

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2008-CP-22-1598

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, Respondents,

v.

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

**RESPONDENTS' RETURN
TO PETITION FOR WRIT OF CERTIORARI**

January 20, 2012

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COUNTER STATEMENT OF THE CASE

Respondents Blackburn would rely upon the previous Statements of the Case and Facts as found in its Final Briefs previously filed. Respondents would also refer the Court to the legal arguments and conclusions previously raised in both of the Blackburns' previously filed briefs and the Court of Appeals' Opinion. That said, and because the nature of the counterclaims are at the center of this appellate dispute, Respondents would like to recount the nature of the counterclaims presented. Wachovia (hereinafter "the Bank") argues that the Blackburns' claims are simple, routine, misrepresentations of the construction schedule, and asserts that these claims are "nothing unusual", "routine", "commonplace", and that "few disputes are more prosaic". To the contrary, the Blackburns would assert that they certainly believe it is not "routine" or "commonplace" that a lender would, in joint venture with a developer and realtors, lie about property values to induce purchasers to pay exorbitant prices, make promises about docks when in fact no such permits had even been applied for (much less approved), and publish false marketing material in conjunction with an illegal lottery and high pressure sales. Then after having engaged in such fraudulent and improper activity, the Bank without justification through its joint venture prevented the Blackburns from selling the property without justification. These and other claims were framed as causes of action for fraud, unfair trade practices, illegality, civil conspiracy, negligent misrepresentation, promissory estoppel, breach of contract/breach of contract accompanied by fraudulent act, and breach of fiduciary duty. The Blackburns believe this type of fraudulent scheme and illegal behavior is far from routine, commonplace, or prosaic as argued by the Bank. (Contradictorily, the Bank for

purposes of this argument calls the claims routine and commonplace but in other arguments in the Petition refers to the claims as the result of “artful pleading” and “creative argumentation”).) As concluded by the Court of Appeals, the claims justify a jury trial, fall outside the scope of the jury trial waivers presented in this case, and involve fraudulent, unforeseeable torts.

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS ERR WHEN IT FOUND THAT THE PLAIN, SPECIFIC LANGUAGE OF THE PURPORTED WAIVER DID NOT APPLY TO THE BLACKBURNS' COUNTERCLAIMS?
2. DID THE COURT OF APPEALS ERR WHEN IT FOUND THAT THE RATIONALE OF THE FRAUDULENT AND UNFORESEEABLE CLAIMS EXCEPTION APPLIES TO JURY TRIAL WAIVERS?
3. DID THE COURT OF APPEALS ERR WHEN IT FOUND THAT THE BLACKBURNS' COUNTERCLAIMS WERE FRAUDULENT AND UNFORESEEABLE CLAIMS WITHOUT A SPECIFIC FINDING OF “OUTRAGEOUSNESS”?
4. DID THE COURT OF APPEALS ERR BY FINDING THE BLACKBURNS' COUNTERCLAIMS WERE NOT ROUTINE, FORESEEABLE CLAIMS?

ARGUMENT I.

Wachovia argues that the language “course of dealing” in the waiver means all dealings between Wachovia and the Blackburns, even if those dealings pre-dated the note and were unrelated to the loan documents. The Bank ignores that the “course of dealing” language in the Note is specifically restricted in the waiver by the words “with respect

hereto”. That clearly refers only to the Note, not the entire sales transaction. Most of the Blackburns’ claims do not arise from the course of dealing with respect to the Note – they arise from the course of dealing with respect to the sales fraud, illegal lottery, and fraudulent promises which are distinct from the Note. And the “loan documents” are specifically defined in the Note with an exhaustive list of documents like letters of credit and applications for letters of credit, commitment letters, security instruments, financing statements, mortgage instruments, renewals or modifications – nowhere in that language can the argument even be reasonably made that a sales contract signed months before the note and promotional literature disseminated months before and verbal lies told months before could possibly be included as loan documents or a course of dealing “with respect” to the Note. Indeed, they pre-date the Note and were made at a time when the Blackburns were not even contemplating signing a Note with the Bank. The Court of Appeals correctly concluded that the bulk of the Blackburns’ claims were not based on nor do they arise out of the note or the loan documents. Instead, they are based on the sales contract, the promotional literature, the lottery procedure, and promises made regarding amenities.

The Bank argues that several cases support its position. The Carolina Care Plan case, 362 S.C. 544, 606 S.E.2d 752 (2004) is largely irrelevant to this Petition because it focuses on the unconscionability of an arbitration clause, and does not address the scope of the clause nor whether the particular claims were fraudulent, unforeseeable torts which should be excepted from the clause. The reliance on Carolina Care also ignores that involved in that case was a contract where one party “agreed to provide services in furtherance of” another party’s business. The allegations were “that all the defendants

failed to cooperate in good faith...to promote...economic interests, failed to properly account for funds..., and generally put the economic interests” of one of the parties above the other. After a motion to dismiss to enforce arbitration was filed, the complaint was amended to allege that the arbitration clause was fraudulently induced. The Court found that fraud in the inducement of the arbitration clause was not properly or validly alleged, and compelled arbitration. Nowhere in that case was the issue raised as to whether the underlying claims fell within the scope of the provision or were somehow unforeseeable and fraudulent such that they should not be subject to the provision. Indeed, all the claims in Carolina Care were clearly based on the contract at hand and not any previously executed contracts or pre-existing conduct not related to the performance of the contract, as alleged in the case at bar. Thus, the Bank’s conclusion that the Court of Appeal’s opinion somehow conflicts with Carolina Care is inaccurate.

The Bank also relies on numerous out of state cases in support of the proposition that “courts in other jurisdictions have regularly held that counterclaims like the Blackburns’ are covered by a contractual jury waiver.” However, the Bank ignores the clear distinguishing facts in those cases. In Efficient Solutions, Inc. v. Meiner’s Country Mart, Inc., 56 F. Supp. 2d 982 (W.D. Tenn. 1999), the first case cited by the Bank on this issue, a service agreement was sued upon for breach of contract and fraudulent inducement of the contract. Efficient, 56 F.Supp.2d at 982-983. Obviously, if the dispute centers on the contract that contains the waiver clause, it will be related. Our case is not that way. The disputed counterclaims have no significant relationship to the loan contract. Indeed, that Court held: “despite the broadness of the language, it is implicit that the waiver only

applies to a dispute between the parties relating to the subject matter of the contract or arising out of the contract.” Efficient at 984.

Joy A. McElroy, MD, Inc. v. Maryl Group, Inc., 114 P.3d 929 (Haw. Ct. App. 2005), the next case cited by the Bank, involved a negligent misrepresentation claim regarding the amount of a CAM fee charged under a lease and the waiver provision was in the lease. Obviously if the CAM fees required by the lease are the basis of the counterclaim, that is significantly related. Not so in the case at bar.

The next case cited by the Bank is Bill Heard Chevrolet Corp. Orlando v. Wilson, 877 So.2d 15 (Fla. Dist. Ct. App. 2004). That case involved unfair trade practices in the sale of an automobile and the arbitration clause specifically listed the causes of action covered. There certainly is no listing in the agreement at bar of tort claims, unfair trade practices, breach of fiduciary duty, civil conspiracy, promissory estoppel, etc.

Finally, the Bank cites Riverside Portage Storage, Inc. v. Pods, Inc., No. 08-1771, 2009 WL 804666 (M.D. Fla. Mar. 27, 2009), and the Bank’s own summary of that case indicates that the breach of contract claims were based on alleged promises related to the contract.

Thus, all of the cases cited by the Bank involved claims that were significantly related to the underlying contract. Predictably, those cases find the waiver applies. Again, our case presents a different scenario.

ARGUMENT II.

The Bank next argues that the Aiken and Partain exception should not be extended to “jury trial waivers in commercial transactions”. The Blackburns did not request the

Court extend that rule, they simply cited those cases as support for the proposition that unforeseeable and fraudulent torts should not be deemed to be “significantly related” to the contracts underlying them which include a jury trial waiver clause. And, the Court of Appeals did not extend a rule, it merely indicated that those two cases were “instructive”. This whole line of argument by the Bank ignores the reality that arbitration clauses are MUCH easier to enforce than jury trial waivers because of the FAA which mandates that courts as a matter of public policy should resolve all doubts in favor of arbitration. No such presumption exists as to jury trial waivers because there is no “Federal Jury Trial Waiver Act” like the “Federal Arbitration Act”, thank goodness. (The wisdom of a public policy in favor of pre-dispute arbitration clauses escapes this writer, so please excuse the sarcasm.) The reality is that jury trial waivers are not subject to the same presumptions of validity as arbitration clauses. While arbitration clauses are to be broadly construed, jury trial waivers are to be strictly construed, as the Court of Appeals noted. See Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863, 866. And, because the ultimate public policy involved when dealing with jury trial waivers is constitutional (not statutory like with the arbitration act), deference to the constitution should be had. The South Carolina Constitution reads: “**The right of trial by jury shall be preserved inviolate.**” Article I, Section 14, SC Constitution. That constitutional right should be at the forefront of any discussion about jury trial waivers, since they by nature attack that right. (In this writer’s view, these pre-dispute jury trial waivers should all be invalid. It’s akin to having the state department of motor vehicles require all licensed drivers to sign a jury trial waiver as a condition of driving in this state. Then, when they get a speeding ticket and show up to court to request a jury trial, the court tells them they already waived it. Surely that would

be stricken as a violation of constitutional rights, because it failed to hold the right to jury trial inviolate. That is precisely what these pre-dispute jury trial waivers attempt to do in the mortgage and other consumer/commercial settings. They take away people's constitutional rights, and the Courts are the last bastions of defense of those rights.)

In summary, jury trial waivers are not under the law subject to the same protection as arbitration clauses, and thus any rules which apply to invalidate arbitration clauses should apply even more broadly to jury trial waivers. Thus, the Aiken and Partain exception for arbitration clauses should not be the same standard applied to jury trial waivers – if anything, the standard for invalidating jury trial waivers should be much less stringent. The Court of Appeals recognized that, and thus was not “extending the rule” from arbitration to jury trial waivers. It simply noted that with the similarities between arbitration and jury trial waivers clauses, Aiken and Partain are instructive. That said, it appears the Bank's argument is twofold: (1) that those cases involve “consumer protection” but this one does not; and (2) that since those cases involve arbitration clauses, the rationale in those cases does not apply to jury trial waiver clauses. Regarding the first argument, and as previously briefed, even if “consumer protection” is the driving force behind those cases, it cannot be effectively argued that the case at bar does not also involve consumer protection. Regarding the second argument, the types of allegations in Aiken, Partain, and Chassereau all are similar, and in some cases identical, to the types of claims made by the Blackburns herein. Again, that is presumably why the Court of Appeals found them instructive. Counsel would rely upon the previous extensive briefing on these issues.

ARGUMENT III.

Next, the Bank argues that because the Court of Appeals did not make a specific finding of “outrageousness”, it was improper to find that the unforeseeable and fraudulent conduct of the bank could fall outside a strict construction of the scope of the waiver. Counsel would refer the Court to the argument just made: that while Aiken and Partain are instructive, they are not the basis of the Court’s ruling that the Blackburns’ claims are outside the scope of the waiver’s language. It is true the Court borrowed language from those cases for support of the proposition that fraudulent, unforeseeable conduct (in this case, illegal actions and pre-purchase fraud) should not be considered within the reasonable contemplation of parties when signing a Note with a bank. Further, Aiken stressed that the claims were legally distinct from the underlying contractual relationship (as is the case here, where the causes of action would survive even if there was no note or mortgage with the bank because they are legally distinct from the note). Thus, no finding of outrageousness is required to follow the rationale. Yes, those cases dealt with torts the court deemed outrageous, and those torts included negligence, unfair trade practices, defamation and outrage. Similarly, in the case at bar, the Blackburns’ action includes claims for negligence and unfair trade practices, and additional claims of fraud and illegality. The Blackburns would contend these are the very same types of claims involved in those cases relied upon by the Court of Appeals. (And while not a necessary finding, certainly the conduct alleged against the Bank in this case is outrageous, unforeseeable, fraudulent conduct.) In conclusion, then, no finding of outrage is required because the cases were merely instructive, not binding precedent, and even if they were, the allegations are such to support that finding.

ARGUMENT IV.

The Bank next argues that the Blackburns' claims relate to "routine" construction delays and thus are foreseeable. As outlined above, the allegations are not simply that construction did not move forward as planned because of weather, or unavailability of materials, or some similar problem which might be considered a typical construction problem. The Blackburns' claims are for fraud in lying about even the plans for docks or the existence of dock permits on the property, claims of illegality of the lottery system used to select the lots to be sold to particular purchasers, claims of fraudulent inflation of values, and other claims which are hardly within the purview of routine construction litigation which might be related to some performance failure. These are not simply claims for breach of a construction promise or delays, they are claims for fraud, a high pressure, unusual lottery scheme of unfair trade practices and liaisons between lenders and developers and realtors, and illegality. As alluded to above in the Statement of the Case, these are far from routine, foreseeable construction problems as the Bank would argue. And, this argument that fraudulent conduct should be "foreseeable" and therefore not subject to additional scrutiny for purposes of the scope of applicable clauses ignores the cautionary note of this Court in the Aiken case:

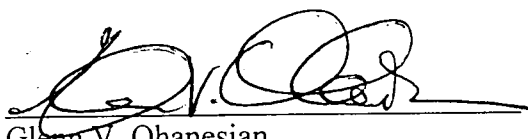
" Additionally, we are somewhat puzzled by the ... characterization of identity theft as a foreseeable tort. Although this Court indicated its concern over the "rampant growth of identity theft" in *Huggins v. Citibank, N.A.*, 355 S.C. 329, 334, 585 S.E.2d 275, 277 (2003), the rule we set forth today is based on the concept of the expectations of a "reasonable man," a standard deeply rooted in tort law. Therefore, a determination of foreseeability under the rule is to be made from the standpoint of the injured party; not this Court. We do not believe that this Court should proclaim that fraudulent acts such as identity theft are foreseeable in the course of normal business dealings." See Aiken, footnote 6.

Similarly, the Court should not proclaim that the fraud and illegality alleged herein is foreseeable in the course of normal business dealings. The Bank's argument in this regard is without merit.

CONCLUSION

For the reasons stated, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,



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