

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

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In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY

SC Court of Appeals

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..

REPLY BRIEF OF APPELLANT

June 12, 2025

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I. THE ARGUMENT REGARDING UNCONSCIONABILITY, BASED ON WAIVER OF UCC DEFENSES, WAS NOT BROUGHT UP FOR THE FIRST TIME ON APPEAL

In both the answer and in the argument at the Summary Judgment hearing, the issue that the Respondent argues Appellant is broaching for the first time on appeal is thoroughly and diligently argued, if imperfectly, during the course of the case.

While there may be a revelation regarding the initial contract **admitting** being unconscionable per se (i.e., waiver of rights guaranteed by the UCC), this revelation merely supplements Counsel for Appellant's argument throughout this case that Appellant, then Defendant Andrew Smith, was being denied his defenses under the UCC. (See transcript page 7 -10.) and also Transcript p.7 lines 11-16. *Your Honor, this case was -- this contract, the one that they're talking about here today in Exhibit A, was originally a lease agreement. And that's how it was written. It's a First Pacific Leasing. And the term of the lease -- and it's written as if it is a lease, even though I believe it's a really thinly veiled purchase-money security agreement.*

Because the contract of FPL was initially presented as a lease, the unconscionable provision of the contract, wherein Mr. Smith waived all his UCC defenses, was not in the forefront. The Appellant argued that the contract, which had a fixed immutable term and no amortization, was deliberately disguised as a lease initially so that these UCC proscriptions were irrelevant. This FPL Contract was a thinly veiled purchase-money agreement, waiving UCC defenses and as such, it was unconscionable. Admittedly, the Appellant did not point to the offending provision when arguing this. However, the Appellant argued throughout that it was unconscionable to require Mr. Smith to forgo his UCC defenses. The forgo of the UCC defenses is what makes this provision in the original contract unconscionable. Moreover, this is the very issue that was always before the Court. The only disconnect is that it need not have been argued indirectly as the drafters of the contract included language which, if

included in what is viewed as a retail financing agreement, is per se unconscionable. Only if presented and viewed as a lease is the FPL agreement somewhat acceptable. This original contract required Defendant Andrew Smith to surrender UCC defenses. (See exhibit to complaint FPL contract page 2) but only those that are not particularly applicable to a lease agreement and this is the deception targeted or complained of by the Appellant.

In the record, there is agreement by the Respondent that this initial contract written by FPL was a purchase money security transaction.

The Plaintiff/Respondent always presented the contract as a simple retail financing agreement. (See Transcript 6 Line 10-14) wherein Respondent Counsel admits: *Ultimately, Your Honor, there was a equipment finance agreement. The defendant signed a personal guarantee on it. The company defaulted on the agreement. They conducted a sale of the collateral, and now we're here seeking the deficiency balance that's still remaining.*

Both Appellant and Respondent, therefore, ultimately agree that this was a secured transaction and, as such, is thereby subject to the proscriptions of the Uniform Commercial Code. UCC defenses are applicable and cannot be waived. Yet they were, and this waiver in the agreement only strengthens the argument regarding unconscionability. Admitting the contract is not a lease renders the waiver encapsulated with certainty on page 2 of the FPL agreement per se unconscionable.

The Appellant's note that this provision was not discovered earlier is merely a lament. It is not an admission of an omission of record.

Again, the Appellant reiterates that throughout, he persistently and determinedly argued that the document was designed to rob Defendant, now Appellant, of his defenses under the UCC. It could have

been done more succinctly and with ultimate authority, but the determination and unwavering commitment to the argument was always there.

Transcript page 11, lines 5-9 *And the reason I would stress that, Your Honor, is that basically, the only thing that Andrew Smith agreed to, to indemnify them for and agreed to hold them harmless on, was the fact that they were basically violating the Uniform Commercial Code.*

II. RESPONDENT INDIRECTLY AGREES THAT THE SECOND AGREEMENT IS A NOVATION.

In the introduction of the Appellant's brief it is noted that Respondent sued Andrew Smith solely. There was no attempt to pursue the LLC, Wateree Site Services, LLC that contracted for the equipment First Pacific Leasing's collateral. Limited Liability Companies are legitimate entities created by their owners or members to shield them from liability. **S.C. Code § 33-44-303(a)** states that "the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company," and a member or manager is **"not personally liable"** for those liabilities **"solely by reason of being or acting as a member or manager."**

Respondent legitimately takes advantage of the fact that Andrew Smith has issued a personal guarantee of Wateree Site Services LLC contractual liability to FPL and now SCJ DBA RED TARGET. As such Andrew Smith can be sued on the obligation individually without joinder of Wateree Site Services, LLC.

Andrew Smith deliberately entered into a new agreement with FPL to not only adjust the term of the contract but to directly sell the collateral and terminate his personal liability. Respondent disagrees. However, the "savings clause" or the contractual language that the both the Court and Respondent point to is that "the customer remains liable" creates a new form of "guarantee" at best.

The Second contract/novation paragraph 4 of the 10/27/2021 agreement 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]* Already it is established in the second agreement that the sole customer is Watree Site Services. Andrew Smith is no longer a guarantor under the very terms of the above NOVATION. He at best is a **Surety**. If words in a contract mean anything, then Andrew Smith as one who has agreed to indemnify only, does not guarantee the loan anymore, at least unconditionally. “A surety’s liability is co-extensive with, and dependent on, the principal’s liability. A **suretyship** “arises when one person, the surety, binds himself to a second, the obligee, to answer for payment of a debt or performance of an obligation owed to the obligee by a third person, the principal” CAROLINA WINDS OWNERS' ASSOCIATION, INC. v. JOE HARDEN BUILDER, INC 383 S.E.2d 463,299 S.C. 224 (Ct. App. 1988)

“A suretyship arises when one person, the surety, binds himself to a second, the obligee, to answer for payment of a debt or performance of an obligation owed to the obligee by a third person, the principal. Philco Fin. Corp. v. Mehlman, 245 S.C. 139, 139 S.E. (2d) 475 (1964). The surety undertakes with the principal that the obligation of the principal will be performed. Id. Without a valid, subsisting principal obligation there can be no suretyship. First Nat. Bank of Tulsa v. Boxley, 129 Okl. 159, 264 P. 184 (1927); cf. Borg Warner Acceptance Corp. v. Sweatman, 372 S.E. (2d) 99 (Ct. App. 1988) (security interest cannot exist without debt); Glidden Coatings & Resins v. Suitt Constr. Co., Inc., 290 S.C. 240, 349 S.E. (2d) 89 (Ct. App. 1986) (mechanics' lien cannot exist without debt); Blackwell v. Powell, 289 S.C. 470, 346 S.E. (2d) 731 (Ct. App. 1986) (mortgage cannot exist without debt).

The surety's engagement is accessory to the obligation of the principal. If the principal is not liable to the obligee, then the surety is not liable either. Greenville Airport Commission v. United States Fidelity & Guaranty Co. of Baltimore, 226 S.C. 553, 86 S.E. (2d) 249 (1955).” **id as above.**

In this matter, affirming that Andrew Smith re obligates himself is fair, but under the novation, he does so only subject to the liability of the principal, which is the customer Wateree Site Services. This is a substantial change and relying on this “reaffirmation” is a tacit admission that a Novation has occurred. Mr. Smith’s liability is at best conditional upon first securing a claim against the principal Wateree Site Services. LLC.. an entity that is not a party to this action, as of the Summary Judgment motion hearing.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court..

Respectfully submitted,

June 12, 2025

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