THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2015-001508
Case No. 2013-CP-10-6439

Wells Fargo Bank, N.A., Successor by Merger to
Wachovia Bank, National Association .... Respondent,

v.

Robert L. Freeman .... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. The Court should review the lower court's order granting the Bank partial summary judgment under the standard of review applicable to summary judgment.

This matter is before this Court on appeal of the lower court's order granting partial summary judgment to the Respondent, Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, National Association ("the Bank"). However, the Bank asserts in its brief that this appeal should be treated as if it were an appeal from a bench trial and final order. Specifically, the Bank asserts that ". . . the factual findings made by a lower court generally will not be disturbed on appeal unless there is no evidence to support them." **(Res. Breif, p. 8).** On summary judgment the court is not supposed to make factual findings because the decision before the court upon summary judgment is whether there are genuine issues of material fact, not how the court decides the factual issues. "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010) (quoting David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)).

When reviewing the grant of a summary judgment motion, this Court applies the same standard that governs the circuit court. See Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993). This standard requires all facts and reasonable inferences to be drawn therefrom to be viewed in the light most favorable to the appellant. Id. The circuit court is not entitled to any deference as to factual findings (its ruling should not include in

any findings of fact) and "[a]n appellate court may decide questions of law with no particular deference to the trial court." In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008).

This Court should not indulge the Bank's efforts to apply the wrong standard of review. (Res. Brief, p. 8) (citing Townes Associates, Ltd. v. Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)) The standard of review advanced by the Bank is reserved for those orders issued after a full bench trial on the merits where the lower court is the fact finder. See Townes at 86, 221 S.E.2d at 775 (stating the standard of review for an appeal of a case tried without a jury to a conclusion where the judge's findings are equivalent to a jury's findings in a law action).

II. The lower court should be reversed because a party seeking to benefit from the twenty-year statute of limitations that has not taken steps to affix a seal to the instrument must show that the contract *clearly evidences* an intent to create a sealed instrument and the Bank failed to make such a showing at summary judgment.

a. South Carolina law requires a contract *clearly evidence* the parties' intention to create a sealed instrument, to apply the twenty year statute of limitations absent a physical seal.

In Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005), this Court specifically rejected the Bank's position. In that case, this Court held that the inclusion of standard attestation language is insufficient to clearly evidence intent to create a sealed instrument. Carolina Marine Handling, 363 S.C. at 169, 609 S.E.2d at 551-52. In this case, the boiler plate in attestation clause is not materially different from the language rejected in Carolina Marine Handling. Compare Id., at at 169, 609 S.E.2d at 551-52 ("IN WITNESS WHEREOF, the parties have hereunto set their hands and seals") and **(Compl., Exs. E, H, M, W, CC & II)** (("**IN WITNESS WHEREOF**, Guarantor, on the day and year first written above, has caused the Unconditional Guaranty to be executed under seal.") (bold and capitalizations in originals)).

The Court explained its rational which applies with equal force in this case:

> In the case before us, we find the parties did not intend to create a sealed instrument. ***The sophisticated parties to this lease arrangement could have easily manifested an intent to create a sealed instrument if they were so inclined.*** We recognize that CSI, by necessity of the posture of the case, must advance the argument that the standard attestation—"IN WITNESS WHEREOF, the parties have hereunto set their hands and seals," compels a finding that the parties intended to create a sealed instrument. We further recognize, however, that ***such generic language is common in non-sealed contracts of all types.*** Were we to construe this boilerplate attestation clause, by itself, as requiring a finding of intent to create a sealed instrument in an otherwise non-sealed instrument, ***we would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state.*** We adhere to our general three-year statute of limitations for most contract actions and acknowledge the availability of the twenty-year limitations period where the contract ***clearly evidences*** an intent to create a sealed instrument

Id. at 174-175, 609 S.E.2d at 551-552 (double emphasis added).

The Court's decision in Carolina Marine Handling was correct and should not be rejected, overturned, or sidestepped as would be required by the Bank's position that was adopted by the lower court. See **(Order, p. 6)** (holding that the Bank's boilerplate language in this case was unequivocal and conspicuous such that Carolina Marine Handling should not apply to this case). This Court based its decision, in part, upon the requirement that a party seeking to benefit from the twenty-year statute of limitations that has not taken steps to affix a seal to the instrument must show that the contract *clearly evidences* an intent to create a sealed instrument. Carolina Marine Handling, at 175, 609 S.E.2d at 552 (explaining that a contract that does not include a physical seal may only be deemed a sealed instrument under section 19-1-160 where "the contract clearly evidences an intent to create a sealed instrument.").

This Court recently reiterated this same standard in Lyons v. Fid. Nat'l Title Ins. Co., Opinion No. 5365, 2015 S.C. App. LEXIS 246, *8-9 (S.C. Ct. App. Dec. 2, 2015). In Lyons, the Court quoted from Carolina Marine Handling as follows: "We adhere to our general three-year statute of limitations for most contract actions and acknowledge the availability of the twenty-year limitations period where the contract clearly evidences an intent to create a sealed instrument." Id.

(quoting Carolina Marine Handling, at 175, 609 S.E.2d at 552). As shown by Carolina Marine Handling and Lyons, South Carolina courts have increasingly stressed the importance of this very strict standard and been reluctant to extend the statute of limitations applicable to contracts by 17 years without a showing that the parties clearly intended such a result. See Carolina Marine Handling, 363 S.C. at 169, 609 S.E.2d at 551-52 (holding that generic and boiler plate language referring to seal in the standard attestation clause in a lease was not enough to demonstrate an intent to create a sealed instrument and, to hold otherwise, "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state").

This Court has even abrogated at least one of its prior rulings that applied the twenty year statute of limitations in an instance where the evidence did not clearly show the parties intended the instrument to be sealed instrument. This Court discussed at length this retreat from previous cases allowing a contracting party to extend the statute of limitations without a showing that the parties clearly intended such a result in Lyons:

> . . . in Treadaway v. Smith, this court found the parties to a separation agreement (incorporated into a 1974 Haitian divorce) intended to create a sealed instrument. 325 S.C. 367, 378, 479 S.E.2d 849, 855 (Ct. App. 1996), ***abrogated by*** Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005). The parties' agreement stated, "IN WITNESS WHEREOF, the parties have hereunto set their respective Hands and Seals in quadruplicate as of the day and year first above written" and "SIGNED SEALED AND DELIVERED IN THE PRESENCE OF [signatures of parties and witnesses]." Id. This court concluded that the plaintiff's action, which sought to enforce a provision of the agreement in which the defendant agreed to pay the children's college expenses, was governed by the twenty-year statute of limitations. Id.
>
> However, in Carolina Marine, this court concluded that the sophisticated parties to a commercial lease agreement did not intend to create a sealed instrument. 363 S.C. at 174, 609 S.E.2d at 551.

Lyons, *11-12 (bold added).

As explained below, the lower court's order that "multiple indicia that the parties intended that the guaranties be 'sealed instruments,'" **(Order, p. 4),** should be revered because the contract did not clearly evidence an intention that the contracts be sealed instruments governed by the twenty year statute of limitations. This Court in Lyons rejected the lower court's ruling and the Bank's position applying this lower legal standard ("multiple indicia" vs. "clearly evidences") from Treadaway v. Smith, 325 S.C. 367, 378, 479 S.E.2d 849, 855 (Ct. App. 1996), instead of that enforced in Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005).

b. The attestation clause in Bank's form guaranty contracts is insufficient to trigger the twenty-year statute of limitations as argued by the Bank and found by the lower court.

The Bank argues in its brief that the attestation clause in its form guaranty contracts is all that it takes for this Court to hold, as a matter of law, that the parties intended the form guaranty contracts to be sealed instruments with a twenty year statute of limitations. **(Res. Brief, p. 10).** The Bank's reliance on its boilerplate language is misplaced. As just discussed, this Court has specifically rejected the argument that a boiler plate attestation clause is sufficient under South Carolina Code section 19-1-160 to establish a sealed instrument and extend the statute of limitations period applicable to contracts by 17 years. Therefore, the lower court's ruling that the form guaranties are sealed instruments as a matter of law because of the attestation clause should be reversed.

c. The Bank's adding a placeholder for a seal by including a notation "(SEAL)" does not express the parties' clear intent that the guaranty contracts be treated as sealed instruments as a matter of law.

After asserting that the boilerplate attestation clause which included the word "seal" in ordinary print established the parties' clear intent to enter a sealed instrument as a matter of law,

the Bank argues the inconspicuous, parenthetical, and unexplained use of "(SEAL)" next to a signature line likewise establishes, as a matter of law, the parties' clear intent to enter into a sealed instrument with a twenty year statute of limitations.

No South Carolina Court has ever found that a boilerplate attestation clause, indistinguishable from the one rejected in Carolina Marine Handling, coupled with the use of "(SEAL)" manifests the parties' unequivocal intent to enter into a sealed instrument as a matter of law. In fact, as explained in Freeman's opening brief, the only court applying the law of South Carolina that squarely considered the issue reached the opposite conclusion. *See* Midwest Dredge & Excavating, Inc. v. Bay Pointe Homeowner's Assoc., C/A 2:06-2021-DCN, 2007 U.S. Dist. LEXIS 99536, *14-15, 2007 WL 7141921 (unpublished) (D.S.C. May 15, 2007) (finding that a standard attestation clause (i.e., "signed and sealed") along with the word "Seal" in parentheses next to the signature line did not show that parties clearly intended to create a sealed instrument).

The Bank attempts to distinguish the district court's opinion in Midwest Dredge on the basis that the instrument in that case included other parentheticals. *See* **(Res. Brief, p. 13).** The Bank also attempts to distinguish Midwest Dredge on the basis that the anticipated length of the contractual relationship in that case was shorter than in this case. *See* **(Res. Brief, p. 14).** Neither of the Bank's arguments is a reason to discount the Midwest Dredge decision.

The issue before this Court is whether or not the placement of "(SEAL)" next to the signature line is conclusive of the parties' intent as a matter of law, not whether there are other parentheticals within the parties' agreement that have nothing to do with whether the instrument was sealed. The district court in Midwest Dredge did not base its determination that the agreement was not a sealed instrument on the presence of other parentheticals but instead on a parenthetical's suggestion that more was necessary. *See* Id. at *14-15 ("The bond form contains blanks labeled

with the terms "(Principal)" and "(Surety)" to indicate where the names of the parties and the signatures of their representatives should be placed. The bond form includes the notation "(Seal)" to reflect the location where the corporate seal is to be affixed if the parties desire to create a sealed instrument. Because no seal is in fact affixed by either of the parties in this case, there is a lack of intent to create a sealed instrument.").

The Bank's second attempt at distinguishing the Midwest Dredge case -- that the anticipated length of the contractual relationship was longer in the Midwest Dredge case than in this case -- is even less compelling. In Midwest Dredge, the district court noted that the contractual relationship was scheduled to last approximately six months and that allowing a party twenty years to bring a lawsuit would serve no purpose. See Midwest Dredge at *14 ("a twenty year limitations period would serve no purpose in the context of a performance bond for the completion of contractual work which was scheduled to take less than six months to complete."). Here, contrary to the Bank's suggestion that these were long term guaranty contracts justifying a twenty year statute of limitations, the initial term of most of the loans was merely three years. **(Compl., Exs. A, C, F, I, K, N, P, R, T, Z, DD, & FF all at pp. 1-2)** (stating REPAYMENT TERMS of two to three years). All promissory notes had matured and become due in full, but had their due dates postponed by a series of similar modification agreements dated April 8, 2010, extending the term only fourteen months, until June 15, 2011, provided the monthly interest payments were made. **(Compl., Exs. B, D, G, J, L, O, Q, S, U, V, Y, AA, BB, EE, GG, HH).** At the time of the defaults there was less than nine-months remaining on the modified promissory notes before they all became due in full.

Contrary to the Bank's argument, the parties were not contemplating an extended relationship that would correspond to the twenty year statute of limitations. The clear intent of the

parties manifested by the extremely short extension of the due dates under the loan modification agreements completely contradicts the notion that they intended the twenty-year statute of limitations to apply as a matter of law. The invocation of the twenty-year statute of limitation in this case would serve no purpose, be a fundamentally unfair, and be at odds with the actual term of the parties' agreements, as modified.

While the Bank is dismissive of the district court opinion addressing the exact issue now before this Court, it nonetheless attempts to shoehorn these facts into the decision of this Court on dissimilar facts in South Carolina Dep't of Soc. Serv. v. Winyah Nursing Homes, Inc., 320 S.E.2d 464, 282 S.C. 556 (Ct. App. 1984) case. In Winyah Nursing Homes, the Court approved the use of a legal abbreviation, "L.S." for an actual physical seal. Id. at 561, 320 S.E.2d at 467 ("The notation 'L.S.' follows the signatures of the agents . . . Clearly, the two contracts are sealed instruments"). L.S. is an abbreviation for the Latin term "locus sigilli," meaning "place of the seal." Here, the document includes no such abbreviation or indication that the parties intend that the instrument be sealed in the absence of a physical seal.

Additionally, it is worth noting that the Bank's argument that L.S. is equivalent to (SEAL) was specifically rejected by United States District Court Judge David C. Norton in Midwest Dredge:

> . . . in South Carolina Dep't of Soc. Serv. v. Winyah Nursing Homes, Inc., 320 S.E.2d 464, 282 S.C. 556 (Ct. App. 1984), the court of appeals found an intent to create a sealed instrument where the attestation clause stated "the parties hereto have set their hands and seals" followed by the notation "L.S." adjacent to the contracting parties' signatures. 320 S.E.2d at 467, 282 S.C. at 561. According to Bay Pointe, the inclusion of the term "(Seal") (sic) under the parties' names is analogous to the inclusion of "L.S." in Winyah and should therefore be held as evidence of intent to create a signed instrument.
>
> This court disagrees with Bay Pointe's arguments and finds the parties did not intend to create a sealed instrument.

Midwest Dredge & Excavating, Inc. v. Bay Pointe Homeowner's Assoc., 2007 U.S. Dist. LEXIS 99536, *13, 2007 WL 7141921 (D.S.C. May 15, 2007).

The Bank also relies upon Transouth Fin. Corp. v. Cochran, 324 S.C. 290, 292, 478 S.E.2d 63, 64 (Ct. App. 1996).[1] In the Transouth case, the Court addressed whether the guarantor in that case was released from liability on when the ten-year judgment lien against the primary obligor expired. Id. at 293, 478 S.E.2d at 65. The Court did not address whether the guaranty in that case was a sealed instrument or what statute of limitations applied, other than stating in a footnote that "[p]ursuant to S.C. Code Ann. § 15-3-520(b) (Supp. 1995), an action upon a sealed instrument may be brought within the prescribed twenty year period." Id. at 294, 478 S.E.2d at 65, n.2. The Bank relies on this case, not by citing to a holding, or even dicta in the case, but by citing to the record of appeal and asserting that the guaranty at issue in that case included the parenthetical "(SEAL)." **(Res.'s Brief 11-12).** The Bank's reliance on the Transouth case is misplaced because the issue of whether the parties clearly intended that the contract be treated as a sealed instrument was not before the court in Transouth, and this Court did not address the issue.

Therefore, the lower court should be reversed because the guaranty contracts did not clearly evidence an intention by the parties to enter into a sealed instrument.

III. The Bank's additional affirming ground should be rejected because the lower court did not rule on it and because the guaranty contracts were not secured by the mortgage.

[1] The Bank also relies upon Cook v. Cooper, 59 S.C. 560, 38 S.E. 218 (1901) and Wallingford v. Western Union Telegraph Co., 60 S.C. 201, 38 S.E. 443 (1901). As noted in Freeman's opening brief, neither of these cases involved an instance where one party was seeking to apply the twenty-year statute of limitations to bring a claim against the other party that would otherwise be time barred. **(App.'s Brief, p. 14, n.4).** Additionally, the instruments in both cases contained substantial evidence clearly establishing the intent of the parties that the instrument be sealed, which is absent here. **(App.'s Brief, p. 14, n.4).**

The Bank raises one additional affirming ground for the application of the twenty-year statute of limitations under S.C. Code § 15-3-520. The Bank argues that even if the form guaranty contracts at issue were not sealed instruments that the twenty year statute of limitations still applies **because** the underlying obligation was secured by a mortgage. **(Res. Brief, pp.18-19)**. For the reasons explained below, the Bank's argument should not be considered. Alternatively, the Bank's additional affirming ground should be rejected.

a. Consideration of additional affirming grounds is discretionary.

"The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). "An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case." Id. It is within the appellate court's discretion whether to address any additional sustaining grounds." Id. "The appellate court may find it unnecessary to discuss respondent's additional sustaining grounds when its affirmance is grounded in an issue addressed by the lower court." Id. at n. 9 (citing South Carolina Federal Sav. Bank v. Atlantic Land Title Co., 314 S.C. 292, 298 n.5, 442 S.E.2d 630, 633 n.5 (Ct. App. 1994) (affirming lower court's decision and declining to discuss additional sustaining grounds)). "The appellate court may or may not wish to address such grounds when it reverses the lower court's decision." Id. at n. 9 (citing Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 438, 472 S.E.2d 612, 615 (1996) (reversing lower court and declining to discuss additional sustaining grounds); Huff v. Jennings, 319 S.C. 142, 148, 459 S.E.2d 886, 890 (Ct. App. 1995) (reversing lower court's decision and discussing additional sustaining ground)).

Here, as explained in detail above and in Appellant's opening brief, the Court should reverse the lower's decision that the form guaranty contracts at issue were sealed instruments. The Court need not address the Bank additional arguments in reversing the lower court. This case was before the lower court on cross motions for partial summary judgment and the lower court's order granting partial summary judgment to the Bank on Freeman's defense of limitations was based on one ground alone. This Court should remit the case to the lower court to allow it to consider the other arguments made by the Bank and to scrutinize the record to determine if there are genuine issues of material fact. However, if this Court decides to address the Bank's additional affirming ground it should be rejected as explained below.

b. A contract guarantying a note is not a contract secured by a mortgage, even if the note it guaranties is secured by a mortgage.

In additional to sealed instruments, a contract which is secured by a mortgage is governed by the twenty year statute of limitations. See S.C. Code §15-3-520 (a) (stating that "an action upon a bond or other contract in writing secured by a mortgage of real property" is governed by a twenty year statute of limitations). Even though the guaranty contracts are clearly not secured by a mortgage, the Bank attempts to bootstrap the mortgage securing the underlying note to support its additional sustaining ground. As explained herein, this alternative effort to accomplish a seventeen year extension of the statute of limitations also fails.

A guaranty is a separate contract from a promissory note. *CoastalStates Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 519, 759 S.E.2d 152, 156, 2014 S.C. App. LEXIS 48, 8-9 (Ct. App. 2014). "The general rule in South Carolina is that a guaranty of payment is an obligation separate and distinct from the original note." *Id.*

> The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise to the latter; and the responsibilities which are imposed by the contract of guaranty

> differ from those which are created by the contract to which the guaranty is collateral.

Id. Because a guaranty and promissory note are separate contracts or obligations with different parties, their independence is not affected by the fact that both contracts are written on the same paper or instrument or are contemporaneously executed. 38 Am. Jur.2d *Guaranty* § 4.

The fully integrated guaranties make no mention of being secured in any manner, much less secured by a mortgage. The guaranties are instead entirely unsecured. Freeman, the personal guarantor, did not pledge any real property in his personal name to secure the guaranties. The separate mortgages that were tied to the promissory notes encumbered the real property of the borrower entities, not Freeman, the personal guarantor.

In arguing that each of the guaranties is secured by a mortgage, the Bank relies solely upon *Scovill v. Johnson*, 190 S.C. 457, 3 S.E.2d 543 (1939). *Scovill* was a 3-2 decision of a sharply divided court. The majority determined that the liability of the *endorsers* of a note that was secured by a mortgage were subject to the twenty year statute of limitations. Critical to the majority's decision was that there was only one instrument – the promissory note that was secured by the mortgage. Even though not a maker of the promissory note, the individual defendants nonetheless endorsed the promissory note in *Scovill*. The individual defendants did not sign a separate guaranty agreement.

The crucial difference between this case and Scovill is that here in each of the transactions there were separate instruments – the promissory note (secured by the mortgage on the land of the borrower entity) and the guaranty (not secured by anything). Unlike in Scovill, Freeman did not endorse the note that was secured by the mortgage, thereby rendering him the equivalent of the maker. As a matter of law, the guaranty and the promissory note in this case are separate contracts. See Citizens & S. Nat'l Bank v. Lanford, 313 S.C. 540, 544, 443 S.E.2d 549, 551 (1994) (recognizing that the general rule in South Carolina is that a guaranty of payment is an obligation separate and

distinct from the original note); CoastalStates Bank v. Hanover Homes of S.C., LLC, 408 S.C. 510, 519, 759 S.E.2d 152, 156 (Ct. App. 2014). In Scovill, there *was only one contract, and it was secured by a mortgage*. There is no case in South Carolina finding that a separate guaranty agreement is "secured by a mortgage" on the basis that it guarantied payment of a separate promissory note, made by another person, that was secured by a mortgage.

Therefore, if the Court decides to consider the Bank's additional affirming ground it should be rejected because the guaranty contract in this case was not secured by a mortgage as a matter of law.

IV. The Bank cannot raise issues on appeal which seek summary judgment on an issue not ruled upon by the lower court.

The lower court granted the Bank's motion for summary judgment that the applicable statute of limitations in this case is twenty years. **(Order, p. 8, 10)**. The lower court did not rule on the other grounds for Appellant's motion for partial summary judgment that the Bank is entitled to prevail as a matter of law even if the statute of limitations is three years partial. **(Order, p. 10, n. 2)** ("In light of the Court's ruling that the statute of limitations is twenty years, it is not necessary to decide the other arguments presented by the parties, including whether the so-called mandatory acceleration provision in the guaranty agreements was self-executing or required affirmative election by the lender, whether Freeman acknowledges the debt through writing or partial payments in a manner sufficient to "reseat" the statute of limitations . . .").

On appeal, the Bank raises three grounds for its argument it initiated this action as to all the guaranties within the three year statute of limitations. **(Res. Brief, pp. 19-28)**. In asking the Court to find that it complied with the three-year statute of limitations as a matter of law, the Bank is not seeking an order affirming the lower court's order that the twenty year statute of limitations applies. In this sense, the Bank is in the same posture as an appellant, seeking a finding that the

lower court declined to make. All of these arguments should be rejected at the outset because they ask this Court to make a finding that was not ruled upon by the lower court and would not have the effect of affirming the lower court's ruling that the twenty year statute of limitations applied. See I'On, 422, 526 S.E.2d at 724 (citing Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court); State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991) (same); Sumter Building & Loan Ass'n v. Winn, 45 S.C. 381, 23 S.E. 29 (1895) (same)).

Therefore, the Court should not consider the Bank's additional grounds as to whether it complied with the three—year statute of limitations. The lower court's ruling was an order partially granting summary judgment on a single issue-the length of the statute of limitations. The reasons the Bank advances in seeking a ruling that it brought this action within the three-year statute of limitations require factual determinations and should not be decided by an appellate court when not addressed below. See, Penza v. Pendleton Station, LLC, 404 S.C. 198, 206, 743 S.E.2d 850, 854 (Ct. App. 2013) ("For us to affirm the partial grant of summary judgment on this basis would be inappropriate. While this may be a viable argument for the Bank, it did not raise it in its summary judgment motion. Because this case is at the summary judgment stage, it is improper for us to decide the case based on this when the facts are not fully developed.").

Finally, in pursuing these separate grounds for its motion, the Bank is largely in the same posture as appealing a denial of a motion for summary judgment which is clearly not subject to appeal. *Olson v. Faculty House of Carolina*, 354 S.C. 161; 580 S.E.2d 440 (2003).

V. Even if the Court were to consider the Bank's arguments that it should have been granted summary judgment as to whether it complied with the three year statute of limitations, all of the Bank's arguments fail.

a. **<u>The plain language of the guaranty contracts provides that the Bank's causes of action against the guarantor for the total outstanding amount of the notes accrued upon default.</u>**

"'A guaranty is a contract.'" *CoastalStates Bank v. Hanover Homes of S.C.*, LLC, 408 S.C. 510, 518, 759 S.E.2d 152, 157 (Ct. App. 2014) (quoting *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 294, 478 S.E.2d 63, 65 (Ct. App. 1996)). "'Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Id.* (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)). All doubts and ambiguities must be construed against the drafter. *Id.* (quoting *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010)).

> **The court must enforce an unambiguous contract according to its terms,** regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. To discover the intention of a contract, the court must first look to its language--if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect.

Ellie, Inc. v. Miccichi, 358 S.C. 78, 93-94, 594 S.E.2d 485, 493 (Ct. App. 2004) (emphasis added) (internal citations omitted).

In *CoastalStates Bank*, this Court looked to the express language of the guaranty when making its determination on the statute of limitations. There, the guaranty provided for "payment when due and as due upon maturity" and set forth the maturity dates. *CoastalStates Bank,* at 516-517, 759 S.E.2d at 156. Because of that express provision and because the guaranties contained specific maturity dates of August of 2009 and April of 2010, the lawsuit in *CoastalStates Bank* was timely filed in December of 2011. *Id.* at 517-518, 759 S.E.2d at 156-157. The Court disagreed with the appellant's contention in that case that the statute of limitations began to run at the time the notes were made in July 2007. *Id.*

Here, the form guaranty agreements drafted by the Bank authorized the Bank to pursue all remedies available to it against Freeman more than three years before this case was filed, upon the respective borrowers' failures to make the required *monthly* payments when due. The Bank's causes of action on the guaranties accrued on the borrower's failure to make a payment when due: "DEFAULT. If any of the following occurs, a default ("Default") under this Note shall exist: Nonpayment; Nonperformance. The failure of timely payment or performance of the Obligations or Default under this Note or any other Loan Documents." **(Compl., Ex. K at p. 3)**; see also **(Compl., Exs. A, C, F, I, N, P, R, T, X, Z, DD, FF for identical provisions); see also, (Compl., Exs. E, H, M, W, CC, II)** (the guaranties even emphasize that they cover "timely payment and performance of all liabilities and obligations" and that they are a "continuing and unconditional guaranty of payment and performance and not of collection.").

Pursuant to the express language of the guaranties, a single default by the borrower triggered all of the guarantor's obligations with respect to that loan: "If a Default occurs, the Guaranteed Obligations *shall be due immediately* and payable without notice . . . and, Bank and its affiliates may exercise any rights and remedies as provided in this Guaranty and other Loan Documents, or as provided in law or equity." **(Compl., Exs. E, H, M, W, CC, II)** (emphasis added). As far as the guarantor's liability is concerned, the terms of the guaranties effectively accelerated the corresponding promissory note obligations upon default. See e.g., Conner v. City of Forest Acres, 348 S.C. 454, 464, 560 S.E.2d 606, 611, n. 4 (2002) (noting that the language of an employee handbook include mandatory language when it because it used the terms "shall be" and "will be"); Seckinger v. The Vessel "Excalibur", 326 S.C. 382, 389, 483 S.E.2d 775, 778-779, (Ct. App. 1997) (". . . the cardinal rule of statutory construction is that words used in a statute should be given their plain and ordinary meaning unless something in the statute requires a

different interpretation. . . . [a]pplying this principle, one can readily ascertain the emphasized language, employing the word "shall," is mandatory.").

According to the clear and unambiguous terms of the guaranties, upon the borrower's default, the statute of limitations (as to the entirety of all guarantied obligations under the corresponding loan documents) began running. Through their automatic acceleration clauses, each of the guaranties transformed the date of default into the date of maturity for that loan obligation as to the guarantor. If there was a default in the monthly payment, the guarantor became liable for the full amount without further action by the Bank, and the Bank could bring suit for the whole amount.

The terms of the guaranties tying the right to proceed against the guarantor to a default by the borrower and establishing the immediate recourse of the lender against the guarantor are in keeping with the prevailing rule. 38 Am. Jur. 2d *Guaranty* § 96 ("Generally, the statute begins to run on the breach of the underlying obligation triggering the guarantor's obligations."); 51 Am. Jur. 2d *Limitation of Actions* § 145 ("If a debt is payable in installments and the instrument contains an automatic acceleration clause, the debt may be fully matured and the statute of limitations may begin running when the debtor first defaults.")

b. The was no admissible evidence below that Freeman acknowledged the debt and restarted the statute of limitations.

The Bank also argues that Freeman acknowledge the debt in writing and restarted the statute of limitations. **(Res.'s Brief, pp. 23-26)**. Under certain circumstances a signed writing acknowledging a debt or a partial payment may restart the statute of limitations. See S.C. Code. § 15-3-120 ("No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter unless it be contained in some writing signed by the party to be charged thereby. But payment of any part of principal or interest

is equivalent to a promise in writing."). In order for an alleged acknowledgement to restart the statute of limitations, the acknowledgment must be a new promise to pay ". . . must amount to an unqualified admission of a subsisting legal liability and must be established by evidence unambiguous and full." In re Vaughn, 536 B.R. 670, 677 (Bankr. D.S.C. 2015)(quoting Black v. White, 13 S.C. 37, 40 (S.C. 1880)).[2]

Nothing in this case supports a finding as a matter of law that Freeman made an unqualified or unambiguous admission to substitute the legal liability of the borrower for his liability under the guaranty contracts. There is neither a writing signed by the party or any partial payments acknowledging the debt.

In support of its argument that Freeman acknowledged the debts in writing, the Bank solely relies on the document it refers to as the "Acknowledgement Letter." See **(Res.'s Brief, pp.23-24) (citing Exhibit B to the Supplemental VanWagenen Affidavit).** The "writing" is a purported letter from Freeman's then counsel to counsel for the Bank and is titled a "**Workout Proposal.**" This correspondence is plainly inadmissible settlement negotiations and should not be considered. See S.C. R. Evid. 408 ("Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible."); e.g., S.C. R. Civ. P.

[2] The Bank relies on three cases, Hill v. Hill, 51 S.C. 134, 28 S.E. 309 (1897); Young v. Monopey, 2 Bail. 278, 18 S.C.L. 278 (Ct. App. Law and Eq. 1831); and Stuber v. Richards, 61 S.C. 393, 39 S.E. 540 (1901), all of which are more than 100 years old and pre-date S.C. Code. § 15-3-120. The Bank's argument is only supported by inadmissible settlement negotiations between the parties' lawyers (and not between the parties themselves as in Hill). These cases do not apply to these facts. Freeman never signed a writing unequivocally acknowledging the debts of the borrower as his debts as would be required under South Carolina law.

56(e)(requiring summary judgment be supported with admissible evidence). If the Bank's argument were adopted, the protections of Rule 408, which encourage the settlement of disputes, would no longer be applicable in the context of debt collections and future debtors would be discouraged from attempting to negotiate a resolution with their creditors.

Additionally, the correspondence relied upon by the Bank is not signed by Freeman as required by the statute and is not an unequivocal admission of legal liability for the debts. Finally, it is worth noting that the letter relied upon by the Bank, Freeman's lawyer discussed a proposed workout wherein numerous alleged creditors would be partially paid and treated equally:

> Except as detailed above, this proposal calls for all similarly situated unsecured creditors to be placed in the same class and to be paid on the same terms. In order to remain in compliance with the Bankruptcy Code and in fairness to all of his creditors, Mr. Freeman cannot agree to pay any unsecured deficiency creditors on different or better terms than shown in this proposal.

(Supplemental VanWagenen Aff., at Ex. B). Under South Carolina law, such a proposal (even if it admits the debts which the letter form Freeman's lawyer does not) cannot be interpreted as restarting the statute of limitations:

> . . . when a party expressly admits the debt exists, but in doing so also ***expressly states he will not pay the debt, instead stating the debt will "come in to be paid with my other debts***," then the debt is not revived. Horlbeck v. Hunt, 26 S.C.L. 197, 201 (S.C. Ct. App. 1841); see also Hill v. Hill, 51 S.C. 134, 28 S.E. 309, 312 (S.C. 1897) (reviving a stale debt requires "an express promise to pay, or such unqualified and unequivocal admission that the debt is still due, unaccompanied by any expression indicative of an intention not to pay").

In re Vaughn, at 677-678 (double emphasis added).

The Bank also asserts that certain "partial payments" restarted the statute of limitations. **(Res.'s Brief, pp. 24-26).** The partial payments were not made by Freeman. The partial payments resulted from the sale of the borrower's collateral and were, therefore, made by the borrower as a matter of law.

Even though any payments received as part of a short sale were payments by the borrower, not Freeman, the Bank asserts that the statute of limitations restarted because Freeman agreed to the borrower's making these payments as part of the short sales. The partial payments at the time of the short sales did not cure the default. In fact, the short sale letters expressly state that the payments are a credit against the total amount due and do not eliminate the unpaid debt. **(Supplemental Affidavit of VanWagenen, at Ex. B)** ("Borrower and Guarantor expressly agree this is a partial payment on the Loan and that neither this payment nor any other partial payment that has been or may be received shall constitute an agreement to waive demand for full payment of all amounts due under the Loan Documents.")

As a matter of law, "tender of anything less than the *full accelerated amount* will not cure the default." *Allendale Furniture Co. v. Carolina Commercial Bank*, 284 S.C. 76, 79, 325 S.E.2d 530, 531 (1985) (emphasis in original). Moreover, as a matter of law, where a creditor applies proceeds to a debt from the sale of collateral (as was the case here), such application will not have the effect of an acknowledgment that revives the statute of limitations because the payment is not voluntary on the part of the debtor. *Zaks v. Elliott*, 106 F.2d 425, 427 (4th Cir. 1939) (appeal from a South Carolina United States District Court).

Furthermore, the short sale letters executed by Freeman are not evidence of an unequivocal admission of liability for the debts. Quite the contrary, these language of these short sale letters reflects that there was no waiver of any right or remedy under the loan documents, at law, or in equity:

> ***Nothing contained in this letter constitutes a waiver of, or any agreement to forbear from exercising any rights and remedies under the Loan Documents, at law or in equity***, and that Lender expressly reserves all such rights and remedies.

(Supplemental VanWagenen Aff., at Ex. B) (double emphasis added). While the second part of the sentence states that the Bank is expressly reserving its rights to exercise any right and remedy, the first part is not qualified and applies with equal force to Freeman, the debtors, and the Bank. Viewing this letter in the light most favorable to Freeman; it cannot be said to be an unqualified admission of liability on the guaranty contracts.

Therefore, even if the Court decides to consider this additional ground for partial summary, the Court should reject the Bank's argument because the letter does not amount "to an unqualified admission of a subsisting legal liability" nor is the Bank arguments that Freeman acknowledgements the debts been "established by evidence unambiguous and full." In re Vaughn, 536 B.R. at 677 (quoting Black v. White, 13 S.C. 37, 40 (S.C. 1880).

c. Because of the acceleration clause, the statute of limitations in this case does not apply to each payment separately.

As discussed in section V.a. above, the Bank's causes of action against the guarantor accrued upon default. The obligations owed on the guaranties matured automatically in accordance with their plain language, which defines default as the borrower's failure to timely perform and which provides that, at that time, all of the Guaranteed Obligations shall be due immediately and payable without notice. Through the automatic acceleration provision in the guaranty, the maturity date became the default date. The undisputed terms of the Bank's guaranties establish that the Bank's cause of action accrues upon the failure to make any payment.

Additionally, the Bank's argument on this additional ground should be rejected because the instruments in this case are not installment payment contracts as the Bank suggests. **(Res.'s Brief, pp. 26-27)**. Many of the original notes expressly allowed interest-only payments monthly. **(Compl., Exs. A, C, I, K, P, R, T, Z, DD, & FF)**. The modifications agreements either left the interest-only monthly payment terms undisturbed or expressly stated that monthly payments could

be made on an interest-only basis. **(Compl., Ex. D)** ("This Note shall be due and payable in consecutive monthly payments of accrued interest only, commencing on . . . , and continuing on the same day of each month thereafter until fully paid. In any event, all principal and accrued interest shall be due and payable on . . .."); see also, **(Compl., Exs., G, L, V, BB, and HH).**

None of the cases cited by the Bank involved interest-only payment terms on notes that were automatically accelerated upon the first missed payment. For example, Dixon v. Roessler 76 S.C. 415, 57 S.E. 203 (1907) and Gilliam v. Gilliam, 29 S.C. Eq. 67, 8 Rich. Eq. 67 (Ct. App. Eq. 1855) are both cited by the Bank. (Res.'s Brief, pp. 26-27), involved payments under a life annuity and the court found that the statute of limitations began to run for each payment when the payment was missed. The court in Dixon expressly stated that the statute of limitations only began to run when the payments become "due and payable." Dixon, at 432, 57 S.E. at 208 ("I think the defendant's second defense, to wit: the plea of the statute of limitations, as against all monthly installments that do not become due within the six years before the commencement of this action, should be sustained. This statute bars plaintiff's right of action for all monthly instalments that became due and payable before the 30th of January, 1898. Under this view, the first instalment for which defendant is liable is that due the 31st day of January, 1898."). Here, as explained above, the entire amounts were due and payable at the time of default.

The other cases relied upon by the Bank are just as easily distinguished because all of them involved payments that had not been accelerated and continued to become due on a monthly basis. See Cheraw v. Turnage, 184 S.C. 76, 94, 191 S.E. 831, 839 (1937) (involving the collection of the assessments where the obligation to pay was not accelerated); Finova Capital Corp. v. Beach Pharm. II, Ltd., 175 N.C. App. 184, 189, 623 S.E.2d 289, 292 (N.C. Ct. App. 2005)(holding that "Plaintiff is barred from recovering only those installment payments due prior to 14 October 1997,

four years preceding the 13 October 2001 date on which it filed suit"); Carswell v. Oconee Reg'l Med. Ctr., Inc., 270 Ga. App. 155, 157, 605 S.E.2d 879, 880-881(Ga. Ct. App. 2004)("Carswell contends that the Agreement is a divisible contract, and as such, Oconee Medical is only entitled to recover those payments under the Agreement which came due within six years from the filing date of the complaint. He argues that the contract was first breached when he failed to make the first monthly payment which was due on February 10, 1994, and that this breach, and every other breach, except the final missed payment, due on July 10, 1995, are barred by the statute of limitation because they occurred more than six years before the Hospital filed its complaint. We agree.").

The modification agreements did not convert the promissory notes into installment payment contracts. Further the guaranty contracts accelerated the total amount due under the notes upon default. The statute of limitations began to run as to the Bank's entire claim at the time the default occurred. The cases relied upon by the Bank all involved divisible contracts or installment contracts where all payments were not due and payable. Therefore, the Court should reject this alternative ground if it decides to consider this ground on the merits even though the lower court did not rule on it.

CONCLUSION

For these reasons and the reasons stated in Appellant's opening brief, the lower Court's order granting the Bank summary judgment as to Freeman's limitations defense should be reversed. The Bank's additional affirming ground (and other additional grounds) should not be ruled upon or, if ruled upon, rejected.

Respectfully Submitted,

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Attorneys for Appellant

January 4, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
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SC Court of Appeals

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10-6439

Wells Fargo Bank, N.A., Successor by Merger to
Wachovia Bank, National Association .... Respondent,

v.

Robert L. Freeman ....Appellant.

PROOF OF SERVICE

I, Nancy Jane Dennis, of Pratt-Thomas Walker, P.A., hereby certify that I have served a true and accurate copy of the INITIAL REPLY BRIEF OF APPELLANT by U.S. Mail postage pre-paid on January 4, 2016, to counsel of record as shown below:

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A. Smith Podris, Esquire
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200 Meeting Street, Suite 301
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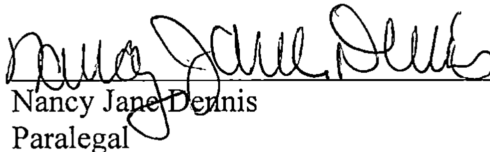
Attorney for Respondent



Nancy Jane Dennis
Paralegal

January 4, 2016
Charleston, South Carolina

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January 4, 2016

The Honorable Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JAN 06 2016
SC Court of Appeals

RE: Wells Fargo Bank, N.A. v. Robert L. Freeman
C/A No.: 2013-CP-10-6439

Dear Ms. Kitchings:

Enclosed please find the Initial Reply Brief of Appellant Robert L. Freeman with Proof of Service.

With kind regards, I am

Sincerely,

PRATT-THOMAS WALKER, P.A.

Trenholm Walker

Enclosures (As Stated)
GTW/njd

c: Robert C. Byrd, Esquire
A. Smith Podris, Esquire

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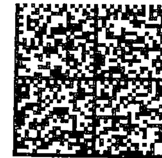
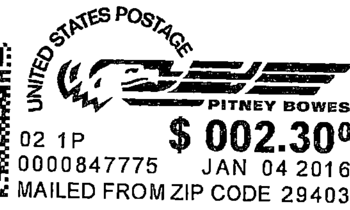
IAN W. FREEMAN (SC, CA) | THOMAS P. GRESSETTE, JR. (SC, USVI) | KATHLEEN FOWLER MONOC | JOHN P. LINTON, JR.





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