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

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.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for the Petitioner, Wachovia Bank, National Association, hereby certify that a Petition for Rehearing was made to the Court of Appeals and was denied by Order dated October 21, 2011.

QUESTIONS PRESENTED FOR REVIEW

1. Whether claims alleging that Wachovia induced Respondents to enter into a loan agreement by misrepresenting the construction schedule for the underlying property are within the scope of a jury trial waiver that expressly covers Wachovia's "course of conduct, course of dealing, statements (whether verbal or written) or actions" with respect to the loan transaction.

2. Whether the exception to consumer arbitration agreements for "outrageous and unforeseeable" torts set forth in *Aiken v. World Fin. Corp.*, 373 S.C. 144, 644 S.E.2d 705 (2007) should be extended to except claims from jury trial waivers in commercial transactions.

3. Whether the Court may ignore the "outrageous" portion of the *Aiken* exception and invalidate a commercial jury trial waiver without a finding of outrageousness.

4. Whether a routine dispute over the timing of construction constitutes "unforeseeable" conduct sufficient to invalidate a knowing and voluntary jury trial waiver in a commercial transaction.

STATEMENT OF THE CASE

I. FACTS OF THE CASE

This is a commercial mortgage foreclosure action that arises out of the failure of William Blackburn and his guarantors, including Judith Blackburn, to make payments on a purchase-money loan from Wachovia Bank, National Association ("Wachovia") that is secured by investment property in a Georgetown County development known as South Island Plantation.

The Blackburns allege that they attended a lottery sales event on July 23, 2005 at South Island Plantation, during which the property developer and real estate broker (together, the "Developers") made certain misrepresentations with regard to the timing of the construction of amenities at the development. (R. p. 73, Second Am. Answer p. 4.) They further allege that Wachovia employees attended so that they could market loans as soon as lots were distributed to purchasers. (R. p. 73, Second Am. Answer p. 4.) The Blackburns claim that Wachovia was a "partner" or "joint venturer" with the Developers in an integrated partnership by which the Developers and Wachovia worked together to sell lots and make loans in South Island Plantation. (R. p. 73-74, Second Am. Answer p. 4-5.)

At the July 23, 2005 event, the Blackburns, along with Tammy Winner and Watson Felder,[1] contracted with Winyah Bay Holdings, LLC, to purchase a piece of investment property in South Island Plantation for $515,519.00. On February 14, 2006, a closing was held on the real estate purchase, which was financed through a loan from Wachovia in the amount of $463,967.00. (R. p. 14, Note p. 1.) This was a commercial transaction, and the Note expressly stated that the loan proceeds would be used to "purchase investment property." (*Id.*) All four investors were personally obligated on the loan—William Blackburn by signing the Promissory Note in his individual capacity, and the others, including Judith Blackburn, by signing personal guaranties. (R. p. 19, Note p. 6; R. p. 40, Guaranty p. 6; R. p. 52, Guaranty of Tammy Winner p. 6; R. p. 46, Guaranty of Watson Felder p. 6.) The loan was also secured by a mortgage on the acquired property. (R. pp. 20-34, Mortgage pp. 1-13 & Ex. A.)

[1] Felder later conveyed his one-fourth (¼) interest in the subject property to Gary Ownbey. (R. p. 10, Compl. p. 3.)

The Note, which was signed by William Blackburn, contains the following jury trial waiver:

> **WAIVER 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. . . .

(R. p. 18, Note p. 5 (emphasis in original).)

Similarly, the Guaranty, which was signed by Judith Blackburn, contains the following jury trial waiver:

> **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 BANK TO ACCEPT THIS GUARANTY. . . .

(R. p. 40, Guaranty p. 6 (emphasis in original).) Felder and Winner also signed guaranties containing this jury waiver. (R. p. 46, Felder Guaranty p. 6; R. p. 52, Winner Guaranty p. 6.)

William Blackburn failed to make the loan payment that came due on July 14, 2008, and he has failed to make any subsequent payments. (R. p. 10, Compl. p. 3.) Wachovia notified Mr. Blackburn of the defaults, but he did not tender payment. (*Id.*) Thus, Wachovia accelerated the balance of the loan, made a final demand for payment,

and, when no payment was received, commenced this foreclosure action against Mr. Blackburn and the three guarantors. (*Id.*)

In response, the Blackburns asserted various defenses and counterclaims, all of which revolve around their contention that Wachovia and the Developers conspired to induce them to purchase South Island Plantation property and take out a Wachovia loan by misrepresenting the schedule on which amenities would be constructed. (R. pp. 75-83, Second Am. Answer pp. 6-14.) The counterclaims do not distinguish between Wachovia and the Developers, nor do they distinguish between the contracts for the sale of the subject property and the loan agreement. Instead, they broadly allege that *all* of the contracts between the parties – including the promissory note and other loan documents – were induced by Wachovia and the Developers' purported misrepresentations. (*See, e.g.*, R. pp. 78-81, Second Am. Answer pp. 9-12.)

Based on the jury waivers quoted above, Wachovia moved to strike the Blackburns' jury demand, and the Circuit Court granted that motion. (R. pp. 101-02, Wachovia's Mot. to Strike Jury Demand and to Refer pp. 1-2; R. p. 7, Order Granting Pl.'s Motion to Strike Jury Demand and to Refer of December 7, 2009, p. 7.) This appeal followed.

II. THE COURT OF APPEALS OPINION

On August 24, 2011, a panel of the Court of Appeals filed an opinion affirming that the Blackburns knowingly and voluntarily entered into the jury waivers at issue, but reversing the Circuit Court's conclusion that the waivers were applicable to the Blackburns' Counterclaims. (Shearouse Adv. Sheet No. 29, August 29, 2011, at 81-92.) The Court made four rulings that are relevant to this Petition.

First, the Court of Appeals held that the jury waivers do not apply because the Blackburns' claims are addressed to the sales transaction, whereas the jury trial waivers apply only to the loan transaction. However, the Blackburns expressly alleged that Wachovia improperly induced them to enter into the loan transaction. Indeed, the premise of the Blackburns' claims is that the sales and loan transactions were not separate but rather part of a *single* joint venture to sell lots and make loans.

Second, the Court of Appeals held that the standards for enforcing a consumer arbitration agreement apply to commercial jury waivers, despite the marked differences between consumer and commercial transactions, and similarly important differences between the procedural safeguards applicable to arbitration proceeding and bench trials.

Third, purporting to apply the *Aiken* exception for "outrageous and unforeseeable" conduct, the Court of Appeals held that the jury waivers are not enforceable. The Court, however, failed to address whether the alleged conduct was outrageous, which *Aiken* and its progeny clearly require in order to strike a dispute resolution clause.

Fourth, again purporting to apply *Aiken*, the Court of Appeals held that disagreements regarding the timing of construction are so unforeseeable in a commercial investment property transaction that they should not be excepted from otherwise valid jury trial waivers.

Each of these holdings conflicts with existing Supreme Court precedent or erroneously resolves a novel question of law. Accordingly, Wachovia filed a timely petition for rehearing, which was denied by Order dated October 21, 2011. This Petition for Certiorari followed.

ARGUMENTS IN SUPPORT OF THE PETITION

"A party may waive the right to jury trial by contract." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63-64, 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)). The Court of Appeals properly held that the Blackburns knowingly and voluntarily waived their right to a jury trial. (Slip Op. at 85-87.[2]) Thus, the jury waivers are presumptively enforceable.

Nonetheless, the Court of Appeals held that the jury waivers did not apply to the Blackburns' counterclaims. In so doing, the Court's decision conflicted with established Supreme Court precedent and incorrectly resolved a novel question of law as follows:

- The Court's holding that the Blackburns' claims did not arise out of the loan transaction conflicts with *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004), in which this Court held that similar claims were covered by a similarly worded dispute resolution clause. It also conflicts with *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998), in which this Court held that a rule of strict construction cannot defeat a provision's plain language, and *N. Charleston Joint Venture*, 307 S.C. at 535, 416 S.E.2d at 638, in which this Court held that jury waivers should be enforced according to their plain terms.

- The Court's novel conclusion that the exception in consumer arbitration clauses for "outrageous and unforseeable" torts set forth in *Aiken* should be extended to jury trial waivers executed in commercial transactions is incorrect because it ignores the substantial differences between arbitration and bench trials, and between consumer and commercial transactions.

- The Court's decision to apply the *Aiken* exception without finding that the alleged conduct was "outrageous" flatly ignores a portion of the test set forth in *Aiken* and thus conflicts with that case and its progeny.

- The Court's determination that a routine dispute over the timing of construction in the context of investment property in a real estate development is so "unforeseeable" to be excepted from an otherwise valid dispute resolution ignores

[2] References to the Slip Opinion cite to the relevant page of Shearouse Adv. Sheet No. 29, August 29, 2011.

the limits on the *Aiken* exception that this Court expressly set forth in *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 689 S.E.2d 602 (2010).

For these reasons, which are explained in more detail below, this Petition for Certiorari should be granted, and the decision of the Court of Appeals should be reversed.

I. THE JURY WAIVERS EXPRESSLY COVER ALL OF THE BLACKBURNS' COUNTERCLAIMS, AND THE COURT OF APPEALS DECISION TO THE CONTRARY CONFLICTS WITH WELL-ESTABLISHED PRECEDENT IN THIS AREA.

The Court of Appeals held that the jury waivers somehow fail to encompass the Blackburns' counterclaims. The waivers at issue, however, could hardly be phrased more clearly. They 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.

(R. p. 19, Note p. 5; R. p. 40, Guaranty p. 6.)

The Blackburns' counterclaims fall easily within the scope of these provisions because their entire case is about Wachovia's alleged "course of conduct," "course of dealing," "actions," and "statements," with respect to the loan transaction. Indeed, their key allegation is that Wachovia, as part of its course of dealing, partnered with the Developers to market lots in, and loans for, the South Island Plantation development. (R. pp. 73-74, Second Am. Answer pp. 4-5; R. p. 96, line 4 to p. 97, line 19, Tr. p. 6, line 4 to p. 7, line 19.) As part of this alleged scheme, Wachovia and the Developers made certain purported misstatements with respect to the construction of the development's amenities, all so that they could sell South Island Plantation lots and make Wachovia loans. (R. pp.

73-74, Second Am. Answer pp. 4-5; R. p. 96, line 4 to p. 97, line 19, Tr. p. 6, line 4 to p. 7, line 19.) Indeed, the Blackburns have directly alleged fraud in the inducement of the Note and other loan documents. (R. p. 80, Second Am. Answer 11.) It is difficult to imagine how the Blackburns could make allegations that more obviously concerned Wachovia's "course of conduct," "course of dealing," "actions," and "statements," with respect to the loan transaction. Thus, there is little question but that the parties' jury waivers cover these counterclaims.

Moreover, the waivers broadly cover any action "based on, arising out of, under or in connection with this Note [or Guaranty] or any agreement contemplated to be executed in connection with this Note [or Guaranty]." (R. p. 19, Note p. 5; R. p. 40, Guaranty p. 5.) The counterclaims arise out of the Note and Guaranty because the Blackburns allege that Wachovia's purpose in taking the actions at issue was to induce them to enter into a loan. (R. p. 73, Second Am. Answer p. 4.) The counterclaims also arise out of the property sales contract, which is an "agreement contemplated to be executed in connection with" the Note and Guaranty. Indeed, the Note states that the funds could only be used to "purchase investment property." (R. p. 19, Note. p. 1.) Thus, the plain language of the waivers covers the Blackburns' counterclaims.

Were there any doubt that the jury waivers cover the Blackburns' counterclaims (and there is not), it is worth noting that courts in other jurisdictions have regularly held that counterclaims like the Blackburns' are covered by a contractual jury waiver. *See, e.g.*, *Efficient Solutions, Inc. v. Meiner's Country Mart, Inc.*, 56 F. Supp. 2d 982, 984 (W.D. Tenn. 1999) (applying contractual jury trial waiver to fraud and negligent misrepresentation claims because they concern the contract); *Joy A. McElroy, M.D., Inc.*

v. Maryl Grp., Inc., 114 P.3d 929, 936-38 (Haw. Ct. App. 2005) (applying contractual jury trial waiver to unfair trade practices claim based on alleged misrepresentations related to the contract); *Bill Heard Chevrolet Corp., Orlando v. Wilson*, 877 So.2d 15, 18 (Fla. Dist. Ct. App. 2004) (applying contractual arbitration clause to unfair trade practices claim based on misrepresentations related to the contract); *Riverside Portable Storage, Inc. v. Pods, Inc.*, No. 08-1771, 2009 WL 804666, at *3 (M.D. Fla. Mar. 27, 2009) (applying contractual jury trial waiver to promissory estoppel and breach of contract claims based on alleged promises related to the contract).

The Court of Appeals held, however, that "the allegations of sales misrepresentations and pre-purchase fraud" are not "sufficiently related" to the loan for the jury waivers to apply. (Slip Op. at 90.) In particular, the Court believed that the counterclaims arise out of the sales transaction only and do not arise out of the loan transaction. (*Id.*) This holding is erroneous because it disagrees with the Blackburns' own allegations and theory of the case.

According to the Blackburns, Wachovia "was promoting itself through banners, promotional materials, and had a team of its own employees on site at the property location *to market loans as soon as the lottery lots were distributed and sales contracts signed on the spot.*" (R. p. 73, Second Am. Answer p. 4 (emphasis added).) In other words, according to the Blackburns, Wachovia and the Developers made promises regarding the amenities to induce them to buy the subject property from the Developers *and secure a loan from Wachovia.* (R. pp. 73-83, Second Am. Answer pp. 4-14.) It is the Blackburns themselves who allege fraud in the inducement of the loan documents. (R. p. 80, Second Am. Answer p. 11.)

Lest there be any question regarding the relationship between the Blackburns' counterclaims and the loan transaction, the Blackburns directly allege that "the contracts sought to be enforced by [Wachovia] are barred" because Wachovia "failed to properly ensure that the representations made were accurate . . . ." (R. p. 74, Second Am. Answer p. 5.) The only contracts that Wachovia seeks to enforce in this foreclosure action are the Note, Mortgage, and other loan documents. According to the Blackburns, those contracts – *i.e.*, the loan transaction documents – are not enforceable because of their relationship to the alleged pre-purchase misrepresentations. Thus, the Blackburns themselves allege a sufficient relationship between the loan transaction and the purported misconduct for the jury waivers to apply.

Under South Carolina law, claims arising out of promises allegedly made to induce one party to enter into a contract are subject to, and within the scope of, a broad waiver provision in that contract. *See, e.g.*, *Carolina Care Plan, Inc.*, 361 S.C. at 553-54; 606 S.E.2d at 757 (holding that allegations of fraud in the inducement were subject to broadly worded arbitration clause and must be submitted to arbitration). Because the Court of Appeals ignored this principle in holding that the jury waivers at issue are inapplicable, its decision conflicts with *Carolina Care Plan.*

In addition, the Court of Appeals defended its holding by invoking the rule of strict construction. However, strict construction "should not be applied so as to defeat the plain and obvious purpose of the instrument." *Taylor*, 332 S.C. at 4, 498 S.E.2d at 864. To the contrary, as this Court has held in the context of a jury waiver, waiver provisions should be given their "plain, ordinary and popular meaning." That the terms of the waiver are broad is of no consequence because South Carolina courts recognize that a

provision may be both broad and clear. *Abu-Shawareb v. S.C. State Univ.*, 364 S.C. 358, 363, 613 S.E.2d 757, 760 (Ct. App. 2005) ("Although the release is broad, it is not ambiguous."). Here, the Blackburns' counterclaims easily fit within the plain language of the waiver provisions at issue, and no plea for strict construction can alter that result. *Id.* Because the Court of Appeals misapplied the rule of strict construction, its decision conflicts with *Taylor*.

Most fundamentally, under South Carolina law, jury waivers are enforceable according to their plain language. *See N. Charleston Joint Venture*, 307 S.C. at 535, 416 S.E.2d at 638 (enforcing jury waiver according to its plain terms); *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866 (holding that jury waivers are construed according to their "plain, ordinary and popular meaning"); *see also S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) (holding that releases are generally enforceable according to their plain language). Because the Court of Appeals ignored the plain language of the jury waivers and relied on a distinction between the sales transaction and the loan transaction that appears nowhere in the pleadings, its holding conflicts with *North Charleston Joint Venture* and similar cases. *Beach Co.*, 351 S.C. at 63-64, 566 S.E.2d at 866; *see also N. Charleston Joint Venture*, 307 S.C. at 535, 416 S.E.2d at 638.

In sum, the Court of Appeals holding that the jury waivers at issue somehow do not apply to actions allegedly taken by Wachovia to induce the Blackburns to enter into a loan agreement conflicts with several of this Court's opinions. Accordingly, certiorari should be granted to correct these errors and prevent confusion in this area of law.

II. THE COURT OF APPEALS ERRONEOUSLY RESOLVED A NOVEL QUESTION OF LAW BY IMPORTING THE "OUTRAGEOUS AND UNFORESEEABLE" INQUIRY APPLICABLE IN CONSUMER ARBITRATION CASES TO THIS COMMERCIAL JURY WAIVER.

The Court of Appeals held that the jury waivers would not apply even if the counterclaims fell within their scope because the counterclaims allege unforeseeable acts. (Slip Op. at 91.) This argument derives from three arbitration cases—*Aiken v. World Fin. Corp.*, 373 S.C. 144, 644 S.E.2d 705 (2007); *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007); and *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 689 S.E.2d 602 (2010)—in which this Court held that it would except certain consumer claims from arbitration clauses that would otherwise cover them. Importing the "outrageous and unforeseeable" inquiry incorrectly resolved a novel question of law by extending a consumer protection exception beyond the bounds set for it by this Court.[3]

In *Aiken*, the Supreme Court first held that it would except claims otherwise covered by a broadly worded arbitration provision if those claims alleged "outrageous torts that are unforeseeable to a reasonable **consumer** in the context of normal business dealings." 373 S.C. at 151, 644 S.E.2d at 709 (emphasis added). Aside from the Court of Appeals decision in this case, no South Carolina court has applied the *Aiken* exception outside the scope of a consumer arbitration agreement.

The *Aiken* exception is limited by its own terms to cases involving consumer transactions. Indeed, in *Aiken*, which involved a loan transaction between a consumer and a finance company, the Court phrased the exception in terms of conduct that is "unforeseeable to a reasonable **consumer**." 373 S.C. at 151, 644 S.E.2d 709 (emphasis

[3] Despite Wachovia's argument to the contrary, the panel held that *Aiken*, *Chassereau*, and *Partain* are "instructive" as applied to commercial jury waivers without further explanation. (Slip Op. at 91 n.5.)

added). Similarly, in *Chassereau*, the Court applied the *Aiken* exception to a case involving a consumer purchase of a swimming pool, 373 S.C. at 172, 644 S.E.2d at 720, and, in *Partain*, the Court applied the exception to a case involving a consumer purchase of an automobile, 386 S.C. at 490, 689 S.E.2d at 603. In short, the *Aiken* exception has never been applied to a commercial contract like the one at issue here, and nothing in South Carolina law suggests that it should be extended beyond the consumer-protection arena in which it was developed. This distinction between consumer and commercial transactions is ubiquitous in South Carolina law. *See, e.g.*, *Sapp v. Ford Motor Co.*, 386 S.C. 143, 149-50, 687 S.E.2d 47, 50-51 (2009) (recognizing exception to the economic loss rule that applies only in consumer housing transactions); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 670 (2007) (noting that transactions between consumers and automobile dealers are analyzed with "considerable skepticism"); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 504 n.3, 229 S.E.2d 728, 731 n.3 (1976) (noting that South Carolina is "in the vanguard of consumer protection"). The Court of Appeals erred by extending the *Aiken* exception to this commercial transaction, and this Court should grant certiorari and reverse that decision.

The *Aiken* exception is also limited to arbitration agreements and should not have been applied to this jury waiver. Bench trials are different in kind from arbitration proceedings in that arbitration proceedings substantially circumscribe a party's procedural rights and remove them from the taxpayer-funded judicial system, whereas bench trials preserve all of a party's normal procedural rights except the right to a jury. In arbitration, parties have no right to pre-trial discovery, the application of the rules of evidence, dispositive motions practice, written findings of fact and conclusions of law,

appellate review, or other procedural safeguards mandated by the Due Process Clause and the Rules of Civil Procedure. *See, e.g., In re Fleetwood Homes of Tex., L.P.*, 257 S.W.3d 692, 695 (Tex. 2008) ("[L]imited discovery is one of arbitration's most distinctive features."); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286 (4th Cir. 2007) (recognizing that "limited discovery is a consequence of perhaps every agreement to arbitrate"); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999) ("A hallmark of arbitration – and a necessary precursor to its efficient operation – is a limited discovery process"); *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) (holding that parties to arbitration have no right to pre-hearing discovery). By contrast, parties who have merely waived their right to a jury trial have access to full pre-trial discovery; pre-trial motions practice; a trial conducted in accordance with the rules of evidence; written, appealable, findings of fact and conclusions of law; and full appellate review, all in strict preservation of the parties' due process rights.

Given the extent to which a consumer gives up his procedural rights by agreeing to arbitration, the *Aiken* exception is a sensible way to prevent consumer abuse. It has no application, however, in the context of a commercial jury waiver because the parties to that transaction are sophisticated and have not given up substantial procedural rights. Thus, the Court of Appeals decision to apply *Aiken* to this commercial jury waiver was in error, and this Court should grant certiorari and reverse that decision. At the least, the Court of Appeals' extension of the *Aiken* exception to commercial jury waivers resolves an important question of law that should be heard and decided by this Court.

III. THE COURT OF APPEALS FAILED TO ADDRESS WHETHER THE CONDUCT AT ISSUE WAS "OUTRAGEOUS," AS *AIKEN* PLAINLY REQUIRES.

The Court of Appeals purported to apply *Aiken* and its progeny in holding that the jury waivers at issue did not apply. However, the Court ignored these cases' references to "outrageous" conduct and erroneously invalidated the jury waiver without ever finding that the alleged conduct was outrageous. Nothing in the case law supports this methodology. To the contrary, this Court expressly held in *Aiken* that the exception applies only to "outrageous torts," and the Court went on to expressly find that the conduct alleged in that case was "outrageous." 373 S.C. at 151, 644 S.E.2d at 709. Similarly, in *Chassereau*, the Court expressly held that the conduct alleged was "historically associated with the common law tort of outrage." 373 S.C. at 172, 644 S.E.d2 at 720. Finally, in *Partain*, the Court again held that the *Aiken* exception applies only where the alleged conduct includes "outrageous acts." 386 S.C. at 493, 689 S.E.2d at 604. In the Court of Appeals decision, however, there is no finding that the alleged conduct was outrageous. This omission alone conflicts with *Aiken*, *Chassereau*, and *Partain*, and warrants granting Wachovia's petition for certiorari to protect the integrity of the test set forth in those decisions.

IV. THE COURT OF APPEALS IGNORED THIS COURT'S WARNING IN *PARTAIN* THAT CREATIVE PLEADING SHOULD NOT EXCEPT ROUTINE CLAIMS FROM OTHERWISE VALID DISPUTE RESOLUTION PROVISIONS.

The Blackburns' counterclaims are a far cry from the kinds of "outrageous" and "unforeseeable" acts involved in *Aiken*, *Chassereau* and *Partain*. Even if the Court of Appeals had properly addressed the issue, the conduct alleged here is neither outrageous nor unforeseeable. The running theme in *Aiken*, *Chassereau*, and *Partain* is that they

involve conduct well outside the scope of a typical business dispute. In *Aiken*, the plaintiff alleged that employees of the defendant finance company used their access to his personal information to steal his identity, obtain sham loans, and embezzle the proceeds. 373 S.C. at 147; 644 S.E.2d at 707. Similarly, in *Chassereau*, the key allegation was that an employee of the defendant above-ground pool merchant revealed the plaintiff's private information to third parties and defamed her, all in an attempt to collect money the plaintiff owed on her pool. 373 S.C. at 170; 644 S.E.2d at 719. Finally, in *Partain*, the plaintiff alleged that the defendant automobile dealer pulled a bait-and-switch maneuver by fraudulently replacing the vehicle he purchased with a different vehicle at the time of pick-up. Here, by contrast, the Blackburns contend that Wachovia and the Developers merely "breached construction promises" by not completing the amenities at the subject planned development on the schedule that was provided. (Blackburns' Opening Br. p. 18; R. p. 73, Second Am. Answer p. 4.)

According to the Blackburns, the alleged misrepresentations were made *before* the loan documents were signed. Thus, as a matter of logic and timing, these alleged misrepresentations could not have been unforeseeable. Indeed, the Blackburns were fully aware of the alleged sales-related representations before they took out a Wachovia loan. Moreover, few disputes are more prosaic than those involving the timing of construction. Indeed, the leading construction law treatises devote full chapters to the issue of timing because it is so often litigated. *See* Philip L. Bruner & Patrick J. O'Connor, Jr., 5 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 15:1, *et seq.* (explaining legal issues involved in disputes over construction delays); *see also* James Acret & Annette Davis Perrochet, CONSTRUCTION LITIGATION HANDBOOK 2d § 7:1 (same). Unlike identity theft,

embezzlement, defamation, invasion of privacy, and bait-and-switch sales tactics, there is nothing unusual or unforeseeable in an investment property transaction about construction not being completed on time. To be sure, the conduct alleged may be actionable, but it is a far cry from the kind of outrageous conduct that should be excepted from a valid jury waiver.[4] Indeed, if a claimant can avoid his jury waiver by alleging something as commonplace as a dispute about a construction schedule, then the *Aiken* exception will swallow the rule that jury waivers are generally valid and enforceable under South Carolina law.

In *Partain*, this Court warned against the kind of result that the Court of Appeals reached in this case. There, the Court noted that "a party may not escape its commitment [to arbitration] by alleging its claim as a tort." 386 S.C. at 494, 689 S.E.2d at 605. Rather, a claim would only be subject to the *Aiken* exception where it "was clearly not within the contemplation of the parties." *Id.* at 494-96, 689 S.E.2d at 605. Here, the Blackburns have attempted to re-cast a routine dispute over the timing of construction as a series of tort claims. Reasonable commercial parties in an investment property transaction – indeed, anyone who has hired a contractor before – would contemplate the possibility that construction may not be completed on schedule. If merely calling such a routine dispute a tort transforms it into "outrageous" and "unforeseeable" conduct, then any arbitration clause or jury waiver can be defeated by creative pleading. To avoid this result, this Court should grant the petition for certiorari and reverse the Court of Appeals's decision.

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[4] In fact, until this case, such conduct had never been excepted from a valid jury waiver under South Carolina law.

CONCLUSION

The Court of Appeals decision allows artful pleading and creative argumentation to avoid contractual jury waivers in virtually every case, and incorrectly equates arbitration clauses with jury trial waivers. Under the Court of Appeals decision and in contravention of this Court's precedent, it is no longer true that contractual jury waivers are generally valid in South Carolina. For these and the foregoing reasons, and any other reason supported by the Record, Wachovia respectfully requests that the Court grant CERTIORARI of the Court of Appeals decision, REVERSE that decision, and AFFIRM the Circuit Court's decision striking the Blackburns' jury demand.

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November 21, 2011

Charleston, South Carolina

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

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.

PROOF OF SERVICE

I certify that I have served the **Petition for a Writ of Certiorari** on all parties in this action by depositing a copy of it in the United States Mail, first class postage prepaid, on November 21, 2011, to the following addresses:

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