THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Tanya A. Gee, Circuit Court Judge

Case No: 2014-CP-32-04259

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

v.

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

APPELLANTS' FINAL REPLY BRIEF

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Table of Contents

TABLE OF AUTHORITIES

Cases

Statues, Rules and Other

LEGAL ARGUMENT

The Respondent presents three arguments in support of the circuit court's erroneous orders. While not addressed as its first argument, the Respondent argues that this Court lacks jurisdiction to hear this appeal. This argument has been soundly rejected by South Carolina courts. Likewise, the Respondent erroneously argues how a court is to consider jury trial waivers. It argues that the proper analysis as to whether a party has a right to a trial by jury is limited to what language is included in a particular provision presented to the Court. The court is not to concern itself, it is argued, with the enforceability of the agreement the waiver is contained within, nor should it consider the practical impact to the facts before the court. This analysis is not supported in South Carolina law or jurisprudence. The waiver of a right to trial by jury requires a greater showing than a citation of words similar to those used in previously enforceable waivers. Finally, the Respondent hopes to have this Court hold all agreements containing an identification of where a seal may be placed as carrying the rights of all properly sealed agreements, irregardless of the intent evidenced within the agreement itself as to whether it is sealed and irregardless of the type of agreement. The Respondent would have this Court and all Courts in South Carolina presume all agreements to be sealed as long the drafter remembers to provide a place to provide a seal. This argument is not in accord with South Carolina law and public policy. A seal has always carried a purpose in our legal system. Therefore, this Court should disregard these arguments and reverse the circuit court's orders relying upon these erroneous assertions.

I. This Court has jurisdiction to hear the matters before it on appeal.

Contrary to the arguments of Respondent, South Carolina law is clear and grants this

Court jurisdiction to hear this appeal. The right to appeal an order is controlled by statute. *N. Carolina Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986). As a general rule, interlocutory orders are not immediately appealable, but there are specific exceptions. "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Ex parte Capital U–Drive–It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Absent a specialized statute, an order must fall into one of several categories set forth in section S.C.Code Ann. § 14–3–330 in order to be immediately appealable. Section 14–3–330, has been narrowly construed and the immediate appeal of various orders issued before or during trial have generally not been allowed. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). "The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000). Generally, an order is not immediately appealable when appellants "have not 'arrived at the end of the road' and [would] be able to appeal the decision after the trial [was] finished." *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004).

Orders affecting the mode of trial, however, have been held to affect a substantial right as defined in section 14–3–330(2), "and must, therefore, be appealed immediately." *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). Moreover, "[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable." *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 23, 431 S.E.2d 587, 590 (1993). Section 14-3-330(2) states:

The Supreme Court shall have appellate jurisdiction for correction of errors of law

> in law cases, and shall review upon appeal:
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

The "court should look to the effect of an interlocutory order to determine its appealability under section 14–3–330(2)(c)." *Thornton v. S. Carolina Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). The Court's traditional analysis for determining whether a party has been denied a mode of trial "proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case." *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). The order of the circuit court granted the Respondent's motion to strike. The effect of the Order was to deny Appellant's proper demand for trial by jury and hold it had no right to a trial by jury. The interlocutory order had the effect of abridging Appellant's right to proceed to trial by jury. See *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 612, 682 S.E.2d 498, 501 (Ct. App. 2009)(failure to immediately appeal decision by lower court denying trial by jury results in waiving the right to raise the issue on appeal).Thus, under the decisions of the Courts of South Carolina interpreting S.C.Code Ann. § 14–3–330, this Court absolutely has jurisdiction to hear this appeal regarding the district court's order granting the Respondent's motion to strike.

Similarly, the Respondent's arguments relating to the jurisdiction of this Court to hear the appeal of the district court's order denying Appellants' motion for summary judgment based upon the statute of limitations is not in accord with South Carolina law. The error was an error of law in a law case, resulting from the circuit court finding guarantees could not, as a matter of law, be considered a sealed note or personal bond. "An order that is not directly appealable may

be considered if there is an appealable issue before the court." *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005)(citing *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct.App.2001). Here this Court has proper jurisdiction to hear the appeal of the order striking Appellants pleadings and may similarly, out of a sense of judicial economy, hear this matter.

The Respondent cites *Olson v. Faculty House of Carolina, Inc.* for the generalized proposition that the denial of a motion for summary judgment may not be reviewed even if another issue is before the court. 354 S.C. 161, 580 S.E.2d 440 (2003). This generalization fails to address the specific limitation to this generalization pointed out by the Supreme Court in that decision. In *Olson*, the Supreme Court explicitly held that exceptions to this generalization have been found in certain cases that consider the judicial economy of hearing the appeal. Id. (Citing *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985)). This misunderstanding by Respondent is made all the more apparent in the Supreme Court decision two years after *Olson* in *Edge*, which again found that a denial of a motion to dismiss an action could be considered immediately on appeal for the purposes of judicial economy, when considered with an issue that is rightfully appealable. 366 S.C. 511, 517, 623 S.E.2d 387, 390 (Furthering the stated policy in *Breland*, supra of avoiding piecemeal litigation). Similarly, the Respondent's reliance on *Thornton v. S. Carolina Elec. & Gas Corp.*, citing the language "is not appealable under any circumstance" is misguided as it conveniently fails to cite the entire sentence which qualifies the "under any circumstance" to the specific order in that action. 391 S.C. 297, 301, 705 S.E.2d 475, 477 (Ct. App. 2011). Unlike the present appeal, the Court of Appeals in *Thornton* found there was no issue before it that was properly appealed and, therefore, it lacked any jurisdiction to hear

any of the matters before it. As a practical matter, a denial of a motion for summary judgement has the same general effect as a denial of a motion to dismiss. Where the language "under any circumstance" applicable in all instances, the Supreme Court's analysis in the *Edge* decision would be incorrect.

This is plainly not the case in this appeal. The circuit court's order striking Appellants' demand for jury is always immediately appealable. Similarly, a finding by this Court that the circuit court erred as a matter of law in finding a guarantee is something other than a "sealed note and personal bond for the payment of money only" will result in the immediate dismissal of this action. This Court's clarification and reversal of the circuit court's finding of law will lead to the end of this matter and prevent future motions and appeals on this same very topic. This is a quintessential example of judicial economy. For these reasons, this Court plainly has jurisdiction to hear these appeals under South Carolina law.

II. Just as the circuit court did in its order, the Respondent erroneously relies upon an unenforceable waiver provisions in unenforceable guarantees.

The Respondent's argument in support of the circuit court's order striking the Appellants' jury trial demand erroneously relies entirely upon a waiver of such right contained in the guarantees. The Respondent argues that because similar language in similar waivers have been held to be enforceable, all waivers of similar import are enforceable. This is patently incorrect. South Carolina law has never held that a jury waiver, irregardless of the facts surrounding that waiver, will be enforceable no matter what. The Respondent, and the circuit court in kind, makes three specific errors. First it disregards the requirement that any order striking a pleading be accompanied by strong evidence that no facts or inferences may support the pleading as being

true. Second, it argues the analysis of whether such a waiver is knowing and voluntary is limited to the appearance of the waiver in some agreement of the parties. Finally, the Respondent argues that once waived, South Carolina law precludes any party from seeking a trial by jury in the future. This arguments fail as a matter of law, and the circuit court's reliance on such arguments should result in the order being overturned.[1]

A. The Circuit Court Order striking Appellants' pleadings failed to be accompanied by strong evidence that no facts or inferences may support them as being true.

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

Implicitly acknowledging the Appellants' right to trial by jury for the actions brought by both parties, the Respondent argues the circuit court was required to enforce the waiver provisions contained in the guarantees. The striking of a pleading, however, "is a 'drastic remedy' rarely to be granted." *Bell v. Forrest Paschal Mach. Co. & Eng'g Associates*, 277 S.C.

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[1] While not addressed with such brevity, the Appellants raised the very arguments before this Court at the hearing before the circuit court and again in its motion to reconsider. As such, these arguments are preserved for this Court's review. *See Appellants' Motion to Reconsider.*

19, 20, 282 S.E.2d 232, 233 (1981). The movant must show that the pleading is "so manifestly false that the trial court had no choice but to strike it as a sham." Id. No such showing was made.

Here, the Bank must show that the Appellants' pleadings regarding the unenforceable nature of the guarantees by virtue of the Bank's breaching those same guarantees is manifestly false. The Bank points to no evidence in the record before the circuit court to support such a finding. The Bank makes two assertions in this regard. First they quizzically claim "there is no dispute that [the Bank] was not required to further renew the Note." Respondent's Brief P. 11. Oddly, the Bank acknowledges this is in fact the contention made in Appellants' counterclaim. There is a legitimate dispute as to whether the Bank complied with the terms of the guarantees. Such an unsupported assertion is neither supported by the evidence presented to the circuit court, nor does such an assertion provide the adequate support to strike the Appellants' pleading under South Carolina law.

The Bank then goes on to compare the language present in the waivers contained in the guarantees to those present in the Supreme Court decision in *Wachovia Bank, Nat. Ass'n v. Blackburn*, arguing the likeness somehow controls the outcome in this matter. 407 S.C. 321, 755 S.E.2d 437 (2014), reh'g denied (Apr. 2, 2014). This analysis is flawed. The Appellants' have argued that a finding that the waivers are enforceable necessarily requires the circuit court striking Appellants' pleadings alleging the guarantees containing such waivers are unenforceable. Such an order is improper and should be reversed. A party may not remove another parties right to a trial by jury by presenting an unenforceable provision in what may amount to a fictitious or fraudulent agreement. South Carolina law requires manifest evidence that the agreement is enforceable as a biding agreement between the parties. The Supreme Court in *Blackburn* never

makes the leap asserted by the Respondent that if a Bank presents any document, enforceable or otherwise, with the same language as was presented in *Blackburn* it must be awarded a non-jury trial. Instead, the Supreme Court rightly holds that any such waiver must be shown to be valid and enforceable. *Id.* As no such evidence was presented to the circuit court, the Order must be reversed.

B. The Respondent mis-characterizes the Appellants' argument regarding the knowing and voluntary waiver of a right to trial by jury.

The Appellants' do not argue that the waiver provisions within the guarantees are not enforceable due to the Appellants failure to read them. Instead, the Appellants argue that to knowingly waive the right to a trial by jury, the right should have arisen first. The idea that a party could know the impact of waiving a right to trial by jury prior to an action arising should be dispelled. The South Carolina Constitution has protected the right to a trial by Jury since 1790. Similarly, the statutes regarding waiver of such a right have contained almost the exact same language limiting waivers to certain circumstances. By their terms, both the statutes and the Constitution plainly contemplate the pendency of litigation regarding the right and at the timing of the waiver. A right that has been enshrined in every constitution of the state of South Carolina and within its rules of civil procedure cannot be waived without a full understanding of all circumstances surrounding relinquishment of the known right.

Such an understanding cannot be had without, at the very least, the actions underlying the potential litigation giving rise to that right having taken place. A person may knowingly enter into an agreement to forego the right to have a negligence action tried before a jury after the alleged negligence took place. A person cannot knowingly forego the same right upon first

meeting the party that will commit the negligence. In the same manner, a party may waive the right to a jury trial for those actions concerning the execution of a contract as such actions giving rise to the suit could be known to that party. A party cannot, however, knowingly waive the right to a trial by jury for a potential suit based upon the unknown intentional future actions of the other party. When a person signs a document, he is responsible for "exercising **reasonable** care to protect himself by reading the document and making sure of its contents." *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (emphasis added). "The law does not impose a duty on the bank to explain to an individual what he **could** learn from simply reading the document." Id. at 664, 582 S.E.2d at 440 (citing *Lanford*, supra at 545, 443 S.E.2d at 551)(emphasis added). A reasonable person could not have learned of the rights waived within the guarantees, as such rights had yet to arise. Simply, one cannot knowingly and voluntarily waive the right to a jury for unknown events and for events that have not yet occurred. This reasoning has been adopted by the Supreme Court's of Georgia and California, and has been long enacted into legislation by the North Carolina legislature. Why should South Carolina citizens have less protection for our constitutional rights than the Citizens of Georgia and North Carolina?

C. The analysis of the enforceability of a waiver is not limited to the language used in the agreement itself.

The Respondent's argument regarding the jury waivers fails to address the fundamental requirement that the jury waivers be enforceable. *Blackburn*, supra. "The courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights." *State v. Thompson*, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003)(Emphasis added), citing *Johnson v. Zerbst*, 304 U.S. 458, 464,

58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938). Similarly, under South Carolina law, a party may only enforce an agreement after showing that it has fulfilled all of its obligations under the agreement. *Hyder v. Metro. Life Ins. Co.*, 183 S.C. 98, 190 S.E. 239, 244 (1937)("in order for one party to recover of another party upon a mutual, dependent contract, the Respondent must allege performance of all conditions precedent on his part"). The Respondent in this action has not fulfilled its obligations. It now argues that the inclusion of a severability provision in a contract precludes the requirements expressed in *Hyder. Id.* The Respondent cites to no authority for this proposition. The alleged breach by Respondent does not result in Respondent being unable to enforce the particular provision it failed to meet. Instead, the legal effect in South Carolina is for the breaching party to be unable to seek enforcement of the agreement generally. This Court and the circuit court is required, in deciding a motion to strike, to accept Appellants' allegations of the Respondents breach as true. Thus, any waiver provision contained in the guarantees breached by Respondent is, similarly, unenforceable by Respondent.

III. The Respondent's interpretation of South Carolina law disregards the impact that seals have played in the South Carolina legal process and wishes to dramatically change South Carolina jurisprudence defining terms such as guarantees, notes, and bonds.

The Respondent argues that the terms of the guarantees "clearly evidences" an intent to create a sealed document. The clear evidence Respondent points to is the complete lack of a seal and the boilerplate included in likely all of its guarantees that provides the term "SEAL" indicating where a seal should be placed. The Respondent then argues that the guarantees should not be identified as also being notes and bonds. These arguments have been and should continue to be soundly rejected by the courts of South Carolina.

A. The Respondent argues, and the Circuit Court's Order finds, the guarantees should be construed as sealed without any "clear" evidence that the parties intended this result.

The placing of the term "SEAL" beside a signature line should not be held as tantamount to the actual placement of a personal seal on an agreement. The importance and public policy surrounding the use of seals in South Carolina law has generally been intertwined with the same public policy embodied in statutes of limitations. The Respondent contends that any agreement where the drafter places the term ("SEAL") beside the designated location for a persons signature must carry the right to bring an action twenty years after its accruing. In order to better consider this position, it is important to consider the some of the development of seals in South Carolina's legal system and the impact such a decision would have in practice.

In an era where parties, such as the Appellants, execute agreements as a matter of course without regard in many instances to full paragraphs contained within an agreement (let alone a single archaic term such as "seal" or "sealed") and the impact those terms have, inferences are important. The Appellants are in no way arguing they should not be held to account for the terms contained within the agreement they executed. Nor do they argue they may somehow avoid the terms of the agreements by not reading them. The Respondent attempts to oversimplify this point by citing the Supreme Court's decision in *Lanford* for the proposition that one cannot avoid the terms of an agreement by arguing they did not understand them or were unaware of their existence. See Respondent's Brief P. 18. The Appellants are, instead, arguing that given that the documents are in no way actually sealed, this Court and South Carolina law, should not hold that failing to seal a document is equivalent to sealing a document. The Respondent, and many banks like it, would prefer to avoid the necessity of having the party signing a document actually seal

the document. Such a requirement would likely create the need to inform the other party to the agreement as to the impact of such a seal. The effect of reading the Guarantees before this Court as actually being sealed relieves the Banks of any need to request an actual seal and ignores the evidence before the Court that the Defendants never intended and would never have sealed the documents if asked. Were this Court to affirm the circuit court's decision holding these Guarantees to be sealed, there would be no reason for any party to actually seal a document, effectively removing any impact seals have in our legal system.

Seals have garnered the respect accompanied by a 20 year statute of limitations for good reason. The genesis of S.C.Code Ann. § 15–3–520 stems from the legislatures wish to codify what was until that point a presumption Court's in this state had fashioned on their own. The Supreme Court's decision in *Boyce v. Lake*, discusses the importance of seals in the context of this presumption and, now, the statute of limitations. 17 S.C. 481 (1882).

> This is a very important question, and demands the gravest consideration of its underlying principles and of the decided cases affecting it. Until 1870 our statute of limitations, the statute of James I., made of force here, did not embrace sealed notes, nor was there any positive limitation here or in England as to such instruments or as to bonds. The seal was supposed to give such papers peculiar force and value, and to impart to them peculiar vitality. This idea, however, has since been exploded, and now, in this State, such instruments stand on the same plane in almost every respect with unsealed contracts.
>
> In all civilized countries where the law is administered as a science having reference to the peace, quiet, and progress of society, as well as to the protection of individual rights, it has been thought wise that there should be some limit to litigation, some boundary beyond which contests or matters open to contests should be regarded as settled. Hence, early in England and in this country, in cases outside of the statute, the courts had resort to presumption to take the place, in many cases of evidence and frequently of belief, as a general common law principle. It was said by Lord Erskine, in Hillary v. Walter, 12 Ves., 267, "Mankind, from the infirmity and necessity of their situation, must, for the preservation of their property and rights, have recourse to some general principle

to take the place of individual and specific belief."

> In the absence of positive statutory limitation as to sealed notes and bonds, they were early brought under the operation of this principle, and the doctrine that twenty years would presume payment firmly established. Mr. Angel says: "By analogy to the statute of limitations, an artificial presumption has long been established, that when payment of a bond or other specialty was not demanded for twenty years, and there has been no circumstance to show that it was still acknowledged to be in existence, the jury are to presume payment at the end of twenty years. This doctrine has been so often recognized that it is not requisite to cite any of the countless authorities to sustain it." Angel Lim., § 93.

17 S.C. at 485-86. If the Supreme Court in 1882 faced with the request to overturn the circuit court's decision in this matter, there is little question they would strongly consider the impact such a decision would have. The legislature adopting the statute of limitations specifically addresses the issue expressed in this decision regarding the inappropriate use of seals in agreements for payment of money only, specifically exempting such agreements from the 20 year limitation.

When discussing the ability of courts to consider an agreement not formally sealed as being sealed, South Carolina court's have gone to great lengths to prevent such a practice from removing the need to actually seal a document. The court's have gone to great lengths to find that the seal was missing by nature of a mistake as opposed to it being impractical for the bank to require such. In *Trustees of Wadsworthville Poor Sch. v. Bryson*, the Supreme Court considered whether a deed lacking a proper seal could be held to be a properly sealed deed. 34 S.C. 401, 13 S.E. 619 (1891). It held:

> But it is contended that the paper purporting to be a conveyance of the land in question to the appellant lacks a seal, and therefore could not operate as a transfer of the legal title; that, [at] most, the appellant has only an equity which must yield to the alleged superior equity of the plaintiffs. It will be observed that the terms of the paper itself show conclusively that it was not intended as a mere agreement to

> convey, but as an actual conveyance. It has all the essential elements of a conveyance of real estate, except the seal; and its omission was clearly accidental, and certainly not intentional. It concludes with the words, "Witness my hand and seal;" and purports to have been "signed, sealed, and delivered" in the presence of two subscribing witnesses, one of whom goes before the proper officer and makes affidavit that he saw the grantor "sign, seal, and as his act and deed deliver, the within written deed," and the paper is spread upon the records of the proper office as a deed; so that there cannot be a doubt that the intention was to execute a formal deed, and the parties, as well as the witnesses, together with the recording officer, manifestly supposed that the paper was what it was intended to be,-a valid deed. This being the case, a court of equity will regard the paper as a deed, and will supply this accidental omission of the seal.

34 S.C. 401, 13 S.E. at 624-25. The Supreme Court looks to not merely the boilerplate language beside the signature block, but also the effect of a swearing witness, the recording officer and the import the agreement itself wished to have. The "intention was to execute a formal deed." Id.

Similarly, in *Sullivan v. Latimer*, the Supreme Court went through the same analysis. 38 S.C. 417, 17 S.E. 221 (1893). It held:

> The intention of the parties, then, must be gathered from the instrument itself. Now, taking this as the rule, can there be a doubt that the instrument here was intended to be a deed, and that it was an accident that the seal was omitted? If not, the whole thing was a palpable fraud. The paper is in the form of a deed. It was said at the bar that it was written on a blank form of deed; it was called a deed; it ends with the familiar words, "Witness my hand and seal;" it purports to have been signed, sealed, and delivered in the presence of witnesses, one of whom made oath that he saw the within John H. Latimer sign, seal, and as his act and deed deliver the within written deed, etc. The wife of the donor relinquished her dower in due form, and the paper was regularly recorded. If these facts, appearing on the paper itself, do not afford sufficient proof that it was intended as a deed in fact, with a seal to it, and that its omission was simply an accident, it is quite certain that-rejecting all evidence aliunde-sufficient proof for that purpose cannot be made in any case whatever. But it seems to us that there has been such a case, and that the very point was decided in Trustees v. Bryson, 36 S. C. 401, 13 S. E. Rep. 624, in which Chief Justice McIver said: "It will be observed that the terms of the paper itself show conclusively that it was not intended as a mere agreement to convey, but as an actual conveyance. It has all the essential elements of a conveyance of real estate, except the seal; and its omission was clearly accidental, and certainly not intentional. It concludes in the words, 'Witness my hand and

> seal,' and purports to have been "signed, sealed, and delivered" in the presence of two subscribing witnesses, one of whom goes before the proper officer and makes affidavit that he saw the grantor sign, seal, and as his act and deed deliver, the within written deed; and the paper is spread upon the records of the proper office as a deed. So that there cannot be a doubt that the intention was to execute a formal deed; and the parties, as well as the witnesses, together with the recording officer, manifestly supposed that the paper was what it was intended to be,-a valid deed. This being the case, a court of equity will regard the paper as a deed, and will supply the accidental omission of the seal." And so we say here. We cannot distinguish that case from this. The judgment of this court is that the judgment of the circuit court, so far as it refused to reform the written instrument in contention by adding a seal to the name of the grantor, John H. Latimer, be reversed, and that the case be remanded to the circuit court to be tried on the issue of damages, if the plaintiff is so advised.

38 S.C. 417, 17 S.E. at 222. The Supreme Court, again, goes to great lengths to stress the accidental nature of the missing seal and the other indicia of the intent of the parties.

In addressing the same issue in regards to an appeal arguing lack of evidence sufficient to bring an action of trespass, the Supreme Court in *Heyward v. Farmers' Min. Co.*, held:

> Third exception: "That his honor erred in holding that the plaintiff had sufficiently connected himself with the grant to Christopher Williman, dated 4th September, 1786." This involves only a question of fact, which cannot be reviewed by this court, as this is a law case. "So far as questions of fact, however, are concerned, this court could do nothing, even if such conclusions of fact should appear erroneous to us, for this court is without authority, as it has been repeatedly held in our decisions, to canvass such findings," etc. Stepp v. Association, 37 S. C. 434, 16 S. E. 134. See, also, Rhodes v. Russell, 38 S. C. 424, 17 S. E. 222. The circuit judge says: "The place on the creek at which the alleged trespass was committed is covered by the plat accompanying the grant from the state to Christopher Williman of 2,400 acres of marsh land. I think the plaintiff has sufficiently connected himself with this grant. The only exception brought to my attention is that a deed from Christopher Williman, Sr., to Christopher Williman, Jr., wants a seal. It seems to me that under the ruling of the supreme court in Trustees v. Bryson, 34 S. C. 401, 13 S. E. 619, this deed is sufficient. The seal seems to have been, as in that case, accidentally omitted," etc. See, also, Sullivan v. Latimer, 38 S. C. 417, 17 S. E. 221. This exception is overruled.

42 S.C. 138, 19 S.E. 963, 969 (1894).

Here, the Appellants have sufficiently presented evidence that the lack of a seal was not an accident, but, in fact, intentional. The Respondent never sought any of the additional indicia of an intent to seal as these decisions of the Supreme Court rely upon. Instead, the Respondent relies on boilerplate language drafted before any agreement between the parties was likely even contemplated. The guarantees in the case at bar contain no indication of an intent to create a sealed instrument. In fact, such a lengthy statute of limitations period would serve no purpose in the context of a guaranty such as was demanded by the Respondent in this case. There is no rationale or need for a twenty-year period of limitations for making payments in the event the primary obligor failed to make the necessary payments on what was a demand note. The Respondent's contention that it should have the right to bring an action on these guarantees as late as 2033 seems uncoupled from any legal support or reason generally. Actions involving deeds notoriously arise long before a party may bring the action. Actions on guarantees 20 years after the alleged breach seems nonsensical. The Trial Court erred in not finding in accordance with all of the evidence before it that the guarantees were not sealed as a matter of law. See *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010)("a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."); also *Republic Contracting Corp. v. South Carolina Dept. of Highways and Public Transp.*, 332 S.C. 197, 206, 503 S.E.2d 761, 766 (Ct. App. 1998) (holding the absence of express language in the body of the contract evidencing the intent that it be an agreement under seal has been held to be indicative of the fact that the document is not to be construed as a sealed instrument), *Square D Co. v. C.J. Kern Contractors, Inc.,* 314 N.C. 423, 334 S.E.2d 63 (1985) (holding the impression of a corporate seal on a construction contract did not transform it into a contract

under seal in the absence of language in the body of the contract creating a sealed instrument).

B. Guarantees, as both sealed notes and personal bonds for the payment of money only, are exempt from the twenty year statute of limitations.

When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). " The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Id. The best evidence of legislative intent is the text of the statute. *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). The Respondent wishes this Court to read the twenty year statute of limitations in a fashion that is confusing. By its very terms, the guaranty may be a note (or "sealed note" if a proper seal accompanies the guaranty) or personal bond under South Carolina law. As previously pointed out in its initial brief, the nature of a guaranty has been clearly defined in South Carolina law. See *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 543, 443 S.E.2d 549, 550 (1994)("A guaranty of payment is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor at maturity"). The terms of the guaranties in this matter do little more than provide that the Appellants promise to pay the Respondent a particular debt if it is not paid by the primary obligor. Contrary to the position taken by the Respondent, provisions regarding the promise to deliver information to the Bank cannot change the material terms of the agreement. South Carolina law has clearly defined guarantees of the kind involved in this matter to be notes and personal bonds.

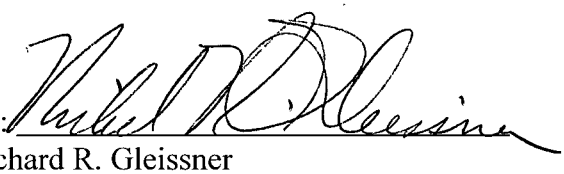
Whether read as conjunctive or disjunctive, the Respondent fails to show how the guarantees at issue here are not both sealed notes AND personal bonds. The Respondent first

argues that *Lanford* should be ignored. The Supreme Court in *Lanford* used language almost identical the language used in *Chambers v. Pingree*, 334 S.C. 349, 513 S.E.2d 369 (Ct. App 1999). *Lanford* defined a guarantee as "absolute or unconditional promise to pay a particular debt," while *Pingree* defined a promissory note as "an unconditinoal written promise, signed by the maker, to pay absolutely and at all events a sum certain." The Respondent fails to show how one is materially different from the other for purposes of including a guaranty as a type of promissory note. By not addressing the issue, the Respondent concedes that the guarantees can similarly be defined as types of personal bonds. The arguments of Respondent and the holding by the circuit court are clear errors of law and should be reversed.

CONCLUSION

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

Respectfully submitted,



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April 26, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Case No: 2014-CP-32-04259

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

v.

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

PROOF OF SERVICE

I certify that I have served the Appellants' Final Reply Brief by depositing a copy of it in the United States Mail, postage prepaid, on April 26, 2016, addressed to its attorney of record as follows:

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