THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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

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

v.

Robert L. Freeman ..... Appellant.

FINAL BRIEF OF APPELLANT

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April 21, 2016

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DID THE LOWER COURT ERR IN DETERMINING THAT THE TWO REFERENCES TO THE WORD "SEAL" ON THE BANK'S PREPRINTED FORM TRANSFORMED THE GUARANTY SIGNED BY APPELLANT INTO AN INSTRUMENT UNDER SEAL AS A MATTER OF LAW THEREBY EXTENDING THE STATUTE OF LIMITATIONS FROM THREE YEARS TO TWENTY YEARS?

STATEMENT OF THE CASE

On October 30, 2013, Respondent Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, National Association ("the Bank") filed this action against three individuals, including Appellant, Robert L. Freeman ("Freeman"). The Bank seeks to recover on a number of guaranty agreements (the "guaranty contracts") entered by Freeman and the other two defendants for various commercial real estate loans entered by a number of limited liability companies. **Compl.; R. pp. 13-28.** The Complaint alleged a separate cause of action on the guaranty contracts for the loans made to each of the separate limited liability companies. **Compl.; R. pp. 13-28.** The Complaint has since been dismissed as to Freeman's two co-defendants.

Freeman filed his Answer on January 17, 2014, that included a qualified denial and asserted affirmative defenses that the guaranties were illegal, void, and unenforceable for being in breach of public policy, that the Bank breached the implied covenant of good faith and fair dealing, that Freeman is entitled to an offset and/or a credit, unclean hands and, failure to mitigate. **Answer; R. pp. 295-307**. Freeman filed an Amended Answer on January 15, 2015, that added the applicable statute of limitations as an affirmative defense. **Answer; R. pp. 295-307; Am. Answer; R. pp. 308-321.**

Freeman filed a motion for partial summary judgment on February 19, 2015, asserting all causes of action on the guaranty contracts, with one exception, were barred by the three-year

statute of limitations for contract actions set forth in South Carolina Code section 15-3-530(1).[1] **Def.'s Motion for Partial Summ. J.; R. pp. 359-360.** On April 22, 2015, the Bank filed a motion for partial summary judgment as to Freeman's statute of limitations defense. **Pl.'s Motion for Partial Summ. J.; R. pp. 361.**

The Honorable J.C. Nicholson, Jr., Circuit Court Judge, conducted a hearing on both motions on May 5, 2015. **Order; R. pp. 1-12.** After considering the record, arguments, and briefs by the parties, the circuit court denied Freeman's motion and granted partial summary judgment in favor of the Bank. The lower court held that the twenty year statute of limitations set forth in South Carolina Code section 15-3-520(b)[2] applies because "the guaranties executed by Freeman are 'sealed instruments' and that the exception(s) do not apply," as a matter of law. **Order, p. 4; R. p. 5.**

The lower court entered its Order on June 2, 2015. **Order; R. pp. 1-12.** Freeman received written notice of entry of the Order on June 9, 2015. **Notice of Appeal; R. p. 684.** Freeman filed and served his notice of appeal on July 6, 2015. **Notice of Appeal; R. p. 684.**

STATEMENT OF FACTS

From 2006 to 2008, the Bank made a number of commercial real estate loans to borrower limited liability companies in which Freeman owned an interest — Seafree, LLC; Seafree Edisto, Inc.; Jadiekate, LLC; 708 Ocean, LLC; Yerby Road, LLC; and 1F3S, LLC (the "borrowers"). *See, e.g.*, **Compl.; R. pp. 13-28; Freeman Aff., ¶¶ 2-4; R. p. 393.** "The bank did not provide

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[1] South Carolina Code section 15-3-530(1) provides a three year statute of limitation for "an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520."

[2] South Carolina Code section 15-3-520(b) provides a twenty year statute of limitations for "an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only whereon the period of limitation is the same as prescribed in Section 15-3-530, except that a sealed contract for sale or an offer to buy or sell goods whereon the period of limitation is the same as prescribed in Section 36-2-725."

any of the closing documents associated with the loans and guaranties until the closings." **Freeman Aff., ¶ 6; R. p. 394.** "All of the documents [Freeman and the others] signed were handed to [them] at the closing, not in advance." **Freeman Aff., ¶ 6; R .p. 394.** As part of the loan transactions, Freeman signed Bank-prepared form documents entitled "Unconditional Guaranty" that were presented to him at the various closings. *See* **Compl., Exs. E, H, M, W, CC & II; R. pp. 56-67, 91-96, 120-131, 176-199, 227-244, 271-294; Freeman Aff., ¶¶ 5 & 7; R. p. 394.** At the bottom of the page on each document is a form number and revision number. *See* **Compl., Exs. E, H, M, W, CC & II; R. pp. 56-67, 91-96, 120-131, 176-199, 227-244, 271-294.** The notations in footers of these documents indicate that the forms have been revised twenty times or more. *See* **Compl., Exs. E, H, M, W, CC & II; R. pp. 56-67, 91-96, 120-131, 176-199, 227-244, 271-294.**

The printed form guaranty contracts are six pages in length. None of the guaranty contracts contains a formal seal. The only mention of "seal" is on the final page. The conclusion of the document contains a boiler plate attestation clause stating "**IN WITNESS WHEREOF**, Guarantor, on the day and year first written above, has caused the Unconditional Guaranty to be executed under seal." **Compl., Exs. E, H, M, W, CC & II; R. pp. 56-67, 91-96, 120-131, 176-199, 227-244, 271-294** (bold and capitalizations in originals). The only other mention of "seal" is a parenthetical next to line for Freeman's signature, containing the word "(SEAL)". **Compl., Exs. E, H, M, W, CC & II; R. pp. 56-67, 91-96, 120-131, 176-199, 227-244, 271-294.** The terms in the body of the guaranty contracts do not expressly state that the parties intend to create a sealed instrument nor that the parties intend for a twenty-year statute of limitations to apply to the guaranty contracts as a result of twice referring to the word "seal".

In September and October 2010, each of the borrowers, with one exception noted below, quit making the required monthly payments on their respective promissory note obligations, as modified. The failure to make the monthly payments when due triggered default under the Bank-prepared loan documents: "**DEFAULT.** If any of the following occurs, a default ("Default") under the Note shall exist: **Nonpayment; Nonperformance.** The failure of timely payment or performance of the Obligations or Default under this Note or any loan documents." **Compl., Exs. A, C, F, I, K, N, P, R, T, X, Z, DD, & FF; R. pp. 29-34, 41-46, 68-73, 97-102, 106-111, 132-137, 141-146, 150-155, 159-164, 200-205, 209-214, 245-250, 254-259** (emphasis in original). The provision titled "**REMEDIES UPON DEFAULT**" provides that "[i]f a Default occurs under this Note or any Loan Documents, Bank may at any time thereafter . . . [e]xercise any rights and remedies as provided under the Note and other Loan Documents, or as provided by law or equity." **Compl., Exs. A, C, F, I, K, N, P, R, T, X, Z, DD, & FF; R. pp. 29-34, 41-46, 68-73, 97-102, 106-111, 132-137, 141-146, 150-155, 159-164, 200-205, 209-214, 245-250, 254-259.** The promissory notes further require that each borrower and anyone else liable under the promissory note waive demand for payment, notice of intention to accelerate maturity, notice of acceleration of maturity and other notices of any kind. *See* **Compl., Exs. A, C, F, I, K, N, P, R, T, X, Z, DD, & FF; R. pp. 29-34, 41-46, 68-73, 97-102, 106-111, 132-137, 141-146, 150-155, 159-164, 200-205, 209-214, 245-250, 254-259.**

The only loan that was not in default more than three years before the Bank initiated this lawsuit on October 30, 2013, was the Bank's loan to 708 Ocean, LLC's known as Obligation Number 000-17-0442-8. *See* **Freeman Aff., ¶¶ 19, 13, 17, 23, 24, 22, 29, 26, 21, & 28; R. pp. 395-398** (Yerby Road, LLC defaulted on obligation number 000-16-8342-4 on September 6, 2010; Yerby Road, LLC defaulted on obligation number 000-16-9515-4 on September 16, 2010;

Seafree, LLC defaulted on Obligation Number 000-16-5243-7 on September 16, 2010; Seafree Edisto, Inc. defaulted on Obligation Number 000-16-8424-0 on October 5, 2010; Jadiekate, LLC defaulted on Obligation Number 000-16-6976-1 and Obligation Number 000-16-5555-4 on October 7, 2010; Jadiekate, LLC defaulted on Obligation Number 000-16-7486-0 on October 12, 2010; Seafree, LLC defaulted on Obligation Number 000-17-2286-7 on October 16, 2010; 1F3S, LLC defaulted on Obligation Number 000-16-7771-5 on October 16, 2010; 708 Ocean, LLC defaulted on Obligation Number 000-16-6715-3 on October 19, 2010; Jadiekate, LLC defaulted on Obligation Number 000-16-9517-0 on October 21, 2010; 1F3S, LLC defaulted on Obligation Number 000-16-6378-0 on October 25, 2010).

These various defaults also triggered Freeman's liability under the guaranty contracts. As specified in each of the guaranty contracts, a default "shall exist" upon "failure of timely payment or performance of the Guaranteed Obligations or a default under any Loan Document." **Compl., Exs. E, H, M, W, CC, II; R. pp. 56-67, 91-96, 120-131, 176-199, 227-244, 271-294.** "If a Default occurs, the Guaranteed Obligations shall be due immediately and payable without notice . . . and, Bank and its affiliates may exercise any rights and remedies as provided in this Guaranty and other Loan Documents, or as provided in law or equity." **Compl., Exs. E, H, M, W, CC, II; R. pp. 56-67, 91-96, 120-131, 176-199, 227-244, 271-294.**

After all these loans went into default in 2010, the Bank, depending on the particular property in question, either (a) foreclosed on its mortgage and obtained a deficiency judgment against the borrow entity or (b) allowed the sale of the mortgaged property. **Complaint ¶¶ 11, 12, 19, 20, 29, 30, 44, 45-48, 58-59, & 69-71; R. pp. 15, 17, 19, 22-23, 25, 27.** The Bank did not join Freeman as a defendant in the foreclosure proceedings to recover on its Unconditional Guaranty for that particular loan.

Freeman moved for partial summary judgment on the ground of that the Bank filed the action on the guaranty contracts against him more than three years after the borrower defaulted on all but one of the underlying promissory notes. **Freeman Mot. for Partial Summ. J.; R. pp. 359-360**. The Bank filed a cross motion for partial summary judgment asserting that it was entitled to judgment as a matter of law with respect to Freeman's defense that the Bank's claims were barred by the applicable statute of limitations. **Bank Mot. for Partial Summ. J.; R. pp. 361.**

In his order dated June 2, 2015, Judge Nicholson granted the Bank's motion for partial summary judgment. **Order; R. pp. 1-12.** He ruled that the "virtually identical" form guaranties executed by Freeman contain "multiple indicia that the parties intended that the guaranties be 'sealed instruments.'" **Order, p. 4; R. p. 5.** He found that the two references to "seal" on the last page of the form document were conspicuous. **Order, pp. 5-6; R. pp. 6-7.** The lower court distinguished those cases where courts have found that an instrument was not executed under seal even though the instrument contained a statement that it was executed under seal. **Order, pp. 5-8; R. pp. 6-9.** Judge Nicholson concluded each of the guaranty contracts was a sealed instrument under South Carolina Code section 19-1-160 and, therefore, subject to the twenty-year statute of limitations for sealed instruments in South Carolina Code section 15-3-520(2) rather than the three-year statute of limitations for contracts in South Carolina Code section 15-3-530(1). **Order; R. pp. 1-12.**

STANDARD OF REVIEW

"'An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, South Carolina Rules of Civil Procedure.'" *All Saints Parish v. Protestant Episcopal Church*, 358 S.C. 209, 222; 595 S.E.2d 253, 261 (Ct. App.

2004) (quoting *Lanham v. Blue Cross & Blue Shield of South Carolina*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002)). Under Rule 56, a party is entitled to summary judgment if there are no genuine issues of material fact for trial, and the moving party is entitled to judgment as a matter of law. S.C. R. Civ. P. 56. If the facts of the case are such that reasonable minds cannot differ, then there is no issue for trial. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55, 58 (1997); *City of Columbia v. ACLU*, 323 S.C. 384, 475 S.E.2d 747, 748 (1996); *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366, 367-68 (1991).

ARGUMENT

I. The Bank's form guaranty contracts are governed by the three-year statute of limitations applicable to contracts and not the twenty-year statute of limitations applicable to sealed instruments, because the guaranty contracts contain no physical seal and do not otherwise clearly evidence the parties' intent to create a sealed instrument.

This case squarely poses the question of whether a bank can extend the three-year statute of limitations applicable to contracts by seventeen years by presenting its customers with bank-prepared, form guaranty contracts at a closing that include boiler plate language in an attestation clause and the word "seal" in parentheses on the signature line. *See* S.C. Code § 15-3-530(1) (providing that an action on a contract, obligation, or liability must be initiated within three years or it is forever barred); S.C. Code § 15-3-520(b) (providing that sealed instruments are subject to a twenty year statute of limitations).

The three-year statute of limitations generally applicable to contracts, like all statutes of limitation, is not simply a technicality and serves purposes that are fundamental to the judicial system. *See generally Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009) (citations omitted). "Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security

and stability to human affairs." *Id.* (citing *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). "One purpose of a statute of limitations is 'to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his [or her] rights.'" *Id.* (quoting *McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989)). "Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation." *Id.* (citing *Pelzer v. State*, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008)).[3]

Long ago the maker of a legal instrument physically sealed it by the use of hot wax impressed with the seal of the maker. *See generally* Black's Law Dictionary, 1376 (8th ed. 2004) (defining "seal" as "2. A piece of wax, or wafer, or some other substance affixed to the paper or other material on which a promise. . . is written, together with a recital or expression of intension by which the promisor . . . manifests that a piece of wax, wafer, or other substance is a seal. The purpose of a seal is to secure or prove authenticity. . . ."); 68 Am. Jur. 2d Seals § 6 ("At common law, a seal meant an impression made on wax or other substance which would receive and retain an impression. In most states in which the seal retains significance, however, a seal

[3] This Court has rejected other efforts to escape the barring effect of the standard three-year statute of limitations for contact actions when there is no showing that the parties intended to create a sealed instrument and extend the statute of limitations. For example, in *Republic Contracting Corp. v. South Carolina Dep't of Highways & Pub. Trans.*, 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998), the appellant argued the presence of "sealed instruments because [one of the parties] placed its professional engineer seal and endorsement on the plans pursuant to statutory requirement." *Id.* at 205, 503 S.E. at 766 (citation omitted). The suggestion that a statutorily mandated seal created a sealed instrument for statute of limitations purposes was dismissed. This Court held that "nothing in the text of [that statute] leads to the inference that a purpose of the mandate for affixing a seal . . . is to extend the time in which an action can be brought . . . ." *Id.* at 205-06, 503 S.E.2d at 766 (citations omitted). The Court also found that nothing in the plans themselves suggested that the professional seal was included for any other purpose than to comply with the applicable licensing statutes and the Court had "no reason, therefore, to believe the parties ***intended*** the plans to have the effect of a sealed instrument." *Id.* at 206, 503 S.E.2d at 766 (double emphasis added).

may be impressed directly upon the paper or may consist of a wafer, scrawl, or any other written or printed mark which clearly appears intended by the person using it to be his or her seal; seals are not created by accident.").

Physically sealed instruments in the modern day are reserved for diplomas and other ceremonial documents, rather than legal instruments. Physically sealing deeds, contracts, and other instruments is no longer a business practice. Today, business instruments are sealed only in concept through the use of certain language that purportedly manifests the parties' intent that the instrument be treated as a sealed instrument. This imputation of intent is in most instances an honored legal fiction. Can it be truly be said that the average person who signs a form note, guaranty, or other contract that contains wording related to its being under seal has a realistic idea of what a sealed instrument is or its legal import sufficient to have intended the instrument to be legally deemed sealed? Even the case law suffers uncertainty. Courts have found some references to seal sufficient to convert a contract to a sealed instrument while other references to seal inadequate.

This appeal squarely presents these important questions. The South Carolina courts' approach to what is a sealed instrument is evolving and by no means clear. Our courts have never ruled on the precise combination of the use of the word "seal" as contained on the last page of the Bank's form guaranty contracts in this case. The lower court found that the two references to "seal" were conspicuous, even though in plain type, and that there were "multiple indicia" of intent that the guaranty contracts be sealed instruments, even though there are only two references to the word "seal" in the entire seven pages. The lower court went on to side with those few decisions that have found other wording to constitute sealed instruments and rejected

decisions by this Court and the United States District Court holding the form wording is not sufficient to transform an ordinary contract into the magisterial status of a sealed instrument.

Appellant respectfully submits that the lower court should be reversed because (1) the two uses of the word "seal" in the form guaranty agreements are not conspicuous, do not constitute multiple indicia of intent, and do not express clear intent by the parties that the guaranty contracts be treated as sealed instruments, (2) the specific references to "seal" in the form guaranties comes under those cases where the court has held the wording was inadequate to convert the agreement to a sealed instrument, and (3) the form agreements that were prepared by the Bank and presented to Freeman for the first time at the closings should be construed against the Bank.

(1) The Two Uses Of The Word "Seal" In the Form Guaranty Agreements Are Not Conspicuous, Are Not Multiple Indicia of Intent, And Do Not Express Clear Intent By The Parties That The Guaranty Contracts Be Treated As Sealed Instruments As A Matter of Law.

As would be expected, none of the guaranty contracts includes a physical seal. Additionally, none of the guaranty contracts includes language which clearly evidenced any intention by the parties that the contracts be sealed instruments. The relevant language in the form guaranty contracts was inconspicuous boiler plate language that the contracts were "executed under seal" and a parenthetical next to Freeman's signature, containing the word seal—(SEAL).

The lower court incorrectly found that that this language was conspicuous and that these two instances of the word "seal" constituted multiple indicia the parties intended the guaranty contracts to be sealed instruments.

Under South Carolina law, a phrase or clause is not conspicuous unless the size, color and type of font make it clearly distinct from the surrounding language. For example, in the

employment context, a disclaimer in an employee handbook is conspicuous when it appears in bold, capitalized letters, in a prominent position. *See Hessenthaler v. Tri-County Sister Help, Inc.*, 365 S.C. 101, 108, 616 S.E.2d 694, 697 (2005) (stating, in the context of an employee handbook disclaimer, "that a disclaimer appearing in bold, capitalized letters, in a prominent position, is conspicuous." (citations omitted)). Courts consider similar factors in determining of whether language purporting to exclude an implied warranty in a sales contract is "conspicuous," a requirement for the exclusion of certain warranties under South Carolina's version of the Uniform Commercial Code. *See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1038 (D.S.C. 1993) *aff'd*, 46 F.3d 1125 (4th Cir. 1995) (noting that under South Carolina law, "(1) the color of print in which the purported disclaimer appears; (2) the style of print in which the disclaimer is written; (3) the size of the disclaiming language, particularly in relation to other print in the document; (4) the location of the disclaimer in the contract; (5) the appearance of the term "merchantability" with respect to color, style, size, and type of print in the disclaimer clause; and (6) the status of the parties contesting the validity of the disclaimer, namely whether they be consumers or commercially sophisticated entities.").

Here, the relevant portions of the guaranty contracts are not conspicuous as a matter of law, and the lower court committed legal error by finding they were. There is no bold or color print to distinguish the language, the type is not larger than the other language in the documents, and the type is not in italics or underlined. The operative language of the attestation clause is not in all capital letters, nor is it in a prominent position.

The Bank could have made the two references to "seal" conspicuous, but it chose not to draw attention to this wording. Instead, the Bank presented Freeman with a form document for

the first time at closing and now relies on the inconspicuous language and parenthetical placeholder in those documents to argue the guaranty documents are sealed instruments.

Not only is this language inconspicuous, it is esoteric, for there are no terms in the guaranty contracts that explain its purported meaning or legal significance to the signer. The two references to "seal" on the last page are the only uses of the word in the guaranty contracts. Even if these two uses of the word "seal" in the form documents were considered some indication of intent, there is no other reference in the guaranty contracts to "seal" or sealed instrument. The lower court plainly erred in finding that the guaranty contracts contained *multiple* indicia of Freeman's intent to create a sealed instrument.

Because the language used by the Bank does not manifest Freeman's intent to enter into a "sealed instrument" as a matter of law, the lower court erred in finding the language should have that effect. South Carolina Code section 19-1-160 provides that a document can be legally considered a "sealed instrument" "[w]henever 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* . . . ." S.C. Code § 19-1-160 (italics added). An important principal overlooked by the lower court is that "[c]ourts in South Carolina construe this statute narrowly." *Orlando Residence, LTD v. Hilton Head Hotel Investors*, 9:89-cv-0662-DCN, 2013 U.S. Dist. LEXIS 36087, *29, 2013 WL 1103027 (unpublished) (D.S.C. Mar. 15, 2013). In fact, a contract that does not include a physical seal may only be deemed a sealed instrument under section 19-1-160 where "the contract ***clearly evidences an intent*** to create a sealed instrument." *Carolina Marine Handling, Inc. v. Lasch,* 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005) (double emphasis added); *see also Treadaway v. Smith*, 325 S.C. 367, 377-78, 479 S.E.2d 849, 855 (Ct. App. 1996) (divorce settlement agreement found to be a sealed

instrument where "language clearly demonstrates the parties' intent to have a sealed instrument").

As explained in more detail below, under the applicable South Carolina case law, the wording of the Bank's form guaranty contracts was insufficient to establish that the parties intended to create a sealed instrument as a matter of law.

(2) The Specific References To "Seal" In The Form Guaranties Comes Under Those Cases Where The Court Has Held The Wording Was Inadequate To Convert The Agreement To A Sealed Instrument.

In *Carolina Marine Handling*, this Court held that the inclusion of standard attestation language, such as "IN WITNESS WHEREOF, the parties have hereunto set their hands and seals," is insufficient to clearly evidence intent to create a sealed instrument. *Carolina Marine Handling,* 363 S.C. at 169, 609 S.E.2d at 551-52 (holding that generic and boiler plate language referring to seal in the standard attestation clause in a lease was not enough to demonstrate an intent to create a sealed instrument and, to hold otherwise, "would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state"). Similarly in *Orlando Residence, LTD v. Hilton Head Hotel Investors*, the United States District Court for the District of South Carolina found as follows:

> The settlement agreement in this case includes the following standard attestation language immediately preceding the parties' signatures: "IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals as of this 1st day of November, 1994."
>
> * * *
>
> South Carolina judicial precedent dictates that the settlement agreement and confession of judgment cannot be considered sealed instruments, and therefore are not subject to the twenty-year statute of limitations for sealed instruments.

Orlando Residence, 2013 U.S. Dist. LEXIS at *30-31.

South Carolina state and federal courts have repeatedly expressed concern that allowing standard boiler plate language in a contract to render the contract a "sealed instrument" "***would likely transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state***." *Carolina Marine Handling*, at 175, 609 S.E.2d at 552 (double emphasis added). *See also Orlando Residence,* at *30-31 (citation omitted); *Clifton, LLC v. Tadlock*, 2012 U.S. Dist. LEXIS 35659, *12, 2012 WL 909826 (unpublished) (D.S.C. Mar. 16, 2012) (citation omitted) *affirmed by* 513 Fed. Appx. 255, 2013 (4th Cir. 2013).

In each instance where South Carolina appellate courts have found an instrument, lacking a physical seal, to be a sealed instrument governed by the twenty-year statute of limitations, the contract evidenced a clear intention by each of the parties that the contract be a sealed instrument. *See, e.g., Treadaway v. Smith*, 325 S.C. 367, 377-78, 479 S.E.2d 849, 855 (Ct. App. 1996) (divorce settlement agreement found to be a sealed instrument where the operative wording was more conspicuous than in the case and provided that "the parties have hereunto set their respective Hands and Seals" and that it was "SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF"); *South Carolina Dep't of Social Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984) (holding that a contract which contained the language "the parties hereto have set their hands and seals" and the *notation* "L.S.," an abbreviation meaning in the place of a seal, followed each of the parties' signatures was a sealed instrument and subject to the twenty year statute of limitations).[4]

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[4] *Cook v. Cooper*, 59 S.C. 560, 38 S.E. 218 (1901) and *Wallingford v. Western Union Telegraph Co.*, 60 S.C. 201, 38 S.E. 443 (1901), the other cases relied upon by the circuit court where the question was whether an the wording of a document constituted a sealed instrument based upon its terms did not involve an instance where one party was seeking to apply the twenty-year statute of limitations to bring a claim against the other party that would otherwise be time barred. *Cook* involved whether a deed was deemed legally valid for being properly sealed. *Wallingford* concerned whether a deposition was properly sealed instrument. Notably, the instruments in

In fact, South Carolina state and federal courts have repeatedly required a showing that a contract "clearly evidences an intent to create a sealed instrument" when a party has tried to use section 19-1-160 to extend the applicable statute of limitations. *See Carolina Marine Handling*, at 175, 609 S.E.2d at 552; *Orlando Residence*, 2013 U.S. Dist. LEXIS at *30-31; *Midwest Dredge & Excavating, Inc. v. Bay Pointe Homeowner's Assoc.*, C/A 2:06-2021-DCN, 2007 U.S. Dist. LEXIS 99536, *14-15, 2007 WL 7141921 (unpublished) (D.S.C. May 15, 2007); *Clifton*, 2012 U.S. Dist. LEXIS at *15 (holding that the phrase "Signed, sealed and delivered" appearing in inconspicuous type immediately above the parties' signature line is insufficient to clearly evidence intent of the parties to entered into a sealed instrument).

For example, in *Midwest Dredge*, a South Carolina federal court interpreting South Carolina case law, recognized that having the word "Seal" within a form document does not create a sealed instrument unless there is an actual seal or some other external indication that the party signing the document intended to create a seal. Similar to the present case, the form in *Midwest* Dredge had a standard attestation clause (i.e., "signed and sealed") along with the word "Seal" in parentheses next to the signature line. The court found the language of that contact did not show that parties clearly intended to create a sealed instrument. Significantly, the court

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both cases contained substantial evidence establishing the intent of the parties that the instrument be sealed. *See Cook* at 562-63, 38 S.E. at 219 (reciting the deed's numerous references that the parties intended it to be a sealed instrument: "before the sealing of these presents in hand"; "before the sealing of these presents in hand;" and "seal Sign Sealed and Delivered in the presents of . . . "); *Wallingford*, at 208, 38 S.E. at 446 (stating that the certificate following the deposition stated as follows: "Witness my hand and official seal . . . Newton W. Cowgill Notary Public" and that the notary attached the word "seal" to the jurat of each deposition.). There is no analogous wording that could be said to express Freeman's clear intention that the guaranty contracts be sealed instruments.

recognized that the word "Seal" in parentheses merely holds the place where the seal may be affixed:

> [T]he performance bond at issue was a form document with the word "(Seal)" adjacent to the block for the parties' names. The context under which the term "(Seal)" appears does not make it evident that the parties intended to create a sealed instrument. The bond form contains blanks labeled with the terms "(Principal)" and "(Surety)" to indicate where the names of the parties and the signatures of their representatives should be placed. The bond form includes the notation "(Seal)" to reflect the location where the corporate seal is to be affixed if the parties desire to create a sealed instrument. Because no seal is in fact affixed by either of the parties in this case, there is a lack of intent to create a sealed instrument.

Midwest Dredge & Excavating, 2007 U.S. Dist. LEXIS at *14-15.

In this case, the circuit court erred in finding that standard boiler plate wording and the parenthetical "(Seal)" sufficient to extend the statute of limitations applicable to contracts by seventeen years, and holding that Freeman's statute of limitations defense is insufficient as a matter of law." **Order at 10; R. p. 11**. The references to the word "seal" do not constitute clear evidence that Freeman intended the guaranty contracts be sealed instruments as a matter of law. To the contrary, the only evidence before the court was that the contract included nothing more than the type of boiler plate language and parenthetical that have been rejected as clear evidence of the parties' intent to create a sealed instrument.

(3) The Form Agreements That Were Prepared By The Bank And Presented To Freeman For The First Time At The Closings Should Be Construed Against The Bank.

The guaranty contracts should be construed against the Bank that prepared them and presented them for the first time to Freeman at closing. **Freeman Aff., ¶ 6; R. p. 394**. These guaranty contracts come within this Court's definition of contracts of adhesion, and the circuit court erred in finding that the boiler plate language and word "seal" in parentheses inserted in the

contracts by the Bank clearly evidence Freeman's intent to execute a sealed instrument governed by a twenty-year statute of limitations. *See generally Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (adopting the following definition of adhesion contract: "A contract of adhesion is generally thought of as a standard form contract offered on a 'take-it-or-leave-it' basis. The terms of the contract of adhesion are not negotiable. An offeree faced with such a contract has two choices: complete adherence or outright rejection." (citations and internal alterations and quotations omitted)).

Furthermore, as form documents prepared by the Bank, any ambiguity must be construed against the drafter. South Carolina Courts hold that when a bank presents its customer with a form contract that it prepared, any ambiguity is construed against the bank. *See S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002) *affirmed as modified by* 356 S.C. 444, 590 S.E.2d 27 (2003). *Middleton* involved a bank prepared note that included a provision that the bank "may" provide the borrower with notice that it was in default and the full amount of the principal was due immediately. *Id.* at 81-82, 562 S.E.2d at 485 (acceleration clause stating that: "If I am in default, the Note Holder **may** send me written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. . ." (emphasis supplied by the court)). The Court of Appeals held that the terms of the acceleration provision were not clear and unambiguous and the "ambiguities arising within a contract must be construed against the drafter." *Id.* at 84, 562 S.E.2d 482, 486. The South Carolina Supreme Court affirmed finding that the ruling was "consistent with caselaw that ambiguous language in a contract should be construed liberally and ***interpreted strongly in***

favor of the non-drafting party." *S. Atl. Fin. Servs. v. Middleton*, 356 S.C. 444, 448-449, 590 S.E.2d 27, 30 (2003)[5].

With respect to the issue at hand, the case law on sealed instruments itself establishes an ambiguity as to the wording used in these guaranty contracts. The decisions of the courts may be easily viewed as inconsistent and difficult to reconcile. Different courts have reached different conclusions on whether a contract is a sealed instrument based on minor variations in the wording used in the contract. Our courts have not espoused a bright line test. This uncertainty in the case law, particularly where the wording used in this case has never been ruled upon, renders the wording ambiguous as to whether the Bank's Unconditional Guaranty would or would not deemed to be a sealed instrument under the law of South Carolina. This ambiguity resulting from the Bank's failure to use clearer and more specific wording must be construed against the Bank.

If the Bank intended for the guaranty contracts to be treated as "sealed instruments" subject to a twenty-year statute of limitations, the Bank, as the form drafter, could have simply included language that would clearly put the signer on notice of the right it was securing for itself. This inherent uncertainty could have been easily eliminated by adding the following to the multiple provisions listed in "**MISCELLANEOUS**" section of the guaranty contracts: "**Sealed Instrument.** Guarantor agrees and intends that this Unconditional Guaranty be deemed a sealed instrument subject to all laws governing sealed instruments including the twenty-year statute of limitations." **Compl., Exs. E, H, M, W, CC, II, at pp. 4-5; R. pp. 59-60, 65-66, 94-95, 123-124, 129-130, 179-180, 185-186, 191-192, 197-198, 230-231, 236-237, 242-243.** Or, the Bank's drafters could have remained obtuse and, instead, used the exact wording in the exact form

[5] The Court of Appeals specifically found that the note was a contract of adhesion. The Supreme Court modified the opinion to the extent it held the bank's form contract was a contract of adhesion because the case could easily be decided "utilizing basic principles of contract ambiguity." *Middleton*, at 448, 590 S.E.2d at 29-30.

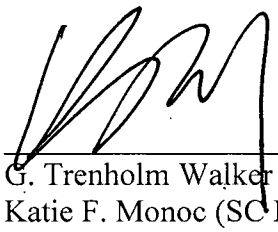
which has been found by our courts to evidence an intent to enter into a "sealed instrument," such as was approved by the court in the *Treadaway* case in 1996. The Bank did neither.

The lower court's holding allows banks with superior bargaining power to use only minimal wording in their form documents to accomplish the lopsided advantages of a sealed instrument, without having to inform its customers expressly that they are entering into a sealed instrument and its consequences. The lower court's ruling is at odds with this Court's holding that only a contract that "***clearly evidences an intent*** to create a sealed instrument" will subject a contracting party to the twenty year statute of limitation. *See Carolina Marine Handling*, at 175, 609 S.E.2d at 552. Most important, the lower court's holding, allowing boiler plate language in the Bank's form contract and the word "seal" in an unexplained parenthetical to render the contract a sealed instrument, will ***"transform the twenty-year statute of limitations into the standard period of limitations for contract actions in this state***." *Carolina Marine Handling*, at 175, 609 S.E.2d at 552 (double emphasis added). *See also Orlando Residence,* at *30-31 (citation omitted); *Clifton*, 2012 U.S. Dist. LEXIS at *12 (citation omitted).

CONCLUSION

For the reasons above, the Court should find that the two references to the word "seal" on bank's preprinted form are insufficient to transform the guaranty contract signed by Freeman into an instrument under seal as a matter of law, thereby extending the statute of limitations from three years to twenty years. Those two uses of "seal" in the guaranty contracts do not clearly evidence Freeman's intent to enter into a sealed instrument as a matter of law. Appellant respectfully submits the circuit court's ruling be reversed.

Respectfully Submitted,



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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2013-CP-10-6439

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

v.

Robert L. Freeman ..... Appellant.

PROOF OF SERVICE

I, Nancy Jane Dennis, of Pratt-Thomas Walker, P.A., hereby certify that I have served a true and accurate copy of the FINAL BRIEF and FINAL REPLY BRIEF by U.S. Mail postage pre-paid on April 21, 2016, to counsel of record as shown below:

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