCC,⁸ including §9-624, there is good reason to call this initial agreement anything other than Secured **purchase** Agreement. Secured Financing is much more flexible. But nevertheless, for reasons stated above, Appellant is content with either analysis..

VI. WATEREE SITE SERVICES IS THE SOLE LIABLE CUSTOMER UNDER THE NEW AGREEMENT BASED ON SOUTH CAROLINA LAW.

The new agreement clearly references *customer* as the sole liable party. **Again**, Customer is

⁸ Uniform Commercial Code § 3-402; adopted by Washington State RCW 62A.3-402(b)(1) (Washington is listed as choice of law in original contract-identical code to South Carolina.)

designated as...

Customer:

WATEREE SITE SERVICES, LLC

Andrew Smith signed under the above as **by** /s/Andrew Smith. “If a guarantee is intended, it must be drafted with language that clearly distinguishes the personal obligation from an officer’s representative authority.” According to Black’s Law Dictionary *By* is defined as ...*Through the means, act, agency or instrumentality of*. Per the South Carolina version of the Uniform Commercial Code Section 36-3-402 **Signature by representative...**

(b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply:

(1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument. (emphasis added)

The note clearly shows that Andrew Smith signed as a representative of Wateree Site Services, LLC. Again, Wateree Site Services, LLC is identified as the customer.

Having met the requirements of this code’s section, showing that he signed in a representative capacity only, and without a clear and unambiguous reference to a personal guaranty in this new instrument, Andrew Smith, therefore, is not personally liable on this debt/note.

The Appellant subsequently is neither a guarantor nor an accommodation party under the code.⁹

⁹ South Carolina Code § 36-9-625, as amended 2008

The Plaintiff (through notice and assignment) as author of the note, should have any ambiguity in same, construed against it.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the court which found that there was no issue of fact. If a matter of law only, then Appellant verily believes that the novation and failure to notify Andrew Smith of any intention to bind him personally on this subsequent agreement, conclusively extinguishes his personal liability.

June 27, 2025

Respectfully submitted,

/s/ Paul L Held

Paul L. Held

S.C. Bar No. 2904

Post Office Box 521

Sumter, South Carolina 29151-0521

(803) 233-3431

Attorney for Appellant

