THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKLEY 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

ECK SUPPLY CO. .....Respondent

v.

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

APPELLANTS' INITIAL REPLY BRIEF

Robert B. Varnado (S.C. Bar # 0007850)
Alexis M. Wimberly (S.C. Bar # 101611)
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES and STATUTES

OTHER AUTHORITIES

INTRODUCTION

The Appellants Superior Electric Company and Dean M. Hensley ("Appellants") submit this reply brief to address errors of law, and the citation of unavailing authority, in the Brief of Respondent filed by the Respondent, Eck Supply Company ("Respondent" or "Eck").

ARGUMENTS

A. Respondent's Contradiction/Waiver Theory Should Be Rejected.

Eck's first argument – which it advances throughout its brief – is that Appellants' decision not to appeal the Master's award of $13,900.33 in principal obligation for the sale of electrical supplies results in a "contradiction" and constitutes a waiver of Appellant's right to appeal Hensley's guaranty liability and the imposition of attorneys' fees and interest. [Resp. Br. pp. 6-7, 12 ("Again, given that Superior is not appealing the validity of the Credit Agreement with respect to the Principle Debt, it should be prevented from appealing the admission of the Credit Application with respect the attorneys' fees and interest.")]. The Court should reject this argument for the following reasons.

First, Respondent makes no citation to any case law, treatise, commentary or any authority whatsoever in support of this novel waiver/preclusion theory. Consequently, it should be deemed abandoned and not presented for appellate review. *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite supporting authority or when the argument is simply a conclusory

statement, the party is deemed to have abandoned the issue on appeal). In a similar vein, Respondent's argument in support of the waiver/preclusion theory is not only without authority but is entirely conclusory – which is also improper in appellate proceedings. *State v. Colf,* 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), *aff'd as modified,* 337 S.C. 622, 525 S.E.2d 246 (2000) ("An issue is also deemed abandoned if the argument in the brief is merely conclusory").

Second, Respondent's waiver/preclusion theory is contradicted by authority and common sense. It has been held (usually in the setting of habeas corpus/post-conviction relief review) that Appellate counsel is entitled to make reasonable choices as to which arguments he or she thinks have the best chance of succeeding on appeal. To that end, appellate counsel is not required to raise all issues on appeal, "but rather may select from among them in order to maximize the likelihood of successful appeal." *Smith v. Robbins,* 528 U.S. 259, 288 (2000). In choosing which issues to pursue, appellant counsel "is entitled to a presumption that he decided which issues were most likely to afford relief on appeal." *Pruett v. Thompson,* 996 F.2d 1560, 1568 (4th Cir. 1993). This principle applies in civil actions. The Master's determination that Superior owed $13,900.33 with no set-off is intensely fact-driven; while Appellant's hoped the Master would reconsider his decision (and devoted some effort to try and convince him in its motion to reconsider), Appellants determined an appeal of the principal-obligation fight would be futile. Since there is no requirement in the South Carolina Appellate Court Rules that every decision in a trial court order must be appealed, it would be improper to punish Appellants for not raising appellate issues which they believe are not likely to afford relief. Taken to its logical extreme, Respondent's waiver/preclusion theory would burden this Court with

additional, time-consuming appellate issues for fear of "waiver" and "contradiction" arguments.

Third, contrary to Respondent's assertion, Eck did not bring the case on the "theory that a debt was owed under the Credit Application and Guaranty" which is why Eck contends that Appellants had to appeal all the Master's findings to avoid "contradiction." [Resp. Br. p. 5]. In fact, the Complaint caption shows that the cause of action is "debt collection" – i.e., an action on an open account. (Compl. p. 1). This is borne out by the text of the Complaint, which makes clear that Superior made a: "... request ... in the normal course of business ... at the price agreed upon by the parties, which the same were reasonably worth." [Compl. ¶ 4]. Consequently, the Credit Application and Guaranty served only as *security* for the underlying debt on the open account. Eck admits this fact in Paragraph 6 of its Complaint when it pleads that Appellant(s) executed the Credit Application and Guaranty "to secure the amounts due the [Respondent] from Superior Electric Company." [Compl. ¶ 6]. Moreover, the Complaint references the Credit Application and Guaranty only for the purpose of assessing attorneys' fees and 18% interest on the underlying debt. [Compl. ¶¶ 5,7]. The testimony of Eck's sole witness, Charles Smith, also supports this conclusion: he testified at trial this was an open account. (Tr. p. 28) and that business between Eck and Superior was not done in writing (Tr. p. 42). In every sense, Eck tried and prevailed in an open account case in much the same vein as the arrangement detailed in the open account case of *Maddux Supply Co., Inc. v. A-C Elec. Co., Inc.*, 321 S.C. 182, 467 S.E.2d 448 (Ct. App. 1996). The Credit Agreement was irrelevant to the principal obligation; the question on appeal has been whether Eck is

entitled to enforce the Guaranty, along with the interest and attorneys' fees provisions of the Credit Agreement, not a rehashing of the open account portion of the dispute.

Fourth, Respondent offers no argument in opposition to Appellants' citation to authority that the Credit Agreement and Guaranty are separate. *Citizens & Southern Nat'l Bank of S.C. v. Lanford*, 313 S.C. 450, 453, 443 S.E.2d 59, 550 (1994) ("[t]he general rule in South Carolina ... is that a guaranty of payment is an obligation separate and distinct from the original note."); *see also* 38 AmJur 2d, *Guaranty* § 4. Accordingly, this Court is free to conclude this failure as tantamount to a confession SDMB's position is correct. *Turner v. South Carolina Dep't Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) ([if a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct."). Since Hensley's guaranty liability is independent of the Credit Agreement, Respondent's argument that his appeal of the Guaranty liability is barred based on a waiver theory is inconsistent with law and logic. Despite Respondent's concession in a footnote on page 6 of its Brief, Respondent intentionally elides and combines the Guaranty and the Credit Agreement [Resp. Br. pp. 6, n.1, 8-12] to cause just this confusion.

B. Issue Preservation Argument is Unavailing.

Eck next makes a half-hearted and erroneous preservation argument – asserting that Appellants failed to address their issues on appeal to the trial court. [Resp. Br. p. 7]. This argument lacks merit. Appellant filed a timely Rule 59(e) motion to reconsider; the motion specifically addresses the matters raised on appeal. [MTR, pp. 7-9]. The motion to reconsider even cites the case of *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005), that Respondent erroneously claims is cited for the

first time in Appellants' brief to support 'new' arguments. [Resp. Br. p. 7]. Appellants met their burden of addressing issues to the trial court so that they could be reasonably understood by the judge. *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Accordingly, the lack of preservation argument should be rejected.

C. Credibility of Witnesses Argument is Unavailing.

Eck tries to mask its failure to offer evidence as to the validity of the signatures on the Credit Agreement and Guaranty by arguing that the Master evaluated the witnesses' credibility, which should not be disturbed on review. [Resp. Br. pp. 10-11]. This argument lacks merit because the Master made no findings whatsoever with respect to credibility of the witnesses, and did not base his ruling on their credibility. [Order].

It was particularly within the province of the Master to pass upon the credibility of witnesses whom he saw and heard. *Byrd v. King*, 245 S.C. 247, 255, 140 S.E.2d 158, 161 (1967). A trier of fact, has the task of assessing the credibility, persuasiveness, and weight of the evidence presented. *Jones v. Leagan*, 384 S.C. 1, 12-13, 681 S.E.2d 6, 12 (2009). However, in his Order [prepared by Eck's Counsel], the Master did not weigh on the credibility of Mr. and Mrs. Hensley with respect to the signatures on the Credit Agreement and Guaranty. [Order, p. 1]. Nor did he find their testimony inconsistent that neither signed these documents. [Id.]. Instead, in the Order the Master was entirely persuaded by the presence of the facsimile stamps on the document. [Id.]

It has been held that a trier of fact should not disbelieve testimony unless there is good reason for questioning the credibility of the witnesses. *Page v. Crisp*, 303 S.C. 117, 119, 399 S.E.2d 161, 162 (Ct. App. 1990). Sworn testimony, albeit self-serving, is still evidence. *Jones v. Leagan*, 384 S.C. 1, 13, 681 S.E.2d 6, 12 (2009). Here, the Master ignored sworn testimony without admitting any contravening testimony or giving any good

reason why he disbelieved the testimony; he simply cites to the presence of facsimile-stamps as proof. Thus, the Master did not make a credibility call and Eck never asked him to so – we are right back to argument in Appellant's Brief that the mere presence of facsimile stamps on a Credit Application or Guaranty does not prove Hensley signed them, or that the signer had authorization from Hensley, or that Hensley, as a principal, independently represented to Eck that the person was authorized. *Town of Kingstree v. Chapman*, 405 S.C. 282, 314, 747 S.E.2d 494, 510 (Ct. App. 2013).

Hensley should not have guaranty liability because Eck was sloppy and slap-dash in how it solicited and processed credit applications from its customers, nor should the Hensleys' testimony be disbelieved without good cause, even if it is described as "self-serving", since it was the only testimony admitted. *Page*, 303 S.C. at 119, 399 S.E.2d at 162; *Jones*, 384 S.C. at 13, 681 S.E.2d at 12. In his deposition, Eck's witness Charles Smith conceded the guaranty must be signed by the actual owner to be effective. [Smith Dep. p. 48].

Accordingly, having framed his Order entirely on the facsimile stamps, the Master erred in finding the stamps proved Hensley signed the documents, and erred in failing to find on these facts that the signatures were unauthorized – which is the only logical conclusion to be drawn. The Master made no findings with regard to credibility for this Court to review and accordingly Eck should not be allowed to recast the order it drafted for the Master in terms of findings regarding credibility. *Cf, Barker v. Barker*, 330 S.C. 361, 371, 499 S.E.2d 503, 508 (Ct. App. 1998) (where the trial court did make findings regarding credibility).

D. Eck's "Other Evidence" Does Not Reasonably Support Factual Findings.

Eck tries to persuade this Court that "other evidence" supports the Master's factual finding that "Dean Hensley ... executed a personal guarantee for Superior's debt to Eck in his individual capacity.' [Resp. Br. p. 9]. Here, Respondent is grasping at straws. The fact Hensley testified he may have signed another credit agreement in the past [Resp. Br. p. 9] is irrelevant to whether he signed the Credit Agreement and Guaranty at bar; the fact his social security number was used is also irrelevant [Id.]. Contrary to Respondent's assertion, Hensley testified that his secretary may have had that information in 2000 – he did not know. [Hensley Depo. p. 33]. The irrelevance of the time-stamps has been discussed *ad nauseum* and proves nothing. [App. Br.]. The presence of "accurate information" is not dispositive one way or another to authorized signatures since the information is of a very common type. In *Epworth Children's Home v. Beasley,* 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005) and *Bluffton Town Centre, LLC v. Gilliland-Prince*, 412 S.C. 554, 563-564, 772 S.E.2d 882, 887 (Ct. App. 2015) it is well established that "[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*** (emphasis added)." The largely irrelevant and cherry-picked facts advanced by Eck do not meet the threshold of reasonableness.

E. Eck's "Only Plausible Conclusion" is Wrong.

Eck next advances the argument that if Mr. and Mrs. Hensley were the only ones authorized to sign the Credit Agreement (and Mr. Hensley were the only one permitted to sign the Guaranty), then if Eck received the documents ergo "then there is only one plausible conclusion: Hensley executed the Credit Application and Guaranty." [Resp. Br. p. 10.]. This is fallatious, *ergo hoc, propter hoc* argument. In light of the feminine script

on both the Credit Application and Guaranty signatures, and the Hensleys' consistent denials it was his signature (and the absence of any testimony from Eck that it was his signature), the obvious conclusion is actually that the signatures were unauthorized – particularly for the Guaranty.

Eck's related argument concerning to *Pee Dee Production Credit Ass'n v. Joye*, 284 S.C. 371, 374-375, 326 S.E.2d 650, 653 (1984) [Resp. Br. pp. 11-12] is inapposite; the issue presented here is not whether Hensley's purported signature was *witnessed*, but whether it what his at all. Eck's citation to *Pee Dee* for the proposition that it had "a right to rely on what the Guaranty purported to be" [Resp.Br. p. 12] is an attempt to do avoid having to prove agency as discussed at length in Appellants' Brief [App. Br.]. *See also Town of Kingstree*, 405 S.C. at 314, 747 S.E.2d at 510. Contrary to Eck's faulty assertion of *Pee Dee*, Eck was required to deal personally with Hensley on the Guaranty. *AMA Mgt. Corp., v. Strasburger*, 309 S.C. 213, 219, 420 S.E.2d 868, 872 (Ct. App. 1994) (holding that a guaranty is a personal obligation). Having failed to obtain an enforceable guaranty, Eck should not be allowed to disregard authority.

F. Eck Misapplies Rules 901(b)(1) and (b)(4), SCRE.

Appellants have established that Mr. Charles Smith was not a "person with knowledge" under Rule 901(b)(1). He testified he could not substantiate the signatures [Trial Tr. p. 43]; he came to work for Eck after the signatures were made [Id. pp. 18, 43]; he was not the record custodian of the Guaranty or Credit Agreement [Id. p. 20]; he had never met or worked with Hensley prior to the litigation [Id. p. 20, 43]; and Eck's counsel (not the witness) represented they had received a copy from Eck's office in Richmond." [Id. at p. 20]. Mr. Smith simply answered affirmatively to his lawyer's question as to

whether that is the document in your file. [Id.]. He knew he was not presenting an original. [Id. p. 43]. That was it.

Eck wants this Court to ignore Mr. Smith's complete lack of knowledge. Eck suggests the fact he was admitted as an expert is probative to authentication but this is nonsense; if any witness can come say "this document is my file" and that constitutes authentication, then there is no point to having Rule 901(a), SCRE. True, authentication is not a high burden but the Court would have to stretch Rule 901 far beyond the plain and ordinary meaning of its text to show Eck met the bar here.

Appellants submit that Respondent misreads *Deep Keel, LLC v. Atlantic Private Equity Group, LLC,* 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015). In *Deep Keel,* the witness was not required to authenticate the instrument while it was in the possession of a predecessor-in-interest but only during the time *Deep Keel* owned the instrument. *Id.*, 413 S.C. at 64-65, 773 S.E.2d at 610. There is no predecessor in interest in this case, and Mr. Smith could not authenticate the document while it was in *Eck's* possession unlike the witness in *Deep Keel* who met his burden easily.

As for Rule 901(b)(4) and Eck's citation to *Kershaw Co. Bd. of Education v. U.S. Gypsum Co.*, 302 S.C. 390, 398, 396 S.E.2d 369, 373-374 (1990) [*see* Resp. Br. pp. 14-15], no testimony was offered about an approved course of conduct except Mr. Smith conceding the principal must sign the Guaranty himself to make it effect. [Tr. p. 43]. Mr. Smith's testimony was otherwise silent on how Guaranties and Credit Agreements are collected, vetted, stored, etc. Moreover, in *Kershaw* the trial court was able to examine multiple documents to judge their authenticity and consistency, which was not permitted

here. *Kershaw*, 302 S.C. at 398, 396 S.E.2d at 374. Accordingly, the Court should reject the Respondent's Rule 901(b)(4), SCRE argument, as well.

The same holds true for the Respondent's argument that Appellant's have failed to show prejudice in the admission of the Credit Agreement and Guaranty [Resp. Br. p. 16-17] *other than, of course, the whole argument that Hensley would not have personal liability and that Superior would not be compelled to pay 18% interest and attorneys' fees which is fairly prejudicial.* [App. Br.]. The assertion that the admission of the deposition of Hensley with the relevant documents attached as exhibits voids any problems is also misplaced. While a party can use the deposition of a party-opponent for any purpose, Rule 26, SCRCP, the Credit Agreement and Guaranty were merely identified as exhibits in those depositions, not entered into evidence as in *de bene esse* depositions. Likewise, the depositions were entered into evidence after Appellant's had interposed their objections. [Tr. pp. 20, 66-67].

G. Eck's Arguments for Failing to Produce Originals Are Unpersuasive.

Eck repeatedly testified that there was an original of the Credit Application and Guaranty in Richmond [Tr. pp. 20, 43; Smith Depo. p. 48] but it nevertheless chose to present an illegible and incomplete copy in spite of the knowledge that its authenticity and fairness would be challenged. Eck offers a lot of excuses why it did not product its original [Resp. Br. pp. 17-18]; once again is miscasts *Pee Dee*, 284 S.C. at 374-375, 326 S.E.2d at 653 (a case about witnesses to signatures) as applicable in the instant case (which deals with whether the signatures are authentic). Eck references the statement made by its attorney at trial that there was only a faxed copy, but it is well-settled that arguments of counsel are inadmissible as evidence. *Cobb v. Benjamin,* 325 S.C. 573, 581 n. 2, 482 S.E.2d

589, 593 n. 2 (Ct. App. 1997) ("[W]here there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record."). Eck offers no compelling reason why the Master should not be reversed for admitting such poor and incomplete duplicates, especially when the missing pages (e.g., the cover sheet, etc.) would be probative. To the extent Eck argues the original was in the possession of Superior, this is actual a case where there would be duplicate originals – Eck had its original in Richmond, but chose to present only a copy. *See, e.g., Shirer v. O.W.S. & Assocs.*, 253 S.C. 232, 236, 169 S.E.2d 621, 622 (1969) (holding carbon copy was admissible as duplicate original, which would be persuasive that any facsimile received by Eck is a duplicate original). Accordingly, the Court should reject Eck's argument.

CONCLUSION

Based on the foregoing arguments and citation to authority, the Court should reject the erroneous positions advanced in the Brief of Respondent.

Respectfully submitted,

Robert B. Varnado (S.C. Bar # 0007850)
Alexis M. Wimberly (S.C. Bar # 101611)
BROWN & VARNADO, LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellants