



The Supreme Court of South Carolina

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April 2, 2014

The Honorable Alma Y. White
PO Box 479
Georgetown SC 29442-0479

REMITTITUR

Re: Wachovia Bank v. William E. Blackburn
Lower Court Case No. 2008CP2201598
Appellate Case No. 2011-203088

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

Daniel E. Shearouse
DS

CLERK

cc: Henrietta U. Golding, Esquire
Glenn V. Ohanesian, Esquire
Jack M. Scoville, Jr., Esquire
Henry Wilkins Frampton, IV, Esquire
Benjamin Albert Barody, Esquire
Robert C. Byrd, Esquire
Edward Bilbro Davis, Esquire
Alyson Smith Podris, Esquire
Alicia E. Thompson, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

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., 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.

Appellate Case No. 2011-203088

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27359
Heard December 5, 2013 – Filed February 26, 2014

REVERSED IN PART, AFFIRMED IN PART

Robert C. Byrd and Alyson Smith Podris, both of Parker, Poe, Adams, & Bernstein, LLP, both of Charleston, for Petitioner.

Glenn V. Ohanesian, of Ohanesian & Ohanesian, of Myrtle Beach, for Respondents.

CHIEF JUSTICE TOAL: Wachovia Bank, National Association (Wachovia), appeals the court of appeals' decision reversing the circuit court's determination that William and Judith Blackburns' (collectively, Respondents) counterclaims in a mortgage foreclosure suit were within the scope of a jury trial waiver signed by Respondents. We reverse in part and affirm in part.

FACTS/PROCEDURAL BACKGROUND

On July 23, 2005, Winyah Bay Holdings, LLC (the Seller), held an event aimed at selling marsh-front lots located in South Island Plantation, an affluent, to-be-built housing development in Georgetown County. The Seller conducted the sale by lottery, using balls and numbers like the South Carolina Education Lottery,¹ and geared the event toward on-the-spot sales. To facilitate same-day sales, the Seller had Wachovia and two unrelated realty and marketing companies (the Realtors) set up booths to promote financing the lot sales. Respondents allege that the Seller, the Realtors, and Wachovia further enticed potential buyers by promising that "day docks, roads, infrastructure, pool [sic], marsh walks, and other amenities would be in place within 18 months of the lottery." Respondents claim that these promises induced them into participating in the lottery.²

Over six months later, on February 14, 2006, Respondent William Blackburn delivered a promissory note to Wachovia in the amount of \$463,967 to finance the purchase of one of the South Island Plantation lots. The note was secured by a mortgage and unconditional personal guaranties executed by Tammy Winner, Watson Felder, and Respondents.³

¹ It is a misdemeanor under South Carolina law to sell houses or land by lottery. S.C. Code Ann. § 16-19-10 (2003).

² Although unclear from the Appendix, Respondents presumably signed the sales contract on July 23, 2005, the day of the event.

³ On October 12, 2007, Felder conveyed his interest in the property to Gary

The note and guaranties contained virtually identical jury trial waivers:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER . . . AND BANK . . . KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR *ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO.* THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE

(Italic emphasis added).

Beginning in July 2008, Respondents failed to make payments on the note. Therefore, on November 13, 2008, Wachovia filed a foreclosure action. In its complaint, Wachovia stated that the note was in default, that they had accelerated the balance of the loan, and that they were thus entitled to judgment against the defendants in the amount of \$473,747.24.

Respondents answered, asserting counterclaims against Wachovia, cross-claims against the South Island Plantation Association, Incorporated (the Homeowners' Association), and a third-party complaint against the Seller and the Realtors. At issue here are the counterclaims against Wachovia, which include claims for negligent misrepresentation, promissory estoppel, breach of contract/breach of contract accompanied by a fraudulent act, breach of fiduciary duty, fraud/fraud in the inducement, breach of contract/negligence, breach of contract, civil conspiracy, illegality of contract, and violations of the South Carolina Unfair Trade Practices Act (the SCUTPA).⁴

Ownbey. Respondents received assignments of rights from Winner and Felder to pursue their claims both individually and as assignees. As such, Winner, Felder, and Ownbey are not parties to this appeal.

⁴ As to the cross-claims and third-party complaint, the circuit court found that, because Respondents chose to raise those claims in a non-jury foreclosure

The gravamen of the counterclaims was that Wachovia "was an agent of, partner of, joint venture [sic] with, or conspirator with" the Seller and the Realtors such that the allegedly wrongful actions of the Seller and the Realtors were "imputed to" Wachovia. According to Respondents, Wachovia, the Seller, and the Realtors "artificially inflated [property values] through collusion by the parties" and promised that various amenities would be in place within eighteen months of the lottery. Respondents contended that the amenities were not completed in a timely manner as promised, and that they were damaged by the delays.⁵ Respondents demanded a jury trial on their counterclaims, requesting monetary damages and rescission of the sales and loan contracts as a remedy for their claims.

Wachovia moved to strike the jury demand and refer the entire matter to the master-in-equity, arguing that Respondents contractually waived their right to a jury trial by executing the note and guaranties, all of which included the jury trial waivers. The circuit court granted Wachovia's motion, holding that the language of the waivers in the loan documents encompassed Respondents' counterclaims, and that Respondents knowingly and voluntarily waived their right to a jury trial through the clear and unambiguous waivers.⁶

Respondents appealed, arguing, *inter alia*, that (1) their jury trial waivers were not knowingly and voluntarily entered into and that (2) South Carolina's so-called "outrageous and unforeseeable torts exception" to arbitration agreements applied to jury trial waivers as well, thus determining whether the sales transaction was "significantly related" to the loan transactions, and whether the counterclaims fell within the scope of the contractual jury trial waiver provisions.

proceeding, they had waived any right to a jury trial on those claims. Respondents did not appeal this ruling.

⁵ According to Respondents, the amenities were in place as of the spring of 2008; however, Respondents did not miss a payment until July 2008.

⁶ Respondents also argued that the waivers were unconscionable and that the circuit court could order a jury trial in its discretion pursuant to Rule 39(b), SCRPC. However, the circuit court did not rule on these issues in its order, and there is no indication in the Appendix that Respondents ever filed a motion to reconsider prior to their initial appeal to the court of appeals. *See* Rule 59, SCRPC. As such, these issues are not preserved, and we will not address them further. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

The court of appeals affirmed in part and reversed in part. *Wachovia Bank, N.A. v. Blackburn*, 394 S.C. 579, 590, 716 S.E.2d 454, 460 (Ct. App. 2011). It held that, although the circuit court correctly found that the waivers were knowing and voluntary, the outrageous and unforeseeable torts exception was "instructive" in determining that the counterclaims were not significantly related to the loan transactions. *Id.* at 584–90, 590 n.9, 716 S.E.2d at 457–60, 460 n.9. Further, the court of appeals found that the counterclaims involved only the sales transaction, and the jury trial waivers only applied to the loan transactions. *Id.* at 588–90, 716 S.E.2d at 459–60. Therefore, the court of appeals found that Respondents' counterclaims were outside the scope of the jury trial waivers and, thus, Respondents were entitled to a jury trial on those claims. *Id.* This appeal followed.

ISSUES

- I. Whether the circuit court and court of appeals applied the correct law regarding counterclaims brought in response to an equitable action?
- II. Whether the jury trial waivers were knowingly and voluntarily executed by Respondents?

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775–76 (1976). However, "[w]hether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Appellate courts may decide questions of law with no particular deference to the circuit court's findings. *Id.* at 15, 690 S.E.2d at 772–73.

ANALYSIS

I. Counterclaims in an Equitable Action

Wachovia's foreclosure action is an action in equity. *Hayne Fed. Credit Union*, 327 S.C. at 248, 489 S.E.2d at 475. "In equity the parties are not entitled, as a matter of right, to a trial by jury." *Williford v. Downs*, 265 S.C. 319, 321, 218

S.E.2d 242, 243 (1975). However, counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial. As we have previously explained:

- (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim. In that case, the proper procedure is as follows:
 - (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
 - (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
 - (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

Johnson v. S.C. Nat'l Bank (Johnson II), 292 S.C. 51, 55–56, 354 S.E.2d 895, 897 (1987) (citation omitted) (internal quotation marks omitted), *modifying C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301–02, 350 S.E.2d 191, 193 (1986); *see also N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989) (utilizing the same rules as *Massengale* and *Johnson II*, but focusing on the difference between permissive and compulsory counterclaims).

Because the issue of jury trial waivers has not arisen in subsequent cases involving this analytical framework, we have not had the opportunity to address where such waivers might fit into the framework. We take the opportunity now to modify the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims.

- (1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.
- (2) If both are at law, the issues are triable by a jury.
- (3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.
- (4) If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim unless a valid jury trial waiver exists that encompasses the counterclaim. If such a waiver does not exist, the proper procedure for handling the counterclaims is as follows:
 - (a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.
 - (b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.
 - (c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

As will be discussed, *infra*, this case is unusual in that the dispositive issue is whether the claims are permissive or compulsory; therefore, we address that issue first.

"By definition, a counterclaim is compulsory only if it arises out of the same

transaction or occurrence as the opposing party's claim." *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 495, 730 S.E.2d 328, 332–33 (Ct. App. 2012) (quoting *First-Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991)); *see also* Rule 13(a), SCRCP.⁷ Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are, instead, permissive. Rule 13(b), SCRCP.

Respondents argued consistently throughout the litigation that the sales and loan transactions were *separate transactions*, and that the wrongs done to them were related solely to various torts committed in the sales transaction. They therefore asserted that the jury trial waivers found in the loan documents—which applied to "any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party" involving the note or the guaranties—only applied to torts committed during the loan transactions, but not to those committed during the sales transaction. Thus, Respondents claimed that the jury trial waivers they executed in connection with the loan documents did not bar their counterclaims related to the sales transaction. However, Respondents simultaneously argued that their counterclaims were *compulsory, i.e.*, that they arose out of the same transaction or occurrence as Wachovia's loan foreclosure action.

We find it unnecessary to determine whether the claims were permissive or compulsory because, in either event, Respondents are not entitled to a jury trial.

⁷ We have previously adopted the "logical relationship" test to determine whether a counterclaim is compulsory under this definition. *N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. at 518, 381 S.E.2d at 905. Under this test, "the 'logical relationship' determination is made by asking whether the counterclaim would affect the lender's right to enforce the note and foreclose the mortgage." *Wells Fargo Bank*, 398 S.C. at 496, 730 S.E.2d at 333; *see also N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. 518–19, 381 S.E.2d at 905. If the defendant's prevailing on his counterclaim would affect the bank's right to enforce the note and foreclose the mortgage, there is a logical relationship between the counterclaim and the underlying suit, and the counterclaim is therefore compulsory. *N.C. Fed. Sav. & Loan Ass'n*, 298 S.C. 518–19, 381 S.E.2d at 905 (finding counterclaims involving breach of an oral agreement purporting to modify a note that the bank was foreclosing on were logically related to the enforceability of the note and thus were compulsory); *Wells Fargo Bank*, 398 S.C. at 496, 730 S.E.2d at 333 (determining a counterclaim alleging a note was unconscionable was logically related to the enforceability of the note and thus was compulsory).

For example, if we found that, as Respondents contended, the sales transaction was separate from the loan transactions, then by definition the counterclaims would be permissive. Wachovia's action is a foreclosure action centered entirely on obligations created by the loan documents. If the sale was separate from the loan, then the counterclaims involving the sale did not "aris[e] out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(b), SCRCF. Therefore, because Respondents raised such permissive counterclaims in an equitable action, they waived their right to a jury trial on the claims. See *Johnson II*, 292 S.C. at 55, 354 S.E.2d at 897.

On the other hand, if we found that the sales and loan transactions were all one continuous transaction or occurrence such that the counterclaims could possibly be considered compulsory under Rule 13(a), SCRCF, the jury trial waivers necessarily apply. Respondents waived their right to a jury trial for any claim related to "any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party" involving the loan documents. Therefore, if we view the sales and loan transaction as one continuous transaction, the sales transaction falls squarely within the coverage of the waiver provisions.

Accordingly, as stated, *supra*, whether the counterclaims were legal or equitable makes no difference *in this instance*. To the extent any of Respondents' counterclaims were equitable in nature, they did not have a right to a jury trial on those claims. *Id.* To the extent any of Respondents' counterclaims were legal—regardless of whether the claims were permissive or compulsory—Respondents waived their right to a jury trial, either through the waiver provisions or because they raised their permissive claims in an equitable action. Respondents may only avoid this result if the contractual jury trial waivers executed in connection with the loan documents are invalid and unenforceable. Therefore, we turn next to that issue.

II. Knowing and Voluntary Waivers

Both the court of appeals and the circuit court found that the jury trial waivers were enforceable because Respondents executed them knowingly and voluntarily. We agree and find the waivers enforceable.

"A party may waive the right to a jury trial by contract." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002) (citing *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992)). However, although the right to a trial by jury is a substantial right, and we "strictly construe" such waivers, *id.* at 64, 566 S.E.2d at

866, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229; 230 (1981); *Evans v. State Farm Mut. Auto. Ins. Co.*, 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977)). Instead, when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents. *Id.* at 663–64, 582 S.E.2d at 440 (citing several of this Court's cases). "The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document." *Id.* at 664, 582 S.E.2d at 440 (citing *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994)).

By signing the note and guaranty, Respondents are charged with having read their contents; therefore, although they assert via affidavit that they were "not aware of any jury trial waiver clause until the motion to strike [their] request for jury trial was made by" Wachovia, they cannot avoid the effects of the waivers merely by arguing that they were unaware that such provisions were included in the note and guaranty.⁸ See *Regions Bank*, 354 S.C. at 663, 582 S.E.2d at 440. We therefore find the waivers enforceable and applicable to any of Respondents' counterclaims that are legal and compulsory.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals is affirmed in part and reversed in part. We affirm the portion of the judgment finding that the waivers were executed knowingly and voluntarily; however, we reverse the portion finding that the outrageous and unforeseeable torts exception to arbitration applies in the jury trial waiver context, and find instead that Respondents waived their right to a jury trial on all of their counterclaims.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

⁸ Further, the waivers here are conspicuous and unambiguous. Unlike the other provisions in the note and guaranties, the waivers are printed in all capital letters and have a bold heading called "**WAIVER OF JURY TRIAL.**" They are located at the very end of the six-page document, directly above the signature line, thus making the conspicuous font even more noticeable, even at a quick glance.

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

Wachovia Bank, National Association,
Respondent,

v.

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

Of Whom William E. Blackburn and Judith
Blackburn are, Appellants.

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 4874
Heard April 5, 2011 – Filed August 24, 2011

AFFIRMED IN PART AND REVERSED IN PART

Glenn V. Ohanesian, of Myrtle Beach, for
Appellant.

Robert C. Byrd and Krista McGuire, both of
Charleston, for Respondent.

LOCKEMY, J.: In this mortgage foreclosure action, William and Judith Blackburn appeal the circuit court's order granting Wachovia's motion to strike their jury trial demand. We affirm in part and reverse in part.

FACTS/PROCEDURAL BACKGROUND

On February 14, 2006, William Blackburn delivered a promissory note (the note) to Wachovia in the amount of \$463,967 to finance the purchase of "investment property" (the property) in South Island Plantation, a Georgetown County planned development. The note was secured by a mortgage on the property executed by William Blackburn, Judith Blackburn, Tammy

Winner, and Watson Felder. Judith Blackburn, Winner, and Felder also executed personal guaranties to secure the note.^[1] The note and each of the guaranties contained waiver of jury trial provisions. The note signed by William Blackburn contained the following jury trial provision:

WAVIER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF BORROWER BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS NOTE, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS NOTE, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS NOTE

(bold and capitalization in original, font size not to scale). The guaranty signed by Judith Blackburn contained the following jury trial provision:

WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF GUARANTOR BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS GUARANTY, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO ACCEPT THIS GUARANTY. . . .

(bold and capitalization in original, font size not to scale).

On November 13, 2008, Wachovia filed this foreclosure action against the Blackburns, Winner, and Felder, asserting the note was in default and it was entitled to a judgment against the defendants in the amount of \$473,747.24. In response, the Blackburns filed a second amended answer, counterclaim, cross-claim, and third-party complaint in which they asserted claims against Wachovia and several third-party defendants.^[2] The Blackburns asserted the following counterclaims against Wachovia: (1) negligent misrepresentation, (2) unfair trade practices, (3) promissory estoppel, (4) breach of contract/breach of contract accompanied by a fraudulent act, (5) breach of fiduciary duty, (6) fraud/fraud in the inducement, (7) breach of contract/negligence, (8) breach of contract, (9) civil conspiracy, and (10) illegality of contract.

The Blackburns alleged Wachovia partnered with the third-party defendants^[3] to promote and sell the property at a "high pressure" sales event which included a lottery. According to the Blackburns, Wachovia and the third-party defendants defrauded buyers by artificially inflating property values and making misrepresentations regarding the construction of amenities in the development. The Blackburns demanded a jury trial.

On June 18, 2009, Wachovia filed a motion to strike the Blackburns' jury trial demand and refer

the case to the master-in-equity. Wachovia argued the Blackburns waived their right to a jury trial in the note and guaranty. In a memorandum opposing Wachovia's motion to strike, the Blackburns alleged (1) there was not a knowing and voluntary-waiver, (2) the language of the waivers did not apply to their counterclaims, (3) the waivers were unconscionable, and (4) the circuit court could order a jury trial in its discretion pursuant to Rule 39(b), SCRCP. In a December 7, 2009 order, the circuit court granted Wachovia's motion, finding the jury trial waivers in the note and guaranty were clear and unambiguous and the Blackburns' counterclaims were within the scope of the waivers. The circuit court held the Blackburns were charged with having read the contents of the note and guaranty and were on notice of the jury trial waivers. The circuit court found the Blackburns' Rule 39(b), SCRCP, argument was without merit, and referred the action to the master. This appeal followed.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). "In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence." Id.

"Whether a party is entitled to a jury trial is a question of law." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [circuit] court." Id. at 15, 690 S.E.2d at 772-73.

LAW/ANALYSIS

I. Knowing and Voluntary Waiver

The Blackburns argue they did not knowingly and voluntarily waive their right to a jury trial. We disagree.

The Blackburns contend there is no evidence in the record they had actual knowledge of the waivers. They maintain the only evidence regarding whether they knowingly and voluntarily waived their right to a jury trial is their affidavit. In their affidavit, the Blackburns asserted they did not knowingly, voluntarily, or intentionally waive their right to a jury trial and were "not aware of any jury trial waiver" until Wachovia's motion to strike jury demand. In their brief, the Blackburns rely on Leasing Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986) to support their contention that a party seeking the enforcement of a waiver must prove that consent was both voluntary and informed. The Blackburns note the Crane court cited National Equipment Rental Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977), wherein the Second Circuit affirmed a finding that a provision whereby a lessee waived a jury trial buried in the eleventh paragraph of a fine print, 16-clause agreement did not constitute a knowing and intelligent waiver of the lessee's right to a jury trial.

Wachovia argues that by signing the note and guaranty, the Blackburns are deemed to have read the documents and cannot avoid their effects by arguing otherwise. Wachovia maintains it did not have a duty to ensure the Blackburns had read and understood the terms of the note and guaranty. Wachovia further contends the waivers are conspicuous, the note and guaranty are not lengthy documents, and there is no evidence the Blackburns are unsophisticated or were incapable of understanding the note and guaranty.

We agree with Wachovia. First, we note that while the Blackburns rely on federal case law in

their brief, a parties' right to a jury trial in South Carolina is governed by state law. See Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978) (holding the Seventh Amendment to the United State Constitution is not applicable to the States).

We do not believe the Blackburns can avoid the waivers in the note and guaranty by arguing they were not knowing and voluntary. "A party may waive the right to a jury trial by contract." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002). "Such a waiver must be strictly construed as the right to trial by jury is a substantial right." Id. at 64, 566 S.E.2d at 866. "When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense." S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 381, 588 S.E.2d 643, 645 (Ct. App. 2003). "A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it." Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). "A person signing a document is responsible for reading the document and making sure of its contents." Id. "Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it." Id. "One who signs a written instrument has the duty to exercise reasonable care to protect himself." Id. at 665, 582 S.E.2d at 440. "The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document." Id.

Here, the waivers are conspicuous and unambiguous. They are printed in all capital letters with the bold heading, "**WAIVER OF JURY TRIAL.**" Furthermore, the note and guaranty are not lengthy documents and the waivers contained therein are not buried within the language of other provisions. Rather, the waivers are contained in separate paragraphs located just above the signature lines. By signing the note and guaranty, the Blackburns are charged with having read their contents, and therefore, they cannot avoid their effects by arguing they were unaware of the inclusion of the waivers. See Regions Bank, 354 S.C. at 663, 582 S.E.2d at 440 ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it."); see also Id. ("Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it."). Accordingly, we find the jury trial waivers are enforceable.

II. Applicability

The Blackburns argue the jury trial waivers in the note and guaranty do not apply to their counterclaims. We agree.

Pursuant to the note and guaranty, the waivers at issue apply to

any litigation based on, or arising out of, under or in connection with this note [or guaranty], the loan documents or any agreement contemplated to be executed in connection with this note [or guaranty], or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect hereto.

The Blackburns allege that while their counterclaims arise out of the same occurrence as the note, they do not arise out of the loan documents as required by the waivers. Pursuant to the note, "loan documents"

refers to all documents executed in connection with or related to the loan evidenced by this Note and any prior notes which evidence all or any portion of the loan evidenced by this Note, and any letters of credit issued pursuant to any loan agreement to which this Note is subject, any applications for such letters of credit and any other documents executed in connection therewith or related thereto, and may include, without limitation, a commitment letter that survives closing, a loan agreement, this Note, guaranty agreements, security agreements, security instruments, financing statements, mortgage instruments, any renewals or modifications, whenever any of the foregoing are executed, but does not include swap agreements.

The Blackburns contend their counterclaims arise from Wachovia's sales misrepresentations and failure to abide by promises to build infrastructure, amenities, and docks, and do not arise from the loan documents.^[4] They maintain the definition of "loan documents" does not include sales contracts, deeds, promotional literature from the developer/seller, lottery procedure, or promises regarding docks and amenities and infrastructure. They also assert their counterclaims do not arise from the note, mortgage, loan application, financing statements, letters of credit, or any of the loan documents defined above. The Blackburns further argue the allegations of sales misrepresentations in their counterclaims are unrelated to the note, and thus, not subject to the waivers. The Blackburns rely heavily on Aiken v. World Finance Corp. of South Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007) and Partain v. Upstate Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010), two supreme court cases involving arbitration agreements, to support their argument.

Aiken involved a tort action based on the theft of Aiken's personal information by employees of World Finance. 373 S.C. at 146, 644 S.E.2d at 706. In Aiken, World Finance sought to enforce an arbitration clause to which Aiken had agreed in applying for a loan. Id. at 147, 644 S.E.2d at 707.

The Aiken court found that "even the most broadly-worded arbitration agreements still have—limits founded in general principles of contract law," and therefore, the court "will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." Id. at 151, 644 S.E.2d at 709. The court provided that it did not seek to exclude all intentional torts from the scope of arbitration, but only "those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties." Id. at 152, 644 S.E.2d at 709. The Aiken court found the theft of Aiken's personal information by World Finance employees to be unanticipated and unforeseeable tortious conduct that was not within the scope of the arbitration agreement. Id. at 151, 644 S.E.2d at 709.

In Partain, Partain alleged Upstate Auto fraudulently replaced the truck he purchased with a different truck at the time of pick-up. 386 S.C. at 490, 689 S.E.2d at 603. Partain filed suit against Upstate Auto alleging he was the victim of a "bait and switch" in violation of the South Carolina Unfair Trade Practices Act. Id. Based on an arbitration agreement, Upstate Auto moved to dismiss Partain's claim. Id. The Partain court found Aiken was controlling and concluded the arbitration clause did not apply because "the alleged actions of Upstate Auto constituted 'illegal and outrageous acts' unforeseeable to a reasonable consumer in the context of normal business dealings." Partain, 386 S.C. at 493, 689 S.E.2d at 604-05. Our supreme court noted Partain could not be held to have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had

agreed to purchase. Id. at 494, 689 S.E.2d at 605. Moreover, the court found Partain could not have "contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct." Id.

Similarly, the Blackburns argue they cannot be held to have contemplated that, in signing the note and guaranty, they were agreeing to waive jury trial claims arising from allegedly fraudulent conduct. They contend that a reasonable person attempting to secure a loan from a bank could not foresee that the bank would partner with the developer/seller and make misrepresentations about the property and the construction of amenities.

Wachovia asserts the Blackburns' counterclaims are within the scope of the waivers because their claims concern Wachovia's "course of conduct," "course of dealing," "actions," and "statements" with respect to the loan transaction. Wachovia maintains the counterclaims arise out of the note because the Blackburns allege Wachovia, as part of its course of dealing, made misrepresentations to induce them to enter into the loan. Wachovia notes the Blackburns allege the marketing of the property, the sale of the lots, and the provision of Wachovia loans were all part of a single transaction orchestrated by a partnership between Wachovia and the developers. Wachovia also alleges the Blackburns' counterclaims arise out of the property sales contract, which is an "agreement contemplated to be executed in connection with the note" and guaranty. Wachovia maintains our supreme court's holdings in Aiken and Partain (1) do not apply outside of the context of arbitration agreements, (2) apply only to consumer transactions, and (3) the Blackburns have not alleged any "outrageous" conduct like that which was excepted in Aiken and Partain.

We do not believe the allegations of sales misrepresentations and pre-purchase fraud by the Blackburns are sufficiently related to the note, and thus, we do not believe they are subject to the waivers. Jury trial waivers are a substantial right and must be strictly construed. Beach Co., 351 S.C. at 64, 566 S.E.2d at 866. Pursuant to the note and guaranty, the waivers apply to "any litigation based on, or arising out of, under or in connection with [the] note, the loan documents or any agreement contemplated to be executed in connection with [the] note." First, we find the Blackburns' counterclaims are not based on nor do they arise out of the note. The Blackburns' claims are based on the sales contract, the promotional literature regarding the development, the lottery procedure, and the promises made regarding amenities. Second, we find the Blackburns' claims are not based on or arise out of the loan documents. The definition of "loan documents" does not include sales documents, and the sales documents were not "executed in connection with or related to the loan" as required by the definition. Third, we find the sales contract was not an "agreement contemplated to be executed in connection with [the] note," as it was executed months prior to the note. Finally, we find the waivers do not apply to "any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect [to the note]." We note this clause refers to conduct and actions with respect to the note and does not refer to the sales transaction.

Furthermore, the Blackburns could not have contemplated that in signing the note and guaranty, they were waiving their right to a jury trial on claims arising from allegedly fraudulent conduct. See Aiken, 373 S.C. at 151, 644 S.E.2d at 709 (holding the theft of Aiken's personal information by World Finance employees was unanticipated and unforeseeable tortious conduct that was not within the scope of the arbitration agreement); see also Partain, 386 S.C. at 494, 689 S.E.2d at 605 (holding Partain could not have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct).^[5] We find a reasonable buyer would not contemplate that a bank would partner with

a developer/seller and make misrepresentations about a property and the construction of amenities. The Blackburns' counterclaims arise out of the alleged pre-sale misrepresentations and fraud of Wachovia, and not out of the note. Although the waivers are enforceable with regard to claims arising from the note, we find the Blackburns' allegations of sales misrepresentations and pre-purchase fraud are not within the scope of the waivers.

Accordingly, applying a strict construction of the language of the waivers, we find they are unenforceable with regard to the Blackburns' counterclaims.[6]

CONCLUSION

We affirm the circuit court's determination that the Blackburns knowingly and voluntarily waived their right to a jury trial. However, we reverse the circuit court's determination that the Blackburns' counterclaims were within the scope of the waivers.[7]

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAMS and GEATHERS, JJ., concur.

[1] On October 12, 2007, Felder conveyed his interest in the property to Gary Ownbey.

[2] The Blackburns filed their original answer on February 2, 2009, and amended answer, counterclaim, cross-claim, and third party complaint on February 13, 2009.

[3] The third-party defendants included Winyah Bay Holdings, LLC; Source One Properties, LLC; and Waterpointe Realty, LLC.

[4] The Blackburns maintain Wachovia "injected itself into the marketing and sale of [the] property . . . , became a joint venturer or partner, and is therefore equally liable for sales misrepresentations made and failures to provide infrastructure, amenities, docks, etc."

[5] While Aiken and Partain involve arbitration agreements and not jury trial waivers, we believe they are instructive.

[6] We note this opinion does not preclude the circuit court, after appropriate discovery and/or testimony, from striking any or all of these counterclaims as insufficient and, if appropriate, referring any remaining equitable matters to the master-in-equity.

[7] Based upon our reversal of the circuit court's order granting Wachovia's motion to strike jury demand, we need not address the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).