

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-04223

Greer State Bank,.....Appellant,

v.

McKeown Property On Lake Robinson, LLC,
Bruce A. McKeown, Robert M. McKeown,
Cathy J. Lockhart, Rita W. McKeown and
Connie S. Santoro f/k/a Connie McKeown,.....Defendants,

OF WHOM McKeown Property on Lake Robinson,
LLC, Bruce A. McKeown and Rita W. McKeown are.....Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN CONCLUDING THAT APPELLANT WAIVED ITS RIGHT TO ENFORCE RESPONDENTS' CONTRACTUAL JURY TRIAL WAIVER?

STATEMENT OF THE CASE

Appellant Greer State Bank commenced this foreclosure action in the Court of Common Pleas for Greenville County by filing a Lis Pendens, Summons and Notice and Complaint on May 4, 2010, seeking foreclosure of its mortgage on certain real property located in Greenville County, South Carolina, as well as seeking deficiency or personal judgments against Respondent McKeown Property on Lake Robinson, LLC, the mortgagor, and Respondents Bruce A. McKeown and Rita W. McKeown, as guarantors. (R. pp. 4-45) The Respondents are hereinafter collectively referred to as “McKeown” unless indicated otherwise.

On August 4, 2010, McKeown filed a Summons and Notice and Answer and Counterclaim setting forth a general denial of the allegations contained in the Complaint and asserting an equitable counterclaim for an accounting.¹ (R. pp. 47-51)

On September 1, 2010, Greer State Bank served McKeown with Greer State Bank’s Motion for Order of Reference and Order of Reference. (R. pp. 100-101)

On October 5, 2010, McKeown filed an Amended Answer and Counterclaim answering the allegations of the Complaint and asserting counterclaims under various “lender liability” theories including wrongful foreclosure, breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty and negligence. (R. pp. 52-62)

¹ The remaining Defendants, Robert M. McKeown, Cathy J. Lockhart and Connie S. Santoro f/k/a Connie S. McKeown, failed to Answer the Complaint or otherwise appear in the action and, therefore, are in default. (R. p. 46)

On October 18, 2010, Greer State Bank filed its Reply to the Amended Answer and Counterclaim denying the allegations of McKeown's Amended Answer and Counterclaims, setting forth numerous and various affirmative defenses to said counterclaims. (R. pp. 63-73)

On July 1, 2011, McKeown filed a Notice of Motion and Motion to Amend Answer and Counterclaim pursuant to Rule 15, *South Carolina Rules of Civil Procedure (SCRCP)*, seeking to add counterclaims for conversion and breach of contract accompanied by fraudulent act. (R. pp. 161-175)

On July 5, 2011, almost two months before the scheduled jury trial of this case, Greer State Bank filed its Motion for Trial by the Court and to Transfer Matter to Non-Jury Docket. (R. pp. 102-131) Thereafter, McKeown filed a Memorandum in Opposition to Plaintiff's Motion by Trial by the Court and to Transfer Matter to Non-Jury Docket. (R. pp. 132-158)

By Order, dated August 2, 2011, and entered on August 3, 2011, the Honorable Judge D. Garrison Hill (1) granted McKeown's Motion to Amend and (2) denied Greer State Bank's Motion to Transfer to Non-Jury Docket, concluding that although McKeown had contractually waived the right to trial by jury, Greer State Bank had waived its right to enforce McKeown's contractual waiver of jury trial. (R. pp. 2)

On August 8, 2011, McKeown filed an Amended Summons, Second Amended Answer and Counterclaim of Defendants containing the additional causes of action for conversion and breach of contract accompanied by fraudulent acts. (R. pp. 74-87)

Greer State Bank filed its Reply to Second Amended Answer and Counterclaim August 12, 2011. (R. pp. 88-99)

Greer State Bank served McKeown with Notice of Appeal on August 10, 2011, appealing the Order of the Trial Court, entered August 3, 2010, denying Greer State Bank's Motion to Transfer to Non-Jury Docket.

FACTS

Greer State Bank commenced this action seeking foreclosure of its mortgage encumbering property owned by Respondent McKeown Property on Lake Robinson, LLC (the "LLC"). (R. pp. 11-45, Complaint, ¶¶ 12-14, R. pp. 27-35, Exhibit C; R. pp. 75-87, Second Amended Answer and Counterclaim, ¶¶ 11-13; R. pp. 102-131, Motion for Trial by the Court and to Transfer to Non-Jury Docket (hereafter referred to as "Motion for Trial by the Court"), R. pp. 125-130, Exhibit 6, Deposition of Bruce A. McKeown)

The mortgage secures a Commercial Promissory Note ("Note 1") from the LLC to Greer State Bank, dated October 28, 2008, in the amount of \$4,750,000.00. Pursuant to the terms of Note 1, the LLC expressly waived its right to trial by jury on all matters between the parties, including the counterclaims and defenses raised in McKeown's pleadings. McKeown's contractual waiver states, in its entirety:

WAIVER OF JURY TRIAL. All parties to this Note hereby waive, to the fullest extent permitted by law, any right to trial by jury with respect to any dispute, whether in contract, tort, or otherwise, arising out of, in connection with, related to, or incidental to the relationship established between them in this Note or any other instrument, document, or agreement executed or delivered in connection herewith or the transaction related hereto. (emphasis in original.)

(R. 11-45, Complaint, ¶¶ 8-9, R. pp. 20-25, Exhibit A; R. pp. 75-87, Second Amended Answer and Counterclaim, ¶¶ 7-8; R. pp. 102-131, Motion for Trial by the Court, R. pp-125-130, Exhibit 6, Deposition of Bruce A. McKeown)

Note 1 was guaranteed by Respondent Bruce A. McKeown pursuant to a Commercial Loan Guaranty, dated October 28, 2008. That Guaranty contains an

express waiver of jury trial virtually identical to that found in Note 1, quoted above. (R. pp. 11-45, Complaint, ¶¶ 27-28, R. pp. 42-43, Exhibit E; R. pp. 75-87, Second Amended Answer and Counterclaim, ¶¶ 20-21; R. pp. 102-131, Motion for Trial by the Court; R. pp. 125-130, Exhibit 6, Deposition of Bruce A. McKeown)

In addition to securing payment of Note 1, the above referenced mortgage also secures payment of a Commercial Line of Credit (“Note 2”) provided by Greer State Bank to the LLC, dated April 24, 2008, in the amount of \$200,000.00. Note 2 also contains an express jury trial waiver virtually identical to that quoted above from Note 1. (R. pp. 11-45, Complaint, ¶¶ 10-11; R. pp. 23-25, Exhibit B; R. pp. 75-87, Second Amended Answer and Counterclaim, ¶¶ 9-10; R. pp. 102-131, Motion for Trial by the Court; R. pp. 125-130, Exhibit 6, Deposition of Bruce A. McKeown)

Note 2 was further secured by another Commercial Loan Guaranty of Respondent Bruce A. McKeown. That Guaranty also contains an express waiver of jury trial virtually identical to that quoted above. (R. pp. 11-45, Complaint, ¶¶ 27-28; R. pp. 40-41, Exhibit E; R. pp. 75-87, Second Amended Answer and Counterclaim, ¶¶ 20-21; R. pp. 102-131, Motion for Trial by the Court; R. 125-130, Exhibit 6, Deposition of Bruce A. McKeown)

Therefore, all Respondents expressly waived their right to any trial by jury.²

Despite their clear and unambiguous contractual waiver of right to a jury trial, McKeown endorsed the Answer and Counterclaim, Amended Answer and Counterclaim, and Second Amended Answer and Counterclaim with a demand for a jury trial.

In Reply to McKeown's demand for a jury trial, and consistent with McKeown's contractual waiver of a jury trial, Greer State Bank responded to each demand to a jury trial with an express denial of McKeown's right to a jury trial. (R. pp. 63-73, Plaintiff's Reply to Amended Answer and Counterclaim, ¶ 55; R. pp. 88-99, Plaintiff's Reply to Second Amended Answer and Counterclaim, ¶ 61.)

In addition, on September 1, 2010, Greer State Bank served its Motion for an Order of Reference requesting that the matter be referred to the Master-in-Equity. (R. pp. 100-101) McKeown never filed a Return to Greer State Bank's Motion.

In order to enforce its contractual right to have the matters raised in the pleadings heard non-jury, as asserted in its pleadings and in its Motion for Order of Reference, Greer State Bank filed its Motion for Trial by the Court and to

² In its Order, the Trial Court also concluded, in reference to Respondent Rita W. McKeown: "Moreover, there is currently a compulsory legal counterclaim by one of the defendants, who is not bound by the jury trial waiver." In this regard, the Trial Court is correct as this was brought to the attention of the Trial Court by counsel for Greer State Bank. (R. p. 211, ll.9-21.) However, such was not a proper basis for denying Greer State Bank's Motion for Trial by the Court as counsel for Greer State Bank advised the Trial Court, upon granting Greer State Bank's Motion for Trial by the Court as to the LLC and Respondent Bruce A. McKeown, Greer State Bank would dismiss with prejudice its claims against Respondent Rita W. McKeown. (R. p. 211, l.22 - p. 212, l.11; p.213, l. 7 - p. 214, l. 8.)

Transfer Matter to Non-Jury Docket on July 5, 2011, approximately two months before the matter was scheduled for trial by a jury on August 29, 2011.

Despite the clear and unambiguous express contractual waiver of McKeown's right to a trial by jury, the preservation of Greer State Bank's right to have the matters heard non-jury as set forth in its pleadings and in its Motion for Order of Reference, and its Motion for Trial by the Court, the Trial Court concluded that although McKeown had contractually waived the right to a trial by jury, Greer State Bank had waived its right to enforce McKeown's contractual waiver of the right to trial by jury. (R. p. 2) In this, the Trial Court erred.

ARGUMENT

THE TRIAL COURT ERRED IN CONCLUDING THAT APPELLANT WAIVED ITS RIGHT TO ENFORCE RESPONDENTS' CONTRACTUAL JURY TRIAL WAIVER.

The issue in this Appeal is whether Greer State Bank is entitled to enforce the bargain that it struck with the McKeown in their loan contracts for all matters between them to be tried without a jury. This issue is not some effort by Greer State Bank to squeeze a procedural advantage out of the Rules of Civil Procedure, but instead is a persistent effort to enforce the bargain between the parties. The Trial Judge ruled that Greer State Bank had waived that agreement. That decision is dead set against the established law in the state and federal courts around the country, which have consistently held that these provisions may be enforced all the way up to the eve of trial.

From the outset it is important to understand what is not on appeal. McKeown did not appeal, or even challenge, the conclusion of the Trial Court that McKeown had contractually waived the right to trial by jury, (R. p.2); nor was that finding ever challenged. McKeown did not challenge the authenticity of the signatures on the contractual waivers; McKeown did not allege or argue that the waivers were not entered into knowingly and voluntarily; McKeown did not assert that the waivers are unconscionable or contrary to public policy; McKeown did not contest the legality of contractually waiving the right to a jury trial; nor did McKeown contest the scope of the contractual waiver of jury trial. The Trial Court specifically found that "there was a waiver of jury trial." (R. p.2) This finding was

not appealed by McKeown and, therefore, is now the law of the case. See *Judy v. Martin*, 381 S.C. 455, 459, 674 S.E.2d 151, 153 (2009) (“[A]n unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal.”)

What is on appeal before this Court is the Trial Court’s conclusion that Greer State Bank waived its right to enforce McKeown’s contractual waiver of any right to a jury trial. (R. p.2) The Trial Court found that Greer State Bank waived its right to enforce McKeown’s contractual jury trial waiver notwithstanding that (a) in its Complaint, Greer State Bank expressly incorporated the Notes and Guaranties containing McKeown’s express waiver of jury trial (R. 11-45, Complaint, ¶¶ 9,11 and 28); (b) with each opportunity in its responsive pleadings, Greer State Bank denied that McKeown had a right to a jury trial (R. pp. 63-73, Plaintiff’s Reply to Amended Answer and Counterclaim, ¶ 55; R. pp. 88-99, Plaintiff’s Reply to Second Amended Answer and Counterclaim, ¶ 61); (c) Greer State Bank filed a Motion for an Order of Reference asking that the matter be referred to the Master-in-Equity for Greenville County, South Carolina for the purpose of having the Master-in-Equity enter final judgment as to all matters arising in this action (R. pp. 100-101); and (d) ultimately to enforce its contractual rights, Greer State Bank filed a Motion for Trial by the Court and to Transfer Matter to Non-Jury Docket. Greer State Bank’s conduct does not support the Trial Court’s finding that it waived its right to enforce the parties’ contractually bargained-for waiver of jury trial. No waiver occurred.

Notwithstanding these overt, affirmative attempts by Greer State Bank to assert its right to have this matter heard non-jury as contracted for by the parties, the Trial Court concluded that Greer State Bank had waived its right to enforce McKeown's contractual waiver of right to trial by jury. The Trial Court erred in this conclusion and this is the issue on appeal.

A. Standard of Review

"Whether a party is entitled to jury trial is a question of law. An appellate court may decide questions of law with no particular deference to the [circuit] court." *Wachovia Bank, N.A. v. Blackburn*, 394 S.C. 579, 584, 716 S.E.2d 454, 457 (Ct.App.2011) (internal quotations and citations omitted.)

B. A Motion to Strike a Request for Jury Trial pursuant to Rule 39(a), SCRPC, may be made at any time, even on the "eve of trial."

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (quoting *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). It requires the "unequivocal intent to relinquish a known right." *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 471 (2007)(citing 7 S.C. Jur. *Estoppel and Waiver* § 17 (1991)).

Therefore, there cannot be any waiver by Greer State Bank of McKeown's jury trial waiver unless Greer State Bank "intentionally" and "unequivocally" surrendered that right, and such a finding flies in the face of the facts that Greer State Bank denied the right to a jury trial in its pleadings, that it filed and served a Motion for Order of Reference, and that it filed its Motion for Trial by the Court

and to Transfer Matter to Non-Jury Docket almost two months before the scheduled trial.

The timing or any alleged delay in Greer State Bank's Motion to have the matter heard nonjury cannot form any basis for waiver since the South Carolina Rules of Civil Procedure (and case law throughout the country) do not impose any time deadline for such a Motion and allow such a Motion to be made on the very eve of trial.

Greer State Bank's Motion for Trial by the Court and to Transfer Matter to Non-Jury Docket was indeed timely, and, therefore, there was no waiver. The Motion was made pursuant to SCRPC Rule 39(a) less than one year after McKeown's jury trial demand and approximately two months prior to the scheduled trial date. Rule 39(a) states:

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the calendar in the Clerk's filebook as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of a trial by jury of some or all of those issues does not exist.

Conspicuously absent from Rule 39(a), specifically subsection 2, is any express period of time within which a party or the court must move to strike a demand for a jury trial. This is important. In contrast, the South Carolina Rules of Civil Procedure are replete with rules that contain deadlines within which action must be taken or be barred. See, for example, Rule 12 (30 days to file Answer), Rules 33, 34 and 36 (30 days to respond to discovery), Rule 38 (10 days after

last pleading to file jury trial demand), Rule 45 (14 days to object to non-party subpoena), and Rule 60(b)(1-3) (1 year to move for relief from judgment). The Rules of Civil Procedure are not shy about imposing time deadlines when timeliness needs to be defined.

Rule 39(a) is clear and unambiguous; it contains no such deadline or other time restrictions for moving to strike a jury trial request, and the Trial Court erred in imposing one. Since Rule 39(a) imposes no deadline within which a party or the court must move to have a trial heard non-jury, the only logical interpretation of Rule 39(a) is that a party or the court can move at *any* time to have the matter heard non-jury, even up to and including the “eve of trial.” See *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003) (“In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.”)

This particular issue has never been addressed by the South Carolina Appellate Courts. However, closely analogous to the present appeal is the Court of Appeals' decision in *Patterson v. McNeill-Patterson & Associates, Inc.*, 312 S.C. 471, 441 S.E.2d 328 (Ct.App.1994). In *Patterson*, the defendant admittedly “through inadvertence” failed to demand a jury trial within the express time specified under Rule 38(b), *SCRCP*. More than a year after the Complaint was filed and after the parties had engaged in discovery, defendant finally moved for

a jury trial. The trial court granted defendant's motion pursuant to Rule 39(b), *SCRCP*, and the Court of Appeals affirmed, holding:

Patterson argues he was prejudiced because McNeill-Patterson chose "the mode of trial after having the merits of [Patterson's] case thoroughly explored and revealed through more than a year of pre-trial procedures." The South Carolina Rules of Civil Procedure, however, permit a defendant to fully investigate the merits of a plaintiff's case. Irrespective of the mode of trial, McNeill-Patterson conducted no more than the extent of discovery permitted by the South Carolina Rules of Civil Procedure. Patterson's assertion that McNeill-Patterson enjoyed some tactical advantage, therefore, is speculative and without merit.

Id., 312 S.C. at 472-473, 441 S.E.2d at 329 (footnotes omitted).

By comparison, Greer State Bank is on stronger footing than that of the defendant in *Patterson*. Not only was Greer State Bank's motion timely made (there being no deadline in Rule 39(a)), there is less prejudice, if any, in transferring a case from the jury docket to the non-jury docket, as Greer State Bank has requested, than transferring a case from the non-jury docket to a jury docket just prior to trial.³ While not controlling, the Court of Appeals' decision in *Patterson* clearly supports Greer State Bank's position that it has not waived its bargained-for contractual right and is entitled to have its case heard non-jury. The Trial Court's decision in the present case creates a terrible anomaly in the law if a "last minute" demand for jury trial is allowed despite an express 10-day rule under Rule 38(b), *Patterson, supra*, but a motion to strike a jury demand is not similarly allowed when the Rules impose no time limitation.

While no appellate court of South Carolina has addressed this specific issue, that is, the timing within which a party must make a Rule 39(a) motion, the

³ The issue of prejudice with respect to Rule 39(a) is discussed in more detail below (Section C, pp. 21-25).

issue has been raised and ruled upon in both federal and state courts across the country, and uniformly the courts have found a motion to strike a jury trial demand to be timely, even up to the eve of trial, since there is no time deadline imposed by Rule 39(a). The seminal case addressing this issue, cited most often by courts, is the decision of the Third Circuit Court of Appeals in *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212 (3d Cir. 2007).⁴

In *Tracinda Corp.*, the Plaintiff sued DaimlerChrysler alleging numerous violations of securities acts, rules, and regulations. Tracinda had entered into a stockholder agreement that contained a broadly worded jury trial waiver. Three years after Tracinda filed its lawsuit, after completion of discovery, after summary judgment motions had been filed, and approximately six weeks prior to trial, DaimlerChrysler moved to strike Tracinda's demand for a jury trial. The district court granted DaimlerChrysler's motion and the Third Circuit Court of Appeals affirmed.

Parties "have a great deal of latitude on the timing of motions to strike a jury demand." MOORE'S FEDERAL PRACTICE ¶ 8-39.13. **Since "a court has the power to act *sua sponte* at any time" under Rule 39, "it follows that a court has the discretion to permit a motion to strike a jury demand at any time, even on the eve of trial."** *Id.* For example, in *United States v. Schoenborn*, 860 F.2d 1448 (8th Cir. 1988), the government filed a motion to strike the defendant's jury demand one week before trial, and the District Court granted the government's motion one day before trial. *Id.* at 1455. On appeal, the defendant conceded that he had no constitutional or statutory right to a jury trial in light of the fact that

⁴ Greer State Bank readily acknowledges that "a parties' right to a jury trial in South Carolina is governed by state law." *Wachovia Bank, NA v. Blackburn*, 394 S.C. 579, 585, 716 S.E.2d 454, 457 (Ct.App.2011). However, Rule 39(a), *SCRCP*, and Rule 39(a), *FRCP*, as noted in the notes to the *South Carolina Rules of Civil Procedure*, are "substantially" the same. This is also true for other States' "Rule 39" discussed herein. In fact, they are identical as they relate to the absence of a deadline within which a motion to strike a jury trial request must be made. While not controlling, the analysis undertaken by various state and federal courts provide guidance to this Court.

the government's suit for restoration of wetlands was in equity and defendant's counterclaims were against the United States. Nevertheless, the defendant asserted that the District Court abused its discretion by striking his jury demand because the government's motion came immediately before trial and was in violation of the court's pretrial scheduling order. Citing Rule 39(a), the Court of Appeals for the Eighth Circuit rejected defendant's argument. *Id.* See *United States v. L.D.T. Corp.*, 302 F.Supp. 990, 991 (E.D.Pa.1969) (rejecting laches defense to government's motion to strike defendant's jury demand where government waited five years to file its motion but defendant showed no resulting prejudice from the delay other than the "mere lapse of time").

Because **a party may file a motion to strike a jury demand at any time under Rule 39(a)**, we conclude that DaimlerChrysler did not commit inexcusable delay by filing its motion to strike after the close of discovery.

Id., 502 F.3d at 226-227. (emphasis added; footnotes omitted).

Other federal courts have followed *Trancinda's* "eve of trial" rule or otherwise recognized the absence of a deadline in Rule 39(a). See *Mowbray v. Zumot*, 536 F. Supp. 2d 617 (D. Md. 2008) (motion to strike jury trial request almost two years after Complaint filed, at the close of discovery, and following summary judgment motions granted; "it is well established that a party...may move to strike a jury demand at any time, even on the eve of trial."); *Jones-Hailey v. Corporation of the Tennessee Valley Authority*, 660 F. Supp. 551 (E.D. Tenn. 1987)(granting a Rule 39(a) motion to strike jury trial request over arguments that there had been constructive consent to a jury trial through lack of objection to the jury demand and by participating in non-binding summary jury proceedings; holding that Rule 39(a) "contains no time limit within which [defendant] was required to object to [plaintiff's] jury demand."); *National Westminster Bank USA v. Ross*, 130 B.R. 656 (S.D.N.Y. 1991)("The court also rejects Ross's claim that

the Bank has waived its right to enforce the Guaranty's jury trial waiver by failing to timely move to strike."); *Cellport Systems, Inc. v. Peiker Acoustic GMBH & Co. KG*, C.A.No. 09-cv-01007-MSK-MJW, 2011 WL 290530 (D. Colo. Jan. 27, 2011), aff'd 2012 WL 360794 (D. Colo. Feb. 6, 2012))(applying the Rule 39(a) "eve of trial" rule to strike a jury trial demand.); and *JPA, Inc. v. USF Processors Trading Corp., Inc.*, No. Civ.A. 3:05-CV-0433P, 2006 WL 740401 (N.D. Tex. Mar. 15, 2006)(applying the "eve of trial" rule in granting party's motion to strike jury demand made more than 300 days after the original demand for a jury trial and only 38 days prior to trial).

The "eve of trial" Rule has also been applied by state courts which have addressed the timing and application of Rule 39(a) motions to strike a request for a jury trial. In *Poole v. Union Planters Bank, N.A.*, 337 S.W.3d 771 (Tenn. Ct. App. 2010), the Tennessee Court of Appeals was asked to decide if a defendant had, through its conduct, waived its right to have the pending matter heard non-jury as contractually agreed to by the parties. Poole filed suit against the bank alleging various lender liability causes of action and demanded a jury trial on all issues. The defendant bank answered denying the material allegations of the complaint but, unlike Greer State Bank, did not reference or otherwise mention plaintiff's contractual waiver of his right to a trial by jury. Four years later the bank moved pursuant to Tennessee's version of Rule 39(a), this rule being substantively and substantially identical to Rule 39(a), *SCRCP*, for an order striking plaintiff's demand for a jury trial. The trial court granted the bank's motion and the Tennessee Court of Appeals affirmed.

Mr. Poole argues, in the alternative, that assertion of a pre-dispute jury-waiver provision pursuant to Rule 39.01(b) must occur early enough in litigation as not to prejudice an opposing party. It is his position that the Bank, by delaying its motion to strike and entering into a scheduling order setting trial, waived its right to enforce the parties' contract. **The better rule, however, permits a party seeking to strike a jury demand to file a motion up to the “eve of trial” to enforce the parties' contract.** See *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 226–27 (3rd Cir. 2007) (citation omitted); see also *United States v. Schoenborn*, 860 F.2d 1448, 1455 (8th Cir.1988). Under such circumstances, the mere entry of a scheduling order coupled with permissible delay is insufficient to demonstrate waiver of the right to enforce a contractual jury-waiver provision. See *Great Earth Int'l Franchising Corp. v. Milks Dev.*, 311 F.Supp.2d 419, 420, 437–38 (S.D.N.Y. 2004) (granting a motion to strike after a jury trial was scheduled). We agree that similar action may amount to consent to waive a jury demand under Rule 39.01(a). See *Nagarajan*, 151 S.W.3d at 176–77 (citing *Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461, 464–65 (6th Cir. 1988)) (finding the entry of an order acknowledging the placement of the case on the court's non-jury docket clear evidence of consent to waive jury demand). However, it is the opinion of this Court that the entry of a scheduling order does not manifest an intent and purpose to waive a jury-waiver provision where, as here, a party may move to strike a jury demand up to the eve of trial. Having reviewed the record, we conclude the Bank did not waive the right to enforce the provisions of the parties' contracts concerning the right to trial by jury. The trial court correctly enforced Mr. Poole's contractual jury waiver unless it is otherwise shown that he did not enter into the various agreements under circumstances supporting their enforcement.

Id., 337 S.W.3d at 782-783 (emphasis added).

Shortly after rendering its decision in the *Poole* case, the Tennessee Court of Appeals issued another opinion, albeit unpublished, on substantially the same issue. See *Regions Bank v. Lost Cove Cabins and Campgrounds, Inc.*, No. M2009-02389-COA-R3-CV, 2010 WL 4514957 (Tenn. Ct. App. Nov. 9, 2010). In *Regions Bank*, the plaintiff bank brought an action in September 2004 to collect a deficiency on a promissory note against defendants. The defendants

counterclaimed alleging numerous and various causes of action and demanded a trial by jury. Approximately three years after initiating the action, following “extensive discovery,” and denial of the bank’s motion for summary judgment, the bank moved to strike the defendants’ request for a jury trial. The bank’s motion was granted and the defendants appealed. On appeal, the defendants argued that the bank had waived its right to enforce the contractual waiver of jury trial. The Tennessee Court of Appeals disagreed.

The defendants’ final argument on the jury waiver issue is that the bank waived its right to enforce the jury waiver provisions “by failing to timely object to the demand and allowing the matter to be set for a jury trial on more than one occasion.” In support of this argument, the defendants emphasize that the bank did not object to their jury demand until December 2008 when the bank filed a motion to strike, whereas the jury demand appeared in their original answer and counterclaim filed in November 2004 and in subsequent amended pleadings. The defendants also point out that the case was set on a jury docket for some period of time.

Under Tennessee law, “[t]here can be no waiver where there is no intent to waive, unless a party so acts as to mislead the other, and is estopped thereby.” *Faught v. Estate of Faught*, 730 S.W.2d 323, 326 (Tenn.1987). For an effective waiver, “there must be clear, unequivocal and decisive acts of the party or an act which shows determination not to have the benefit intended.” *Gitter v. Tenn. Farmers Mut. Ins. Co.*, 60 Tenn.App. 698, 450 S.W.2d 780, 784 (Tenn.Ct.App.1969). We consider the court’s analysis in *Poole* instructive regarding the defendants’ “waiver of the waiver” argument in the present case. In *Poole*, the court addressed Mr. Poole’s argument that the bank had waived its right to enforce the jury waiver provisions by delaying its motion to strike (which was filed almost four years after the commencement of the lawsuit) and by entering into a scheduling order. *Poole*, 2010 WL 1404416, at *7. In rejecting Mr. Poole’s argument, the court reasoned:

The better rule, however, permits a party seeking to strike a jury demand to file a motion up to the “eve of trial” to enforce the parties’ contract. Under such circumstances, the mere entry of a scheduling order coupled with permissible delay is insufficient to demonstrate waiver of the right to enforce a

contractual jury-waiver provision.... [I]t is the opinion of this Court that the entry of a scheduling order does not manifest an intent and purpose to waive a jury-waiver provision where, as here, a party may move to strike a jury demand up to the eve of trial.

Id. (Citations omitted.) We likewise conclude in this case that the bank did not evidence an intent to waive its right to enforce the contractual jury waiver provisions. Therefore, the trial court did not err in denying the motion to strike.

Id., 2010 WL 4514957 at *5-6. In *Regions Bank*, the Tennessee Court of Appeals followed the “eve of trial” rule adopted in *Poole* as originally announced by the Third Circuit Court of Appeals in *Tracinda Corp.* See also, *Camel Square, LLC v. Rubin Companies, Inc.*, No. 1 CA-CV 09-0342, 2010 WL 2773399 (Ariz. Ct. App. 2010) (motion to strike jury trial demand granted where motion to enforce jury waiver provision was made more than three years after jury demand and only two months before trial was set to begin).

Greer State Bank, throughout the proceedings below, asserted that McKeown had no right to a jury trial in its pleadings and in its Motion for an Order of Reference. In order to enforce its contractual rights to have the dispute heard non-jury, Greer State Bank was forced to file a Rule 39(a) Motion for Trial by the Court and to Transfer Matter to Non-Jury Docket. It is clear from a plain reading of the Rule 39(a), *SCRCP*, there is no deadline within which motions to strike jury trial requests must be made. To the contrary, consistent with the overwhelming majority of jurisdictions which have addressed this issue, Rule 39(a)(2) motions may be made at any time, even up to the “eve of trial.” Greer State Bank’s motion, made less than one year after McKeown’s demand for jury trial and approximately two months before trial, was timely. The Trial Court erred in

concluding that Greer State Bank had waived its right to enforce McKeown's contractual waiver of their right to a jury trial.

C. Prejudice: Under Rule 39(a), Prejudice to McKeown, if any, is not relevant; nor has prejudice been shown.

Under Rule 39(a), *SCRCP*, as set forth above, a party or the court has the absolute right to move to strike a demand for a jury trial at any time, up to and including the eve of trial. Such right is based upon the clear and unambiguous language of Rule 39(a), *SCRCP*, and is not contingent upon the existence of any alleged prejudice that the non-moving party may claim to have suffered. Arguments about "prejudice" are a mere smokescreen with no substance and, certainly, no relevance. Prejudice is a concept that is fundamental to estoppel and laches, which are not issues before this Court. "Waiver" is found where there is an unequivocal intent to relinquish or surrender a known right and does not rely upon any prejudice. *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 471 (2007)(citing 7 S.C. Jur. *Estoppel and Waiver* § 17 (1991)).

The Third Circuit Court of Appeals in *Tracinda Corp.*, after concluding that a Rule 39(a), *FRCP*, motion to strike a jury demand may be made up to the eve of trial, held: "we need not consider whether [the moving party] delay caused prejudice to [the non-moving party]." *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 227 (3d Cir. 2007). Other federal courts that have recognized that a Rule 39(a) motion may be filed at anytime have done so apparently without regard to any alleged prejudice by the non-moving parties. See *Mowbray v. Zumot*, *supra*; *James-Haley v. Corp. of Tennessee Valley Authority*, *supra*;

Cellport Systems, Inc. v. Peiker Acoustic GMBH & Co. KG, supra; and *JPA, Inc. v. USF Processors Trading Corp., Inc., supra*.

Likewise, state courts that have addressed the issue have generally applied the bright line “eve of trial” rule without reference to any prejudice. See *Poole v. Union Planters Bank, N.A., supra* (dismissing claims of alleged prejudice, noting that “the better rule, however, permits a party seeking to strike a jury demand to file a motion up to the ‘eve of trial’ to enforce the parties’ contract.”)

In the event that this Court were to determine that it is appropriate to consider prejudice to McKeown under Rule 39(a), then it should, like the few of courts that have concerned themselves with the issue of prejudice, focus on the alleged prejudice that exists from having to try the case before a judge as opposed to a jury. Any issue of alleged “prejudice” that might be advanced relates only to “prejudice” resulting from a judge deciding the case instead of a jury and not to the timing of the motion to strike the jury trial demand, and there is no prejudice from the mode of trial that is legally cognizable.

In *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961 (7th Cir. 2004), the court was faced with the bank’s Rule 39(a) motion made approximately two and a half years after suit was filed. The bank initially consented to a trial by jury, but subsequently withdrew its consent and moved to strike the jury trial request two weeks prior to trial. The district court granted the bank’s motion. The Seventh Circuit affirmed and held “the district court determined that this was not too late in the litigation process and **Kramer has**

provided no reason why she was prejudiced by a bench trial rather than a jury trial.” 355 F.3d at 968 (emphasis added).

Similarly, the District Court for the Northern District of Georgia, in *CPI Plastics, Inc., et al., v. USX Corp.*, 22 F. Supp. 2d 1373 (N.D. Ga. 1995), was faced with defendant’s Rule 39(a) motion to strike a jury demand made approximately one month before the jury trial was to commence. In granting defendant’s Rule 39(a) motion, the District Court held:

Finally, no real prejudice to Defendant results from striking the jury demand at this late date. While all parties have operated under the assumption that the trial would be before a jury up to this point, two weeks remain before the trial to allow the parties to adjust their presentation for a bench trial. A trial before the court will require less preparation than trial before a jury. Both parties can focus on effectively presenting their versions of the facts rather than collateral matters such as jury selection.

22 F.Supp.2d at 1378 (internal citations omitted).

Finally, the United States District Court for the Middle District of Alabama, in *R.A. Barton v. American Red Cross*, 826 F.Supp. 412 (M.D. Ala. 1993), was also faced with defendant’s Rule 39(a) motion to strike plaintiff’s request for jury demand.⁵ In granting the defendant’s motion, and addressing the issue of alleged prejudice by the plaintiff, the District Court held:

Finally, the Bartons argue that the Red Cross’s motion to strike the jury demand was untimely filed. Although the Bartons claim that, if the motion to strike is granted, their case preparation will be confused, the court ascertains no prejudice to the Bartons. Certainly, the Bartons will not have to make any additional preparations for a bench trial. If anything, a jury trial would require slightly more preparation.

826 F. Supp. at 415.

⁵ The case had not been set for trial at the time the Red Cross’s motion was filed.

In the present matter, conspicuously absent from the Trial Court's Order is any finding that McKeown suffered any prejudice. (R. p. 2) This is not a coincidence since the record is devoid of any evidence of how McKeown could be prejudiced by a bench trial as opposed to a jury trial. McKeown did submit for the Trial Court's consideration the affidavit of Respondent Bruce A. McKeown to the effect that McKeown incurred "several thousand dollars" in fees and costs for the attorneys' jury trial preparation, while simultaneously conceding that the trial date was not a day certain. (R. pp. 157-158, Affidavit of Bruce A. McKeown, ¶ 6.) McKeown also made speculative, unsupported claims that undue delay would result if the case was transferred to the non-jury docket and/or referred to the Master-in-Equity. (R. pp. 132-158, Memorandum in Opposition to Plaintiff's Motion for Trial by the Court and to Transfer Matter to Non-Jury Docket, p.135.) But, no evidence exists on the critical issue as to how McKeown will be prejudiced by a bench trial versus a jury trial. They will not. This is exactly what the parties bargained-for in their contracts (the Notes and Guaranties), and Greer State Bank seeks nothing more than to enforce the parties' expectations and bargains.

The issue of McKeown's alleged prejudice under a Rule 39(a) motion is irrelevant since Greer State Bank may move, pursuant to the express language of Rule 39(a), at any time, up to and including the eve of trial. However, if this Court were to consider McKeown's alleged prejudice, of which the Trial Court found none, the prejudice to be addressed is that allegedly suffered by having to try the case before the court, not a jury. There is no evidence in the record of

any alleged prejudice that McKeown would suffer from having to try this case before a judge as opposed to a jury.

D. Mode of trial at issue anew each time pleadings are amended.

Each time McKeown amended the pleadings, the mode of trial was opened anew.

On July 1, 2011, McKeown filed a Notice of Motion and Motion to Amend Answer and Counterclaim Pursuant to Rule 15, *SCRCP*. Specifically, McKeown sought to amend the counterclaims to add additional causes of action for breach of contract accompanied by fraudulent act and conversion.

At the hearing on McKeown's Motion to Amend, the Trial Court granted McKeown's Motion to add the cause of action for breach of contract accompanied by fraudulent act (R. p. 203, ll. 17-18) and, thereafter, granted McKeown's Motion to add a cause of action against Greer State Bank for conversion. (R. p. 2)

On August 8, 2011, McKeown filed an Amended Summons, Second Amended Answer and Counterclaim of Defendants containing the additional causes of action for conversion and breach of contract accompanied by fraudulent acts. (R. pp. 74-87) Even if there had been some sort of waiver of the jury trial demand, upon filing and serving the Second Amended Answer and Counterclaim, McKeown opened the door anew as to the mode of trial. With the door reopened, Greer State Bank again asserted its contractual right to have the

matter heard non-jury.⁶ (R. pp. 88-99, Reply to Second Amended Answer and Counterclaim, ¶ 61.)

There is no Rule of Civil Procedure that addresses the effect of amended pleadings on the right to move for a specific mode of trial under Rule 39(a). There is no need for such a rule since a Rule 39(a) motion may be made at any time. However, the Court can look by analogy to Rule 38, *SCRCP*. (R., p. 205, l. 25 – p. 206, l. 5.)

Under Rule 38(b), a party has the right to demand a trial by jury of any issue triable of right by a jury “not later than 10 days after the service of the last pleading directed to such issue.” Rule 38(b), *SCRCP*.

The South Carolina Court of Appeals has interpreted this provision to mean that the mode of trial is re-opened upon the filing of amended pleadings that add a cause of action. The South Carolina Court of Appeals held in *Mortgage Electronic Systems, Inc. v. White*, 384 S.C. 606, 682 S.E.2d 498 (Ct.App.2009), that a demand for a jury trial, made more than three years after the action was commenced, was timely:

The Whites demanded a jury trial in their September 21, 2005 answer to Mortgage Electronic's second amended complaint when they asserted their fraud counterclaim for the first time. We find this demand for a jury trial was timely made because it was made within ten days of the service of the last pleading.

Id., 384 S.C. at 613, 682 S.E.2d at 502. Similarly, in *Shaw v. Atlantic Coast Life Insurance Co.*, 322 S.C. 139, 470 S.E.2d 382 (Ct.App.1996), the South Carolina

⁶ Aside from reopening the mode of trial through the amended pleadings, assuming *arguendo* that it ever closed, an amendment to the pleadings likewise supports Greer State Bank's position its Rule 39(a) motion was timely, being filed *only four days* after McKeown moved to amend their pleadings. (R. pp. 102-131, Plaintiff's Motion for Trial by the Court.)

Court of Appeals noted in passing that “the Amended Complaint only added the Plan as a defendant and did not add additional causes of action ***which would have affected the ‘jury’ designation.***” (emphasis added). Clearly, amended pleadings that add a new cause of action open anew the mode of trial.

If the right to demand a jury trial is allowed within ten days of the date of the last pleading adding a new cause of action, then the right to insist on the enforcement of contractual jury trial waivers must also exist from the time of service of the last filed pleadings adding causes of action. While Greer State Bank denies that it waived, at any time, its right to enforce McKeown’s contractual waiver of the right to a trial by jury, to the extent it was waived, the right to enforce the contractual waiver was revived upon McKeown’s filing and service of amended pleadings adding additional causes of action. The Trial Court erred in ruling that Greer State Bank waived its right to enforce McKeown’s contractual waiver of their right to a trial by jury.

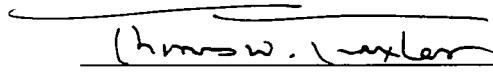
E. Conclusion

The Rules of Civil Procedure are not designed to lay traps for the unwary or swords to frustrate bargains that were fairly struck between parties. The Rules exist instead to provide for an orderly disposition of cases and to prevent parties from “gaming” the legal system. In this instance, Greer State Bank seeks, pursuant to Rule 39(a), *SCRCP*, to enforce the parties’ contract for a non-jury trial. It does not seek to squeeze any advantage or benefit that the parties did not bargain for nor does it seek to slip into cracks and crevices in the Rules for some unfair advantage. Assertions of prejudice are disingenuous and are

imaginative grasps at any argument designed to avoid the bargain the McKeown struck with to obtain the loans in the first instance.

The Trial Court erred in finding that Greer State Bank had waived McKeown's jury trial waiver and in thereby denying Greer State Bank's Motion for Trial by the Court and to Transfer Matter to Non-Jury Docket. The Order entered August 3, 2011, should be reversed and this matter remanded for trial by the court.

Respectfully submitted,


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2010-CP-23-04223

Greer State Bank,.....Appellant,

v.

McKeown Property On Lake Robinson, LLC,
Bruce A. McKeown, Robert M. McKeown,
Cathy J. Lockhart, Rita W. McKeown and
Connie S. Santoro f/k/a Connie McKeown,.....Defendants,

OF WHOM McKeown Property on Lake Robinson,
LLC, Bruce A. McKeown and Rita W. McKeown are.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.


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May 22, 2012

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant, Final Reply Brief of Appellant, and Certificate of Counsel on **McKeown Property On Lake Robinson, LLC, Bruce A. McKeown, and Rita W. McKeown**, by mailing a copy to their attorney of record, **Charles M. Groves, CHAPMAN, HARTER &**

GROVES, P.A., at his office at PO Box 10224, FS, Greenville, South Carolina
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