THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Robert E. Watson
The Honorable Dale E. Van Slambrook
Berkeley County Masters in Equity

APPELLATE CASE NO.: 2015-002287

SUPERIOR ELECTRIC COMPANY and DEAN HENSLEY..... Appellants

v.

ECK SUPPLY CO. .....Respondent

APPELLANTS' INITIAL BRIEF

Robert B. Varnado
Alexis M. Wimberly
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellants

Other Counsel of Record:
Steven L. Smith, Esquire
Smith Closser
Post Office Box 40578
Charleston, South Carolina 29423-0578
Attorney for Respondent

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STATEMENT OF THE CASE

The Appellant Superior Electric Company ("Superior") is a commercial electrical subcontractor with its principal place of business in Berkeley Count. It is a duly registered South Carolina corporation; the Appellant Dean Hensley ("Hensley") as its sole owner and president. [Trial Tr.].

The Respondent Eck Supply Co. ("Eck) is a supplier of electrical components. Its principal offices are located in Richmond, Virginia but it has operations in North Charleston, South Carolina. [*Id.*]

Superior and Eck had a long-standing business relationship dating back at least into the 1990s. The appeal at bar arose out of a dispute over whether Superior owed additional sums for ballasts and other electrical supplies purchased from Eck for use in the construction of a parking garage at the Summerville Town Hall, during the period of 2006-2007. [*Id.*]

Eck contended that Superior owed $13,900.93 in unpaid invoices. Superior argued that it was contractually bound to pay no more than $295,636.00 for the Summerville Town Hall project, and that when credits and charges were taken into account, Eck actually owed Superior the sum of $8,394.86. [*Id.*]

During pre-trial discovery, Eck produced an incomplete "Credit Application" that was purportedly signed by Hensley on or about September 25, 2000. [Plt. Exh. 1]. Importantly, the Credit Application contains a Guaranty.

The document produced by Eck contains facsimile headers which purport to show the document was faxed back and forth from Eck and Superior. The document references "Please see attached" repeatedly – though no such attachments were produced by Eck.

Many spaces are blank or incomplete. Much of the text, particularly in the Guaranty / section, is entirely illegible. [*Id.*]. Although Eck's witness admitted the original was in Eck's possession, the original was not produced at trial. [Trial Tr.]. Eck never produced a copy of a prototype Credit Application from the same period, either.

PROCEDURAL HISTORY

This matter came to a bench trial on June 16, 2014 before the Honorable Robert E. Watson, Berkeley County Master in Equity by virtue of a consent order of reference. At the Master's request, both parties submitted proposed orders following the trial.

Before he ruled, the Master had the parties appear at a hearing on October 8, 2014 to argue the issue of attorneys' fees. Appellant's filed a memorandum in opposition to the same. [Memo].

The Master then issued an Order of Judgment on October 24, 2014 which was filed with the Clerk of Court on October 27, 2014 ("Order of Judgment"). [10.24.14 Order].

In the Order of Judgment, Judge Watson gave a judgment in the amount of $33,100.24 to the Eck against both Superior Electric Company and Dean M. Hensley – consisting of the $13,900.93 in principal debt claimed by Eck, and $19,199.31 in attorneys' fees (capped at $2,500.00), interest at 18.00% and costs. [*Id.*]

Significantly to this appeal, the Master found:

> "Defendant Dean Hensley executed the credit application on behalf of Superior and further executed a personal guarantee for Superior's debt to Eck in his individual capacity. Cember Hensley confirmed these facts by offering testimony that the credit application was transmitted by Superior to Eck as shown by Superior's facsimile stamp thereon. The credit application provides for Eck's recovery of Superior's outstanding balance with Eck plus interest at 1.5% per month or 18% annually, plus Eck's attorneys' fees in the amount of 25% of principal debt amount, plus all costs incurred by Eck pursuing the collection (hereinafter Total Debt). The

personal guarantee executed by Dean Hensley, personally and individually obligates Dean Hensley to Superior's Total Debt."

[*Id.*, p. 2].

The Defendants filed a timely motion to alter or amend on November 10, 2014, having confirmed written notice of receipt of the Order of Judgment on October 31, 2014. [Motion].

Due to the retirement of Judge Watson, the new Berkeley County Master in Equity, the Honorable Dale E. van Slambrook, took up the matter. He issued an Order on September 30, 2015, filed October 2, 2015, denying the motion to reconsider [9.30.15 Order], which was received by Appellant on October 6, 2015.

This appeal followed, being submitted on November 2, 2015 and received by the Court of Appeals on November 4, 2015. [Not. of Appeal].

In this appeal, Appellants do not appeal the Master's award of $13,900.93 in principal debt claimed by Eck against Superior.

Appellant's are, however, appealing the award of personal liability against Hensley as the purported Guarantor, as well as the award of the attorneys' fees and interest based on the Credit Application.

STANDARD OF REVIEW

An action for breach of contract seeking money damages is an action at law. *McCall v. IKON,* 380 S.C. 649, 658, 670 S.E.2d 695, 700 (Ct. App. 2008). When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate court will not disturb the judge's findings of fact as long as they are reasonably supported by the evidence. *Epworth Children's Home v. Beasley,* 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005); *Bluffton Town Centre, LLC v. Gilliland-Prince*, 412 S.C. 554, 563-564, 772 S.E.2d 882, 887 (Ct. App. 2015) ("[t]he appellate court will not disturb the master's findings of fact unless the findings are found to be without evidence reasonably supporting them."). However, the reviewing court is free to decide questions of law with no particular deference to the Master. *Id.*

STATEMENT OF ISSUES ON APPEAL

I. Did the Master err in finding that there was evidence to support that Defendant Dean Hensley executed a personal guaranty?

II. Did the Master err in finding that there was evidence to support that Defendant Dean Hensley signed the credit application?

III. Did the Master err in admitting the Credit Application into evidence when Eck failed to authenticate it or Dean Hensley's signature as required by Rule 901(a), SCRE?

IV. Did the Master err in admitting the illegible, incomplete Credit Application into evidence when there was a genuine issue of authenticity, pursuant to Rule 1003, SCRE?

APPEAL ARGUMENT I

The Master erred in finding that there was evidence to support that Defendant Dean Hensley executed a personal guaranty.

The Master's factual finding that "Dean Hensley ... executed a personal guarantee for Superior's debt to Eck in his individual capacity" is without evidence to reasonably support it and should be reversed on appeal for the following reasons. *Epworth Children's Home,* 365 S.C. at 164, 616 S.E.2d at 714; *Bluffton Town Centre*, 412 S.C. at 563-564, 772 S.E.2d at 887.

A guaranty is a contract. *Peoples Fed. Sav. & Loan Ass'n. v. Myrtle Beach Retirement Group, Inc.,* 300 S.C. 277, 280, 387 S.E.2d 672, 673 (1989); *Coastal States Bank v. Hanover Homes of South Carolina, Inc.,* 408 S.C. 510, 518, 769 S.E.2d 152, 157 (Ct. App. 2014); *cf Crafton v. Brown,* 346 S.C. 347, 354, 550 S.E.2d 904, 907 (Ct. App. 2001) (using the term "[a] contract of guaranty"). Specifically, "[a] guaranty is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is himself in the first instance, liable to such payment or performance." *Branch Bank & Trust Co. of South Carolina v. Carolina Crank & Core, Inc.*, 362 S.C. 647, 652-653, 608 S.E.2d 896, 899 (2005) (citing *Crafton,* 346 S.C. at 350-51, 550 S.E.2d at 905). A guaranty is a personal obligation running directly from the guarantor to the creditor which is immediately enforceable against the guarantor upon default of the debtor. *AMA Mgt. Corp., v. Strasburger*, 309 S.C. 213, 219, 420 S.E.2d 868, 872 (Ct. App. 1994).

As Appellants have argued every step of the way, the only evidence offered to the Master was that Hensley did not sign the guaranty. His testimony was unequivocal: it was not his signature and he had never seen the document before the litigation. [Trial Tr. pp.

105, 111]. There was no testimony that he ratified it; he did not know who might have signed it. [*Id.* p. 108]. Cember Hensley, his wife, did not recognize the signature [*Id.* p. 202]. Only she and Hensley would have had the actual authority to enter the contract. [*Id.*].

Despite having the burden of proof, Eck never admitted – or sought – a signature exemplar from Hensley. Eck did not call in a handwriting expert. Eck did not even offer any testimony consistent with Rule 901(b)(2), SCRE ("Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation."). The signature and al the writing is clearly in a feminine script. [Plt. Exhibit 1]. Hensley said the handwriting was too neat to be his. [Trial Tr. pp. 105]. He did not testify, nor was he asked, if he had ever ratified the signature. No records custodian witness appeared on behalf of Eck – either by Affidavit or otherwise – to substantiate or authenticate the document.

Moreover, Eck's sole witness in its case-in-chief, Charles Smith, testified he could not substantiate the signature. [Trial Tr. p. 43]. Mr. Smith made it clear that he was not the record custodian of the Guaranty; his counsel represented they had received a copy from Eck's office in Richmond." [Id. p. 20]. Smith was not in possession of the original. [*Id.* p. 43]. In fact, Smith went to work for Eck several years after the guaranty was purportedly executed. [*Id.*]. He had not worked with or met Mr. Hensley before the litigation. [*Id.*]. Before Eck rested its case, it called no witness who could substantiate that Mr. Hensley signed the guaranty. This is simply a complete failure of proof or evidence on the part of Eck.

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties." *Crafton,* 346 S.C. at 354, 550 S.E.2d at 907. "If the guaranty is signed

by the guarantor at the request of the other party, or if the latter's agreement is contemporaneous with the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract." *Id.*; *cf. Sadighi v. Daghighfekr,* 66 F.Supp.2d 752, 760 (D.S.C. 1999) (holding that the signature of parties amounts to mutual assent); *see also New v. GameStop, Inc.*, 232 W. Va. 564, 572-73, 754 S.E.2d. 62, 76 (2013) ("Mutual assent may be demonstrated by unambiguous language of an agreement coupled with an acceptance of that agreement by means of signature."); *Edens v. Laurel Hill, Inc.,* 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978) ("[i]t is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms").

Because Eck offered no proof that Hensley signed the guaranty – and because all the probative testimony was that he did not – then there can be no mutual assent to the guaranty as a matter of law. *Crafton,* 346 S.C. at 354, 550 S.E.2d at 907. When the record is reviewed *in toto* there is no proof of mutual assent to the Guaranty at all. Thus, the Master should be reversed because there is no evidence to reasonably support any conclusion that Hensley did sign.

Case law further supports such a determination. In *Pee Dee Production Credit Ass'n v. Joye*, 284 S.C. 371, 374-375, 326 S.E.2d 650, 653 (1984), our Supreme Court found that the testimony of a handwriting expert and the lay testimony of a bank employee (who examined signatures as part of his employment), along with the proper presentation of a signature exemplar, was sufficient evidence to support a jury finding that the defendant signed a promissory note. In the instant case, however, Eck – which bears the burden of proof – presented no such handwriting expert, nor the lay testimony of an employee who

examines signatures; likewise, it failed to demand or obtain a writing exemplar. Additionally, in *American Casualty Company v. Niagara Fire Ins. Co.,* 244 S.C. 411, 418-419, 137 S.E.2d 412, 415 (1964), our Supreme Court ruled plainly that a plaintiff was not bound by the unauthorized signature of her name onto a cancellation of insurance.

The only evidence adduced at trial is that any signature on the guaranty was not Hensley's and unauthorized by Hensley Thus, Hensley is not bound by to it. *American Casualty Co.*, 244 S.C. at 418-419, 137 S.E.2d at 415. Eck never took any evidentiary steps to authenticate the purported signature or submit evidence which would support a finding by the Master that Hensley signed the Guaranty. *Pee Dee Production*, 284 S.C. at 371, 326 S.E.2d at 653. All the proof adduced at trial, in fact, militates against such a ruling. Accordingly, the Master should be reversed based on the prevailing case authority as well; under these facts, the absence of a valid signature means there was no mutual assent and no meeting of the minds. *Crafton,* 346 S.C. at 354, 550 S.E.2d at 907.

Facsimile Stamps

It is anticipated that Respondent will point to the "facsimile stamps" on the guaranty as somehow probative. Respondent's counsel made a big point that Cember Hensley testified about the facsimile stamps – which the Master relied on, too. [Pl. Exh. 1; 10.24.14 Order]. But in light of the testimony, the facsimile stamps are meaningless to ascertain the true issue concerning the guaranty: whether there is evidence that Hensley signed the guaranty and is thus bound by it.

Contrary to the Master's finding, Cember Hensley never "confirmed" that Dean Hensley signed the Credit Application; in fact, she denied it outright [Trial. Tr. p. 202]. All she said was it appeared someone had faxed the document from Superior to Eck as per

the facsimile stamps. [Id.] It is a verbal sleight of hand to spin that factual point into some blanket admission that Hensley signed the guaranty. In light of the unequivocal testimony that the signature is not Hensley's, the fact Eck received a fax from Superior is not evidence that reasonably supports a finding Hensley signed the document – the most the Court could find is that there was an unauthorized signature.

Hensley should not have guaranty liability because Eck was sloppy and slap-dash in how it solicited and processed credit applications from its customers. In his deposition, Eck's witness Mr. Smith conceded the guaranty must be signed by the actual owner to be effective. [Smith Dep. p. 48]. The guaranty cannot be enforced against Hensley on these facts without ignoring the law and the evidence.

Apparent Agency

It is anticipated that Respondent will argue as an alternate sustaining ground that the Master's reliance on facsimile stamps shows whoever signed the guaranty was authorized to sign on his behalf of Hensley by virtue of apparent agency. As a matter of law, however, Eck cannot establish guaranty liability on Hensley through "apparent agency" of whoever signed the application.

To establish apparent agency, a party must prove the purported principal has represented another to be his agent by either affirmative conduct or conscious and voluntary inaction." *Town of Kingstree v. Chapman* 405 S.C. 282, 314, 747 S.E.2d 494, 510 (Ct. App. 2013). "The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party." *Id.* Importantly, it is axiomatic that an agency may not be established solely by the declarations and conduct of an alleged agent. *Id.*

Since Hensley denies it is his signature, and testified that no one had a right to sign a guaranty for him, the only evidence that could establish a purported agency would be for Eck to have shown Hensley represented to Eck that the unidentified employee had authority to sign the guaranty on his behalf. Eck clearly failed to make this showing. It did not even try to prove it. No proof in the record could possibly be stretched to establish the same. Thus, the act of signing and faxing by the purported agent would be solely the unilateral declaration and conduct of the alleged agent -- which is insufficient to bind Hensley. *Town of Kingstree*, 405 S.C. at 314, 747 S.E.2d at 510. No evidence adduced that Hensley *himself* faxed the guaranty to Eck; or that he represented to Eck that someone else was specifically authorized to sign the guaranty; or that he ratified it after the fact. It should be recalled that Eck's sole witness at trial said he did not work with or communicate directly with Hensley, and that he was hired by Eck after the fact. [Trial Tr. p. 48].

Thus, Hensley simply cannot be bound under an "agency theory" – especially for so serious an obligation as a contract of guaranty. *Town of Kingstree*, 405 S.C. at 314, 747 S.E.2d at 510; *see also WDI Meredith & Co. v. American Telesis, Inc.*, 359 S.C. 474, 478-479, 597 S.E.2d 885, 887 (Ct. App. 2004); 2A CJS Agency § 181 ("[a] third party may not assume from the fact of a mere agency, either limited or general, that he has authority to make a contract of guaranty"); 3 WILLISTON ON CONTRACTS § 277A (3d Ed.)("[h]owever general the character of an agency may be, a contract of guaranty ... is not normally to be inferred from such agency"); *Nevis v. Fidelity New York, F.A.*, 104 Nev. 576, 578, 763 P.2d 345, 346 (1988)("Courts recognize the serious obligation imposed upon a guarantor, and generally require specific authorization before finding that an agent has authority to bind his principal in a guaranty agreement."). Because Superior is a corporation, the provisions

of S. C. Code Ann. § 33–44–301(b)(1) of the South Carolina Uniform Limited Liability Act (regarding a manager's signature as binding on the company) do not apply here.

Guaranty is Separate and Distinct

It is further anticipated Eck will argue that even if the signature on the guaranty is invalid in 2000, the contract of guaranty is nevertheless enforceable against Hensley because Superior made subsequent credit purchases from Eck; this argument would be predicated on principles such as acceptance, ratification, performance, etc. In any event, this Court should reject this type of argument as an alternate sustaining ground for liability against Hensley individually.

In *Citizens & Southern Nat'l Bank of S.C. v. Lanford*, 313 S.C. 450, 453, 443 S.E.2d 59, 550 (1994), our Supreme Court held that: "[t]he general rule in South Carolina ... is that a guaranty of payment is an obligation separate and distinct from the original note." The *Lanford* Court went on to adopt the language of 38 AmJur 2d, *Guaranty* § 4:

> "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 of 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. The fact that both contracts are written on the same paper or instrument does not affect the independence or separateness of one from the other."

Id., 313 S.C. at 454, 443 S.E.2d at 551.

Thus, any finding that Superior's use of credit somehow makes the other provisions of the Credit Application enforceable does not automatically trigger guaranty liability to Hensley. Such a finding would violate the principle in *Lanford* by conflating two separate and distinct obligations. *Id.* Hensley's alleged guaranty liability must be determined totally in isolation from Superior's purported liability on the other parts of the Credit Application. *Id.*

APPEAL ARGUMENT II

The Master erred in finding that there was evidence to support that Defendant Dean Hensley signed the credit application.

As with the Guaranty, there is no evidence in the record that reasonably supports the Master's factual finding that Dean Hensley signed the non-guaranty section of the Credit Application. This would result in the invalidation of the attorneys' fees and contractual interest provisions.

The same evidence applies Mr. and Mrs. Hensley denied the signatures. [Trial. Tr. p. 105, 108. 111, 202]. Eck's sole witness could not substantiate the signatures. [Id. p. 43]. There was no after-the-fact acceptance of the Credit Application by Hensley. Moreover, even though the signature was clearly in a feminine script, there was no evidence that Eck took any steps to confirm its validity or seek Hensley to reissue it

Any signature thereto was thus unauthorized and consequentially non-binding on Superior. *American Casualty Co.*, 244 S.C. at 418-419, 137 S.E.2d at 415; *Town of Kingstree*, 405 S.C. at 314, 747 S.E.2d at 510; 2A CJS Agency § 181 ("[a] third party may not assume from the fact of a mere agency, either limited or general, that he has authority to make a contract of guaranty"); 3 WILLISTON ON CONTRACTS § 277A (3d Ed.). The fact that there were facsimile stamps on Credit Application do not prove Hensley signed it or that the signer had authorization from Hensley, or that Hensley, as principal, independently represented to Eck that the person was authorized. *Town of Kingstree*, 405 S.C. at 314, 747 S.E.2d at 510.

Moreover, Eck failed to present at trial any kind of probative evidence (a handwriting expert; a witness under Rule 901(b)(2), SCRE; admissible exemplars of

Hensley's signature) that would tend to prove Hensley made a signature after he unequivocally denied it was his. *Pee Dee Production*, 284 S.C. at 371, 326 S.E.2d at 653.

In *Cason Companies, Inc. v. Gorrin*, 399 S.C. 150, 730 S.E.2d 887 (Ct. App. 2012), the Court found that a credit application constituted a contract. If the Credit Application here is contractual in nature, then Eck's failure to offer any proof of mutual assent to overcome the absence of a valid signature results in the Master having no evidentiary basis to find Superior was bound to it. *Accord, Crafton,* 346 S.C. at 354, 550 S.E.2d at 907. This Court must reverse a finding of a Master when his factual findings are not reasonably supported in the record. *Epworth Children's Home,* 365 S.C. at 164, 616 S.E.2d at 714; *Bluffton Town Centre*, 412 S.C. at 563-564, 772 S.E.2d at 887.

The practical effect of finding that the credit application is invalid does not necessarily void the Master's judgment that Superior owes the purported principal obligation ($13,900.93). Instead, it would result in no valid attorneys' fee provision or compounding 18% interest beyond the lawful pre-judgment interest rate. *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct. App. 2005) ("The general rule is that attorney's fees are not recoverable unless authorized by contract or statute"); *J.C. White Lumber Co., Inc. v. Allen,* 306 S.C. 183, 410 S.E.2d 588 (Ct.App.1991) (reversing the award of 18% based on an unsigned invoice and remanding for the entry of judgment in accordance with S.C. Code Ann. § 34-31-20(A)). Even if the purchase of supplies on credit supports the judgment on the principal balance, Superior is not obligated to pay attorneys' fees and interest if Eck cannot prove Superior assented to the same. Eck should be limited to its actual damages and interest at the lawful rates.

APPEAL ARGUMENT III

The Master erred in admitting the Credit Application into evidence when Eck failed to authenticate it or Defendant Dean Hensley's signature as required by Rule 901(a), SCRE.

The arguments made in Sections 1 and 2 *infra* are predicated upon Eck's complete failure to prove Hensley signed the Credit Application/Guaranty which the Master entered into evidence. In this third issue, Appellant submits that the Master erred in the first instance by admitting the Credit Application into evidence at all because Eck could not and did not authenticate the document or Hensley's purported signature.

A party offering evidence must meet "[t]he requirement of authentication ... as a condition precedent to admissibility." Rule 901(a), SCRE; *Deep Keel, LLC v. Atlantic Private Equity Group, LLC,* 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015); *see also* Collins, SOUTH CAROLINA EVIDENCE 2D., §13.1 ("[t]he authenticity of a particular piece of evidence must be proved before it is admissible."). "[T]he burden to authenticate ... is not high" and requires only that the proponent "offer [ ] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." *Deep Keel*, 413 S.C. at 64-65, 773 S.E.2d at 610. With respect to authenticating business writings, it has been written: "[t]he writing standing alone does not itself constitute evidence. It must be accompanied by competent proof of some sort from which the jury can infer that it is authentic and that it was executed or written by the party by whom it purports to be, unless such facts are admitted by the opposing party. Likewise, business writings must be authenticated before they are admissible." Collins, *supra.*, p. 367.

Applying *Deep Keel* to the case at bar, Plaintiff failed to authenticate the document. Mr. Smith, Eck's sole witness, came to work for Eck in 2003 as branch manager in South

Carolina. [Trial Tr. p. 18] – after the execution of the Guaranty. He only testified thatwas "a copy of the credit application that you maintained in your files." [*Id.* p. 20]. Appellant's counsel immediately objected that Mr. Smith could not substantiate the document, nor had it been substantiated in Rule 30(b)(6) depositions. [*Id.*].

Mr. Smith cannot authenticate the document under Rule 901(b)(1) as the *Testimony of a Witness with Knowledge*. He is not a records custodian but a branch manager. [*Id.*]. He conceded he was not presenting an original document; Eck's original version is kept at its office in Richmond. [*Id.* at p. 43]. He could not substantiate that it was Hensley's signature. [*Id.*]. He was not employed with Eck in 2000. [*Id.* at p. 43]. He had never had direct communications with Hensley. [*Id.*]. All Mr. Smith could say was that this was a document Eck had in its possession, without being able to identify or substantiate or authenticate anything more. He could not and did not substantiate they were the documents Eck claimed them to be. He has no personal knowledge. In *Deep Keel* the Court found persuasive the testimony of the Defendant's witness, Bynum:

> Bynum testified he agreed to purchase a note from CresCom Bank, he examined the loan documents while negotiating the agreement, and the loan documents offered in evidence were the ones he examined and later received pursuant to this transaction. This testimony authenticated the loan documents because it was sufficient to support a finding that they were the documents Deep Keel claimed them to be.

Deep Keel, 413 S.C. at 65, 773 S.E.2d at 611.

Here, Eck's witness Smith does not come anywhere close to approaching the level of testimony set forth by Bynum in *Deep Keel*. Unlike Bynum, Smith offered zero personal knowledge of the circumstances of how the Credit Application was prepared, received or stores. He had no participation in obtaining it. His duties do not include maintaining it. He could not substantiate the signature. He did not work with anyone at Superior. He just

flashed a document. This does not begin to meet even the relatively low bar of authentication. A witness who does not know the manner in which the records were prepared is not a proper authenticating witness. Collins, *supra*, §13.8 (citing *State v. Sarvis*, 317 S.C. 102, 450 S.E.2d 606 (Ct. App. 1994). Hearsay evidence cannot be used to prove the signature. *Id.* (citing *Sample v. Gulf Refining Co.*, 183 S.C. 399, 191 S.E. 209 (1937); *Bourquin v. Northwester R.R. Co.*, 79 S.C. 217, 60 S.E. 521 (1908)). The Master should be reversed for having admitted the Credit Application into evidence without proper authentication. Rule 901(a), SCRE. The admission of this evidence prejudicially resulted in turning a simple debt collection case into a personal judgment against Hensley, along with the imposition of ruinous attorneys' fees and costs nearly double the obligation.

No Self-Authentication

Since the conclusion of the trial, this Court issued its opinion in *Deep Keel,* where a borrower argued that its loan documents were improperly authenticated. The *Deep Keel* panel, *inter alia*, ruled that five of the loan documents were "self-authenticating" under SCRE 902(9) because they constituted commercial paper or documents relating thereto. *Id.*, 413 S.C. at 66, 773 S.E.2d at 612. A sixth document – a release – was not deemed self-authenticating. *Id.*

It is anticipated that the Respondent may argue as an additional supporting ground that the *Deep Keel* holding vis-à-vis Rule 902(9), SCRE applies to the case at bar. It does not. First, as established above, a guaranty is contractual in nature and separate from any other contract included in the same document. *Lanford*, 313 S.C. at 454, 443 S.E.2d at 551. Thus, the guaranty portion of the Credit Application is like the release in *Deep Keel*, i.e., it is not self-authenticating.

Second, this case does not involve "commercial paper" – which has two definitions: (A) unsecured, short-term promissory notes issued by commercial entities, payable to the bearer on a stated maturity date, typically less than nine months. *Securities Industry Ass'n v. Board of Governors of Federal Reserve System*, 468 U.S. 137, 140, 104 S.Ct. 2979, 2981 n. 1 (1984); and (B) negotiable instruments governed by UCC Article 3. *See* S.C. Code Ann. § 36–3–101 (2003); *In re Kain*, 2012 WL 1098465 (Bankr. D.S.C. 2012) (holding that Article 3 governs commercial paper); *Cf. IHFC Properties, LLC. APA Marketing, Inc.*, 850 F. Supp. 604, 620, n. 10 (M.D.N.C. 2012) ("As a negotiable instrument, a check is a species of commercial paper, and therefore self-authenticating."). Thus, neither the Guaranty specifically nor the Credit Application as a whole meet the definition of "commercial paper." This result is further supported by the fact the *Deep Keel* Court refused to extend Rule 902(9), SCRE to the mortgage release, a standard contractual document. *Deep Keel,* 413 S.C. at 66, 773 S.E.2d at 612.

APPEAL ARGUMENT IV

The Master erred in admitting the illegible, incomplete Credit Application into evidence when there was a genuine issue of authenticity, pursuant to Rule 1003, SCRE.

Even if this Court finds Eck authenticated the Credit Application, the Master should not have admitted on the additional ground that it was not the original. "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." *See* Rule 1002, SCRE. "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Rule 1003, SCRE.

Appellants acknowledge that the admission of evidence is generally within the trial court's discretion. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.,* 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000). "The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." *Id.* "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.,* 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006).

Here, the error of law was admitting an illegible, incomplete, non-original copy of the Credit Agreement when there was such a genuine question of authenticity of both the document and the signatures. Appellants clearly established a question of authenticity at trial. [Trial. Tr. p. 105, 108. 111, 202]. Moreover, Eck's sole witness, Smith, testified at trial that he was not in possession of the original form [Trial Tr. p. 43]. In his deposition, on page 48, Smith was even more explicit that the original document was located in Eck's offices in Richmond, Virginia.

> Q. Do you think you have an original of this somewhere at the office?
> MR. SMITH: In our office?
> Q. Yeah.
> MR. SMITH: In Richmond. We do not have shadow files in Charleston. So the credit application in full would be in Richmond.
> Q. Okay. Does it need to be actually signed by the owner to be effective?
> MR. SMITH: Yeah.
> Q. Okay.
> MR. SMITH: Well, it needs to be signed by an owner or officer of the company.
> Q. Okay. Sitting here today, are you able to tell me on behalf of Eck whether that signature is the signature of Dean Hensley?
> MR. SMITH: No.

Upon cursory examination, the Credit Application is incomplete (none of the "See Attached" items are included. The signature and other information appears to be a

woman's handwriting. None of Plaintiff's witnesses could substantiate the signature, authenticate the document or discuss the whereabouts of the original. No records custodian witness appeared on behalf of Eck. There is no way the Court can tell if anyone at Eck removed or detached anything, or if there are additional or deviating terms. Finally, the document presented by Eck is practically illegible.

All of the foregoing makes it prejudicially unfair for the Master to have admitted an illegible, incomplete and questionable duplicate when Eck's sole witness already admitted the original was in Eck's possession in its Richmond offices. Based on the foregoing, the Master erred in admitting a copy of the credit application in the face of such genuine issues of authenticity and fairness, resulting in the prejudice of turning a simple debt collection case into a personal judgment against Hensley, with heavy attorneys' fees and costs nearly that double the obligation. Rule 1003, SCRE.

CONCLUSION

The Master should never have allowed this Credit Application/Guaranty into evidence. He had no basis to rule conclusively that Hensley executed the document. He should never have found Hensley has guaranty liability. Accordingly, the matter should be remanded to the Master for further proceedings and/or the Court should modify the original award down simply to the principal balance against Superior only, along with pre and post judgment interest at the lawful rates. There shall be no award of attorney's fees or the 18% contractual interest; the judgment against Hensley should be vacated.

Respectfully submitted,

Robert B. Varnado
Alexis M. Wimberly
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Robert E. Watson
The Honorable Dale E. Van Slambrook
Berkeley County Masters in Equity

APPELLATE CASE NO.: 2015-002287

SUPERIOR ELECTRIC COMPANY and DEAN HENSLEY..... Appellants
v.

ECK SUPPLY CO. .....Respondent

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Appellants' Initial Brief*** in the above referenced case was served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on the 3rd day of February, 2016 to the following:

Other Counsel of Record:
Steven L. Smith, Esquire
Smith Closser
Post Office Box 40578
Charleston, South Carolina 29423-0578
Attorney for Respondent

Robert B. Varnado
Alexis M. Wimberly
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellants

BROWN & VARNADO LLC
ATTORNEYS AT LAW

103 CHURCH STREET (29464)
POST OFFICE BOX 1127
MT. PLEASANT, SC 29465
OFFICE: (843) 737-7300
FACSIMILE: (843) 654-5109

ROBERT B. VARNADO
DIRECT: (843) 737-7301
EMAIL: rvarnado@brown-varnado.com

February 3, 2016

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Superior Electric Co. & Dean Hensley v. Eck Supply Co.***
Appellate Case No.: 2015-002287
Our File No. 6128 - 3

Dear Ms. Kitchings:

Enclosed herewith for filing please find one (1) original and one (1) copy of: (I) ***Appellants' Initial Brief*** and (II) ***Appellants' Designation of Matter to be Included in the Record on Appeal***. Upon filing, please return the file-stamped copy of both in the envelope provided. By copy of this correspondence, I am providing all Counsel of Record with a copy of the same via U.S. Mail.

If you have any questions or concerns, please do not hesitate to contact my office.

With best regards, I remain

Very truly yours,

BROWN AND VARNADO LLC

Robert B. Varnado

RBV/qai

Enclosure(s): as stated

cc: Steven L. Smith, Esquire (*Via U.S. Mail*)

Brown & Varnado, LLC
103 Church Street
P.O. Box 1127
Mount Pleasant, SC 29464

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201