**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

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Case No. 2014-CP-32-4259

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

v.

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

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# BRIEF OF RESPONDENT WELLS FARGO, N.A.

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## STATEMENT OF THE CASE

This appeal follows the trial court's order denying a motion for summary judgment based on the statute of limitations filed by Don A. Nummy, II, Dee S. Nummy, and Don A. Nummy (collectively, the "Nummys") and granting the motion to strike the Nummys' jury demand filed by Wells Fargo N.A., as successor by merger to Wachovia Bank, National Association ("Wells Fargo"). As set forth below, the trial court did not err in making these rulings and the Nummys have not presented an appealable order for the Court's review.

Wells Fargo brought this action on November 19, 2014 to recover amounts due pursuant to guaranties signed by the Nummys (the "Guaranty Agreements") in connection with a $600,000 promissory note that was executed by Danco Construction, Inc. ("Danco") on July 25, 2006 and delivered to Wells Fargo (the "Note"). (R. at 14-16). In their Answers and Counterclaims, the Nummys denied the majority of the allegations in the Complaint and made additional factual allegations. (R. at 58-64).[1] The Nummys also asserted the statute of limitations as an affirmative defense and counterclaims for breach of contract and surety defenses against Wells Fargo. (R. at 60-61). The Nummys demanded a jury trial on all causes of action. (R. at 58).

On March 2, 2015, Wells Fargo moved to strike the Nummys' jury trial demands ("Motion to Strike") on the grounds that the Nummys waived their rights to a jury trial by signing the Guaranty Agreements, each of which contained a provision waiving a jury trial ("Jury Waivers"). (R. at 76). The Nummys filed a memorandum in opposition to

[1] Dee S. Nummy and Don A. Nummy filed a joint Answer and Counterclaim. (R. at 58-64). Don A. Nummy, II filed an identical Answer and Counterclaim. (R. at 50-56). For ease of review, all references to the Nummys' Answer and Counterclaims refer to the Dee S. Nummy and Don A. Nummy Answer and Counterclaim ("Answer").

the Motion to Strike on April 14, 2015, arguing the following: 1) the Guaranty Agreements are unenforceable because Wells Fargo waived its right to damages; 2) the Guaranty Agreements and the Note are unenforceable because Wells Fargo's action is barred by a three-year statute of limitations; 3) the Nummys' counterclaims are legal in nature; 4) the Jury Waivers are unenforceable because the Nummys' counterclaims are compulsory; 5) the Nummys did not knowingly and voluntarily agree to waive their rights to a jury trial; and 6) the Jury Waivers are unconstitutional. (*See* R. at 81-94).

On March 20, 2015, the Nummys moved for summary judgment based on the three-year statute of limitations for breach of contract actions (the "Motion for Summary Judgment"). (*See* R. at 97-100). The Nummys argued Wells Fargo filed the present action more than three years after the Note matured on January 21, 2011. (R. at 98). Wells Fargo responded to the Motion for Summary Judgment, arguing that Wells Fargo's claims are subject to the twenty-year statute of limitations found in S.C. Code Ann. § 15-3-520 because the Guaranty Agreements were executed under seal. (R. at 129-130). In reply, the Nummys claimed that the twenty-year statute of limitations did not apply because 1) there is no physical seal on the Guaranty Agreements; 2) there is no evidence that the parties intended to execute the Guaranty Agreements under seal; 3) the Guaranty Agreements are not "instruments"; 4) the three-year statute of limitation applies to any action on an absolute guaranty; and 5) the Guaranty Agreements are personal bonds for the payment of money only and, as such, are exempted from the twenty-year statute of limitations. (*See* R. at 168-174).

On April 22, 2015, the trial court heard the Motion to Strike and the Motion for Summary Judgment. (R. at 3). A formal order followed on May 8, 2015 in which the

trial court granted the Motion to Strike and ruled that the contractual Jury Waivers executed by the Nummys were valid and enforceable. (R. at 7-9). Additionally, the trial court denied the Nummys' Motion for Summary Judgment because the Guaranty Agreements were executed under seal and, therefore, S.C. Code Ann. § 15-3-520 is the applicable statute of limitations. (R. at 4-7).

By motion dated May 22, 2015, the Nummys sought reconsideration of the trial court's order based on the same arguments they presented at the hearing. (*See* R. at 196-202). The trial court denied the motion in a Form 4 order. (R. at 10). This appeal followed.

## FACTS

On July 25, 2006, Danco executed and delivered the Note to Wells Fargo in the original amount of $600,000.00. (R. at 14-15).[2] In connection with the execution of the Note, the Nummys executed identical Guaranty Agreements in which they guaranteed to Wells Fargo "the timely *payment and performance* of all liabilities and obligations of [Danco] to [Wells Fargo] and its affiliates, including, but not limited to, all obligations under [the Note]." (R. at 36; 42) (emphasis added). The Guaranty Agreements and other loan documents "represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties." (R. at 40; 46).[3]

As stated in the Guaranty Agreements, they are "a continuing and unconditional

[2] The Note was further renewed, modified, and/or extended on June 16, 2008 and August 6, 2009. (R. at 15).

[3] The Guaranty Agreements also contain a severability clause that states if any provision of the Guaranty Agreements or other loan documents are "prohibited or invalid under applicable law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty or other Loan Documents." (R. at 39; 45).

guaranty of *payment and performance* and not of collection." (R. at 36; 42) (emphasis added). The Guaranty Agreements also contain a waiver of jury trial provision whereby the Nummys contractually waived their right to a jury trial. (R. at 41; 47). The Guaranty Agreements close with the following language, "IN WITNESS WHEREOF, Guarantor, on the day and year first written above, has caused this Unconditional Guaranty to be executed under seal." (*Id.*). Each of the Nummys then signed where indicated on a line indicating the signature was under "(SEAL)." (*Id.*).

Danco defaulted under the terms of the Note and filed for relief under Chapter 7 of the Bankruptcy Code on September 9, 2013. (R. at 15, 16; 59, 60). Upon Danco's default, Wells Fargo notified the Nummys of the default and demanded payment pursuant to the terms of the Guaranty Agreements. (R. at 16; 60). At that time and since, the Nummys failed and refused to cure their contractual default as required by the Guaranty Agreements. (*Id.*).

## ARGUMENTS

### I. The trial court correctly found that the Nummys waived their right to a jury trial in the Guaranty Agreements.

In this case, the trial court properly construed unambiguous contracts and determined that the Nummys had waived any right to a jury trial for the asserted claims as a matter of law. "Whether a party is entitled to a jury trial is a question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "Appellate courts may decide questions of law with no particular deference to the circuit court's findings." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014). Moreover, construction of an unambiguous contract is a matter of law for the court. *Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996). If the language

of a contract is clear and unambiguous, it determines the rights and obligations of the parties as a matter of law and no additional evidence will be considered. *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994).

### A. The Nummys waived their rights to a jury trial in the Guaranty Agreements.

"A party may waive the right to a jury trial by contract." *Blackburn*, 407 S.C. at 332, 755 S.E.2d at 443 (quotation omitted). This general rule applies to legal counterclaims as well as equitable ones, regardless of whether the counterclaim is permissive or compulsory. *See id.* (finding legal counterclaims were not subject to jury trial based on valid jury waiver executed by parties). There is nothing unconstitutional or unusual about contractual waivers of jury trials.

The Guaranty Agreements executed by the Nummys contain identical jury trial waivers:

> **WAIVER OF JURY TRIAL.** TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH OF GUARANTOR BY EXECUTION HEREOF AND BANK BY ACCEPTANCE HEREOF, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT EACH MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS GUARANTY, THE LOAN DOCUMENTS OR ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION WITH THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY WITH RESPECT HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO BANK TO ACCEPT THIS GUARANTY. EACH OF THE PARTIES AGREES THAT THE TERMS HEREOF SHALL SUPERSEDE AND REPLACE ANY PRIOR AGREEMENT RELATED TO ARBITRATION OF DISPUTES BETWEEN THE PARTIES CONTAINED IN ANY LOAN DOCUMENT OR ANY OTHER DOCUMENT OR AGREEMENT HERETOFORE EXECUTED IN CONNECTION WITH, RELATED TO OR BEING REPLACED, SUPPLEMENTED, EXTENED OR MODIFIED BY, THIS GUARANTY.

(R. at 41; 47) (emphasis in original). The Nummys signed the Guaranty Agreements, including the Jury Waivers, and are charged with having read their contents.

In *Blackburn*, the Supreme Court of South Carolina held that jury trial waivers that were nearly identical to those contained in the Guaranty Agreements were conspicuous and unambiguous, and therefore enforceable. As the court explained,

> Unlike the other provisions in the note and guaranties, the waivers are printed in all capital letters and have a bold heading called '**WAIVER OF JURY TRIAL.**' They are located at the very end of the six-page document, directly above the signature line, thus making the conspicuous font even more noticeable, even at a quick glance.

*Blackburn*, 407 S.C. at 333 n.8, 755 S.E.2d at 443 n.8 (emphasis in original). As a result, the *Blackburn* court ruled that the jury trial waivers were enforceable and applied to the respondents' counterclaims because the respondents knowingly and voluntarily executed the jury trial waivers; even though respondents argued that they were unaware of the waiver until the appellant served its motion to strike their jury demands. *Id.* at 333, 755 S.E.2d at 443. The Nummys have made a similar argument in Section II(B)(3) of their Appellant's Brief, and it should fail for the same reasons given in *Blackburn*. Ignorance of a contractual waiver provision does not provide a defense to its effects. "'[A] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it.'" *Id.* at 332-33, 755 S.E.2d at 443 (quoting *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003)). Moreover, South Carolina law does not "'impose a duty on the bank to explain to an individual what he could learn from simply reading the document.'" *Id.* (quoting *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994)).

In the face of a broad jury waiver in loan documents such as these, a party is only entitled to a jury trial "if the contractual jury trial waivers executed in connection with the loan documents are invalid and unenforceable." *Id.* at 332, 755 S.E.2d at 443. The Jury Waivers here are indistinguishable from the waivers found to be valid and enforceable in *Blackburn*. In each case, the waiver language was set off with the same heading in bold type, "**WAIVER OF JURY TRIAL.**" In addition, the waiver clauses are located in the same part of the agreements, at the end directly above the signature lines. (R. at 41; 47).

The Nummys also argue that they did not knowingly and voluntarily waive their rights to a jury trial because they could not have been aware of the basis and circumstances of any future claim upon the Guaranty Agreements.[4] The Nummys' argument, if valid, would render all jury waivers in South Carolina invalid as the parties can never anticipate what may happen in the future. This is not the law in South Carolina as reflected in the case law upholding contractual jury waivers. *Blackburn*, 407 S.C. at 332, 755 S.E.2d at 443 (citing *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002)). The Nummys' citations to out of state cases are unavailing in light of this precedent.

Having established that the Jury Waivers are valid, the next issue is whether they cover the Nummys' counterclaims. The answer to that question is yes as the counterclaims each relate to the parties' obligations under the Note and the Guaranty Agreements. As set forth in the Jury Waivers, the Nummys waived a jury trial as to "any litigation based on, or arising out of, under or in connection with . . . the loan documents or any agreement

[4] To the extent that the Nummys rely on the allegation in their brief that the Guaranty Agreements were "un-negotiated" to support their argument, the Nummys did not raise this issue in the trial court and, thus, it is not preserved for this Court's review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998).

contemplated to be executed in connection with this guaranty, or any course of conduct, course of dealing . . . or actions of any party with respect hereto." (R. at 41; 47) (emphasis omitted). In their counterclaims, the Nummys allege that Wells Fargo breached the covenant of good faith and fair dealing when it refused to extend further credit to Danco under the Note resulting in "a substitute contract and/or impos[ing] risks on the [Nummys] fundamentally different" from the original agreement. (R. at 53-56). Thus, the allegations of the counterclaims fall within the scope of the Jury Waivers as correctly determined by the trial court.

### B. Nothing in the South Carolina Rules of Civil Procedure invalidates the Jury Waivers.

The Nummys also argue that the Jury Waivers are not binding because the Nummys complied with Rule 39(a), SCRCP in making their jury demand. However, the Nummys fail to consider the entire text of Rule 39(a). Subsection (a)(2) provides that once a party has made a timely demand for a jury trial under Rule 38, SCRCP, "[t]he trial of all issues so demanded shall be by jury, unless . . . (2) the court **upon motion** or its own initiative finds that a right of trial by jury of some or all of those issues does not exist." Rule 39(a)(2), SCRCP. Here, Wells Fargo filed a motion seeking to strike the jury demand as expressly contemplated by Rule 39; therefore, the trial court was well within its rights in considering the motion to strike.

The Nummys also contend that the Jury Waivers were not binding until filed with the court pursuant to Rule 43(k), SCRCP. Rule 43(k) is simply inapplicable in this context. It applies to agreements made in the course of litigation, not agreements between the parties that pre-date the dispute. If the Nummys' position was correct, any contract could be repudiated at any time prior to being filed in a court. Moreover, the Nummys did not

raise this issue in their Memorandum of Opposition to the Motion to Strike Jury Demand, Motion for Reconsideration, or at the hearing. Thus, this issue is not preserved. *Wilke*, 330 S.C. at 76, 497 S.E.2d at 734 (holding that issue must be raised to and ruled on by the trial court to be preserved for review); *Zaman v. South Carolina Bd. of Med. Exam'rs*, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) (holding that the record must show where an issue was presented to the trial court to be preserved for review).

**C. Wells Fargo did not breach the terms of the Guaranty Agreements.**

Next, the Nummys argue that the Jury Waivers are unenforceable because Wells Fargo breached the Guaranty Agreements and, as such, Wells Fargo is unable to enforce the Jury Waivers. This argument was not raised to the trial court, and therefore is not preserved for review. *See Wilke*, 330 S.C. at 76, 497 S.E.2d at 734.

Assuming, arguendo, that this issue is preserved, the Nummys have failed to show a breach of contract. Nummys' breach of contract claims stem from Wells Fargo's alleged refusal to extend additional credit to Danco. (*See* R. at 53-55). In essence, they argue that there is a breach of the covenant of good faith and fair dealing with respect to the Note, and, as a result, the Guaranty Agreements are unenforceable. (*See id.*). However, nothing required Wells Fargo to extend further credit to Danco, and there is no breach of the implied covenant of good faith and fair dealing by conduct that the law permits. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (holding "there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do"). Moreover, a claim for breach of the covenant of good faith and fair dealing cannot stand if the party seeking damages has not performed under the contract. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) ("[O]ne who seeks to

recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it.") (citation omitted). Here, there is no dispute that Wells Fargo was not required to further renew the Note, nor is there any dispute the there was a default under the Note and the Guaranty Agreements. Thus, there has been no breach of contract.

Moreover, even assuming that Wells Fargo did breach some term of the Guaranty Agreements or some part of the Guaranty Agreements were found to be invalid, Wells Fargo would still be entitled to enforce other portions of the agreements, such as the Jury Waivers. The Guaranty Agreements expressly provide that the terms are severable, as follows:

> If any provision of this Guaranty or of the other Loan Documents shall be prohibited or invalid under applicable law, such provision shall be ineffective but only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty or other Loan Documents.

(R. at 39; 45) (emphasis in original). "Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." *Beach Co.*, 351 S.C. at 64, 566 S.E.2d at 867 (citing *Scruggs v. Quality Elec. Servs.*, 282 S.C. 542, 545, 320 S.E.2d 49, 51 (Ct. App. 1984)). Therefore, the Nummys' arguments relating to the validity of other portions of the Guaranty Agreements does not change the analysis of the Jury Waivers. For all of these reasons, the trial court correctly granted the Motion to Strike and this matter should be remanded to the trial court for disposition.

## II. The Nummys have not presented any appealable order for this Court's review.

An interlocutory order relating to a mode of trial is only immediately appealable if the order deprives a party of a mode of trial to which it is entitled as a matter of right. *C & S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) ("An order denying a party a jury trial is **not** immediately appealable unless it deprives him of a mode of trial to which he is entitled as a matter of right." (emphasis added)). As a result, if this Court agrees that the Jury Waivers are valid and enforceable, then the trial court's order striking the Nummys' jury demand is not immediately appealable because the order did not deprive the Nummys of a mode of trial to which they were entitled as a matter of right.[5]

Moreover, it is well settled that orders denying motions for summary judgment are not appealable. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161. 168, 580 S.E.2d 440, 444 (2003) (finding the denial of summary judgment may not be reviewed even if another appealable issue is before the court); *see also Raino v. Goodyear Tire and Rubber Co.*, 309 S.C. 255, 422 S.E.2d 98 (1992); *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986); *Matthews v. City of Greenwood*, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991); *Harris v. Campbell*, 293 S.C. 85, 358 S.E.2d 719 (Ct. App. 1987). More specifically for the purposes of this case, this Court has ruled that denial of a motion for summary judgment on a party's claim that the action is barred by the statute of limitations "is not appealable **under any circumstances**." *Thornton v. South Carolina Elec. & Gas*

[5] As noted by former Chief Justice Toal, orders denying a mode of trial are "anomalous" in part because "the appellate court must consider the merits of the question in the lower court—whether the party was entitled to a particular mode of trial—to determine if the order is immediately appealable." Jean H. Toal, et al. *Appellate Practice in South Carolina* 156 (3d ed. 2016). For this reason, Wells Fargo addressed the merits relating to the Motion to Strike in Section I.

*Corp.*, 391 S.C. 297, 300-01, 705 S.E.2d 475, 477 (Ct. App. 2011) (emphasis added); *see also Davis v. Tripp*, 338 S.C. 226, 525 S.E.2d 528 (Ct. App. 1999). Rather, the question of whether a party has complied with the statute of limitations "remains one the circuit court must answer at trial." *Id.* at 307, 705 S.E.2d at 481.

Given this precedent and contrary to Section I(A) of the Nummys' brief, the denial of summary judgment does not establish the law of the case. *See Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). A denial of summary judgment is an interlocutory order, which the trial judge can reconsider until the end of trial. *Blyth v. Marcus*, 335 S.C. 363, 366, 517 S.E.2d 433, 434 (1999). This is so regardless of the language in the order denying summary judgment. *Ballenger*, 313 S.C. at 476-77, 443 S.E.2d at 380.

For all of these reasons, the Nummys have not presented this court with an appealable order and this appeal should be dismissed in its entirety. In the alternative, the Court should dismiss that portion of the appeal relating to the denial of the Nummys' summary judgment motion.

## III. Assuming the Nummys can appeal the trial court's order denying their Motion for Summary Judgment, the trial court correctly denied the motion because Wells Fargo's action is subject to a twenty-year statute of limitations.

Summary judgment is warranted when there is no genuine issue of material fact and it appears that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Material facts are those identified by controlling substantive law as essential elements of claims and defenses. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A court must view the facts and inferences reasonably drawn from them in the light most favorable to the

non-moving party. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusions to be drawn from those facts." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (quoting *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000)).

### A. Wells Fargo's claims are not barred by the applicable statute of limitations because the Guaranty Agreements are sealed instruments.

Generally, a three-year statute of limitations applies to breach of contract actions. *See* S.C. Code Ann. § 15-3-530(1). However, pursuant to S.C. Code Ann. § 15-3-520, there is a twenty year statute of limitations where a contract clearly evidences an intent to create a sealed instrument. *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005).

"A sealed instrument is defined as 'an instrument to which the bound party has affixed a personal seal, usually recognized as providing indisputable evidence of the validity of the underlying obligations.'" *Lyons v. Fidelity Nat. Title Ins. Co.*, 415 S.C. 115, 125, 781 S.E.2d 126, 131-32 (Ct. App. 2015) (quoting *Sealed Instrument*, BLACK'S LAW DICTIONARY (9th ed. 2010)) ( alterations omitted). "A seal is defined as 'an impression or sign that has legal consequences when applied to an instrument.'" *Id.* at 125, 781 S.E.2d at 132. A seal may consist of "'any substance affixed to the document or the use of an impression such as that customarily used by notaries and corporations, or the use of any other mark, work, symbol, scrawl, or sign intended to operate as a seal.'" *Id.* at 125-26, 781 S.E.2d at 132 (quoting 1 Williston on Contracts §2:4 (2007)).

It is immaterial whether there is a physical seal attached to the instruments in question. S.C. Code Ann. § 19-1-160 unambiguously provides:

> Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument **although no seal be actually attached thereto**.

(emphasis added). "The clear language of section 19-1-160 imposes a statutory rule of evidence and requires that the determination of whether a non-sealed instrument should be considered a sealed instrument be gleaned from the instrument." *Carolina Marine*, 363 S.C. at 173, 609 S.E.2d at 550-51.

In *South Carolina Department of Social Services v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984), this Court concluded "that although the contract at issue did not include a seal, the language of the contract manifested the parties' intent to create a sealed instrument." *Lyons*, 415 S.C. at 126, 781 S.E.2d at 132 (citing 282 S.C. 556, 561, 320 S.E.2d 464, 467 (Ct. App. 1984)). In that case, the attestation clauses stated, "the parties hereto have set their hands and seals." *Winyah Nursing Homes*, 282 S.C. at 561, 320 S.E.2d at 467. The notation "L.S." followed the parties' signatures. *Id.* According to this Court, the inclusion of "L.S." in *Winyah Nursing Homes* was significant because L.S. is an abbreviation for "*Locus sigilli*," which means "'the place of the seal; the place occupied by the seal of written instruments.'" *Carolina Marine*, 363 S.C. at 174, 609 S.E.2d at 551 (citing *Locus Sigilli*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

Similarly, in *Treadaway v. Smith*, 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 648 (Ct. App. 2005), this Court found the parties to a separation agreement intended to

create a sealed instrument. The separation agreement stated, "IN WITNESS HEREOF, 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.* Thus, this Court concluded that the twenty-year statute of limitations governed the plaintiff's action to enforce a provision of the agreement. *Id.*

However, in *Carolina Marine*, this Court concluded "that the sophisticated parties to a commercial lease did not intend to create a sealed instrument . . . [because] the lease did not contain an actual seal, the letters 'L.S.,' referring to the place where a seal would be affixed, or such a phrase as 'signed, sealed, and delivered.'" *Lyons*, 415 S.C. at 127, 781 S.E.2d at 133; at 58 (citing *Carolina Marine*, 363 S.C. at 174-75, 609 S.E.2d at 551-52).[6] This Court explained that a "boilerplate attestation clause, *by itself,"* is not enough to establish the intention of the parties to execute an instrument under seal. *Carolina Marine*, 383 S.C. at 175, 609 S.E.2d at 552 (emphasis in original).

Here, the Guaranty Agreements contain identical attestation clauses that state:

> **IN WITNESS WHEREOF**. Guarantor, on the day and year first written above, has caused this Unconditional Guaranty to be executed under seal.
>
> [signatures of parties] (**SEAL**)

(R. at 41; 47) (emphasis in original). The Guaranty Agreements' attestation clauses are most closely related to the contract construed in *Winyah Nursing Homes* and, as such, provide clear evidence that the parties' intended for the Guaranty Agreements to be sealed instruments. Not only do they contain language in the attestation clause that the Guaranty

[6] The lease at issue contained only an attestation clause reading "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals." *Carolina Marine*, 363 S.C. at 174, 609 S.E.2d at 551.

Agreements were "to be executed under seal," but the notation "**SEAL**" follows the signatures of the parties. As this Court noted in *Winyah Nursing Home*, this language is "significant," and perhaps even more so in this case because the Guaranty Agreements use common language, as opposed to a Latin abbreviation, to evidence the parties' intention for the Guaranty Agreements to be sealed instruments.

The Nummys cannot avoid the effects of the Guaranty Agreements and the language relating to the seal by claiming that they did not read them. As an initial matter, this Court should disregard the Nummys' affidavits relating to their intentions in signing the Guaranty Agreements as they were untimely and would not have been admissible at trial. The Nummys first presented these affidavits to the trial court on June 2, 2015, after they filed their Motion to Reconsider. (R. at 204-209). As such, they are not properly in the record. *Johnson v. Sonoco Products Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (holding that issues raised for the first time in a Motion to Reconsider are not properly preserved for review). In addition, these affidavits are not admissible under the parol evidence rule to the extent they contradict the plain language of the Guaranty Agreements. *Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 568, 577-78, 762 S.E.2d 696, 700-01 (2014). Thus, they cannot present a question of fact at the summary judgment stage. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (holding "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence"). This argument also fails on its merits. As argued above, South Carolina law does not "impose a duty on the bank to explain to an individual what he could learn from simply reading the document." *Lanford*, 313 S.C. at 545, 443 S.E.2d at 551.

Therefore, the trial court looked to the Guaranty Agreements themselves and found that the Nummys intended for the Guaranty Agreements to be executed under seal. As such, the trial court correctly concluded that the twenty-year statute of limitations found in S.C. Code Ann. § 15-3-520 applies.

### B. The Guaranty Agreements are not sealed notes and personal bonds for the payment of money only.

The Nummys argue in Section I(A) of their brief that the trial court erred by finding that Wells Fargo's action on the Guaranty Agreements is not covered by S.C. Code Ann. § 15-3-520 by operation of subsection (b). That provision provides that the statute of limitations is twenty years for "an action upon a sealed instrument, *other than* **a sealed note and personal bond** for the payment of money only." S.C. Code Ann. § 15-3-520(b) (emphasis added).

This Court has previously indicated that a guarantee does not fall under the exceptions to the general rule for instruments under "seal." In *TranSouth Financial Corp. v. Cochran*, 324 S.C. 290, 478 S.E.2d 63 (Ct. App. 1996), this Court applied a twenty-year statute of limitations to a guarantee that was executed under seal. *See* 324 S.C. at 294 n.2, 478 S.E.2d at 65 n.2. In so doing, this Court held that the liability of a guarantor, based upon a guarantee signed under seal, survived the expiration of a related confession of judgment. *Id.*

The Nummys contend that the Guaranty Agreements are "either unsealed notes **or** personal bonds under South Carolina's definition of the term" and, therefore, fall within the statutory exception. However, the Nummys fail to recognize that the language of subsection (b) is conjunctive, not disjunctive. Thus, the Nummys must show that the Guaranty Agreements are sealed notes **and** personal bonds for the payment of money only.

The Guaranty Agreements are not notes under the traditional understanding of the term because they are subject to performance by Danco under the Note. *See Chambers v. Pingree*, 334 S.C. 349, 354, 513 S.E.2d 369, 372 (Ct. App. 1999) ("A promissory note . . . is an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer or to a person therein designated or his order, at a time specified therein, or at a time which must certainly arrive."). Instead, the Guaranty Agreements reflect a promise on behalf of the Nummys be responsible with respect to payment and performance for all liabilities and obligations of Danco under the Note. *See Ruberg v. Brown*, 71 S.C. 287, 51 S.E. 96, 98 (1905) ("The definition of guaranty is a promise to answer for the payment of some debt or the performance of some duty in the case of the failure of another person, who himself, in the first instance, liable to such payment or performance."). Thus, the Guaranty Agreements are not "sealed notes" under the statute.

In addition, the Guaranty Agreements are not instruments "for the payment of money only."[7] This is clearly shown in the language of the Guaranty Agreements in which "Guarantor[s] hereby absolutely, irrevocably and unconditionally guarantee[] to [Wells Fargo] . . . *the timely payment and performance of all liabilities and obligations* of [Danco] to [Wells Fargo] . . . ." (R. at 36; 42) (emphasis added). As an illustration of obligations other than for the payment of money found in the Guaranty Agreements, the Nummys agreed to deliver to Wells Fargo "such information as [Wells Fargo] may reasonably request from time to time, including without limitation, financial statements and information pertaining to [the Nummys'] financial condition." (R. at 36, 40; 42, 46).

[7] Wells Fargo presents this argument as an alternate sustaining ground pursuant to Rule 220, SCACR.

For all of these reasons, the trial court correctly ruled that Wells Fargo's action is not "an action upon . . . a sealed note and personal bond for the payment of money only" and, thus, not exempted from the twenty-year statute of limitations found in S.C. Code Ann. § 15-3-520. Therefore, the Court should affirm the trial court's ruling and should remand this matter for further proceedings in the event the Court reaches the merits of this issue.

## CONCLUSION

As shown above, this appeal is interlocutory and should be dismissed. In the alternative, the trial court correctly struck the Nummys' jury demand based on its determination that the Jury Waivers are valid and enforceable. In addition, the trial court properly considered the plain language of the Guaranty Agreements in determining that this action was subject to the twenty year limitations period found in S.C. Code Ann. § 15-3-530. Thus, if the Court determines it has jurisdiction in this matter, the trial court's orders should be affirmed in their entirely and this matter should be remanded to the trial court for disposition.

Respectfully submitted,

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April 21, 2016

**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge



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Case No. 2014-CP-32-4259

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

v.

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

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**PROOF OF SERVICE**

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I certify I have served the Final Brief of Respondent Wells Fargo, N.A., as successor by merger to Wachovia Bank, National Association and Certificate of Compliance, by depositing a copy of it via U.S. Mail on April 21, 2016, addressed to the attorneys of record for Appellants:

Richard R. Gleissner, Esq.
1237 Gadsden Street, Suite 200A
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Respectfully submitted,

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Dated April 21, 2016

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## CERTIFICATE OF COMPLIANCE

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I certify that the final respondent's brief in this matter complies with Rule 211(b), SCACR and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers.

Respectfully submitted,

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Dated April 21, 2016

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April 21, 2016

**Via Hand Delivery**
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *Wells Fargo, N.A., as successor by merger to Wachovia Bank, National Association v. Don A. Nummy, II, Dee S. Nummy, and Don A. Nummy*
Trial Court Case No. 2014-CP-32-4259
HSB File No. 31686.0255

Dear Ms. Kitchings:

Enclosed herewith for filing is an original, unbound Final Brief of Respondent Wells Fargo, N.A., as successor by merger to Wachovia Bank, National Association, together with sixteen (16) bound copies. Also enclosed are the original and one (1) copy of the Certificate of Compliance and Proof of Service. I would appreciate you having the originals filed and returning clocked copies to me via my courier.

Thank you for your assistance.

Sincerely yours,

**HAYNSWORTH SINKLER BOYD, P.A.**

John G. Tamasitis

Enclosures

cc: Richard R. Gleissner (via email rick@gleissnerlaw.com and U.S. Mail)