

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

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

Wachovia Bank, National Association, Petitioner,

v.

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

Of Whom William E. Blackburn; Judith Blackburn, are, Respondents,

v.

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

**RESPONDENTS' REPLY IN SUPPORT OF
PETITION FOR REHEARING**

March 27, 2014

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Pursuant to Rule 240, SCACR, Respondents file this Reply in support of their Petition for Rehearing. Respondents would rely upon their previous briefs and the Petition for Rehearing (including the Memorandum submitted), and would further reply to the arguments made in the Bank's Return to the Petition filed March 20, 2014.

A. Respondents assert the first four issues in the Petition were overlooked or misapprehended by the Court and thus are proper subjects for a Petition for Rehearing.

The Bank argues that the first four issues fail to identify an issue or fact overlooked or misapprehended by the Court.

1. As to issue #1, it is our position that the Court has wholly overlooked the reality that its ruling relegates constitutional rights to the exact same level of scrutiny as every other menial contractual term. The Bank's argument even says "as with other contract terms" when talking about jury trial waivers. That's the point – the waiver of a constitutional right is not, and should not be, "just another contract term". We believe the Court has overlooked the fact that its ruling vitiates any effectiveness of the requirement of a "knowing and intentional waiver" by finding that mere signature on a document constitutes the "knowing and intentional" waiver of a constitutional right.

2. The issue regarding whether the counterclaims are compulsory is contingent upon the Court changing its mind on issue #1, but the misapprehension asserted in issue #1 is therefore the basis for asserting misapprehension on this issue.

3. The issue of whether the court has mis-applied the doctrine of strict construction to the waiver in question is also an allegation that the court has misapprehended or overlooked this issue.

4. Similarly, as argued in the Petition, the Court has overlooked this issue by its summary reversal of the Court of Appeals' decision to use the "outrageous or unforeseeable tort exception."

B. Issue of Mere Signature Constituting Knowing and Intentional Waiver of a Constitutional Right

This issue is addressed in the Petition, but the Bank's response alleges that "there is no evidence presented to suggest that the Respondents...are ignorant or unwary." To the contrary, the only evidence in this case regarding the Respondents' knowledge is their affidavit indicating they did not know about the waiver provision.

C. Issue of Whether the Counterclaims are Compulsory

The Bank is right in stating that if the Court doesn't change its ruling on the mere signature being a knowing and intentional waiver, it will not reach this issue. However, if the issue is reached, the Bank's Return attempts to minimize the distinction between the "sale/loan transaction" and the "note/guaranties" by calling it an artificial distinction. While there is a distinction between those two, that characterization draws the Court's attention away from the truly important distinction, which is the different standards applicable to the determination of the compulsory/permissive issue and the very different determination of whether the claims are significantly related for purposes of the waiver clause (argued more fully in the Petition).

Further, the Bank's argument on page 4 of the Return highlights the very reason the clause does not apply. The Bank argues that "Respondents' claims squarely attack Petitioner for its course of conduct..with respect **to the circumstances underlying the execution of the loan documents.**" (emphasis added) The point is that the Bank (and the Court) is impliedly adding that language to the clause, because the clause only provides

that it applies to the course of conduct with respect “hereto” (which is the Note only, NOT the “circumstances underlying the execution of the loan documents”).

D. Issue of Strict Construction

The Bank argues that the waiver is broad. Again, it is not (see above, it only applies to the Note, not to the entire underlying and preceding sales transaction). And thus, it should be strictly construed.

E. Outrageous/Unforeseeable Torts Exception

This Court summarily, without explanation, reversed the Court of Appeals’ decision on this issue, and Respondents believe the Court overlooked this issue since there is no basis given for the decision.

F. Mr. Blackburn’s Inconspicuous Waiver

Despite the Bank’s protestation in the Return, its argument ignores the reality that Mr. Blackburn’s signature was not directly below the waiver clause and that the waiver clause was on the same page with other identical font and capitalization of other clauses.

G. Cross-claim and Third-party Claims as Permissive.


The Blackburns’ appeal, if successful on the main issue (that is, that mere signature is not sufficient evidence of knowing and voluntary waiver of a constitutional right), dominoes to the other issues raised herein, including whether the counterclaims were compulsory. If they were, then the jury trial waiver is invalid, and the cross- and third-party claims would also retain their jury trial demands.

H. Preservation of Unconscionability and Rule 39(b) Discretion

This issue is appropriately addressed in the Petition.

CONCLUSION

Respectfully, Respondents request a rehearing in this matter to address more fully the arguments described in the Petition.



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PROOF OF SERVICE

I certify that I have served one (1) copy of the Respondents' Reply in Support of Petition for Rehearing on each other party, by depositing copies of same in the United States Mail, postage prepaid, on March 27, 2014, addressed at the addresses set forth on the attached page.

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