ORIGINAL

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 REPLY BRIEF OF APPELLANT

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I. Whether a party is entitled to a jury trial a question of law, to be decided by this Court with no deference to the Trial Court.

Greer State Bank reiterates the applicable standard of review in this matter, which was clearly and unequivocally enunciated by the Supreme Court of South Carolina in *Verenes v. Alvanos,* 387 S.C. 11, 690 S.E.2d 771 (2010): "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 trial court." (internal citations omitted).

Respondents McKeown Property on Lake Robinson, LLC, Bruce A. McKeown, and Rita W. McKeown (hereinafter collectively referred to as "McKeown" unless indicated otherwise), cite inapplicable arbitration cases and a case that was actually tried to verdict by jury to persuade this Court that it must defer to the trial court if there is any evidence in the record to support factual findings. (Brief of Respondents, pp. 10-12.)

There is a critical difference between compelling arbitration and determining the mode of trial. When parties agree to arbitration, they agree to opt out of the court system, and they agree not to avail themselves of all of the rights and privileges attendant to the court system, except for entry of the arbitration decision as an enforceable judgment. In contrast, in cases of a jury trial waiver, it is only the mode of trial *within* that court system that is at issue. This is why it is misguided to draw too close a parallel between cases involving motions to compel arbitration and motions on mode of trial. The standard enunciated in *Verenes* controls the review of this appeal.

II. Greer State Bank may assert its contractual jury trial waivers at any time up to and including the eve of trial, notwithstanding assertions of waiver or consent.

McKeown repeatedly states that Greer State Bank "agreed" or "consented" to a jury trial, and their entire argument hinges upon that assertion. That is the same basis for McKeown asserting that Greer State Bank waived the contractual jury trial waiver.

That is wrong, and McKeown's Brief fails to grasp certain essential issues:

1. A case is automatically designated by the Clerk of Court as a jury case and then put on the Jury Trial Roster any time a party makes a jury trial demand, regardless of whether the demand is proper.

2. The Court can determine at any time (even on the eve of trial) whether the right to a jury trial exists.

3. A contractual waiver of a jury trial forever extinguishes any right to a jury trial.

4. A party can assert a jury trial waiver on the eve of trial even if it had previously agreed to a jury trial.

That is the thread of law and logic that is woven in all of the Rules of Civil Procedure and case law relied upon by Greer State Bank.

A. A jury trial demand made by a party, no matter how invalid, means that a case is designated as a jury trial under the *South Carolina Rules of Civil Procedure,* and then automatically transferred to the jury trial roster after one year, with the Trial Judge having the right to review that at any time.

Greer State Bank filed its case and stated in the caption that it was to be tried on a nonjury basis. (R. pp. 10-11) Pursuant to Rule 40, *South Carolina Rules of Civil Procedure (SCRCP)*, the case was to be placed on the General Docket as a nonjury matter, but when the McKeowns filed their Answer and Counterclaim and designated the case as "Jury Trial Demanded," the case was

automatically "designated upon the calendar and the clerk's filebook as a jury action" pursuant to Rule 39(a), *SCRCP* and then later transferred to the Jury Trial Roster after a year on the General Docket pursuant to Rule 40(f), *SCRCP.* This designation and ultimate transfer to the Jury Trial Roster were automatic and did not require nor reflect any agreement or consent of the parties, nor was there any determination of whether McKeown even have the right to the jury trial that it demanded. It was simply an automatic administrative procedure mandated by Rules 39(a) and 40, *SCRCP* because the magical words of "Jury Trial Demanded" appeared in the McKeown caption, whether rightfully or wrongfully.

In such a situation, the question then becomes one of how the Court or a party raises the issue of improper demand or designation.

SCRCP Rule 40(g) provides:

> A party may move to strike a case from the Jury Trial Roster if upon timely motion that party establishes that it did not consent to the transfer as represented to the clerk, or that at the time the case was automatically transferred under (f) above, there was in effect a scheduling order setting another date for the transfer, or a pending motion for such order.

There was not any scheduling order in this case or a motion for one, and neither party represented to the Clerk of Court that the other party consented to a transfer to the Jury Trial Roster. Therefore, Rule 40(g) does not apply. (The representation to the clerk refers to the opportunity of the parties to agree to transfer a case to the Jury Trial Roster sooner than the one year provided in Rule 40(f), *SCRCP.*)

It is the Rule 39(a) and its case law that govern the outcome of this case.

Rule 39(a) also provides for the automatic administrative designation of a case on the calendar and the clerk's filebook as a jury action whenever a jury trial demand is made. Again, this is an automatic administrative procedure without regard to whether the jury trial demand is legitimate or not, and it does not require the agreement, consent or acquiescence of any party. It is not discretionary with the clerk.

It is also Rule 39(a) that provides the "check" on whether a right to trial by jury actually exists despite a jury trial demand: "The trial of all issues so demanded shall be by jury, unless ...(2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of the issues does not exist." It is the Rule 39(a) and its case law that govern the outcome of this case.

The pivotal question in this appeal is *when* such a motion by a party to challenge the right to a jury trial must be made. The *South Carolina Rules of Civil Procedure* do not set a time deadline. The State and Federal cases addressing this issue and the applicability of this Rule uniformly hold that the lack of a right to a jury trial can be raised at any time under Rule 39(a), even up to the eve of trial. The Court can raise it on the eve of trial, and so, too, can a party. The cases applying this Rule 39(a) are discussed at length in Greer State Bank's Brief, pp. 11 – 21, and revisited below to correct assertions made by McKeown in their Brief, and they hold that there is no time limit on when a Rule 39(a) motion to strike an improper jury trial demand can be made or when the court can find that the right to a jury trial does not exist. If there is simply no right to a jury trial, it does not matter when it is raised.

McKeown uses the time that Greer State Bank waited to assert this issue as evidence of "consent" or "agreement" to a jury trial and to plead "prejudice." Those arguments have likewise been uniformly rejected around this country on the basis that a jury trial demand when no right to jury trial exists is a nullity from the very beginning, that Rule 39 imposes no time limit on when a jury trial waiver can be asserted, and therefore there can be no prejudice. Since a party has until the trial itself to assert the lack of a right to a jury trial, the intervening time cannot be used to infer an agreement, consent or acquiescence to a jury trial.

Since a party can assert the lack of a right to a jury trial at any time, Greer State Bank's Motion[1] to strike the jury trial demand almost two months before the trial was timely even though the trial had previously been scheduled during weeks of a jury term. The Motion could have been made the day before trial, and it would still have been timely, and all of the discovery, motions, pleadings, roster meetings, scheduling and the like throughout the entire process leading up to trial were always subject to the Motion to strike the jury trial demand. Therefore, all of the intervening procedural and discovery matters were subject to the Motion being made, and no prejudice can therefore be claimed and no "agreement" or "consent" or "waiver" can be extracted from those proceedings or purported delay in the Motion. It is exactly the same as if Rule 39(a) were literally written to state expressly that such a Motion could be made up to the eve of trial. Those words are not there, but since there is *no* time limit, the case law has uniformly allowed "eve of trial" motions under Rule 39(a).

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[1] Technically the Motion was captioned *Motion for Trial by the Court and to Transfer Matter to Nonjury Docket.*

The key to understanding why such a motion to change a case to nonjury can be made at any time, even on the eve of trial, is this: **if the right to a trial by jury does not exist, that right was never assertable and any attempt to demand a jury trial when that right does not exist is a nullity and of no effect whatsoever** (except as to how the Clerk of Court must first calendar the case).

Sometimes the right to a jury trial, even if "so demanded," does not exist because the causes of action are purely equitable in nature and; therefore, are to be determined by the court.

Other times, the right to a jury trial might not exist because it was extinguished by a contractual waiver, as McKeown did. A contractual waiver of a jury trial eliminates the right, the same as if it never existed. A contractual waiver of a jury trial does not simply mask or cover up a jury trial right to be exposed to daylight at some later date. It eliminates it. Therefore, the court or any party can move at any time before trial to recognize that the right to trial by jury does not exist.

Once McKeown contractually surrendered its right to a jury trial, that right was extinguished. It ceased to exist. It was gone, and any demand for it was a nullity. "Courts have cited and applied this rule in decisions striking a jury demand because the right to a jury trial, having been contractually waived, ***no longer existed***." *Bear Stearns Funding, Inc. v. Interface Group-Nevada, Inc.*, 2007 WL 3286645 (S.D.N.Y.2007) at 3, fn 3. (citing *Tracinda,* 502 F.3d at 226-227; *Great Earth Int'l Franchising Corp. v. Milks Dev.,* 311 F.Supp.2d 419, 437

(S.D.N.Y.2004))(Emphasis added). *See also Quinn Construction, Inc. v. Skanska USA Building, Inc., et al,* 2010 WL 4909587 (E.D.Pa.2010)(holding that a party who has contractually waived trial by jury does not have the right to demand a jury trial).

As McKeown went through discovery and prepared for trial and attended status conferences, they knew or should have known that they had no right to that jury trial that they had demanded.

After the case had been transferred to the Jury Trial Roster under Rule 40, "roster meetings" were held during which the trial of the case was set for a jury term of Court. Greer State Bank agreed to the scheduling of the trial during a jury term week, and it agreed to continuances and rescheduling to later jury term week, but the automatic placement of the case on the Jury Trial Roster and the concurrence to setting the trial during a jury term of Court do not constitute a waiver of the contractual jury trial waiver. "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)).

The automatic transfer of a case to a Jury Trial Roster under *SCRCP* Rule 40 cannot constitute a "voluntary and intentional abandonment or relinquishment of a known right" or an "unequivocal intent to relinquish a known right," and, it is not an unequivocal abandonment of contractual rights to allow the scheduling of

a trial during a jury term of court when the law holds that a party is allowed to assert the jury trial waiver even as late as the eve of trial. Greer State Bank never agreed to a jury trial and to waive the contractual jury trial waiver.

The fallacy of McKeown's position set forth in their Brief can best be illustrated this way: If McKeown had not made a jury trial demand (and Greer State Bank certainly did not) but the case had been inadvertently placed on the Jury Trial Roster by the Court, there would be no question but that Greer State Bank would have been allowed on the eve of trial to point that error out to the Court, even after discovery, even after several continuances on the trial roster, and have the matter transferred to the Nonjury Docket. That is a "given." If it is pointed out to the Court that there was never a jury trial demand, then without question the trial judge would move it to the nonjury roster. If no jury trial demand had been made, there could be no prejudice, no argument about timeliness, and no argument about consent.

But McKeown did include a jury trial demand in his pleadings. The question is whether that jury trial demand, when he had no right to a jury trial, can operate to change the right of Greer State Bank to have the case transferred from the Jury Trial Roster even on the eve of trial. Stated another way, what effect does the nullity of an invalid jury demand have on the "right" to a jury trial. Simply put, no act of Greer State Bank can resurrect jury trial rights that have long since been dead because of McKeown's contractual waiver. That is why Rule 39(a) is written to allow the trial court, even on the eve of trial, to move the case to the nonjury roster on the court's motion or a party's motion. McKeown

attempts to bootstrap themselves into rights to a jury trial that they did not have, and they do so by an argument of "you should have caught me sooner and if you do not catch me soon enough, your delay blossoms into jury rights that I otherwise did not have." That is exactly what he argues to this Court, and it is why the Trial Court erred in denying Greer State Bank's Motion to try the matter nonjury.

And the irony of it all is that the case law holds that a party, in any event, can withdraw any purported consent to a jury trial at any time, as discussed below at pages 16-18.

B. McKeown has not presented a single case to contradict the legion of cases allowing a motion to strike a jury trial demand all the way up to the eve of trial under Rule 39(a).

McKeown's Brief does what every good lawyer does: "When you cannot find a single case to support your position on the law, then try to whittle away the cases against you. In other words, if the law is against you, change the law or, at least, attack the law to make it look inapplicable.....and if you must, try to distinguish a couple of cases and ignore the other cases against you." That is what this section of the Reply Brief responds to.

Greer State Bank's Brief cites the litany of cases from across the country that establish the law to be that a party may assert a jury trial waiver even on the eve of trial under Rule 39(a). McKeown does not cite a single case that deals with the motion to strike a jury trial demand under Rule 39(a). McKeown's one lonely case is from a state trial court in New York that does not address any rule of civil procedure, much less Rule 39(a). Instead, he resorts to "then make it look

like the other side has nothing" by poking at all the cases that support Greer State Bank's argument.

McKeown challenges the applicability of the seminal case of *Tracinda Corp. v. DaimlerChrysler AG,* 502 F.3d 212 (3d Cir. 2007),[2] by saying that there was no indication that the "bank" acquiesced and consented to a jury trial. (Brief of Respondents, p. 13.) First, McKeown continues the mantra that Greer State Bank agreed to a jury trial when it allowed the trial to be set during a jury term and maintains that this was not the case in *Tracinda.* He is not right that Greer State Bank agreed to a jury trial, and he is not right that this McKeown-style argument was not present in *Tracinda.* The motion to strike the jury demand in *Tracinda* was not filed until (1) approximately three years after Tracinda had demanded a jury trial, (2) after the close of discovery, (3) about six weeks before trial, and (4) approximately eight months after DaimlerChrysler filed its motions for summary judgment. *Id.* at 226. The *Tracinda* opinion does not explicitly state that the scheduled trial was a scheduled jury trial, but it is certainly implicit since the motion to strike a jury trial demand would have been pointless if it had been scheduled for a nonjury trial. Again, the *Tracinda* Court held that a jury trial demand could be struck on the eve of trial, even three years into the case and after discovery was closed and the matter only six weeks away from a [jury] trial. If anything, the facts under *Tracinda* would be more supportive of McKeown's

[2] The litigation in the *Tracinda* case was very protracted and resulted in multiple published decisions at the trial court level and then finally the Third Circuit opinion. McKeown's Brief incorrectly (and certainly inadvertently) cites a lower court cite at 197 F. Supp. 2d 42 (D. Del. 2002) which does not address the jury trial waiver. If the intent was to cite the pertinent trial court order, then correct cite for that is *Tracinda Corp. v. Daimlerchrysler AG,* No. 00-CV-993-JJF, 2003 WL 22769051 (D.Del. Nov.19, 2003). The Third Circuit opinion that Greer State Bank relies upon and that upheld the trial court striking the jury trial demand is cited as *Tracinda Corp. v. DaimlerChrysler AG,* 502 F.3d 212 (3d Cir. 2007).

argument than the Greer State Bank case, but this McKeown-style argument failed in *Tracinda*.

This McKeown-style argument likewise failed in *Poole v. Union Planters Bank, N.A.*, 337 S.W.3d 771 (Tenn.Ct.App.2010), which McKeown also challenges. (Brief of Respondents, p.13). McKeown dismisses the *Poole* decision as factually distinguishable. However, the *Poole* decision states: "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." *Id.* at 782. It is again implicit that the scheduling order was for a jury trial[3]. The facts in *Poole* are even stronger for "consent" to a jury trial since the bank in *Poole* had entered into a scheduling order for a jury trial, and yet it was still allowed later to assert the contractual jury waiver on the eve of trial. Like *Tracinda*, the facts in *Poole* are more supportive of the McKeown-style argument because the bank in that case had agreed to a scheduling order for a jury trial, which is not present in the present case.

McKeown then moves on to try to distinguish the case of *Regions Bank v. Lost Cove Cabins and Campgrounds, Inc.*, No. M2009-02389-COA-R3-CV, 2010 WL 4514957 (Tenn.Ct.App.Nov. 9, 2010) by stating that it is not applicable because "Greer State Bank consented to the mode of trial, even to the point of agreeing to a day certain jury trial." (Brief of Respondents, pp. 13-14). That is neither a distinction nor a difference. Scheduling orders set day certain trial or

[3] Greer State Bank is mindful that Keynotes to a published decision are written by the legal publishing companies and are not the opinion of the court, but the inference that the scheduling order scheduled a *jury* trial is buttressed by the Keynote #10 which states in part: "although trial court had entered a scheduling order setting case for ***jury*** trial and lender did not move to strike jury demand until nearly four years after commencement of suit,..." *Id.* (emphasis added.)

time frames. There was one in *Tracinda*[4], and there was one in *Poole*. And both of those courts clearly held that it made no difference.

But there is more to the *Lost Cove* case: the defendants in that case advanced the exact same argument as McKeown with virtually identical facts. Here is what that Court's decision said of the defendants' arguments, and these are virtually the same arguments in McKeown's Brief:

> 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. *Id.* at 5.

The *Lost Cove* Court applied the same law[5] on waiver as South Carolina, rejected the defendant's argument, and reaffirmed the right to assert a jury trial waiver at the eve of trial---even when the case had been pending for four and a half years and even after the plaintiff had allowed the case to be set on the jury docket "for some period of time." *Id.* Change the *Lost Cove* caption to the McKeown caption, and this appeal has been decided.

The only other "eve of trial" case that McKeown tries to get around is *Mowbray v. Zumot,* 536 F. Supp. 2d 617 (D. Md. 2008). McKeown simply dismisses *Mowbray.* (Brief of Respondents, p. 14.) The opinion in *Mowbray* does

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[4] While it is reasonable to infere that the court's scheduling order addressed the date of the jury trial, the *Tracinda* opinion does not specifically state one way or the other.

[5] For an effective waiver under Tennessee law, "there must be clear, unequivocal and decisive acts of the party or an act which shows determination not to have the benefit intended." *Id. at 5* (quoting *Gitter v. Tenn. Farmers Mut. Ins. Co.,* 60 Tenn.App. 698, 450 S.W.2d 780, 784 (Tenn.Ct.App.1969)).

not recite enough factual history to determine what had transpired prior to the issue of the jury trial waiver arising except to say that it came after a year and a half after the case had been removed and after motions and orders for summary judgment and after the close of discovery. The significance of *Mowbray* is the holding: "It is well established that a party...may move to strike a jury demand at any time, even on the eve of trial." *Id.* at 621. It is not fair for either party to state that more can be read into that case.

In support of its position, McKeown does cite the lone case of *Valmont, Inc. v. 171 Madison Associates,* 121436/99, 2001 WL 1537896 (N.Y.Sup.Ct. August 31, 2001), a trial court order, which held that the jury trial waiver is itself waived if not timely made. That begs the question of when can it be timely made. *Federal Rule of Civil Procedure* (*FRCP*) and *SCRCP* Rules 39(a) do not provide any time limit, and the *Tracinda* case and its progeny patently, unequivocally say that it is timely even if made on the eve of trial. Those cases rely on Rule 39(a), as does this present appeal. The *Valmont* court made no reference to any rule of civil procedure, much less any rule like *SCRCP* Rule 39(a). Therefore, the *Valmont* decision is of no significance in this appeal other than a statement of common law of New York without regard to any overriding rule of civil procedure.

That is the extent of McKeown's efforts to change or distinguish the cases that are aligned against him.

He does not challenge *Camel Square, LLC v. Rubin Companies, Inc.,* No. 1 CA-CV 09-0342, 2010 WL 2773399 (Ariz.Ct.App.2010) where the motion to strike jury trial demand was granted although it was made more than three years

after jury demand and only two months before trial was set to begin. *Id.* at *11. Again, inferentially, the scheduled trial had to have been a jury trial, otherwise a motion to strike a jury trial demand would have been moot.

Nor does McKeown argue against *Jones-Hailey v. Corporation of the Tennessee Valley Authority*, 660 F. Supp. 551 (E.D. Tenn. 1987) which reaffirmed that Rule 39(a) contains no time limit on a motion to strike a jury trial demand. There the plaintiff argues that the defendant had constructively consented to a jury trial through lack of objection to the jury demand and by participating in non-binding summary jury proceedings. That McKeown-style argument was again rejected.

A new case came out in February, 2012, the day before Greer State Bank filed its Brief. It, too, is contrary to McKeown. *Engines, Inc. v. MAN Engines & Components, Inc.*, 2012 WL 589558 (D.N.J. Feb. 22, 2012) was a case where the plaintiff decided to assert a jury trial waiver after that same plaintiff had executed a Joint Final Pretrial Order with the caption "Jury Trial Demanded" on the first page and only weeks before trial. Yet, the Court upheld the right to assert the jury trial waiver. The Court even made an express finding: "Both parties have conducted this litigation as if their disputes would be tried before a jury. Numerous colloquies with the Court bear this out." However, not even that was sufficient to overcome the jury trial waiver.

Interestingly, the *Engines* court made the same observation that is discussed above:

> Yet, MAN knew or should have known that it had waived its right to a jury. Its jury demand was therefore ineffective. *See, e.g. Quinn*

> *Construction,* 2010 WL 4909587 at *4 (noting that since plaintiff had "explicitly waived its jury right via contract" it had "no pre-existing right to make a demand" under Federal Rule of Civil Procedure 38, and therefore its demand was "without effect" under Rule 39); Fed.R.Civ.P. 39(a)(2) ("When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless the court ... finds that ... there is no federal right to a jury trial."). Accordingly, this matter will proceed to trial before the Court.

Id. at *1. Additionally, the *Engines* Court rejected any argument as to the timing and found that *FRCP* Rule 39(a) contained no time limitation, following the *Tracinda* holding.

Therefore, all of the cases addressing the timeliness of a jury trial waiver under Rule 39(a) hold that the waiver can be asserted even on the eve of trial, even if the party asserting the jury trial waiver had consented to or even demanded a jury trial. McKeown does not cite any case in support of their position, except *Valmont* which did not address timeliness under Rule 39(a).

In light of the absence of any legal support, it is understandable why McKeown does not focus on waiver and the "eve of trial" rule, but instead attempts a misdirect of the issue before this Court. McKeown takes the position that Greer State Bank consented to a trial by jury and, therefore, the issue of waiver is irrelevant. (Brief of Respondents, pp. 12-14.) For the reasons stated above, this argument must fail.

Boldly and perhaps brashly stated, this Court's decision is whether to follow the uniform precedent around the country or to forge new law unique to South Carolina.

C. Even if Greer State Bank had agreed to a jury trial, the law still allows it to assert the jury trial waiver.

Even if Greer State Bank had been found to have consented to a trial by jury, which it denies, Greer State Bank could nevertheless enforce its contractual right to a nonjury trial. As conceded by McKeown: "**The McKeowns agree that Rule 39 is clear and unambiguous**." (Brief of Respondents, p. 15.)(Emphasis added.) Notwithstanding the fact that Rule 39 is clear and unambiguous, McKeown attempts to read into Rule 39(a) limitations on Greer State Bank's right to a trial by the court when no such limitation is found within the plain language of Rule 39(a).

Specifically, nowhere does Rule 39(a) prevent Greer State Bank from moving to strike the jury trial demand at any time, even if it had previously been found to have consented to a jury trial. McKeown flatly misrepresents the "eve of trial" case law cited by Greer State Bank when McKeown states, "that not one of them involves a situation in which a moving party consents to a jury trial and then attempts to reverse course on the eve of trial." (Brief of Respondents, p. 13.)

To the contrary, there are at least two cases where this exact scenario was addressed. In *Kramer v. Banc of America Securities, LLC*, 355 F.3d 961 (7th Cir. 2004), plaintiff argued that defendant consented to a jury trial when defendant included a demand for a jury trial in its answer to the complaint and amended complaint. Subsequently, defendant sought to withdraw its consent which the trial court allowed, even though defendant had actually demanded a jury trial itself. In affirming the trial court, the Court of Appeals held, "[b]ut *Kramer* had no right to a jury trial and *there is no restraint of Rule 39 on the ability of a*

party to withdraw its consent to a jury trial that is not of right." 355 F.3d at 968 (Emphasis added.) In the present action, McKeown, having waived their right to trial by jury, does not have a "right" to a jury trial and, therefore, Greer State Bank properly withdrew any purported consent to a jury trial through its Motion for Trial by the Court.

Similarly, in *Jones-Hailey v. Corporation of Tennessee Valley Authority*, 660 F.Supp. 551 (E.D.Tenn. 1987), the plaintiff argued that the defendant had "either constructively or expressly consented to trial by jury in this matter and cannot now revoke its consent." The District Court rejected plaintiff's arguments, finding them unpersuasive.

> Rule 39(a) of the *Federal Rules of Civil Procedure* provides that a trial shall be by jury on all issues for which a jury was properly requested pursuant to Rule 38 unless "the court upon motion or its own initiative finds that a right of trial by jury of some are all of those issues does not exist under the constitution or statues of the United States." This rule contains no limit within which TVA was required to object to Jones-Hailey's jury demand."

Id. at 553.

Greer State Bank never consented to a jury trial, and even if it did it was freely allowed to withdraw that consent and assert its contractual rights to a trial by the court.

III. *SCRCP* Rule 39(c) does not apply since there was no Court Order that ordered a jury trial and there was no consent to a jury trial by the parties.

SCRCP Rule 39(c) states:

> **(c) Advisory Jury and Trial by Consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or the court, with the consent of

> both parties may order a trial by jury whose verdict has the same effect as if trial had been a matter of right.

The *consent* required by Rule 39(c) by which the court may order a trial by jury does not exist, and there has not been any court order unless the denial of Greer State Bank's Motion for Trial by the Court and to Transfer to Nonjury Docket were to constitute such an order.

McKeown relies upon *Horn v. Davis Electrical Constructors, Inc.*, 302 S.C. 484, 395 S.E.2d 724 (Ct. App.1980) *aff'd as modified*, 307 S.C. 559, 416 S.E.2d 634 (1992) for the proposition that parties implicitly agreed to a trial by jury. In *Horn,* the parties actually went through a jury trial and submitted equitable claims to a jury and pursued those claims through a jury verdict. It is no surprise that the parties would not then later be heard to complain of a jury trial. Those facts are light years from the present case.

Greer State Bank denies consenting to the trial by jury, pursuant to Rule 39(c) or otherwise. Nevertheless, this Court has previously held that the mere posture in which the parties find themselves with respect to litigation in and of itself is not sufficient to support a finding of consent under this Rule. *See First State Savings and Loan Association v. Nodine*, 291 S.C. 445, 354 S.E.2d 51 (Ct. App.1987) In *Nodine*, plaintiff brought an action to set aside a deed, clearly a matter in equity. Nevertheless, the case was tried before a jury. During trial, the trial judge granted plaintiff a directed verdict. In considering the standard of review, this Court noted that "[s]ince] the record does not reflect the parties consented to the jury rendering a final verdict, we treat the case as one tried in equity, and will review the record and determine the facts for ourselves." 291

S.C. at 448, 354 S.E.2d at 53 (internal citations and footnotes omitted.) Importantly, in a footnote this Court held:

> We are of the opinion also that the mere acquiescence of the parties in the irregular posture of this case did not infer a consent where the record reflects no affirmative consent.

Id. at fn. 1.

Like *Nodine*, any acquiescence in the posture of the present case does not support a finding of consent. In trying to reconcile *Horn* with *Nodine*, the conclusion must be that a jury trial to jury verdict constitutes consent, but under *Nodine* mere participation in the start of a jury trial that does not reach jury verdict does not constitute consent under Rule 39(c).

Finally, clearly the mode of trial, and the alleged consent, affect the proceedings and is, consequently, subject to the requirements of Rule 43(k), *SCRCP*. Therefore, even had Greer State Bank consented to having this matter heard by a jury, unless such was "reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel," such is not binding and, therefore, not enforceable. Rule 43(k).

IV. The Trial Court does not have discretion, pursuant to Rule 39(b), *SCRCP*, to order a jury trial in this matter.

McKeown argues for the first time that pursuant to Rule 39(b), *SCRCP*, a trial court has discretion to order a jury trial even when such right has been contractually waived by the parties. (Brief of Respondents, pp. 18-19.) For numerous reasons, McKeown's attempted misdirection must fail.

McKeown completely misconstrues Rule 39(b), *SCRCP*. Rule 39(b) grants the court "discretion upon motion" to order a trial by jury only when a party fails to timely demand a jury trial under Rule 38. Rule 39(b) neither explicitly nor implicitly authorizes the court to exercise its discretion haphazardly, particularly in light of a contractual waiver of jury trial to the contrary. Rule 39(b) is simply inapplicable.

Furthermore, the argument that a trial court has discretion to order a jury trial, over another party's contractually-based objection, completely ignores the well-established jurisprudence in this State, to wit: valid contractual jury trial waivers are enforceable and will be enforced by the trial courts of this State. See *North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe Inc.,* 307 S.C. 533, 416 S.E.2d 637 (1992); *Wachovia Bank v. Blackburn*, 394 S.C. 579, 716 S.E.2d 454 (Ct. App. 2011); and *Beach Company v. Twillman, LTD,* 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002). The validity of the jury trial waiver is not contested in this case.

Nevertheless, ignoring the plain language of Rule 39(b) and applicable controlling precedent, McKeown cites a few cases and an A.L.R annotation for the proposition that a trial court has discretion to order a jury trial in this matter pursuant to Rule 39(b). (Brief of Respondents, pp. 18-19.) The authority cited by McKeown is primarily concerned with a party's failure to timely demand a jury trial as is so clearly stated in Rule 39(b). In that instance, Rule 39(b) grants a trial court's discretion to order a jury trial. However, neither the cases nor the

annotation cited by McKeown address the exercise of discretion when one party seeks to enforce a contractual waiver of a jury trial.

Where this specific matter has been addressed, the courts have ruled that no discretion exists when the parties have contractually waived their right to a jury trial. *See e.g., Gelco Corp. v. Campanile Motor Service Inc.,* 677 So. 2d 952, 952 (Fla.Dist.Ct.App.1996)("A trial court commits error when it chooses to ignore the parties' waiver of jury trial and orders a common law jury trial. ...").

V. Respondents have suffered no legal prejudice.

McKeown argues they will suffer prejudice if the mode of trial ordered is consistent with their agreement. That position has been consistently rejected in all of the cited cases.

In support of their position that they have suffered prejudice, McKeown analogizes the present factual scenario to cases addressing waiver of arbitration provisions. (Brief of Respondents, p. 15.) In this, McKeown misses the point. Greer State Bank readily acknowledges that the appellate courts of this state have repeatedly held in arbitration cases that a party may not "take advantage of the judicial system" and thereafter invoke the right to arbitrate. *See, e.g., Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct.App.2007).

However, the reasoning and policy that apply in arbitration cases is simply inapplicable when the issue before the Court is the mode of trial, as opposed to judicial vs. non-judicial proceedings. As observed by the Court of Appeals in *Patterson v. Neil-Patterson & Associates, Inc.,* 312 S.C. 471, 441 S.E.2d 328 (Ct.App.1994):

> 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).

In contrast to arbitration cases, and as noted by the court in *Patterson*, when the issue before the court is the mode of trial, steps taken to prepare for one mode of trial cannot constitute prejudice if the court orders a different mode of trial. As "the *South Carolina Rules of Civil Procedure*... permit a [defendant] to fully investigate the merits of plaintiff's case" irrespective of the mode of trial. The trial judge in the present case correctly noted that arbitration cases are not analogous to the present case. (R. p. 221, ll. 11-22.) Counsel for McKeown acknowledged the difference. (R. p. 221, ll. 23-25.)

Apparently recognizing the weakness of their "arbitration" analogy, McKeown argues further that they will be prejudiced by spending several thousands of dollars in preparation for a jury trial, along with counsel enduring a few minor inconveniences. (Brief of Respondents, pp. 15-16.) This argument also misses the point. In those rare cases where courts have considered prejudice under these circumstances, the issue is not time and expense involved in preparing for one mode of trial, but whether a party is prejudiced by having the matter heard by the court as opposed to a jury. (Brief of Appellant, pp. 21-23.) Notwithstanding the standard for establishing prejudice, clearly enunciated in

Greer State Bank's Brief, McKeown fails to address the issue. There is simply no evidence in the record, nor could there be, to support the untenable proposition that McKeown would be prejudiced by having the matter heard by the court as opposed to a jury. McKeown's failure to address this issue is not only telling, but fatal.

VI. Respondent Rita W. McKeown's counterclaims are not a proper basis for the Trial Court to deny Greer State Bank's Motion for Trial by the Court.

In its Order, the Trial Court cited the existence of Respondent Rita A. McKeown's counterclaims as a basis for denying Greer State Bank's Motion for Trial by the Court. (R. p. 2) However, the existence of Respondent Rita A. McKeown's counterclaims is not a proper basis for denying Greer State Bank's motion as to the remaining Respondents. One party's right, or absence of right, to a jury trial is not dependent upon the rights of other parties to the same action as the court can order separate trials pursuant to Rule 42(b), *SCRCP*. However, and notwithstanding Rule 42(b), the mere existence of Respondent Rita A. McKeown's counterclaims will not prevent a trial by the court in light of Greer State Bank's stated trial strategy.

Greer State Bank advised the Court that upon a determination that Respondents McKeown Property on Lake Robinson, LLC and Bruce A. McKeown had contractually waived their right to trial by jury, then the Bank would dismiss its claim against Respondent Rita A. McKeown on her guaranty *with prejudice*. (R. p. 211, l. 9 - p. 214, l. 8.) Contrary to the hyperbole contained in McKeown's Brief (Brief of Respondents, p.17), Greer State Bank was not

"attempt[ing] to bargain with the Court" but merely advising the court of the Bank's trial strategy.

Specifically, Rita McKeown does not own any interest in the Respondent McKeown Property on Lake Robinson, LLC. Her only involvement in this matter is the guaranty that she signed. Upon Greer State Bank dismissing its claim on the guaranty against Respondent Rita A. McKeown's, she has no counterclaim, permissive or compulsory. Respondent Rita W. McKeown then would have the option to having her claims heard nonjury with the present action or, if appropriate, move for a separate trial under Rule 42(b). *See, Keels v. Pierce*, 315 S.C. 339, 433 S.E.2d 902 (Ct.App.1993)("If [the counterclaim] is permissive, the court, on its own motion or the motion of the pleader, may order a separate trial of the counterclaim pursuant to Rule 42(b) to avoid prejudice to the pleader's right to a jury trial.") But, Respondent Rita W. McKeown would not be entitled to a trial by jury in the present action. *Johnson v. South Carolina National Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987).

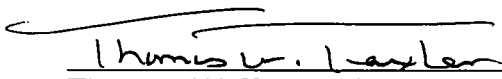
Respondent Rita W. McKeown's counterclaims are not a proper basis for denying Greer State Bank's motion to strike the remaining Respondents' request for a jury trial which, ultimately, will result in a nonjury trial for all Respondents in this action as set forth above.

Conclusion

The Trial Court erred in finding that Greer State Bank had waived the contractual jury waiver by McKeown and in failing to grant Greer State Bank's Motion for Trial by the Court and to Transfer Matter to Nonjury Docket. The Trial

Court's Order should be reversed and the matter remanded for a nonjury trial....just as McKeown and Greer State Bank bargained for.

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 29603, on May 22, 2012.

May 22, 2012

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