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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Case No: 2014-CP-32-04259

Wells Fargo, N.A. as successor by merger to Wachovia Bank, NA ..... Respondent,

v.

Don A. Nummy, II, Dee S. Nummy, and Don A. Nummy, ... Appellants

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INITIAL BRIEF OF APPELLANTS

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II. *Whether the trial court erred in making a finding of fact in regards to the intent of the parties to seal a guarantee in response to a motion for summary judgment where no evidence was presented to support such a finding?*

III. *Whether the trial court erred in relying upon an unenforceable waiver provision within the guarantee in striking the Appellants proper demand for trial by jury?*

STATEMENT OF THE CASE

Wells Fargo, N.A. as successor by merger to Wachovia Bank, NA (the "Bank") brought an action seeking a money award against Don A. Nummy, II, Dee S. Nummy, and Don A. Nummy (the "Appellants" and the "Nummys") on alleged guaranties. See Complaint, Prayer for Relief. The Appellants responded by filing their answers and counterclaims against the Bank. The Appellants timely answered, demanded a jury trial and brought a counterclaim that seeks to preserve their breach of contract cause of action against the Plaintiff. See Answer and Counterclaim. One of the defenses raised by the Appellants in their answers was based upon the applicable statute of limitations. The Bank moved to strike the Appellants jury demand. See Motion to Strike. The Appellants moved for summary judgment as to the actions brought by the Bank based upon the statute of limitations. See Motion for Summary Judgment. In support of their motion, the Appellants filed supporting affidavits. The Respondent's presented no evidence to the Court.

The Court scheduled a hearing on both the Motion to Strike and the Motion for Summary Judgment. The Court granted the Motion to Strike and denied the Motion for Summary Judgment. See Order. The Court found that the guarantees were sealed as a matter of law, the applicable statute

of limitations was S.C. Code Ann. § 15-3-520, and the Appellants were not entitled to a trial by jury as to any of the claims in the matter. See Order.

STANDARD OF REVIEW

"Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). Similarly, whether a party is entitled to a jury trial is a question of law, which this Court reviews de novo, owing no deference to the Circuit Court's decision. See *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

On appeal from a circuit court's denial of a motion for directed verdict, the Court of Appeals applies the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). The Court of Appeals will not reverse the circuit court's ruling unless there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Law v. S.C. Dept. of Corr.*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006).

FACTS

This case is an action for suit on guaranties that were signed by Appellants in connection with a demand note that was executed by Danco Construction, Inc. ("Danco") on July 25, 2006 and delivered to Plaintiff in the original amount of Six Hundred Thousand and 00/100 ($600,000) Dollars (the "Note"). (See Affidavit. of R. Terway, at~ 5; Answer of Appellants Dee S. Nummy and Don A. Nummy, at ~ 12.) Appellants executed and delivered to Plaintiff unconditional guaranty agreements (the "Guarantees"), pursuant to which Appellants guaranteed the payment and

performance of each and every debt of Danco. (See id., at ~~ 6-8; Answer of Defs. Dee S. Nummy and Don A. Nummy, at~~ 8-9.) Danco is alleged to be in default under the terms of the Note. (Id., at ~ 9.) Upon the alleged default and under the terms of the Note, Wells Fargo notified Appellants of the default and demanded payment. (Compl., at~ 13; Answer of Defs. Dee S. Nummy and Don A. Nummy, at~ 13.) However, as alleged by the Plaintiff, Appellants failed and refused, and continue to fail and refuse, to cure their contractual default as set forth in the Guarantees. (Compl., at~ 13.) Wells Fargo subsequently brought this action against Appellants to recover for the amounts due pursuant to the Guarantees. In their Answers and Counterclaims, Appellants asserted a defense of a failure to bring the action within the applicable statute of limitations, denied the majority of the allegations in the Complaint, asserted counterclaims for breach of contract and surety defenses, and demanded a trial by jury.

LEGAL ARGUMENT

I. *The Trial Court erred in disregarding South Carolina's long established law regarding the applicable statute of limitations for actions on a guaranty.*

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996). The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. See *Webb v. Greenwood County*, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956); *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 231, 599 S.E.2d 462, 464 (Ct.App.2004). Significantly, "[s]tatutes of limitations provide potential Appellants with certainty that after a set period of time, they will not be hailed [sic] into court to defend time-barred claims." *In re Elkay*

Indus., Inc., 167 B.R. 404, 408 (D.S.C.1994). "Moreover, limitations periods discourage plaintiffs from sitting on their rights." *Id.* at 408-09. Statutes of limitations are, indeed, fundamental to our judicial system. South Carolina judicial precedent dictates that the guarantees in this action are neither controlled by the twenty year statute of limitations, nor can the boilerplate contained within them render them sealed instruments. The actions, therefore, are subject to the three year statute of limitations. To hold otherwise "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state." *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548, 552 (S.C.Ct.App.2005).

A. The guaranties in this action are specifically exempt from S.C.Code Ann. § 15–3–520.

The Trial Court erred by finding the action on the guaranty was not an action on a note or personal bond specifically limited by the three year statute of limitations. In South Carolina, a civil action based "upon a contract, obligation or liability" must generally be brought within three years of the date on which the plaintiff knew or should have known that he had a cause of action. S.C.Code Ann. §§ 15–3–530(1), 15–3–535; *Richland–Lexington Airport Dist. v. Am. Airlines, Inc.*, 306 F.Supp.2d 548, 566 (D.S.C.2002). However, in certain instances, the legislature has carved out specific actions based upon certain sealed instruments having a twenty-year statute of limitations. S.C.Code Ann. § 15–3–520(b); Lasch, 609 S.E.2d at 550. The twenty year statute specifically provides that the exemption does not apply to agreements like those present in this action. It states;

> "an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only whereon the period of limitation is the same as prescribed in Section 15-3-530"

S.C.Code Ann. § 15–3–520. Thus, any action upon a "sealed note and personal bond for the payment of money only" would fall within the three year statute of limitation under Section 15-3-530. When

a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). " The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Id. The best evidence of legislative intent is the text of the statute. *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). In holding the action brought by Respondent was controlled by the twenty year statute of limitations the trial court incorrectly held that a guaranty was not "a sealed note and personal bond for the payment of money only."

By its very terms, the guaranty is a note or personal bond under South Carolina law. The nature of a guaranty has been clearly defined in South Carolina law. See *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994)("A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity"). The terms of the guaranties in this matter do little more than provide that the Appellants promise to pay the Respondent a particular debt if it is not paid by the primary obligor. Whether the guarantees have titles of "note" or "personal bond" is irrelevant to the understanding of how the law should treat them. South Carolina law has clearly defined guarantees of the kind involved in this matter to be notes and personal bonds. Thus, any action on them necessarily falls within the three year statute of limitation.

In a decision interpreting whether a particular agreement, not defined as a note by the parties thereto, was, in fact, a note under the law of South Carolina, the South Carolina Constitutional Court of Appeals held that "any mere written promise to pay money unconditionally, is a promissory note." *Woodfolk v. Leslie*, 11 S.C.L. 585, 586 (S.C. Const. App. 1820); see also *Pepoon v. Jacob D. Stagg & Co.*, 10 S.C.L. 102, 103 (S.C. Const. App. 1818)("No precise form of words is necessary to

constitute a promissory note; it is sufficient if it amount to a promise or undertaking to pay unconditionally"). Under South Carolina law, a guarantee falls within the legal understanding of the term note as used in the statute. Similarly, in a decision interpreting whether a particular agreement, again not defined as a bond by the parties thereto, was, in fact, a bond under the law of South Carolina, the Supreme Court in *Duncan v. City of Charleston*, held as follows;

> A bond is nothing more than an agreement or contract under seal to pay money, "or to do some other thing." See 1 Rap. & L. Law Dict. 141; Canty v. Duren, Harp. 434. See, also, 4 Am. & Eng. Enc. Law, at page 620, where it is said: "In the technical sense, a bond is an obligation in writing, and under seal, binding the obligator to pay a sum of money to the obligee. *** Under this definition is included every sealed obligation for the payment of money, whether absolutely or upon condition." See, also, Boyd v. Boyd, 2 Nott & McC. 126, where it is said: "A bond is defined to be a deed or obligatory instrument in writing whereby one doth bind himself to another to pay a sum of money or to do some other act." Any indebtedness, the payment of which is secured by a contract under seal, is a bonded indebtedness.

60 S.C. 532, 39 S.E. 265, 272 (1901). Thus, under South Carolina law, a sealed guaranty may also fall within the legal understanding of the term personal bond as used in the statute.

The Appellants plainly argued before the Trial Court that the guarantees were either unsealed notes or personal bonds under South Carolina's definition of the term. The Respondent's only argument in response was that Black's Law Dictionary defined bonds as in some instances containing a condition subsequent. See Respondent's Brief in Opposition to the Motion for Summary Judgment. Apart from this requirement nowhere being found in South Carolina law, the argument fails for the simple fact that the guaranty was in fact a conditional promise to pay. By its very terms, the Appellants' promise to pay the Respondent was conditioned upon a failure of the primary obligor to make full and final payment under the underlying note. The guarantees state in part: "[Appellants]

hereby absolutely, irrevocably and unconditionally guarantee to [Respondent] and its successors, assigns, and affiliates the timely payment and performance of all liabilities and obligations of the Borrower to [Respondent]." Such a promise necessarily includes the condition subsequent that full and final payment of all liabilities and obligations of the Borrower to Respondent results in termination of the agreement. This is in fact the nature of most, if not all, guarantees. This is in fact the nature of most, if not all, personal bonds. Quizzically, the Trial Court, in its order denying Appellants motion for summary judgment and order denying Appellants motion to reconsider, only implicitly determined the guarantees were not personal bonds. Such a finding, now law of the case, was a clear error of law and should be reversed.

B. The Respondent failed to present any evidence of intent by the parties to seal the document.

While the Trial Court agreed that neither party actually physically attached a seal to the guarantees in question, it and the Respondent contend, without evidence in support, the intent of the parties was to seal the document. The courts of South Carolina have come to recognize that there must be sufficient evidence of intent to transform an ordinary contract into a sealed instrument for purposes of application of the 20-year limitation period described in S.C. Code Ann. § 15-3-520. Consistent with this conclusion, the courts of South Carolina have held that minor indicia are insufficient to convey the requisite intent to create a sealed instrument. The trial court's findings in light of Respondent's failure to present any indicia of an intent to seal the guaranty is precluded under South Carolina law and should be reversed.

The Trial Court erred in not finding in accordance with all of the evidence before it that the guarantees were not sealed as a matter of law. "[A] court will construe any doubts and ambiguities

in an agreement against the drafter of the agreement." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010). Further, the absence of express language in the body of the contract evidencing the intent that it be an agreement under seal has been held to be indicative of the fact that the document is not to be construed as a sealed instrument. *See Republic Contracting Corp. v. South Carolina Dept. of Highways and Public Transp.*, 332 S.C. 197, 206, 503 S.E.2d 761, 766 (Ct. App. 1998) (citing *Square D Co. v. C.J. Kern Contractors, Inc.,* 314 N.C. 423, 334 S.E.2d 63 (1985) (holding the impression of a corporate seal on a construction contract did not transform it into a contract under seal in the absence of language in the body of the contract creating a sealed instrument). In this case there is no indication in the body of the guaranty that the parties truly intended it to be a sealed agreement. Failing this element, the trial court improperly sought to establish the requisite intent by reference to vague boilerplate items. These boilerplate notations appear near the signature blocks, and not in the body of the guarantees. The court in the case of *Lasch* clearly held that: "the presence of a standard attestation clause--such as, "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals"--in an instrument which is neither sealed nor required to be sealed is insufficient, standing alone, to create a sealed instrument." Supra at 177, 609 S.E.2d at 553.

The guaranty in question in the case at bar contains no clear indication of an intent to create a sealed instrument. In fact, such a lengthy statute of limitations period would serve no purpose in the context of a guaranty such as was demanded by the Respondent in this case. There is no rationale or need for a twenty-year period of limitations for making payments in the event the primary obligor failed to make the necessary payments on what was a demand note. This, too, indicates a lack of intent to create a situation that would serve no conceivable purpose on behalf of the parties to the

guarantees. In this case, use of a form document with the word "(Seal)" adjacent to the block for the parties' names is insufficient to transform the guarantees into a sealed instrument. *See Republic Contracting Corp.*, supra at 206, 503 S.E.2d 761, 766 (dismissing the argument that the twenty year statute of limitations applied due to the presence of a professional engineer seal and endorsement on the plans) (citing *Landmark Eng'g, Inc. v. Cooper,* 222 Ga. App. 752, 476 S.E.2d 63 (1996) (holding that a statute requiring the stamp of a registered surveyor on certain documents ensures only that the surveyor takes responsibility for the work but does not allow a plaintiff to bring an action within the limitations period prescribed for documents under seal); *County Sch. Bd. of Fairfax County v. M.L. Whitlow, Inc.,* 223 Va. 157, 286 S.E.2d 230, 232 (1982) ("The impression of a corporate seal on a document, without more, does not create a sealed instrument.")). The context under which the term "(Seal)" appears does not make it evident that the parties intended to create a sealed instrument. The guaranty forms includes the notation "(Seal)" beside the signature line to reflect the location where the corporate seal is to be affixed **if the parties desire to create a sealed instrument**. No seal is, in fact, affixed by either of the parties in this case, which indicates a lack of intent to create a sealed instrument.

In this instance, the Appellants are not sophisticated individuals that were capable of negotiating the terms of the guarantees. They simply followed the directions of the Respondent and affixed their signatures in the space designated for such. There was never a discussion of whether the guarantees would be sealed or if the Appellants had seals with them for the purpose of sealing the documents. Similarly, the Respondent did not require the signatures be notarized. The only evidence before the trial court regarding the intent of the parties as to a seal was (1) the complete lack thereof, (2) sworn affidavits of the Appellants that sealing the documents was never their intent,

and (3) boilerplate language in a contract of adhesion demanded by the Respondent that may reasonably be read to simply be a marker for where a seal may be placed. The absence of any evidence supporting an intent to seal the guarantees should have resulted in a finding that the guarantees were, in fact, not sealed. Thus, the Trial Court's denial of the Summary judgement on such ground should be reversed.

II. *The Trial Court erred in finding the guaranty was a sealed instrument as a matter of law.*

The Trial Court found, as a matter of law, that the guarantees were sealed instruments, though no such seal was present and the only evidence was contrary to such a finding. At best, the Respondent presented an issue of an ambiguity as to the intent of the parties to enter a sealed instrument. It is for the Court to apply the limitation period to the facts where the facts are clear. *See e.g., Dean v. Ruscon Corp.*, 321 S.C. 360, 366, 468 S.E.2d 645, 648 (1996) (There was no question of fact for the jury to decide because the only reasonable conclusion supported by the evidence was that the lawsuit accrued in November 1984, and the filing of suit in April 1991 was barred by the statute of limitations. The circuit court correctly ruled as a matter of law on this issue.); *Doe v. Howe*, 367 S.C. 432, 443, 626 S.E.2d 25, 30 (Ct. App. 2005) (Nothing in the record reflected a dispute related to the factual issues regarding the applicability of the statute of limitations in the underlying case. The Court held, as a matter of law, that Plaintiff's claim had lapsed.); *Harvey v. South Carolina Dept. of Corrections*, 338 S.C. 500, 508, 527 S.E.2d 765, 769 (Ct. App. 2000) (The statute of limitations issue is one at law and, therefore, a limitations defense may be available to bar recovery.) (citing *Medlin v. South Carolina Farm Bureau Mut. Ins. Co.,* 325 S.C. 195, 480 S.E.2d 739 (1997)). Whether the twenty or three year statute of limitations applied to the guarantees when the only evidence supported a finding of the application of the three year statute

III. The Trial Court erred in striking the Appellants properly demanded trial by jury.

The proper standard to apply to a motion to strike is the same as the standard for a motion to dismiss under Rule 12(b)(6), of the South Carolina Rules of Civil Procedure. See *Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (2009); *McCormick v. England,* 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct.App.1997). Where a pleading is attacked, "the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case." *Robinson*, 384 S.C. at 585, 682 S.Ed.2d at 496; *Burns v. Wannamaker,* 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct.App.1985). Thus, the Trial Court was required to accept the facts as plead by the Appellants, including the enforceability of the guaranties.

The Trial Court's order striking the Appellants' demand for trial by jury was improper and should be reversed. The Appellants are afforded the right to trial by jury for all of the claims asserted in this matter, have properly demanded a jury trial under the South Carolina Rules of Civil Procedure, and have not waived that right. The waiver provisions relied upon by the Trial Court are not enforceable. Thus, the Trial Court's Order striking Appellants demand fails as a matter of law and should be reversed.

A. The Trial Court's order was improper under SCRCP 39 and should be reversed.

The Appellants' constitutional and statutory right to trial by jury cannot be removed without some showing that South Carolina law provides for such a removal. The South Carolina Rules of Civil Procedure specifies that the right of trial by jury "shall be preserved to the parties inviolate." Rule 38 SCRCP. It further provides:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than

10 days after the service of the last pleading directed to such issue.

Id. And still further, "[i]ssues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived." Id. "Courts employ a high bar when judging the waiver of constitutional rights." *Grosshuesch v. Cramer*, 377 S.C. 12, 24, 659 S.E.2d 112, 118 (2008). The Appellants have properly demanded a trial by jury and Respondent has failed to show that this right was waived. Therefore, the Trial Court erred in granting Respondent's motion to strike.

The Appellants' demand was proper under South Carolina law. The Appellants endorsed a demand for trial by jury upon the initial response to Respondent's Complaint. The demand was timely under SCRCP 38 as it was made contemporaneous with the last pleading directed to such issue. The demand was similarly proper under SCRCP 38 as the Appellants are entitled to a trial by jury under the South Carolina Constitution and statutory law as the Respondent seeks a judgment award of money damages only. Article 1, Section 11 of the South Carolina Constitution plainly states "[t]he right of trial by jury shall be preserved inviolate." The Supreme Court has found that part of the purpose, design, and policy of this right as follows;

> "The great right of trial by jury has existed from time immemorial in all those forms of actions at common law which were in use before the adoption of the Code, such as assumpsit, **debt**, covenant, trover, trespass vi et armis, to try titles, and case, etc., and no doubt such right exists in the actions provided by the Code as a substitute for these common-law actions [...]"

Frazee v. Bratton, 26 S.C. 348, 2 S.E. 125, 127 (1887)(emphasis added). Similarly, Rule 38 SCRCP provides that "an action for the recovery of money only or of specific real or personal property **must** be tried by a jury." Emphasis added. Since the Respondent seeks only money damages, this action

clearly falls within those actions at common law that afforded a defendant a right to a trial by jury. The Appellants demand for a jury was timely and proper under the South Carolina law.

Assuming the allegations of the complaint to be true, only one primary right of the Respondent has been alleged to have been violated; that is the right to have the terms of the guarantees complied with, and the wrong complained of is the noncompliance or breach of the guarantees. A suit for breach of contract, regardless of how brought, has the adequate remedy at common law of a monetary judgment by the court of common pleas. See *Smith & Co. v. Bryce*, 17 S.C. 538 (1882)(a suit seeking ordinary remedy at common law entitles a Appellant to have his case tried by a jury). Thus, any action seeking a monetary judgment affords the parties a right to a trial by jury under the South Carolina Constitution. See *White v. Kendrick*, 3 S.C.L. 469, 472 (S.C. Const. App. 1805)(stating the summary jurisdiction of the court of common pleas provided either party the right to demand a trial by jury); see also *Airfare, Inc. v. Greenville Airport Comm'n*, 249 S.C. 265, 269, 153 S.E.2d 846, 848 (1967)(holding an action for damages for a breach of contract is an action at law and either party has the right of trial by jury); *Johnson v. South Carolina National Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987)(holding action against guarantor was legal and that it entitled the guarantor a jury trial); *S. Bank & Trust Co. v. Harley*, 295 S.C. 423, 368 S.E.2d 908 (1988)(holding that an action on a guarantee seeking a deficiency was an action of law). The Respondent's suit seeking money damages necessarily provides the Appellants the right of a trial by jury.

The legal remedy of money damages sought by the Respondent entitles the Appellant to a right to have the legal claims against it tried by a jury. The cause of action of the Respondent as set forth in its complaint is one at law. The counterclaims of Appellants for breach of the guarantees are similarly ones at law.

B. The Trial Court's Order relies upon a waiver that is unenforceable as to the matters raised in this action and should, therefore, be denied.

The Trial Court's Order striking Appellant's demand for jury trial should be reversed as it improperly relies upon an unenforceable provision in an unenforceable agreement. First, the guarantees are unenforceable as alleged by the Appellants. Second, the waivers relied upon are unenforceable under South Carolina law. Finally, the waiver relied upon should be held unconstitutional. Therefore, the Trial Court erred in no denying the Respondent's motion.

1. The alleged waiver provision is not binding on the Appellants.

South Carolina law provides limited grounds for precluding a trial by jury for those actions by which the right to a trial by jury is afforded. Trial by jury is a substantial right and any waiver thereof must be strictly construed. See *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). "The courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights." *State v. Thompson*, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003)(Emphasis added), citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938).

The Trial Court's Order granting the motion to strike relies entirely upon Rule 39 SCRCP and an alleged waiver of the right to a trial by jury. Rule 39(a) of the South Carolina Rules of Civil Procedure provides that once a party has made a timely demand for a jury trial under Rule 38:

> [t]he trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

Here, nothing in the record indicates the parties or their attorneys either by written stipulation filed with the court or by oral stipulation made in open court and entered in the record consented to a trial by the court without a jury. Therefore, the Respondent's motion should have been denied.

Further, the waiver provision, by law, is not binding until filed with the court. Until that time the waiver may be withdrawn. South Carolina law has held that agreements between parties affecting the proceedings in an action are not binding "unless reduced to the form of a consent order or written stipulation." SCRCP 43. Thus, until said written stipulation is filed, the South Carolina Supreme Court has held that such agreements may be withdrawn. See *Jones v. Enoree Power Co.*, 92 S.C. 263, 75 S.E. 452, 454 (1912); see also *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006). The Appellants properly withdrew any waiver of jury trial upon the proper demand for trial by jury as required under SCRCP 38. Thus, the striking of a jury demand based upon a withdrawn waiver is inappropriate.

2. The guarantees and waiver provision contained therein are not enforceable.

This matter involves several executed guarantees. The Appellants have alleged that the Respondent breached the guarantees and under the standard of review, the Trial Court was required to accept the allegations as alleged by the Appellant. The Respondent's breach of the guarantees results in the Respondent's inability to enforce those guarantees or the terms therein. Under South Carolina law, a party may only enforce an agreement after showing that it has fulfilled all of its obligations under the agreement. *Hyder v. Metro. Life Ins. Co.*, 183 S.C. 98, 190 S.E. 239, 244 (1937)("in order for one party to recover of another party upon a mutual, dependent contract, the Respondent must allege performance of all conditions precedent on his part"). The Respondent in this action has not fulfilled its obligations. Thus, any waiver provision contained in the guarantees

is unenforceable by Respondent.

Finding that a waiver of a constitutional right may be done through an unenforceable agreement, as the Trial Court's order does, would result in absurd consequences. Such a ruling would require a judge to, similarly, enforce a waiver in a contract that had been defined under South Carolina law as illegal, fraudulently induced, or even completely fabricated. Such a result would not only be in conflict with South Carolina law, but would make little logical sense. See *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866–67 (Ct.App.2002)("The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.")(citation and internal quotation marks omitted).The Trial Court's ruling, at its core, holds that, under South Carolina law, the only time a court will enforce those agreements unenforceable by law is when a constitutional right has been waived therein. South Carolina courts have always professed to protect constitutional rights, not carved out exemptions to disparage them. See *Cramer*, supra. One can easily foresee deceptive parties producing legally unenforceable waivers so as to remove constitutional rights without ever having the document tested before the proper trier of fact. See *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)("Waiver is a question of fact for the finder of fact"). Such a result is not and cannot be the law in South Carolina. Therefore, the Trial Court's Order should be reversed.

3. The Respondent failed to show that the Appellants voluntarily and knowingly waived their right to trial by jury.

The Appellants did not knowingly waive their rights to trial by jury. "Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that **the party seeking enforcement** of the waiver must prove that consent was both

voluntary and informed." *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986)(Emphasis added). Principally, the Trial Court erred in finding a knowing and voluntary waiver without any evidence admitted in support of such a finding . Secondly, no evidence could be provided to show such a knowing and voluntary waiver, as it is impossible to knowingly and voluntarily waive a right on does not know exists. The Appellants could not have knowingly and voluntarily agreed to waive their rights to a trial by jury for claims it did not yet know would arise. Thus, the Trial Court's order must be reversed.

South Carolina law has been clear as to how such waivers should be construed. "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)(emphasis added). "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 *Lanford*, supra at 545, 443 S.E.2d at 551)(emphasis added). Presented here, a reasonable person could not have learned of the rights waived within the guarantees, as such rights had yet to arise. Pursuant to the plain, ordinary, and popular sense of the guarantees, the Appellants could not have knowingly and voluntarily waived the right to a jury. Thus, the Appellants are entitled to a jury trial on its counterclaims.

The Trial Court's order enforces a waiver of the right to a jury executed before any default

occurred, before any litigation was brought, before any knowledge of the conduct on the part of the Respondent occurred. How can such a waiver of a jury trial possibly be "knowing" when one doesn't even know that one has a cause of action against the party seeking the waiver. "Waiver has been frequently defined as the voluntary relinquishment of a known right and may be express or implied." *Farmers' & Merchants' Bank v. People's First National Bank of Charleston*, 161 S.C. 286, 159 S.E. 617 (1931). The rights held to be waived through the provisions contained in the guarantees were not known to the Appellants, nor could they have been known. Thus, the Trial Court erred in finding such rights knowingly waived.

There should be a presumption that a waiver contained in an un-negotiated document that contains a waiver of the right to a jury trial is not a knowing and voluntary waiver. The Supreme Court in *Johnson*, stressed that no matter which option the trial judge chooses, great care should be taken to insure that a party's right to a jury trial is not infringed. Supra at 52, 354 S. E. 2d at 896. In the *Howard v. Bank South, NA*, the Georgia Court of Appeal's makes the excellent point, "how can a waiver be a knowing and voluntary waiver of events that have not yet transpired?" 209 Ga.App. 407(4), 433 S.E.2d 625 (1993). Simply, one cannot knowingly and voluntarily waive the right to a jury for unknown events and for events that have not yet occurred.

In criminal matters, before allowing a person accused of a crime to plead guilty and thereby waive the accused's right to a jury trial, the trial court must consider a multitude of factors in determining whether the accused is knowingly and voluntarily waving the right to a jury trial. See Rule 14, South Carolina Rules of Criminal Procedure ("In all cases, the trial judge shall ensure that the Appellant's rights under the state and federal constitutions to a trial by jury are preserved."). The trial court does not and would not ever enforce a waiver that occurred prior to even the crime being committed. That

is exactly what the Respondent is asking this court to do.

4. The waiver provision is unenforceable as it is unconstitutional.

The waiver provision within the Draw Agreement is repugnant to the Constitution of South Carolina and should be held as unconstitutional. The waiver provision provides for the waiver of the constitutional right of a trial by jury for unknown future causes of action. It is contained in a contract of adhesion where the party waiving its rights has no legitimate alternative. South Carolina law is clear. If an agreement is "manifestly repugnant to the constitution, the parties are not supposed to contract in reference to the act, but in reference to the constitution, as the paramount law." *Belcher ads. Commissioners of Orphan House of Charleston*, 13 S.C.L. 23, 25 (S.C. Const. App. 1822). The South Carolina Constitution has protected the right to a trial by Jury since 1790. Similarly, the statutes regarding waiver of such a right have contained almost the exact same language limiting waivers to certain circumstances. By their terms, both the statutes and the Constitution plainly contemplate the pendency of litigation regarding the right and at the timing of the waiver. The constitutionality of pre-litigation waivers of the right to a jury have been addressed in California and in Georgia. Both States have held that such waivers are against public policy and cannot be enforced. See *Bank South, N.A. v. Howard*, 264 Ga. 339, 444 S.E.2d 799, (1994) (Georgia Law); *Grafton Partners L.P. v. Superior Court*, 36 Cal.4th 944, 116 P.3d 479, 32 Cal.Rptr.3d 5, (2005) (California Law).

In *Howard*, the Georgia Court of Appeals first looked at the issue of whether a waiver contained in a guaranty can be enforced because the trial court had stricken the jury demand. According to the Georgia Supreme Court,

"The Court of Appeals reversed the trial court's judgment, holding that a valid waiver

> of jury trial must be knowing and voluntary, and that since Howard could not have known when he signed the guaranty contract what the basis and circumstances of a future claim on the guaranty might be, his waiver could not have been knowing and voluntary. *Howard v. Bank South, N.A.*, 209 Ga.App. 407(4), 433 S.E.2d 625 (1993)."

Bank South, N.A. v. Howard, 264 Ga. 339, 339, 444 S.E.2d 799, 799 (1994). The Georgia Supreme Court then granted certiorari to "consider whether a pre-litigation contractual waiver of jury trial is enforceable under the laws of Georgia." *Id.* The Georgia Supreme Court held as follows:

> Civil litigants in this state's courts are guaranteed the right to a jury trial by the Constitution of Georgia and the Civil Practice Act. Waiver of that right is a matter which is "carefully controlled" by statute. Manderson & Assocs. v. Gore, 193 Ga.App. 723(5), 389 S.E.2d 251 (1989). The constitutional guarantee of the right to trial by jury refers to two circumstances in which the right may be waived: when no issuable defense is filed and when the parties fail to demand a jury trial. OCGA § 9-11-39(a) provides for waiver by express stipulation, either written and filed in the record or made orally in open court. By their terms, both the statute and the Constitution plainly contemplate the pendency of litigation at the time of the waiver. We conclude, therefore, that pre-litigation contractual waivers of jury trial are not provided for by our Constitution or Code and are not to be enforced in cases tried under the laws of Georgia.

Id. at 264 Ga. 339, 339-340, 444 S.E.2d 799, 799-800. Similarly the Supreme Court of California examines the constitutional origin of the right to a jury and the statutory requirements associated with the waiver of that right. Finding that no statutory authority exists for a pre-litigation waiver of the right to a jury, the Supreme Court of California holds that such pre-litigation waivers are unenforceable. *Grafton Partners L.P.,* supra. No South Carolina case addresses these issues.

In South Carolina, the requirements associated with the waiver of the right to a jury are equally as strict as Georgia and California. Rule 38(a) of the South Carolina Rules of Civil Procedure provides:

> The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.

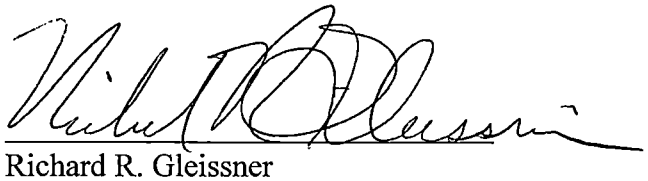
Rule 38(a), SCRCP. The only mechanism under the rules for waiving the right to a jury trial is found in Rule 38(d), SCRCP. This provision provides that "[t]he failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a)." Rule 38(d), SCRCP. In this case, the jury trial has been made and the Appellants do not consent to the withdrawal of this demand for a jury trial.

Simply, as in California, there is no procedure and no statute authorizing pre-litigation waivers of the right to a jury trial, let alone pre-dispute waivers of the right to a jury trial. Therefore, the Appellants believe that the South Carolina Supreme Court would join the Supreme Courts of Georgia and California in holding such pre-litigation waivers of the constitutional right to a jury trial unenforceable.

CONCLUSION

The trial court made clear legal error in finding that the separate claim against the Guarantor did not entitle the Guarantor to a jury trial on the Respondent's complaint against him. The trial court made clear legal error when it found the Plaintiff's claims were not barred by the statute of limitation. The trial court made clear error when it found the Appellants had waived their right to a jury. The trial court's order must be reversed with instructions to dismiss this matter as barred by the statute of limitations.

Respectfully submitted,

By: 

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Case No: 2014-CP-32-04259

Wells Fargo, N.A. as successor by merger to Wachovia Bank, National Association,
Respondent,

v.

Don A. Nummy, II, Dee S. Nummy, and Don A. Nummy,
Appellants.

PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief by depositing a copy of it in the United States Mail, postage prepaid, on December 30, 2015, addressed to its attorney of record as follows:

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