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STATE OF WISCONSIN
SUPREME COURT

TAFT PARSONS, JR., and
CAROL PARSONS,
Plaintiffs-Appellants,

District 1
Appeal No. 2014AP002581

v.

Circuit Court Case No.
2011CV008389

ASSOCIATED BANC-CORP.,
Defendant-Respondent-Petitioner,

XYZ INSURANCE COMPANY,
Defendant.

Appeal From The Circuit Court
For Milwaukee County, Wisconsin
Case No. 2011CV008389
The Honorable Jeffrey A. Conen, Presiding

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER ASSOCIATED BANC-CORP.

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INTRODUCTION

For decades, this Court has encouraged parties to avoid the time and expense and delay of circuit court litigation through arbitration. The Court should now confirm that this public policy – encouraging parties to choose the more efficient and less expensive mode of bench trial as an alternative to jury trials – is alive and well.

In evaluating the enforceability of a pre-litigation jury waiver, the Court need not look beyond our existing well-established standards of contract interpretation and enforcement. This is particularly true with respect to a commercial contract with a common clause like a jury waiver. When the parties have agreed upon clear and unambiguous language, the Court should enforce the contract. Wisconsin has long recognized that parties who elect to disregard a document they sign must not be protected from the adverse terms in that document in the event of litigation. A party claiming fraud or duress as an excuse to such a waiver must be held to the pleading and proof requirements of such claims. A conclusory and conflicting affidavit is not enough to disregard a jury trial waiver. Finally, as with other matters of scheduling, the trial court is in the best position to determine if a party has not timely objected to the opposing party's jury demand.

STATEMENT OF THE ISSUES

1. Can parties to a business transaction in Wisconsin agree that any disputes between them will be resolved without the need for a jury trial?

Answered by the Trial Court: Yes

Answered by the Court of Appeals: Yes

2. Should a party seeking to enforce a jury trial waiver be required to prove – beyond establishing elements of the contract as a whole – that the specific waiver term was made "knowingly and voluntarily" by the other party?

Answered by the Trial Court: No

Answered by the Court of Appeals: Yes

3. If a party seeking to enforce a jury trial waiver is required to establish a "knowing and voluntary" waiver, does the party seeking enforcement have the burden of proof and may the court rely upon the allegations of the Complaint and a conflicting Affidavit to make this determination?

Answered by the Trial Court: Did not reach this issue

Answered by the Court of Appeals: Yes

4. Did the Trial Court properly exercise its discretion to manage the procedure and timing to resolve the dispute regarding a jury trial?

Answered by the Trial Court: Yes

Answered by the Court of Appeals: No

5. Is it procedurally and substantively unconscionable for a lender to advise a well-educated business customer that it will not provide financing unless certain terms are agreed upon and the loan is closed "soon" and must the lender give up something of value within the jury clause itself in order to maintain enforceability?

Answered by the Trial Court: No

Answered by the Court of Appeals: Yes

STATEMENT OF THE CASE

I. Factual Background

The allegations of the plaintiff's Amended Complaint revolve around financing extended to the plaintiffs, Taft and Carol Parsons ("Parsons"), for

construction of a redevelopment project.[1] The financing was provided by a predecessor in interest to Associated Banc-Corp. ("Associated").[2] Taft Parsons ("Taft") is an African-American male, sixty-four (64) years old, a national board certified structural engineer, and has owned and operated his own engineering firm since 1984. (R.21, ¶9, P.App.53). Taft alleges that he came up with the idea of tearing down homes on his block (including his own residence) combining the empty lots, and building modern affordable row houses. (*Id*., ¶10). Taft contacted Joseph Bowles ("Bowles"), Vice President of Central City Construction Inc. ("CCC"), to serve as general contractor for the project. (*Id.*). Bowles, in turn, introduced Taft to Michael Woyan ("Woyan"), the Executive Director of People's Action Redevelopment Coalition ("PARC"). (*Id.* ¶12, P.App.54). Woyan and Taft made a credit approval presentation to Aaron Moeser, a commercial loan officer, to secure financing for the project. (*Id.* at ¶22, 24, P.App.55). After this, Moeser issued two commitment letters to Taft, the first for a home equity line of

[1] The trial court did not hold an evidentiary hearing on the jury trial issue. Many of the "facts" which Parsons continue to rely upon are drawn only from allegations in the Amended Complaint which Associated has denied. Despite this, the Court of Appeals in its decision drew "facts" from "the Complaint, an affidavit submitted by Taft Parsons, and the loan documents submitted by the bank. . . ." *Parsons*, 2016 WI App 44, ¶2. The Parsons conceded in their reply brief at the Court of Appeals that the "facts" are "all still allegations which have not yet been put to test in a trial." (Reply Brief, at 5).

[2] For ease of reference, Associated and its predecessor in interest, State Financial Bank, are simply collectively referred to herein as "Associated".

credit ("HELOC") and the second for a construction loan. Each of the loans was conditioned upon the borrower executing "State Financial Bank's loan forms". (*Id*. at ¶26, Ex. B and C, P.App.56). On August 22, 2003, Taft and Carol executed documents to secure the HELOC in the amount of Forty Thousand Dollars ($40,000.00). (*Id.* at ¶30, Ex. D, P.App.56). In November, 2003, Taft and CCC executed a Construction Agreement. (*Id.* at ¶31, P.App.56).

The Parsons complain that in the nine (9) months between the time they secured the HELOC in August, 2003, and the closing of the construction loan on May 26, 2004, they paid $27,500.00 to CCC, but CCC failed to complete its obligations under the Construction Agreement specifically failing to complete design documents, obtain city approvals, or obtain proof that the project was not in a flood plain. (*Id*. at ¶39, 40, P.App.57-58). Despite this, Taft elected to move forward with the project and executed the construction loan documents on May 26, 2004. (*Id*. at ¶44-45, P.App.58-59). In the Promissory Note dated May 26, 2004 ("Promissory Note") both parties waived the right to a jury trial. The jury waiver is set forth a few inches above Taft's signature:

> **WAIVER OF JURY TRIAL.** THE BORROWER AND LENDER (BY THEIR ACCEPTANCE HEREOF)

> HEREBY VOLUNTARILY, KNOWINGLY, IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY RIGHT TO HAVE A JURY PARTICIPATE IN RESOLVING ANY DISPUTE (WHETHER BASED UPON CONTRACT, TORT, OR OTHERWISE) BETWEEN OR AMONG THE BORROWER AND THE LENDER ARISING OUT OF OR IN ANY WAY RELATED TO THIS DOCUMENT, ANY OTHER RELATED DOCUMENT, OR ANY RELATIONSHIP BETWEEN THE BORROWER AND THE LENDER. THIS PROVISION IS A MATERIAL INDUCEMENT TO THE LENDER TO PROVIDE THE FINANCING HEREIN OR IN OTHER LOAN DOCUMENTS.

(R.21, Ex. G, P.App.84). Immediately above Taft Parsons' signature, the Note provides:

> PRIOR TO SIGNING THIS NOTE, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE, INCLUDING THE VARIABLE INTEREST RATE PROVISIONS. BORROWER AGREES TO THE TERMS OF THE NOTE.
>
> BORROWER ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS PROMISSORY NOTE.

(R.21, Ex. G, P.App.84). These clauses, together with the jury waiver, are the ***only*** provisions of the two-page Promissory Note set forth in all capital letters.

The Construction Loan Agreement executed with the Promissory Note provides that no waiver of any Associated's rights can occur unless set forth in writing and signed by Associated:

> No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay

> or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Borrower, or between Lender and any Grantor, shall constitute a waiver of any of Lender's rights or of any of Borrower's or any Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

(R.21, Ex. H; P.App.92).

On competing motions on the jury trial issue, the only factual evidence contrary to the plain language of the loan documents presented to the trial court was a three page affidavit of Taft. (R.40, P.App.95). The affidavit is both conclusory and conflicting. Taft claims that he never "noticed any jury waiver" because he was "not given time to review the loan documents prior to the closing." (R.40, ¶2, P.App.95). Significantly, however, at the time the construction loan was signed: (a) nine (9) months had passed since the time the HELOC was extended; (b) Taft was already embroiled in disputes with CCC, claiming that work had not been completed;

and (c) no construction loan funds had been advanced.[3] Any risk to Parsons at this time was limited to the funds extended through the HELOC – which had no conditions on use and could have been used by Parsons for any purpose. (R.41, Ex. D). Taft also claimed that he did not have counsel at the time the documents were executed and "signed the documents under pressure." (R.40, ¶16, 19, P.App.97).

Taft's affidavit conflicts regarding the circumstances of the loan execution. First, Taft claims that Moeser, Woyan ***and*** Bowles told him that "the bank would withdraw its commitment for the Construction Loan if the papers were not signed ***soon***." (*Id.* at ¶12, emphasis added, P.App.96). Later, Taft claims that he was told "if I did not sign the closing documents ***immediately***, the bank would withdraw its support for the project." (*Id.* at ¶18, emphasis added, P.App.97). Significantly the affidavit does not even indicate when these words were said.[4]

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[3] See also Parson's Response and Appendix to Associated Banc-Corp.'s Petition for Review, p. 23: "[Taft] claimed that he was pressured by Aaron Moeser to sign the construction loan with its Promissory Note in May, 2004, even though he kept telling Moeser that none of the Phase I work he had paid for with the Home Equity loan had been done, and that the construction loan commitment letter had required that Phase I work be completed before the construction loan."

[4] Taft's affidavit also reflects additional inconsistencies. He claims that at the time the commitment letters were issued in November, 2003, he had "never met with anyone at the Bank", yet alleges in his Complaint that "before August 7, 2003, Woyan and Taft made a credit approval presentation to Moeser." (R.21, ¶24).

After Taft executed the documents on May 26, 2004, funds were disbursed on that loan. (R.21, ¶60, 77, 92, 101, P.App.61-65). The Parsons allege that their relationship with CCC continued to deteriorate and they learned CCC had outstanding tax levies and judgments. (R.21, ¶105-107, P.App.66). Taft alleges that the CCC pay requests, which he signed indicating his approval, were signed "under duress" just like the loan documents. (R.21, ¶88, 100, P.App.64). By its stated terms, the Promissory Note on the construction loan matured on May 26, 2005, bringing the balance due and payable. (R.21, Ex. G, P.App.83). The Promissory Note has not been repaid. (R.21, ¶121, 132, P.App.69).

II. Procedural History

On May 26, 2011, Parsons filed their Complaint in Milwaukee County Circuit Court asserting various claims and demanded a twelve person jury. (R.1). On August 10, 2011, the Circuit Court conducted a scheduling conference and issued a scheduling order which set a final pretrial conference on November 16, 2012 and required payment of the jury fee one week prior, by November 9, 2012, or "all parties shall be deemed to have waived their right to a jury". (R.8). The Parsons' initial counsel withdrew from the case on September 12, 2011, and the Parsons proceeded at that time *pro se*. (R.9).

Over eight (8) months passed until May 29, 2012, when the Parsons current counsel appeared in the case and three months later filed a Motion for Leave to File a First Amended Complaint. (R.17, 18). Parsons' Motion came on for hearing on October 26, 2012, at which time the parties stipulated to the filing of the First Amended Complaint – which included new claims for racketeering under Wis. Stat. Sec. 946.83(1) – and negligent hiring, training and supervision. (R.21, P.App.51). The court set the matter for a new scheduling conference on December 12, 2012. (See CCAP Court Record Events for Case No. 2011CV008389, *Parsons v. Associated Banc-Corp.*, P.App.104). The original jury fee deadline of November 9, 2012, passed and the Parsons did not tender the jury fee as required by the scheduling order. (R.8).

The court conducted a second scheduling conference on December 12, 2012, and ordered a deadline of January 31, 2013, for the jury fee. (R.22). Parsons paid the jury fee on January 9, 2013. (R.23). On August 21, 2013, Taft filed a Petition in the Bankruptcy Court seeking protection under Chapter 13 of the United States Bankruptcy Code. (See Docket, Case No. 13-31319-gmh, United States Bankruptcy Court, Eastern District of Wisconsin, P.App.108). The filing of the bankruptcy case imposed the

automatic stay. As such, nothing occurred in the case until the Bankruptcy Court dismissed Taft's case on March 21, 2014, following Taft's own motion. (*Id*., P.App.114). On April 16, 2014, the court conducted a status conference and set a deadline of May 19, 2014, for motions on the jury trial issue. (P.App.101). Following the court's order, Associated moved to strike Parsons' jury demand and the Parsons moved for a declaration that they were entitled to a jury trial. (R.36, 38).[5]

The trial court issued a Decision and Order on October 24, 2014, striking Parsons' jury demand. (R.45, P.App.46). The trial court recognized, as did the parties, that no Wisconsin law addressed the validity of contractual pre-litigation jury trial waivers. The court cited, with approval, the Seventh Circuit's decision in *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989 (7th Cir. 2008), that "jury waiver clauses do not need to be separately negotiated because the non-drafting party is free to either negotiate for a jury trial or not enter into the contract." (R.45, p. 2, P.App.47). The trial court concluded that Taft "is an intelligent business man who undoubtedly has experience reviewing paperwork and entering into

[5] The original timeline for payment of the jury fee and the bankruptcy stay account for about 28 months of the "unexplained three year delay" questioned by the Court of Appeals. *Parsons*, 2016 WI App. 44, ¶19, P.App.11

contracts; he surely knows the importance of thoroughly reviewing documents." (*Id.* at 3, P.App.48). The trial court also found the jury trial waiver to be conspicuous and that a party executing a contract is presumed: (1) to have knowledge of its contents; and (2) to have consented to its terms. (*Id.*). The trial court also rejected Parsons' claim that Associated waived its right to object to the jury demand, specifically recognizing that Parsons' claim had itself evolved from the original Complaint, to the Amended Complaint, finally to the November, 2013, Pretrial Report in which they limited their claims to racketeering and negligent hiring. (*Id.* at p. 4, P.App.49).

Parsons sought leave to appeal the trial court's decision under Wisconsin Statute Section 809.50 which was granted by the Court of Appeals, on December 12, 2014. The Court of Appeals issued its initial decision on May 10, 2016, reversing the decision of the Circuit Court. (P.App.22). On May 11, 2016, the day after the decision was issued, counsel for Parsons wrote to the Court of Appeals and identified what the Parsons' viewed as multiple factual errors in the Court's decision. (P.App.41). These included the Court's conclusion, without any support in the record, that the project stood half-constructed at the time Taft was allegedly pressured to

execute the loan documents. (P.App.24). On May 12, 2016, the Court of Appeals issued an "errata sheet" and revised the decision including "corrections" to seven paragraphs. (P.App.3).

The Court of Appeals concluded that the Parsons had a constitutional and statutory right to a jury trial which could be waived. *Parsons v. Associated Banc-Corp.,* 2016 WI App 44 ¶15-16, 370 Wis.2d 112, 881 N.W.2d 793. The Court of Appeals also ruled that Associated should have demanded a trial by the court "at or before the scheduling conference or pretrial conference, whichever is held first." Wis. Stat. Sec. 805.01(2), *Parsons,* 2016 WI App 44, ¶20. The Court of Appeals further concluded that Associated should be equitably estopped from moving to strike the jury demand despite the fact that it took nineteen months after the complaint was filed for the Parsons to pay the jury fee and the case was further delayed by the withdrawal of Parsons' counsel, the request to amend the complaint, and Taft's decision to file bankruptcy. (*Id*., ¶23).

The Court of Appeals decided that a party seeking to enforce a jury trial waiver must sustain the burden of demonstrating that the waiver was made by the other party knowingly and voluntarily. (*Id*., ¶30-31). Referring back to Taft Parsons' three page affidavit, the Court of Appeals concluded

that the bank "fraudulently obtained" the jury waiver clause despite Taft's education, experience, and business acumen. (*Id*., ¶29). Finally, the Court of Appeals found the waiver of jury trial clause procedurally and substantively unconscionable. (*Id*., ¶35, 38).

This Court granted Associated's Petition for Review on September 13, 2016.

STANDARD OF REVIEW

The trial court's decision that the Parsons' request for a jury trial was barred by the agreement of the parties involves the interpretation of the Wisconsin Constitution and other statutory provisions. As such, the review is subject to a *de novo* standard. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 1, ¶16, 295 Wis.2d 1, 719 N.W.2d 408. The trial court's decision that Associated's motion to strike the jury demand was not time-barred was a discretionary matter related to the trial court's calendar and is therefore subject to an "abuse of discretion" standard. *Lentz v. Young*, 195 Wis.2d 457, 465, 536 N.W.2d 451 (Ct.App. 1995).

ARGUMENT

I. The Right to a Jury Trial – Whether Arising From the Constitution or Statute – May be Waived.

The Parsons have previously argued that a pre-litigation jury waiver clause was not permissible under the Wisconsin Constitution.[6] (See Appellants' Brief, p. 12-14). Parsons abandoned this position at oral argument before the Court of Appeals, and the Court of Appeals determined that pre-litigation jury trial waivers were permissible. The Supreme Court can now clarify this.

Article I, Section 5 of the Wisconsin Constitution provides:

> The right of a trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law.

The "vast majority of courts have held, at least in the abstract, that if the parties entered into a contract containing a jury trial waiver clause, such clause will be enforced as not being unreasonable." Jay M. Zitter,

[6] While Associated concedes that Parsons' Wisconsin Organized Crime Control Act ("WOCCA") claims allow for a ***statutory*** right to a jury trial, Parsons offered the trial court no basis upon which to find a ***constitutional*** right to a jury trial for its two remaining claims – under WOCCA and negligent hiring/supervision. Associated maintains that no constitutional right to trial exists on these claims because WOCCA is purely a product of the legislation enacted long after the Wisconsin Constitution and the negligent hiring and supervision claim is based on allowing the racketeering activity. (R.21, ¶154-155, P.App. 73-74). See *Village Food & Liquor Mart v. H&S Petroleum, Inc.*, 2002 WI 92, 254 Wis.2d 478, 647 N.W.2d 177.

Contractual Jury Trial Waivers in State Civil Cases, 42 A.L.R. 5th 53 (1996).[7]

This Court has recognized that "[i]t is well settled that constitutional rights, as well as any other personal or property right may be waived." *Booth Fisheries Co. v. Industrial Comm'n*, 185 Wis. 127, 200 N.W. 775 (1924)(citation omitted). This conclusion is in line with not only the "vast majority of courts" but also Wisconsin's recognized public policy which encourages parties to select and contract for the efficient resolution of disputes without the need for a jury trial. Rather than adopt the extreme minority position of California and Georgia, this Court should clarify that Wisconsin parties are free to enter into contracts that include jury waivers and that Wisconsin courts will respect such provisions.

II. Since a Party Can Lose The Right to a Jury Trial Through Simple Neglect, "Negotiated, Known, and Voluntary" Should Not be Imposed.

The Court of Appeals' prerequisites for enforcing a contractual pre-litigation jury waiver are excessive, obstruct the parties' right to contract, and

[7] The exceptions are California and Georgia courts, which hold "parties to a contract cannot waive their right to a jury trial before a dispute commences, and any contract provision seeking to effect such a waiver is unenforceable unless expressly authorized by statute." *In re County of Orange*, 784 F.3d 520, 529 (9th Cir. 2015).

are inconsistent with Wisconsin public policy which favors agreements to resolve disputes without the time and expense of a jury trial.

A. The Contract Language and Party's Signature Should be Honored.

The Court of Appeals rejected the trial court's careful consideration of *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989 (7th Cir. 2008). In that case, the Seventh Circuit, interpreting Illinois law, rejected the approach that "[a]greements to resolve disputes by bench trials are enforceable only if extra evidence of negotiation or consent supports that clause." *IFC Credit*, 512 F.3d at 993. Significantly, the Seventh Circuit observed that a plaintiff could lose the right to a jury trial through procedural "accident or lack of foresight" such as failing to request a jury in the Complaint. *Id*. Accordingly, the Court found no reason to impose "knowing and voluntary" burdens upon a party seeking to enforce a contractual jury trial waiver. *Id*. In *IFC*, the Seventh Circuit specifically recognized that decisions of both the Second and Sixth Circuit required "extra evidence of negotiation or consent" in order to enforce the waiver because of the "constitutional status" of the jury right under the Seventh Amendment to the United States Constitution. *IFC Credit*, 512 F.3d at 993.

In the end, the Seventh Circuit rejected this approach and instead rested upon ordinary rules of contract interpretation and enforcement:

> These decisions do not persuade us. They begin from the proposition that only a knowing and intelligent waiver, with the usual formalities that "waiver" entails, may surrender the right to a jury trial. Yet if the parties' contract is silent on the issue, then Fed.R.Civ.P. 38 will govern. And Rule 38 says that omission of a jury demand from a complaint or answer forfeits any opportunity to have the case heard by a jury. Omissions may occur by accident or lack of foresight. If accidental forfeitures can blot out any right to a jury trial – for no one argues that Rule 38 is unconstitutional – then there is no federal rule that bench-trial agreements must be attended by extra negotiation or depend on evidence of voluntariness beyond what is required to make the rest of the contract legally effective.

Id. The United States District Court for the Eastern District of Wisconsin adopted the *IFC Credit* holding in a case under Wisconsin Law.[8] "The Seventh Circuit held that, where parties understand that they are making a contractual commitment, the jury waiver is binding." *Cousins Subs Systems, Inc. v. Better Subs Development, Inc.*, No. 09-C-0336, 2011 WL 4585541, *14, (E.D. Wis. September 30, 2011). Here, the Court of Appeals offered no explanation as to ***why*** the reasoning of *IFC Credit* was flawed, and only

[8] The court found that the documents provided that Wisconsin law governed, that the franchises were located in Indiana, but in the end "the choice between Wisconsin and Indiana law does not appear to affect this decision." *Cousins Subs Inc.*, 2011 WL 4585541 *4.

distinguished the case as arising in the Federal forum and applying Illinois law. *Parsons*, 2016 WI App 44, ¶27.

While the Parsons have also repeatedly dismissed the Seventh Circuit's decision in *IFC*, this Court has previously recognized the value of such decisions in evaluating jury trial issues:

> Our decision in the present case is buttressed by federal cases addressing the question whether the Seventh Amendment right of trial by jury in civil cases survives a default judgment or sanctions for a party violating a discovery order. This court, in construing Article I, Section 5 of the Wisconsin Constitution, may look for guidance to federal decisions interpreting the Seventh Amendment.

Rao v. WMA Securities, Inc., 2008 WI 73, ¶46-7, 310 Wis.2d 623, 752 N.W.2d 220.

In fact, all of the factors cited by the Seventh Circuit in *IFC Credit* to reject a "knowing and voluntary" requirement are recognized under Wisconsin law as well.

First, in Wisconsin, a party may lose the right to a jury trial by "accident or lack of foresight." *IFC*, 512 F.3d at 993. For example, the failure to follow a local rule or scheduling order deadline can result in a waiver of a jury trial. *See e.g., Phelps v. Physicians Ins. Co. of Wisconsin Inc.*, 2005 WI 85, ¶9, 282 Wis.2d 69, 698 N.W.2d 643 ("[I]t is evident that

the failure to pay a jury fee is a basis for finding waiver of the right to trial by jury. . . the time permitted to pay the jury fee is dictated by the court's scheduling order and local court rules.") The Court has previously recognized that a party's "waiver" of the Article I, Section 5 right of trial by jury "need not be a 'waiver' in the strictest sense of that word, that is, an 'intentional relinquishment of a known right.' Instead, a party may 'waive' the Article I, Section 5 right to a trial by jury by failing to assert the right timely. . . ." *Rao v. WMA Securities, Inc.*, 2008 WI 73, ¶22, 310 Wis.2d 623, 752 N.W.2d 220.

Second, in an arbitration agreement the party waives not only a ***jury*** but also the right to a trial before a Wisconsin tribunal and all rights and protections under Wisconsin Civil Procedure. While this is undisputedly a ***greater*** waiver of rights, these provisions are presumed valid and enforceable. *Wisconsin Auto Title Loans Inc. v. Jones*, 2006 WI 53, ¶28, 290 Wis.2d 514, 530, 714 N.W.2d 155, 163. As recognized by the Seventh Circuit in *IFC*, the decisions approving a "knowing and voluntary" analysis fail to "mention[] or attempt[] to justify the disparate treatment of bench-trial and arbitration agreements, or the oddity of applying a waiver standard to a

contract when Rule 38 does not use a waiver approach once the case gets to court." *IFC Credit*, 512 F.3d at 994.

Wisconsin arbitration clauses have never been subject to separate "knowing and voluntary" requirements or proof of separate negotiation. While the Parsons dismiss the arbitration analogy as one arising from statute, this ignores the public policy expressed by this Court which stands independent form the arbitration statute: "It is the policy of this Court to encourage arbitration." *McKenzie v. Warmka*, 81 Wis.2d 591, 597, 260 N.W.2d 752 (1978). There is no logical reason why an arbitration clause should be "encouraged" and enjoy a presumption of validity without the same afforded to a ***lesser*** waiver of rights. Indeed, under the Court of Appeals' approach in this case, the presumption would shift entirely ***against*** enforcement.

The Parsons offer no attempt to reconcile Wisconsin public policy regarding arbitration clauses with the higher "knowing and voluntary" burden – because it is impossible to reconcile. Wisconsin's public policy favoring resolution of matters short of jury trial should remain intact. Indeed, if a "knowing and voluntary" burden applies to a mutual jury waiver

provision, it must reasonably be imposed on a party seeking to enforce a mutual arbitration clause as well.

B. Commercial Parties Should be Held to Their Agreements.

The Court of Appeals relied upon this Court's decision in *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, 325 Wis.2d 135, 785 N.W.2d 302, and approved the factors set forth in *Whirlpool Financing Corp. v. Sevaux*, 866 F.Supp. 1102 (N.D. Ill. 1994) to evaluate the jury trial waiver. *Parsons*, 2016 WI App 44, ¶30, 31. Reliance on these cases is misguided. First, this Court's decision in *Brunton* related specifically to the venue right in a ***consumer case***. *Brunton*, 2010 WI 50 at ¶28. *Brunton* arose under Section 421 of the Wisconsin Consumer Act. Part of the purpose of the Act is to "protect consumers against unfair, deceptive, false, misleading and unconscionable practices by merchants." Wis. Stat. Sec. 421.102(2)(b). The act is to be "liberally construed and applied" to promote such purposes. Wis. Stat. Sec. 421.102(1). The Court of Appeals removes the *Brunton* reasoning from this very specific context and now transposes those goals into a commercial transaction. This is not a consumer case – the Parsons acknowledge that they entered into this business venture for profit. (See Appellants' Brief at 4).

The Court of Appeals' reliance on *Whirlpool Financial* is similarly misplaced. This case predates the Seventh Circuit's decision in *IFC* and, as such, is no longer good law. Later cases acknowledge this:

> Most of the factors cited by defendants, [the Whirlpool factors] however, do not bear on the analysis. The Seventh Circuit, in a split from the circuit court cases cited above, had held that when a contract is governed by state law, the validity of a jury trial waiver similarly is governed by state law. In this case, as in the *IFC* case, the Rental Agreement is governed by the UCC, which Illinois has adopted. As Judge Esterbrook's opinion in *IFC* explained, ***unequal bargaining power and form contracts do not invalidate the plain language of a jury trial waiver*** (noting that form contracts are common and enforceable). ***And the fact that Defendants did not separately negotiate the provision does not alter the jury-trial-waiver analysis***: after all, there are many telecommunications firms and 'all a customer need do is say no to any given offer and let the competition continue'. ***What does matter is the plain language of the provisions: Illinois law 'honors straightforward terms with understandable meanings'***. (citing *Nicor, Inc., v. Associated Elec. & Gas Svcs., Ltd.*, 223 Ill.2d 407, 307 Ill.Dec. 626, 860 N.E.2d 280, 285-86 (Ill. 2006)).

AEL Financial LLC v. City Auto Parts of Durham Inc., No. 08-CV-3490, 2009 WL 2778078, *3, (N.D. Ill. August 31, 2009). (internal citations and footnote omitted; emphasis in original and added; bracketed text added). Wisconsin courts should not use bad law from foreign jurisdiction cases as persuasive authority.

III. If a "Knowing and Voluntary" Standard is Adopted by This Court, the Burden Should Not Rest on the Party Seeking to Enforce the Jury Waiver and More Evidence is Required Than a Conflicting Affidavit.

A. The Jury Trial Waiver is Enforceable Under Contract Analysis.

If this Court requires a "knowing and voluntary" waiver, analysis in this case should begin and end with the clear and unambiguous contractual language. It is well recognized in Wisconsin that a party is "presumed to know those things which reasonable diligence on his part would bring to his attention." (R.45, p. 3, citing *Bostwick v. Mutual Life Insurance Company of New York*, 116 Wis. 392, 402, 92 N.W. 246 (1902)). It is also presumed that a party to a contract has knowledge of its contents and consents to its terms. (R.45, p. 3, citing *Deminsky v. Arlington Plastics Mach.*, 259 Wis.2d 587, 611 (2003).[9] "Failure to read a contract, particularly in a commercial contract setting, is not an excuse that relieves a person from the obligations of the contract." *Deminsky*, 259 Wis.2d at 611. Contract analysis is limited when the terms are clear: "Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms. . . We

[9] Also note that immediately above his signature, Taft acknowledged that he "read and understood all the provisions of this note. . . ." (R.21, Ex. G, P.App.84).

presume the parties' intent is evidenced by the words they chose, if those words are unambiguous." *Tufail v. Midwest Hospitality, LLC*, 2013 WI 62 ¶26, 348 Wis.2d 631, 833 N.W.2d 586 (internal citations omitted).

In addition, "Wisconsin courts have always recognized the importance of protecting parties' freedom to contract." *State ex rel. Journal/Sentinel, Inc. v. Pleva*, 155 Wis.2d 704, 710, 456 N.W.2d 359 (1990); *Watts v. Watts*, 137 Wis.2d 506, 521, 405 N.W.2d 303, 305 (1987). "A founding principle of freedom of contract is that 'individuals should have the power to govern their own affairs without governmental interference.'" *In re F.T.R.*, 2013 WI 66, ¶ 56, 349 Wis.2d 84, 115, 833 N.W.2d 634, 649; *Merten v. Nathan*, 108 Wis.2d 205, 211, 321 N.W.2d 173 (1983).

In *K.M.C. Co., Inc. v. Irving Trust Co.*,757 F.2d 752, 758 (6th Cir. 1985), the Sixth Circuit, unlike the Seventh Circuit, adopted the "knowing and voluntary" analysis, but placed the burden on the objecting party given the presumptions favoring contract enforcement:

> While the Magistrate was of the opinion that there was a very heavy burden on Irving to prove that K.M.C. knowingly, voluntarily and intentionally agreed to the jury waiver provision, Irving in effect contends that the burden should have been placed on K.M.C. to prove that its waiver was *not* knowing and voluntary. It argues that even if the Butler affidavit is admissible, this court should make an independent examination of the record bearing on the issue of waiver and that the affidavit is not entitled to any weight.

> Professor Moore states:
>
> In determining whether to give effect to the contractual waiver against an objecting party the court ***should start with a presumption in favor of validity in the interest of liberty of contract***. This would require the objecting party to point to some one or more matters that render the provision improper.
>
> 5 Moore's Federal Practice ¶ 38.46, at 38–400 (2d ed. 1984). We agree that in the context of an express contractual waiver the ***objecting party should have the burden*** of demonstrating that its consent to the provisions was not knowing and voluntary.

K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d at 758. (emphasis added). See also *J.P. Morgan Chase Bank, NA v. Winget*, 639 F.Supp.2d 830 (E.D. Mich. 2009).

The Court of Appeals failed to recognize these presumptions and instead determined that the party seeking to enforce a contractual jury waiver carries the burden to show that the other party had actual knowledge of the waiver, voluntarily surrendered the right, and should explain whether the waiver was separately negotiated. *Parsons*, 2016 WI App 44, ¶28. The fact that the waiver language itself is clear, unambiguous, and conspicuous, should have ended the analysis. Imposing a new threshold for enforcement of this particular contract term raises significant practical issues of proof. How will lenders prove – in thousands and thousands of outstanding

commercial loans – that the borrower knew and understood specifically about the jury waiver?

Parties seeking to enforce a jury trial waiver should not have to produce separate evidence of negotiation, voluntariness, or knowledge other than the clear language and the party's signature. The Court of Appeals' approach, which effectively amounts to a "blue line" of the parties' contract, striking one solitary term, but retaining all other obligations of the lender including those to extend credit and offer particular terms of repayment and a specific interest rate. As recognized by the Seventh Circuit in *IFC Credit*, it should not matter whether this was a "form contract" or whether the parties have unequal bargaining power:

> As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just leads to lower prices. . . ***If buyers prefer juries, then an agreement waiving a jury comes with a lower price to compensate buyers for the loss*** – though if bench trials reduce the cost of litigation, the sellers may be better off even at the lower price, for they may save more in legal expense than they forego in receipts from customers. . . As long as price is negotiable and the customer may shop elsewhere, consumer protection comes from competition ***rather than judicial intervention making the institution of contract unreliable by trying to adjust matters ex post in favor of the weaker party*** will just make weaker parties worse off in the long run.

IFC Credit, 512 F.3d at 993 (internal citations omitted; emphasis added). This is certainly consistent with this Court's decisions that "the court's role

is ***not to make contracts or reform them*** but to determine what the parties contracted to do. It is not the function of the Court to relieve a party to a freely negotiated contract of the burdens of a provision which becomes more onerous than had originally been anticipated." *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, ¶38, 363 Wis.2d 699, 866, N.W.2d 679 (citations omitted, emphasis added). Parties "cannot disregard terms that [they] belatedly decide[] are unacceptable." *Id*. at ¶82.

Under the existing presumptions and burdens established under Wisconsin law, the jury waiver clause in this case is certainly enforceable. Wisconsin law already provides for relief for parties who enter into contracts because of fraudulent inducement. No new standards or tests are necessary. The Parsons cannot show under existing law that the "clause was the result of a distinct fraud." *IFC Credit*, 512 F.3d at 991.

The Court of Appeals decided that the jury waiver was "fraudulently obtained by the bank." *Parsons*, 2016 WI App 44 at ¶29. Fraud in the inducement would require finding the five elements of intentional misrepresentation – (1) the defendant made a factual representation; (2) which was untrue; (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false;

(4) the defendant made the representation with intent to defraud and to induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied on it to his/her detriment and, in addition, the misrepresentation must occur "before contract formation." *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶12, 283 Wis.2d 555, 699 N.W.2d 205.

Wisconsin Statute Section 802.03(2) requires allegations of fraud to be stated with "particularity." Taft's affidavit cannot possibly provide the basis for fraud in the inducement – there are no allegations of untrue representations occurring before the contract – or reliance by Taft in any respect. In addition, the Parsons have abandoned their claim for fraudulent inducement. (R.45, p.4, P.App.49).[10]

There can be no question that Taft understood he was "making a contractual commitment" to borrow and therefore "knowingly assented to a contract containing a clause agreeing to a bench trial." *Id*. at 995. To decide otherwise would allow parties to enjoy the benefits of their contracts without

[10] In addition, two Federal Circuit Courts have held that "[G]eneral allegations of fraudulent inducement in connection with a contract that includes a jury waiver provision – but not directed at the jury waiver provision itself – are insufficient to negate an otherwise valid waiver." *Aventa Learning v. K12, Inc.*, No. C10-1022 JLR, 2011 WL 13100747 (W.D. Washington November 8, 2011), citing *Merrill Lynch v. Allegheny Energy, Inc.*, 500 F.3d 171 (2nd Cir. 2007); *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988).

full appreciation for the burdens as well. The Court of Appeals disregarded contract language to achieve what it viewed as a "fairer result" – an approach this Court has rejected. *Ash Park*, 2015 WI 65, ¶78.

B. Even if a "Knowing and Voluntary" Test is Imposed, This Clause Meets It.

Many federal courts consider four factors in assessing jury trial waivers: "(1) the negotiability of contract terms and negotiations between the parties concerning the waiver provision; (2) the conspicuousness of the waiver provision in the contract; (3) the relative bargaining power of the parties; and (4) the business acumen of the party opposing the waiver." *Morgan Guar. Trust Co. of NY v. Crane*, 36 F.Supp.2d. 602, 604 (S.D.N.Y. 1999) (citations omitted). Other courts have avoided utilizing a list of factors:

> We decline to endorse any specific list or catalogue of factors, since they will almost certainly vary from one case to another. The issue in any case is not whether this or that factor has been satisfied but rather, as the court held in [*Chase Commercial Corp. v. Owen*, 32 Mass.App. Ct. 248, 253, 588 N.E.2d 705,708 (1992)] whether the jury trial waiver is unconscionable, contrary to public policy, or unfair in the particular circumstances presented.

Pers Travel, Inc. v. Canal Square Associates, 804 A.2d 1108, 1111-12 (D.C. 2002).

The trial court, addressing the "knowing and voluntary" factors, properly concluded that the waiver was enforceable, and rejected Taft's conclusory affidavit. The court rested this decision on undisputed facts – not speculation about the "context" of the transaction. With respect to relative bargaining power and business acumen, Taft is an "intelligent business man who undoubtedly has experience reviewing paperwork and entering into contracts." (R.45, P.App.48). Indeed, Taft negotiated and executed an extensive contract for the construction of the project, which required mandatory arbitration while effectively, of course, waived a jury trial. (R.21, ¶31, Ex. D). On consipcuousness, the trial court found the language of the waiver obvious – appearing in capital letters just inches above Taft's signature line. He couldn't overlook it if he tried.

IV. Parsons Cannot Meet Existing Standards for Procedural and Substantive Unconscionability.

This Court has already established standards, in *Wisconsin Auto Title Loans Inc. v. Jones*, 2006 WI 53, 290 Wis.2d 514, 714 N.W.2d 155 for procedural and substantive unconscionability analysis. The Court of Appeals expansion of this is unnecessary. Curiously, the Court of Appeals ventured into an unconscionability analysis because it anticipated that the question "may arise during trial." *Parsons*, 2016 WI App. 44, ¶32. The trial court

would have been better suited to assess such issues, as necessary or as raised by the parties, with facts available to it at trial. In addition, if a "knowing and voluntary" test is required, ***that*** should be the operative analysis to evaluate the jury waiver.[11]

First, with respect to procedural unconscionability, in *Wisconsin Auto Title Loans* this Court directed consideration of multiple factors including but not limited to "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms would have been permitted by the drafting party, and whether there were alternative providers of the subject matter of the contract." *Parsons*, 2016 WI App 44, ¶34, citing *Wisconsin Auto Title Loans*, 2006 WI 53 at ¶34. The Court of Appeals injected a new and ***overriding*** factor – the "relevant procedural context" when the documents were signed – to disregard the waiver.

Without addressing or evaluating the relative bargaining power of the parties, whether alterations would have been permitted by the drafting party,

[11] In *Cousins Subs System*, the Eastern District of Wisconsin acknowledged that "the holding of *IFC Corp.* implicitly rejects a finding that jury waivers are unconscionable." 2011 WL 4585541 *14.

and whether there were alternative providers of the loan, the Court of Appeals reached the conclusion that the jury waiver was procedurally unconscionable. Parsons were engaged in a business transaction and sought a profit. This was a commercial, not consumer transaction. This is significant when evaluating unconscionability, (See e.g. *Deminsky v. Arlington Plastics Machinery*, 259 Wis.2d 587, 612-13, 651 N.W.2d 411 (2003) "The parties to this contract were two commercial entities with prior dealings.")

To reach this result, the Court of Appeals: (1) adopted Taft's statement that Associated insisted upon "immediate signing";[12] (2) ignored Taft's inconsistent statement that he was told the documents needed to be signed "soon"; and (3) blindly concluded that Associated "refused to allow Taft the time and opportunity to read the documents [and] refused to allow Taft to consult an attorney about the documents." *Parsons*, 2016 WI App. 44, ¶35. The Court of Appeals ignored that the transaction had been in

[12] On their face, the words of Associated (or of Associated, Woyan and Bowles – depending on which paragraph of the affidavit is accepted) cannot be the basis of unconscionability. Parsons sought funds for construction. He had already been in dispute with the contractor. The commitment had been outstanding for nine months. Certainly, a reasonable customer would not expect a bank to honor a commitment on an open-ended basis. In addition, it would not be surprising for the customer to expect, as a condition of receiving funds, to sign the bank's loan documents. Even if the indication that the bank "would withdraw its support" was a threat, "Threats to do what the threatening person has a legal right to do, do not constitute duress." *Wurtz v. Fleischman*, 97 Wis.2d 100, 110, 293 N.W.2d 155 (1980).

process for at least nine months before Taft claimed he was "under pressure" to sign. (R.40, ¶19).

Taft's affidavit is as significant for its conflict as its omissions. Taft never indicated that he asked for additional time to review the documents, asked for clarification about what "soon" meant, asked about whether alterations would be permitted, or offered any suggestion that there were no alternative providers of the loan. If conclusory statements about feeling "pressured" are all that is necessary to avoid a jury waiver this may ultimately be to the detriment of borrowers. As is typical in commercial transactions, on default, the borrower is responsible for the costs of collection, including attorneys' fees. (See R.21, Ex. G, P.App.84; R.21, Ex. H, P.App.92). Obviously, to the extent a lender is forced to proceed to jury trial with respect to collection, the borrower would ultimately bear that cost or alternatively it would have to be factored as part of the transaction as a whole.

Particularly in a commercial context, the presence of a jury waiver should not be surprising. One commentator has suggested that over the past forty years, such provisions have become "common place" and the inclusion of such provision "into leasing and lending agreements by financial institutions has been going on for many years." Jarod S. Gonzalez, A Tale

of Two Waivers; Waiver of the Jury Waiver Defense Under the Rules of Federal Rules of Civil Procedure, 87 Neb. L. Rev. 675, 676 (2009).

With respect to substantive unconscionability, the Court of Appeals immediately concluded that Associated was the "more powerful party" in the transaction.[13] Even if there were facts in the record to support this, the Court of Appeals inappropriately isolated the jury waiver from the balance of the contract bargain, finding "the Bank gave up little or nothing of value ***by the terms of the waiver***." *Parsons*, 2016 WI App 44 at ¶38 (emphasis added). On its face, the waiver is mutual, with Associated also giving up its right to a jury. More importantly, Associated performed by delivering construction loan funds pursuant to the documents that Taft executed. Whether a lender "gives up something of value" cannot be determined on a piecemeal basis clause by clause. If necessary at all, this must encompass an evaluation of the entire transaction. Perhaps without a jury waiver, the rate would have

[13] Generally, the evaluation of substantive unconscionability involves "the reasonableness of the contract terms to which the parties agreed." *Wisconsin Auto Title Loan*, 2006 WI 53 at ¶104, n. 2. As such, "it can often be determined from the face of the contract." Certainly there is nothing on the face of this contract that suggest substantive unconscionability and the Court of Appeals' decision to wade into whether something was bargained in exchange for the waiver moves far beyond the contract terms themselves and is wholly unwarranted. *Wisconsin Auto Title Loans* involved a contractual provision where a "stronger party may impose arbitration on the weaker party without accepting the arbitration forum for itself." 2006 WI 53 at ¶66. That is not the case here, where both parties are equally bound and Associated has no opportunity to "impose" anything on Parsons that it has not also accepted.

been higher, terms would have been different, or Associated may not have elected to proceed with the loan at all. In addition, it is significant that jury waivers are now recognized to be "common place" in loan documents. 87 Neb. L. Rev. at 676. There is nothing shocking or unusual about this – particularly on a commercial loan. How can this provision be "common" and "unconscionable" under these circumstances – this is irreconcilable.

V. The Trial Court Must Have the Discretion to Manage its Calendar and is in the Best Position to Assess Delays.

The Court of Appeals determined that Associated was obligated – before the plaintiff ever took action to perfect its claim to a jury trial – to affirmatively demand a trial to the court under Wisconsin Statute Section 805.01. The Court of Appeals further found that Associated delayed objecting to the jury demand and should be equitably estopped from claiming its contractual right. *Parsons*, 2016 WI App 44, ¶23. The Court of Appeals decision is inconsistent with the statutory language. The procedure utilized by the trial court in its discretion to manage the trial mode was appropriate, particularly because the record demonstrates that the Parsons – not Associated – were responsible for significant delays in these proceedings.

While neither party raised the issue in the trial court or in briefing before the Court of Appeals, the decision, rested, in part, on its interpretation of Wisconsin Statute Section 805.01:

> 805.01 Jury trial of right.
> …
>
> (2) DEMAND. Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled at or before the scheduling conference or pretrial conference, whichever is held first. The demand may be made either in writing or orally on the record.
>
> (3) WAIVER. The failure of a party to demand in accordance with sub. (2) a trial in the mode to which entitled constitutes a waiver of trial in such mode. The right to trial by jury is also waived if the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Interestingly, while the language of subsection 2 – "may demand" – is permissive, the language in subsection 3 suggests that the failure to demand constitutes a waiver of trial in such mode.

More importantly, the statute on its face does not apply to ***any*** plaintiff, but only applies to one that is "***entitled*** to trial by jury." Just as a plaintiff in an action in equity is not ***entitled*** to a jury, neither is a plaintiff that has previously waived that right. Since Parsons were not entitled to a jury trial given the previous waiver, the Court of Appeals' reliance on Wis.

Stat. Sec. 805.01 to ***reinstate*** that right is misguided. This is consistent with several decisions under Federal Rule of Civil Procedure 39, in which Federal Courts have approved motions to strike a jury all the way up to the eve of trial. (See e.g. *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212 (3rd. Cir. 2007), 226, (allowing a motion to strike the plaintiff's jury demand approximately three years after it was made); *Mowbray v. Zumot*, 536 F.Supp.2d 617, 621 (D. Md. 2008) ("party may move to strike a jury demand at any time, even on the eve of trial.")

Another federal court considering this issue rejected the claim of prejudice by a party that had executed a jury waiver, even though its adversary's motion was not filed until after discovery was complete:

> If a time came during pretrial litigation when counsel for Interface indulged themselves in the assumption that Bear Stearns had by its silence on the subject acquiesced in a jury trial, ***that assumption was not justified***, given the waiver Bear Stearns bargained for, obtained, and never stated was relinquished. In any event, Interface will not be unfairly prejudiced by trying the case before a judge, as it contractually agreed to do. Jury trials and bench trials have common purposes. Both forms of trial seek to ascertain the facts and then give judgment in accordance with the governing law, are conducted in accordance with the same rules of procedure and evidence, and require thorough preparation by counsel. Interface may prefer, for reasons that are not stated, to present its case to a jury rather than a judge. But Interface bargained that right away, and holding Interface to its bargain ***works no unfair prejudice upon it***.

Bear, Stearns Funding Inc. v. Interface Group – Nevada, Inc., No. 03 CIV 8259 (CSH), 2007 WL 3286645, *5, (S.D.N.Y. November 7, 2007) (emphasis added).

The trial court's decision in this case is consistent with the conclusion that the Parsons were not "entitled" ***because of*** the waiver. (R.45, P.App.48-49). The Parsons' demand and payment of a fee are of no consequence because they previously waived the right.[14]

While the Court of Appeals criticized the "unexplained three year delay", the Parsons didn't pay the fee until nineteen months after the complaint was filed. *Parsons*, 2016 WI App. 44, ¶19, P.App.11. Until then, the plaintiff's intent was not certain and there was no need for Associated to object. The trial court was also aware that during this time, the parties also participated in an extended multi-session mediation.

The Court of Appeals' conclusion that Associated was responsible for delays in bringing its Motion to Strike the Jury Demand is completely unsupported by the record. In fact, the timeline reflects delays occasioned by Parsons, not Associated:

- May 26, 2011 – Complaint filed (R.1);

[14] In addition, Taft agreed that any waiver by Associated of its rights would have to be in writing. (R.21, Ex. H, P.App.92).

- August 10, 2011 – Original scheduling conference held with jury fee due by November 9, 2012 (R.8);

- September 12, 2011 – Parsons first lawyer withdraws (R.9);

- May 29, 2012 – Alex Flynn & Associates S.C. appears for Parsons (R.17);

- August 23, 2012 – Counsel for Parsons files Motion for Leave to File First Amended Complaint (R.18);

- October 26, 2012 – Hearing on Motion with stipulation to file First Amended Complaint and new scheduling conference set for December 12, 2012 (P.App.115);

- December 12, 2012 – second scheduling conference held with jury fee due January 31, 2013 (R.22);

- January 9, 2013 – jury fee paid (R.23);

- August 21, 2013 – Taft files Chapter 13 Bankruptcy Petition (P.App.119);

- March 21, 2014 – Taft's Chapter 13 case dismissed (P.App.125);

- April 16, 2014 – Court conducts status conference and determines that any motions on jury issue due by May 19, 2014 (P.App.112);

- May 14, 2014 – Associated files Motion to Strike Parsons Jury Demand (R.36);

- May 14, 2014 – Parsons Motion for Declaration of Plaintiffs' Right to Jury Trial (R.38).

This timeline was evident in the record and ignored by the Court of Appeals. In addition, the Parsons presented no evidence that they had somehow prepared the case differently with the expectation of a jury trial or had incurred any expense in this respect. The trial court also appropriately recognized that the Parsons' claims had evolved during the proceeding and that it was "only in their November 2013 pre-trial report that the Parsons' limited their claims to racketeering and negligent hiring." (R.45, p. 4, P.App.49). Neither Wisconsin Statute Section 805.01 nor the Court of Appeals' finding of "unexplained delays" support the limitation on the trial court's ability to manage its calendar in this respect.

CONCLUSION

This Court has the opportunity to deliver a message to parties who enter into commercial contracts that is consistent with well-established law and public policy. First, you are presumed to know contract terms that are available to you through reasonable diligence. Second, when contract terms are unambiguous they will be enforced. Finally, an election by parties to resolve disputes through bench trial – as opposed to a more expensive jury trial – will be encouraged, rather than unnecessarily scrutinized.

A "knowing and voluntary" requirement imposed on a party seeking to enforce its contract is out of place when the law already approves that the right to a jury trial may be forfeited by simple oversight. If a "knowing and voluntary" standard is adopted, however, it must be considered in harmony – and not in conflict – with existing rules of contract interpretation. Associated Banc-Corp. respectfully requests the Court to reverse the decision of the Court of Appeals, affirm the trial court's decision and remand the matter for a court trial.

Respectfully submitted this 13th day of October, 2016,

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CERTIFICATION – FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (d) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,456 words.

Dated at Menomonee Falls, Wisconsin this 13th day of October, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirement of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Menomonee Falls, Wisconsin, this 13th day of October, 2016.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(3)(b) and that contains a table of contents.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Menomonee Falls, Wisconsin, this 13th day of October, 2016.

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STATE OF WISCONSIN
SUPREME COURT

TAFT PARSONS, Jr. and
CAROL PARSONS,
Plaintiffs-Appellants,

v. Appeal No. 2014AP2581

ASSOCIATED BANC-CORP.,
Defendant-Respondent-Petitioner

XYZ INSURANCE COMPANY,
Defendant

PARSONS' RESPONSE AND APPENDIX TO PETITIONER'S BRIEF

ON APPEAL FROM DECISION AND ORDER
OF THE CIRCUIT COURT OF MILWAUKEE COUNTY
HON. JEFFREY A. CONEN, PRESIDING
CIRCUIT COURT CASE NO. 2011CV008389

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INTRODUCTION

The Petitioner, Associated Bank [the Bank], treats this case as if it were a contract case. It is NOT a contract case. It does not seek release from a contract or enforcement of a contract. The Bank is not seeking the repayment of loans, and the plaintiffs-appellants, the Parsons, are not seeking to compel the Bank to honor a contract to make a loan. Nor does this case involve an arbitration clause, as the Bank's brief infers.

This case involves a civil claim under the Wisconsin Organized Crime Control Act, Wis. Stat. § 946.83(1), alleging that the Bank's loan officer, Aaron Moeser, engaged in a pattern of racketeering activity when he gave loans to the Parsons, that the Bank learned of Moeser's criminal behavior but then the Bank did nothing to make the Parsons whole, and, instead, continued to receive the proceeds of the racketeering activity in the Bank's enterprise. [*See* Appendix to this brief [Ap.] pp. 225¶8 and 243-245]. The case also involves an alternate claim for negligent hiring, training, and supervision. [Ap. 245-246].[1]

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[1] There were other causes of action in the Amended Complaint [Ap. 245-253], but plaintiffs limited their case to the racketeering claim and the negligent hiring, training, and supervision claim in their pre-trial report [R.33], filed with the circuit court on November 22, 2013.

The Bank attempts to treat this case as a contract case in its argument that the jury waiver clause that appears in *one* of the loan documents in this case, the Promissory Note [Petitioner's Appendix [P.App.] pp. 00083-00084], should be honored because it is stated in large print in the Note signed by *one* of the plaintiffs-appellants, Taft Parsons. The Bank's argument that a jury waiver clause can never be challenged would mean that a contract itself could never be challenged. This is belied by the many contract actions that have come before the courts. The supreme court should not deem the jury waiver clause in a contract to be the only sacred clause that is beyond challenge. The court of appeals concluded that knowledge and voluntariness need to be shown when a jury waiver clause is challenged. The supreme court should affirm the court of appeals on this.

Apart from any general law concerning jury waiver clauses, the Bank tries to sidestep the fact that in this particular case it allowed three years to pass from the filing of the original Complaint, which contained a jury demand, before the Bank ever asserted a claim that it objected to a jury. The court of appeals concluded that Wis. Stat. § 805.01 was binding on the Bank as well as on the Parsons. That statute states in subsection

(2): "Any party *entitled* to a trial by jury *or by the court* may demand a trial in the mode to which entitled at or before the scheduling conference…." [Emphasis added]. The statute goes on to state in subsection (3): "The failure of a party to demand in accordance with sub. (2) a trial in the mode to which entitled constitutes a waiver of trial in such mode." The Bank considers itself *entitled* to a trial without a jury because of the jury waiver clause in the Promissory Note.

The court of appeals concluded that the Bank had an obligation under Wis. Stat. § 805.01 to assert its objection to a jury trial and its claim for a bench trial before the scheduling conference. The Bank actually had two chances in this case to assert its claim because there was a scheduling conference on the original Complaint on August 10, 2011 and then a second scheduling conference on December 12, 2012 with the new judge assigned to the case (because of rotation), when the Amended Complaint was accepted for filing. The Bank did not assert a claim to a jury waiver in its Answers and Affirmative Defenses [R. 4 and 20] or at either of the scheduling conferences. Instead, the Bank waited until an off-the-record conference in chambers on April 16, 2014 to assert a claim to a jury waiver. [*See* CCAP, Item 47 at Ap.216]. This delay was not due to

the trial court managing its calendar, as the Bank argues [Br.36]. A trial court does not have the discretion to ignore Wis. Stat. § 805.01. Nor was the delay due to any bankruptcy action. The court of appeals concluded that the Bank's delay constituted a failure to follow the clear mandate of Wis. Stat. § 805.01. The supreme court should affirm the court of appeals on this matter.

The Bank and the *amicus,* Wisconsin Bankers Association [WBA] repeatedly argue that this was a commercial or business transaction, not a consumer transaction. [Bank Br. 22, 33; WBA Br. 1,2,3] However, it was Taft personally who signed the Promissory Note and the other construction loan documents, and there was no mention in these documents of his business, Parsons Engineering. Moreover, collateral for the loan was a mortgage on the Parsons' home.

The Bank and WBA have many laudatory descriptions of Taft in their briefs, in an effort to persuade the court that there was equality of bargaining power when Taft signed the Promissory Note containing a jury waiver clause. The Bank variously describes Taft as "well-educated" [Br. 3], as "an intelligent business man who undoubtedly has experience reviewing paperwork and entering into contracts" [Br. 11-12 and 31], and

as having "education, experience, and business acumen" [Br. 14]. These descriptions are repeated by WBA, which adds the word "sophisticated" to the above list, [WBA Br. 1,6,8,11,12], and also calls Taft a "commercial property developer," [WBA Br. 1]. The Bank and WBA make these laudatory descriptions of Taft without any evidence that they are accurate.

It is undisputed that Taft is well-educated. That was an allegation in the Amended Complaint, which stated that he is a board-certified structural engineer with professional engineering licenses and with some additional studies in architecture. [Ap. 225, ¶9]. However, the other characterizations of him are subjective and without foundation in the Record. He owned Parsons Engineering, [Ap. 225, ¶9], a one-person firm which he operated out of his home, but that does not necessarily mean he had "experience reviewing paperwork and entering into contracts." It has never been established what his business experiences were with Parsons Engineering, what kind of jobs he got, whether he ever negotiated any previous contracts or took out commercial loans, whether he had developed any "business acumen," whether he was "sophisticated, " or that he was a "commercial property developer." The court of appeals

acknowledged the lack of foundation for some of these descriptions. [¶29] Moreover, as discussed in the fact section below [pp.21-22], the Bank showed that none of these laudatory descriptions made any difference and that the Bank did not accord Taft any bargaining power, when the Bank refused to allow Taft to salvage the project after it became apparent that the project could not go forward with the construction company the Bank wanted Taft to use for the project.

STATEMENT OF THE CASE

The supreme court should note that this statement of the case contains some argument and not just bald statements of procedure or facts. This occurs where argument is appropriate to answer misstatements of fact or the Bank's arguments related to procedure or facts in its Petitioner's brief.

A. Procedural Facts

1. Jury Demand and Payment of Fee

This case was originally filed in May 2011. [R.1]. Counsel for the plaintiffs had to leave this case for personal reasons in September 2011 [R.9], and then the Parsons proceeded *pro se* [R.10,11,12]. Because of

judicial rotation, a new judge was assigned to the case in January 2012 [R.15]. The undersigned attorney Alex Flynn came on to the case in May 2012 as new counsel for the Parsons. [R.17]. A Motion for an Amended Complaint with a renewed demand for a jury trial was filed in August 2012 [R.18]. At the first hearing before the new judge on October 26, 2012, [CCAP Item 27 at App. 213-214], the parties stipulated to the filing of the First Amended Complaint, which contained a renewed demand for a jury trial. [Ap.254]. A new scheduling conference was set for December 12, 2012. [CCAP Item 27 at Ap. 213-214]. At the scheduling conference, [CCAP Item 30 at Ap. 214] the court accepted for filing plaintiffs' Amended Complaint [Ap. 223-254] and Defendant's Answers and Affirmative Defenses to the amended complaint [R.20]. Also, the court ordered the Parsons to pay the jury fee by January 31, 2013. [R.22]. The Parsons paid the jury fee on January 9, 2013 [R.23]. The Bank's Answers and Affirmative Defenses did not object to the Parsons' jury demand, and the Bank did not object to the court's scheduling order that the jury fee be paid by January 31, 2013. [CCAP Item 30 at Ap.214]. Nor did the Bank object when the Parsons actually paid the jury fee on January 9, 2013 [R.23].

Given these procedural facts of stipulating to the filing of the Amended Complaint on October 26, 2012 and not objecting to the new scheduling order or payment of the jury fee, it is disingenuous for the Bank to subtly suggest on page 10 of its Brief that the Parsons should have paid the jury fee by November 9, 2012, as ordered in the original scheduling order issued by the first judge in the case. It was not until their Petition for Review that the Bank ever suggested that the Parsons should have paid the jury fee by November 9, 2012. Moreover, the Bank had stipulated to the filing of the Amended Complaint and to a new scheduling conference on October 26, 2012, which was prior to the November 9, 2012 date. [*See* CCAP, Item 27 at Ap. 213-214]. It is likewise disingenuous for the Bank to argue on page 19 of its Brief that it took nineteen months after the complaint was filed for the Parsons to pay the jury fee. The Parsons paid it on January 9, 2013, before they were required to do so in the second scheduling order.

2. An Unrelated Bankruptcy Action

On April 30, 2013, the court set a final pretrial conference for November 26, 2013, but set no trial date. [CCAP Item 35 at Ap. 214-

215]. Before the scheduled pretrial conference, both parties filed a pretrial report [R.33, 34], but at the pretrial conference on November 26, 2013, the court adjourned the conference because the parties had not completed mediation. [CCAP Item 44 at Ap.216]. The parties then participated in one unproductive mediation session. At the next pretrial conference on February 20, 2014, the court learned that a different attorney from any of the attorneys involved in the instant case had filed an unrelated federal bankruptcy action for Taft [CCAP Item 45, Ap.216].[2] February 20, 2014 was the first time that this unrelated bankruptcy action had been mentioned in this case, as CCAP shows, contrary to the time line the Bank presents on page 40 of its Brief, in its effort to argue that Taft held up the instant case from August 21, 2013 to March 21, 2014. Moreover, Taft's August 21, 2013 filing of the bankruptcy case was long past the December 12, 2012 date when the Bank should have objected to any jury trial, pursuant to Wis. Stat. § 805.01. Thus, the bankruptcy has nothing to do with the jury trial question.

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[2] That bankruptcy action was to save an inherited property that had unpaid property taxes and was only tangentially related to this case, in that the Bank filed as a creditor of Taft.

When the court learned on February 20, 2014 of the federal bankruptcy proceeding, the court adjourned the second pre-trial conference to April 2014 to give counsel more time to follow the bankruptcy case. [*See* CCAP item 45, Ap. 216]. Thus, contrary to the Bank's footnote 3 on page 11 of its Brief, any bankruptcy stay was not a factor in this case until February 2014. The bankruptcy case accounts for only about two months of the three years' delay before the Bank objected to a jury trial, since the bankruptcy action was not raised as an issue until February 2014 and the next hearing in circuit court was in April 2014. [CCAP Items 47 & 45, Ap.216] During that two-month period, Taft dismissed the unrelated bankruptcy, in part to avoid any delay in this case.

3. The Bank's Motion to Strike Plaintiff's Jury Demand

At the final pre-trial conference on April 16, 2014, the court set a trial date for a "1 week jury trial" for December 15, 2014. [CCAP Item 47, Ap. 216]. Because the bank mentioned its objection to a jury trial at that pre-trial conference, the court ordered any motions on that issue to be filed by May 19, 2014. On May 15, 2014, the Bank filed a Motion and brief to strike plaintiff's jury demand, arguing that Taft Parsons signed a

jury waiver in one of the loan documents with the Bank. [R.37]. This was three years after the initial Complaint was filed, almost two years after the Amended Complaint was filed and the scheduling conference was held on the Amended Complaint, almost eighteen months after the jury fee was paid, and one month after a trial date was set for a "1 week jury trial." The most delay that can be argued the Parsons contributed was the two months from February 2014 to April 2014, after the court became aware of the unrelated bankruptcy action and adjourned the final pre-trial conference for two months. The pages in the Bank's Appendix to its Brief dealing with the unrelated bankruptcy action [P.App.00108---00115] are irrelevant for this case. They are simply a smokescreen and were not even mentioned to the court of appeals. The Bank did not introduce them until its Petition for Review.

After the filing of the Bank's motion to strike the jury demand and after the May 19, 2014 status conference, at the urging of the court, the parties participated in one additional unproductive mediation session. This and the January 2014 session were the only two mediation sessions. There was not "extended multi-session mediation" as the Bank states in its brief

[Br. 39] in an effort to explain why it waited so long to object to a jury and why it did not follow Wis. Stat. § 805.01(2) and (3).

The circuit court decided the Bank's May 2014 jury trial Motion on October 24, 2014. [R. 45]. The Parsons filed a petition for leave to appeal a nonfinal order with the court of appeals on November 5, 2014 and sent a copy to the circuit court with a Motion to stay the trial scheduled for December 15, 2014. [R.46]. The circuit court granted the Motion to stay the trial on November 14, 2014 [CCAP Item 62, Ap. 218]. The court of appeals granted the Interlocutory appeal on November 26, 2014. [CCAP Item 65, Ap.218]. Briefing was completed in April 2015. Oral argument was on November 4, 2015. The Court of Appeals issued its opinion on May 19, 2016. The Bank filed a Petition for Review on June 9, 2016. The supreme court granted the Petition for Review on September 13, 2016.

The court of appeals issued an "errata sheet" after it issued its opinion. [*See* P.App.00001-00002]. This was due to a letter that appellants sent as a matter of courtesy and honesty with the court, pointing out one minor undisputed , factual error that appeared several places in the opinion. [*See* Ap.209-210]. The court's errata sheet made

corrections to the opinion related to this error of fact, plus one or two minor corrections, such as commas, that the court made on its own. By discussing the errata sheet in its brief [Br. 12-13] and by including both versions of the court's slip opinion in its Appendix. [P.App.00003-00040], the Bank is attempting to make an issue out of the court of appeals issuing an errata sheet. There was no need for the Bank to include two versions of the slip opinion in its Appendix. The opinion is a published opinion, ***Parsons v. Associated Banc-Corp.***, 2016 WI App. 44, 370 Wis.2d 112, 881.N.W.2d 793. It was only necessary for the Bank to include the published version in its Appendix. The Appendix to this Response Brief contains the published version. [Ap.201-208].

Before the errata sheet was issued, the Bank's counsel wrote a letter to the court saying that if that if the Parsons' letter pointing out the factual error was a motion for reconsideration, the Bank wanted a chance to be heard. [P.App.00043]. The Parsons' letter was not intended as a motion for reconsideration and the court did not interpret it as such. [P.App.00044-00045]. Moreover, the Bank never indicated any substantive objection to the factual error the Parsons pointed out, or any problem with the changes the court made, not in its letter to the court, not

in its Petition for Review, and not in its Brief to the supreme court. Thus, it is curious why the Bank is still bringing up the errata sheet.[3]

B. Statement of Facts

This lawsuit involves a civil claim for the Bank's violation of Wisconsin's anti-racketeering statute, Wis. Stat. § 946.83(1), and for the bank's negligent hiring, training, and supervision of its former loan officer named Aaron Moeser. There are additional causes of action listed in the Amended Complaint [R.Ap.243-253], but they were narrowed to these two in plaintiff's pre-trial report, filed November 22, 2013. [R.33]. (The Amended Complaint is in the Appendix [R.Ap.223-254], but plaintiffs' extensive exhibits are not in the Appendix, except for Exhibits B ,C,& I. The other exhibits are in the record at R.21, pp.33-158.)

This case arises from a Home Equity loan and a construction loan that State Financial Bank (SFB), the predecessor of Associated Bank (the Bank), gave to the Parsons for proposed construction of townhouses

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[3] Actually, the Bank should have written its own letter, pointing out to the court the error of fact in footnote 3 of the opinion. Associated Bank acquired State Financial Bank in 2005, not 2006, according to our research, which the Bank has not challenged.

called the Stark Street Rowhouses. [Ap. 225, ¶10; 227, ¶24; 228, ¶26-28]. Aaron Moeser was the loan officer who handled those loans for SFB and was also employed by Associated Bank after its merger with SFB. [Ap. 227, ¶22&25]. Moeser was later indicted in federal court and pled guilty to conspiracy to commit bank fraud in a project very similar to the Stark Street Rowhouse Project; that project was called the 5th Street Rowhouses. [Ap. 240, ¶119; 242, ¶131; R.21, pp. 133-158, Exs. S&T].

The 5th Street project involved the same cast of characters, other than the Parsons, and had a similar MO to the Stark Street Rowhouse Project. [Ap. 225-226, ¶10-18; 227, ¶22-25; 240, ¶119]. In a deposition in this case, Aaron Moeser invoked the 5th amendment in response to every question. The Bank conducted an investigation of Moeser when his criminal activities came to light and produced a report of this investigation. On December 2, 2014, the circuit court in this case issued an Order for the Bank to turn over its investigative report on Moeser to the Parsons [R.47], but the Bank has not done so.

The background of this case is the following. Plaintiff Taft Parsons is a licensed professional engineer. [Ap. 225, ¶9]. In about 2002, Taft came up with the idea of constructing twelve townhouses called the Stark

Street Rowhouses in his neighborhood in the north, central area of Milwaukee. [Ap. 225, ¶10]. Taft hoped it could be the beginning of projects to improve neighborhoods like his, and Taft knew that banks were being encouraged, through the federal Community Reinvestment Act, to give loans for such projects. [Ap.225, ¶8].

Taft's plan included razing the Parsons' own home for the first six townhouses to be built on that site and on two adjacent lots which the Parsons owned. Taft and Carol would get one of the townhouses to replace their home [Ap.229, ¶35], which would provide space for Taft to expand his office in the home for his one-person business, Parsons Engineering. The Parsons would also receive some profit from the sale of the other five townhouses. The plan also called for subsequent construction of an additional six townhouses on adjacent land still to be acquired, after the first six townhouses would be completed. [R.33,pp.17-47; Ap. 226, ¶19; 227, ¶24].

When Joseph Bowles of Central City Construction (CCC) learned of Taft's idea, he came to Taft to try too work with him. He introduced Taft to a Michael Woyan, who had recently come to Milwaukee from Chicago and had founded and headed up an organization called PARC

(People's Action Redevelopment Commission). [Ap. 225-226, ¶¶10-19]. It turned out that the members of the Board of Directors of PARC were all associated with CCC, and Woyan was on the payroll of CCC, but Taft did not realize that in the beginning. [Ap.226, ¶15].

Woyan met with Taft to learn about Taft's townhouse idea and said he would try to get a bank to fund it. [Ap.227, ¶22]. Woyan made a presentation to the Bank without Taft. [R.21,Ex.A]. Shortly after that, Woyan met with the Parsons and handed them two loan commitment letters from SFB, both over the signature of Aaron Moeser, both dated August 7, 2003, and both with copies to Michael Woyan. [Ap.255-258]. One commitment letter was for a Home Equity loan (HELOC) for $40,000. [Ap.255; R.21,ExB] The other commitment letter was for a construction loan for $774,000.[Ap.257; R.21, Ex.C]. The understanding was that the Home Equity loan was to pay for pre-construction cost, called "Phase I" in the construction loan commitment letter. [Ap.221,¶9]. The construction loan would be given when Phase I had been completed. [*Id.*] The construction loan commitment letter also stated a requirement that certain payments be made to Michael Woyan and that the Parsons maintain a relationship with the National Association of Minority

Contractors. (John Bowles was president of NAMAC) and with PARC, Michael Woyan's organization allied to CCC. [Ap.221,¶8; 257-58].

In retrospect, Taft realizes he should have been wary when Woyan brought him the loan commitment letters instead of a bank officer giving him the letters directly. Taft also thinks he should have suspected some improper alliance between Woyan and Moeser when the construction loan commitment letter specified payments that had to be made to Woyan. (Both Moeser and Woyan were later indicted in relation to the similar 5th street townhouse project. [R.21, pp. 133-158, Exs.S&T; *see also* ***U.S. v. Moeser***, 758 F.3d 793 (7th Cir. 2014)]). Even though the initial idea for the project had come from Taft, and Taft is a professional engineer and had the idea for the Stark Street Rowhouses, Aaron Moeser required the Parsons to work with Woyan and with NAMAC, and thus with the construction company of John and Joseph Bowles. [Ap.221,¶8 & 257-58].

The papers for the HELOC loan were signed on August 22, 2003. [Ap. 228, ¶30]. From then until May 26, 2004, Taft raised a number of complaints with Moeser that, although he had made payments from the Home Equity loan to CCC, nothing was being done on the project, not even the obtaining of permits. Yet, Moeser, Woyan, and Bowles began to

pressure Taft to sign the papers for the construction loan and he was told the construction loan commitment would be cancelled if he did not sign soon. [Ap.221,¶¶ 11,12]. Taft finally bowed to this pressure and agreed to the date of May 26, 2004 for closing on the construction loan. When Taft arrived at the title company for the closing, a meeting was taking place among Moeser, Woyan, John Bowles, Joseph Bowles, and a title company officer in a private meeting room, but the Parsons were not permitted to join in the meeting. [Ap. 230, ¶ 43]. After that meeting, at the closing for the construction loan, Taft was told he had to pay closing costs to the bank and the title company but also had to make payments to Woyan and to CCC. [*See* Closing Statement at Ap. 259, Ex.I; also Ap. 232, ¶ 54]. He objected but was told the construction loan would not go forward if he did not agree. [Ap.220, ¶3]. Moeser had arrived at the closing with pre-cut cashier's checks made out to Woyan and CCC, totaling $76,250 from the construction loan proceeds [Ap.259]. It was at this signing that Taft was presented with almost thirty pages of documents to sign and was not permitted time to read them or consult a lawyer. [Ap.220-223, ¶¶2,16]. One of those documents was the Promissory Note that has a jury waiver

clause. [Ap.223, ¶¶16,17]. It is that clause that is the subject of the appeal and this case in the supreme court.

Taft maintains in a sworn affidavit that he signed all of these documents under threat that the construction loan commitment would be withdrawn, even though he had already incurred the debt of the HELOC loan to pay for Phase I of the construction, which had not even been done. [Ap. 220-223, ¶¶3,13,18]. Thus, he was faced with the possibility of losing the $30,000 he had already invested in the project (out of the $40,000 HELOC) or give in to the pressure that he sign the construction loan papers over his objections that the preliminary work was not even started.. Of note is the fact that the Promissory Note with the jury waiver clause does not contain Carol Parsons' signature. Nor does it contain the signature of any bank officer. [R.21, Ex.G; P.App.00083-00084].

Subsequently, three payments were made to CCC from the construction loan over Taft's objections that nothing was still being done on the project by CCC. [Ap.233-238]. In January 2005, after $30,000 from the HELOC loan and over $121,000 from the construction loan were paid out over Taft's objections, but no permits had been taken out for the project and no construction had begun, Taft happened to receive a Notice

of Levy from the IRS saying that Stark Street Rowhouses would have to turn over to the IRS any money it was obligated to pay CCC because CCC had a number of unpaid tax liens. [Ap. 238, ¶105-107]. Taft then did his own research on CCC and found there were also a number of unpaid judgments against CCC [*Id.*]. The bank apparently had never investigated CCC's creditworthiness before requiring Taft to work with CCC, or else the bank investigated but never informed Taft of CCC's problems before requiring Taft to do business with CCC. [*Id.*]. Taft gave Moeser the information about the IRS and the unpaid judgments because Moeser was requiring him to work with CCC, but Taft knew that CCC would not do any work on the project, if payment for such work had to be turned over to the IRS. [*Id.*]. Instead of finding another way for the project to continue without CCC, Moeser stopped payments and ended the Parsons' construction loan for the Stark Street Rowhouses in May 2005, leaving the Parsons with $40,000 plus interest due for the Home Equity loan and at least $121,000 plus interest due for the construction loan, but nothing to show for it, not even a hole in the ground. [Ap. 241, ¶121].

Before Moeser ended the loans, Taft had presented Moeser with a booklet containing a detailed proposal from Taft showing how Taft's

business, Parsons Engineering, could continue the project and have the townhouses built. [Ap. 240, ¶115-116]. A copy of that booklet is at R.33, 17-47. Moeser refused to consider Taft's proposal, even though it would have mitigated or eliminated both the bank's and the Parsons' damages. [*Id.*]. This alone shows Taft had no equality of bargaining power.

In May 2005, Moeser called for immediate payment of the construction loan on which was owed approximately $121,000. [Ap.241, ¶121]. When Taft could not pay these loans, State Financial Bank (SFB) started a foreclosure action in August 2005 against the Parsons. [Ap.241, ¶122].

Shortly after SFB started its foreclosure action against the Parsons, SFB merged with Associated Bank in October 2005. [Ap. 241, ¶124]. After the merger, Associated (the Bank) continued the foreclosure action. The Parsons filed counterclaims. [Ap.241, ¶123]. However, Taft was forced to declare bankruptcy to save the Parsons' home. This stopped the foreclosure action. [Ap.241, ¶125]. Note, this is not the later, unrelated bankruptcy action the Bank discusses in its Brief and includes in its Appendix [P. App.00108-00115]. The circuit court handling the foreclosure case eventually dismissed the 2005 foreclosure action and the

counterclaims *sua sponte*, without prejudice, in 2008. [Ap. 241, ¶128]. The present case was filed in 2011. It has nothing to do with foreclosure.

Back in September 2004, when Moeser was giving payments to John Bowles from Taft's construction loan, over Taft's objections that no work was being done, Moeser approved loans to the Bowles and Woyan on another townhouse project called the 5th Street Rowhouses at South 5th and Arthur in Milwaukee. [R.21, pp.133-158. Exs. S&T; ***U.S. v. Moeser***, 758 F.3d 793 (7th Cir. 2014)]. It turns out Moeser also put his own money into the 5th street project, an important reason why he, Joseph Bowles, and Woyan were later indicted in federal court. [*Id.*]. Unlike Taft's project, construction did begin on the 5th street project immediately. Eventually the shell was built for the 5th street project, but nothing was done on the interior of the townhouses before all the construction money allotted to the project had been drawn, and further construction was abandoned in October 2005 (the same time the merger between SFB and Associated took place). [*Id.*].

Associated Bank later investigated the 5th street Rowhouse project and found that their employee, Aaron Moeser, together with Joseph Bowles and Michael Woyan and several others had engaged in a criminal

enterprise. These people, including the bank's employee, Aaron Moeser, were eventually indicted and convicted in federal court for their criminal activities. [*Id.*]. ***U.S. v. Moeser***, 758 F.3d 793 (7th Cir. 2014)

It is possible that SFB did not know of Moeser's criminal alliance with Woyan at the beginning of the Parsons' loan process. Perhaps at that point SFB was only guilty of negligent hiring, training, and supervision of Moeser. However, at a certain point, knowledge of Moeser's pattern of racketeering activity can be imputed to SFB. Moreover, by the time that Associated Bank had merged with SFB and then investigated Moeser in connection with the 5th street project, the Bank knew its employee was a criminal engaged in a pattern of racketeering activity. It also knew the Parsons' claims that Moeser had engaged in similar criminal actions with their loans. Yet, the Bank continued to hound the Parsons for the ill-gotten proceeds of the Parsons' loan, and the Bank continued to use those proceeds in its enterprise. Thus, the Parsons allege that the Bank became directly liable for racketeering in violation of Wis. Stat. § 946.83(1).

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO A JURY TRIAL CAN BE WAIVED, BUT THE WAIVER MUST BE IN A "MANNER PRESCRIBED BY LAW."

The Bank erroneously states at the beginning of its brief. [Br, 15] that the Parsons argued that a pre-litigation jury waiver clause is "not permissible" under the Wisconsin Constitution. The Parsons did not argue this in their briefs and they did not "abandon this position at oral argument before the Court of Appeals." [Br. 15]. The Parsons argued that there were no Wisconsin cases dealing with whether pre-litigation jury waivers are constitutional in Wisconsin, and the Parsons urged the court of appeals to find that they are not constitutional, following cases is several other states. The court of appeals determined that pre-litigation jury waivers are constitutional in Wisconsin.

The right to a jury trial in civil cases is a constitutional right in Wisconsin. ''The right of trial by jury shall remain inviolate…; but a jury trial may be waived by the parties in all cases *in the manner prescribed by law.*'' Wis. Const. Art I, § 5 (Emphasis added). The Wisconsin statutes also recognize this right. ''The right of trial by jury as declared in article I, section 5, of the constitution or as given by a statute…shall be

preserved to the parties inviolate.'' Wis. Stat. § 805.01(1). In the instant case, the Parsons have a constitutional right to a jury trial but also a right "given by statute" because their first cause of action, racketeering, explicitly provides for a jury trial in the statute. ''Any person who is injured by reason of any violation of s. 946.83 or 946.85 has a cause of action.…The defendant or any injured person may demand a trial by jury in any civil action brought under this section.'' Wis. Stat. § 946.87(4).

Since the constitutional right to a jury trial may be waived in "the manner prescribed by law" both the Wisconsin statutes and case law must be examined to determine the "manner prescribed by law." Regarding the "manner prescribed by law" that is contained in the statutes, there is no Wisconsin statute stating that general pre-litigation jury waiver clauses in contracts can take away a persons' Wisconsin constitutional right to a jury trial. Regarding case law, there was no Wisconsin case law, prior to the opinion of the court of appeals in this case, prescribing the manner in which waivers not covered by statute can legitimately waive the constitutional right to a jury trial.

The law in the statutes provides two ways a party can waive the right to a jury trial: first, by failing to make a jury demand orally or in

writing before the earlier of the scheduling conference or the pretrial conference; or second, by a filed written stipulation or an oral stipulation in court agreeing to a bench trial. Wis. Stat. § 805.01(2)&(3). The statutes also provide that a party can lose the right to a jury trial by failing to pay the jury fee. Wis. Stat. § 814.61(4).

In the instant case, the Parsons fully complied with the requirements of Wis. Stat. § 805.01 to preserve their right to a jury trial. They made a jury demand for a twelve-person jury in their original Complaint filed May 26, 2011 [R.1], as well as in their Amended Complaint [.Ap. 223-254]. The parties stipulated to the filing of the Amended Complaint in court on October 26, 2012 [CCAP, Item 27, Ap. 213]. The court stamped it as filed on December 12, 2012 [Ap. 223], the day of the second scheduling conference. The Parsons paid the jury fee on January 9, 2013 [R.23]. Besides setting up requirements for parties to preserve their right to a jury trial, §805.01(3) also states: ‘‘A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.’’ Wis. Stat. § 805.01(3). The Parsons have not withdrawn their demand for a jury trial.

While Wis. Stat. § 805.01(3) provides that consent of the parties may withdraw a properly made jury demand in litigation, it does not provide for a pre-litigation waiver of the right to a jury. The issue in this case is whether signing a jury waiver clause in a standard form contract of adhesion in the context of the allegations in this case constitutes a waiver of the constitutional right to a jury trial "in a manner prescribed by law."

More importantly, the question is whether such a jury waiver clause in a contract of adhesion absolves the holder of the contract, in this case the Bank, from the requirement of Wis. Stat. § 805.01(2) and (3) that any party who is *entitled* to a trial by the court [bench trial] must demand that mode of trial by the scheduling conference or it is deemed waived. The position of the Parsons is that the Bank, as the holder of the jury waiver, which is an entitlement to a mode of trial, had an obligation to follow the requirements of Wis. Stat. § 805.01(2) and (3) and demand that mode of trial before the scheduling conference. The Bank did not make that demand before either of the two scheduling conferences in this case and so lost its right to object to the Parsons' jury demand.

The Bank concedes that the Parsons had a statutory right to a jury trial but suggests in a footnote [Br.15,fn6] that the Parsons had no

constitutional right to a jury trial, citing ***Village Food and Liquor Mart v. H&S Petroleum, Inc.***, 2002 WI 92, 254 Wis.2d 478, 647 N.W.2d 177. The Bank says that the Parsons two causes of action, racketeering and negligent hiring, training and supervision were not in existence at the time of the enactment of the Wisconsin Constitution.

Village Food concerned a case under the Unfair Sales Act where there was no statutory right to a jury trial. The supreme court concluded that the Wisconsin Constitution guaranteed the defendant's right to a jury trial in that case because the cause of action created by the Unfair Sales Act was essentially known or recognized at common law as an action at law. Even if the test of ***Village Food*** controlled the Parsons' case, both of the Parsons' causes of action would pass the test because they are both actions at law rather than equity and they were both essentially known or recognized at the common law at the time of the adoption of the Wisconsin Constitution. Racketeering is basically a fraud and conspiracy cause of action. It is a species of "cheating" which was treated by William Blackstone, *Commentaries on the Laws of England*, Book 4, Chapter 12, section 5. Moreover, the elements of a cause of action for fraud are often referred to as elements of the *common law* tort of fraud. Similarly, the

cause of action for negligent hiring, training, and supervision is founded on common law negligence of an employer in regard to the wrongful actions of an employee. Again, that is treated by William Blackstone, *Commentaries on the Laws of England,* Book 1, Chapter 14.

It should be noted that Carol Parson, one of the plaintiffs, did not sign the Promissory Note. She is liable for the debt on the loan under marital property law, but marital property law does not extend to depriving someone of their constitutional right to a jury trial, just because their spouse signs a jury waiver on a loan document. Thus, Carol is entitled to a jury trial, even if the supreme court accepts the Bank's position and decides that Taft is not entitled to a jury trial.

II. THE COURT OF APPEALS' DECISION THAT A JURY WAIVER CLAUSE IN A STANDARD FORM CONTRACT MUST BE SIGNED WITH KNOWLEDGE AND VOLUNTARINESS IS NOT A NOVEL, UNREASONABLE, OR BURDENSOME REQUIREMENT.

Since there was no Wisconsin case law on the "manner prescribed by law" for a pre-litigation jury waiver clause in a contract to be constitutional in Wisconsin, the Parsons urged the court of appeals to follow the precedent in the State of Georgia. The Supreme Court of

Georgia was faced with a similar question to the instant case in the Georgia case of a guarantor who signed a jury waiver clause in a guaranty for a loan. ***Bank S., N.A. v. Howard***, 264 GA 339, 444 S.E.2d 799 (GA 1994). The Georgia Supreme Court held that pre-litigation jury waiver clauses were not enforceable because they were not addressed in the Georgia Constitution and waivers not in the Constitution were ‘‘carefully controlled’’ by statute. *Id.* 444.S.E.2d at 800. The Georgia Supreme Court further stated that both the Constitution and statutes contemplated the ‘‘pendency of litigation’’ before allowing waiver of the right to a jury trial. *Id. See also* ***Zeesell Realty Co. v. Cunningham***, 125 Misc. 444,445, 211 N.Y.S.591,592 (1925) (pre-litigation clause in lease not enforceable because such ‘‘anticipatory provision is not one of the methods expressly defined by statute by which the right to a trial by jury may be waived’’). The Bank also mentions in its brief an additional case from California which states that California does not approve pre-litigation waivers [Br. p.16, fn7]. *See* ***In re County of Orange***, 784 F.3d 520, 529 (9th Cir. 2015). The Wisconsin Constitution and statutes likewise do not provide for waiver of the right to a jury trial prior to litigation, except the

arbitration statutes, Wis. Stat. chapter 788. There is no arbitration clause in the loan documents in this case.

The court of appeals did not address the Georgia case or New York case but simply cited an article in American law reports, Jay M. Zitter, J.D., Annotation, *Contractual jury trial waivers in state civil cases,* 42 A.L.R. 5th 53 (1996), which "identifie[d] a handful of cases in which prelitigation contractual jury waivers were held unenforceable…but identifie[d] numerous cases in which the waiver was held enforceable." [Ap. 211, § 24]. The court of appeals decided to follow the majority and found pre-litigation waivers constitutional in Wisconsin.

The court of appeals then proceeded to outline the requirements for a pre-litigation jury waiver in Wisconsin if it is to be a waiver in "a manner prescribed by law." After reviewing several cases in other jurisdictions, the court of appeals settled on a Wisconsin Supreme Court case on a different topic but where the supreme court considered contractual waiver of a right protected by statute. ***Brunton v. Nuvell Credit Corp,*** 2010 WI 50, 325 Wis.2d 135, 785 N.W. 2d 302. The supreme court had concluded in ***Brunton*** that valid waiver requires that a party has (1) actual knowledge of the right they are waiving, and (2)

intends to give up the right. The court of appeals considered this precedent binding on it in this present case. The court of appeals concluded that the allegations in the Complaint in this case [Ap.223-254] and the sworn evidence contained in the affidavit of Taft Parsons [Ap. 220-222] suggested fraud surrounding the loans in this case, and so there was not knowledge and voluntariness when the contract with the jury waiver clause was signed. [R.Ap. 214, ¶29].

The supreme court precedent in ***Brunton*** regarding contractual waiver of a right protected by statute is the very thing that the Bank opposes in its Brief. Associated claims that the requirements of knowledge and voluntariness for a valid waiver are new and unreasonable burdens and new requirements that the court of appeals put on parties to a contract. The supreme court should reject this argument which flies in the face of both supreme court precedent in ***Brunton*** and general contract law. It also flies in the face of longstanding precedent that a waiver of a constitutional right must be knowing, intelligent, and voluntary. *See* ***Aetna Insurance v. Kennedy***, 301 U.S.389 (1937); ***State v. Klessig***, 211 Wis.2d 194, 564 N.W.2d 716 (WI 1997).

The Bank argues that ***Brunton*** does not apply because that case arose under the Wisconsin Consumer Act whose explicit purpose is to "protect consumers against unfair, deceptive, false, misleading and unconscionable practices by merchants." Wis. Stat. § 421.102(2)(b). Apparently, the Bank believes that if it is a commercial case, rather than a consumer case, and there is not a statute that explicitly protects from such practices, then anything goes! They think there is no requirement that the jury waiver must be knowing and voluntary in a commercial case!

The Bank blithely says this is a commercial case [Br. 22,33], but there is no evidence of that. The loans to the Parsons were signed by Taft as an individual and the loans were guaranteed by mortgages on the Parsons' home. It is not clear that the Wisconsin Consumer Act, Wis. Stat. chapters 421-427, does not apply, as the Bank suggests [Br. 22], but argument on that that is beyond the issue of this appeal.

The Bank's Brief urges the supreme court to follow the Seventh Circuit case of ***IFC Credit Corp. v. United Bus. & indus. Fed Credit Union,*** 512 F.3d 989 (7th Cir. 2008), upon which the trial court relied in this case. The court of appeals declined to follow ***IFC Credit Corp.***, noting that the contract in that case included a clause that affirmatively

chose a bench trial in the federal forum instead of a clause simply waiving a jury trial. Moreover, the court of appeals noted that the ***IFC*** court said that the validity of the clause in that case was controlled by Illinois law. In ***IFC***, the contract was between two commercial entities, the contract explicitly selected Illinois law and an Illinois judicial forum, and the parties explicitly agreed to resolve disputes by a bench trial rather than simply waiving a jury trial. Thus, ***IFC*** is not precedent for the present case. It only interprets Illinois law. Several of the federal cases the Bank cites are also concerned only with Illinois law and are not laying down laws in general for jury waivers.

The Bank's Brief also objects to the court of appeals' use of ***Whirlpool Financial Corp. v. Sevaux***, 866 F. Supp. 1102 (N.D. Ill. 1994) to flesh out the ***Brunton*** requirements. The Bank cites [in Br. 23] the unpublished case of ***AEL Financial LLC v. City Auto Parts of Durham, Inc.***, 2009 WL 2778078, *3, Case No. 08-CV-3490 (N.D. Ill. August 31, 2009 [P.App.00116-00126] as its authority to say that ***Whirlpool*** was "effectively overruled" by ***IFC Credit Corp.*** "Effectively overruled" is certainly a strange new legal category. Moreover, the Bank's arguments do not support its claim. ***IFC Credit*** itself does not

overrule ***Whirlpool***, and ***AEL Financial*** is an unreported case from the district court in the Northern division of Illinois and so cannot "overrule" the Seventh Circuit, even if only "effectively." Moreover, ***AEL Financial*** did not reject the ***Whirlpool*** factors for evaluating knowledge and voluntariness. It simply said that the Seventh Circuit held in ***IFC Credit*** that when a contract was governed by state law, the validity of a jury trial waiver is governed by state law [P.App. 00100]. The relevant state law in both ***IFC Credit Corp*** and ***AEL Financial*** was the Illinois statutes. ***Whirlpool*** is still good law for evaluating whether jury waivers are knowing and voluntary.

The Bank also relies [Br.18] on the unpublished case of ***Cousins Subs Systems, Inc. v. Better Subs Development, Inc.***, No. 09-C-0336, 2011 WL 4585541, (E.D.Wis.September 30, 2011)[Copy at P.App.00138-00149]. ***Cousins Subs*** said that in ***IFC*** "the Seventh Circuit holds that, *where parties understand that they are making a contractual commitment*, the jury waiver is binding." And also "implicitly rejects a finding that jury waivers are unconstitutional." [P.App.00148, Emphasis added]. The defendant in ***Cousins Subs***, against whom the jury waiver was being asserted, was an attorney who "had particular experience and

knowledge respecting the need to read the entire contract, including boilerplate." [P.App.00148]. He worked with financial matters related to franchises, which was the subject of the case. [P.App.00139]. He had been advised in writing ahead of receiving any contracts that the final document would contain a jury waiver clause. [*Id.*] Additionally, there was an extended research period where he received preliminary documents.[P.App.00138-00139]. These are the kind of facts that show "parties understand that they are making a contractual commitment." [P.App.00148].These are also the kind of facts that prevent a particular jury waiver from being unconscionable. In contrast, Taft was given no warning that there would be a jury waiver clause, and he had no "research period" where the documents were discussed with him. ***Cousins Subs*** does not apply to his case.

The Banks's position and the position of the *amicus*, WBA, is that the existence of a contract document with a jury waiver clause and a signature is the only thing that should be necessary to trump a person's constitutional right to a jury trial. In the Bank's view, knowledge and voluntariness are "burdens" and "new requirements" for contracts. Apparently, the Bank would not even allow an argument that is was not

the person's signature on the document. No amount of fraud or deception in procuring the contract is relevant in the Bank's view. Even if a gun had been placed at the head of the signer of the document, the Bank would apparently argue that there should be no jury trial if the document had a jury waiver clause. Such a position is ridiculous.

The Bank argues that if the supreme court permits jury waivers to be challenged under the knowing and voluntary standard, it should assign the burden of proof to the person challenging the jury waiver. However, one of the unpublished federal cases that the Bank cites states: "Most of the federal courts addressing the issue of voluntary and knowing waiver of a jury trial have placed the burden on the party seeking to enforce the waiver." ***Aventa Learning, Inc v. K12, Inc***, No. C10-1022 JLR, 2011 WL 13100747 (W.D. Washington, November 8, 2011). [This opinion is in the Bank's Appendix at 00127-00131, quote is at 00128].

The Bank and WBA also argue that it will make loans more expensive if the knowledge and voluntariness standards are affirmed for jury waivers. [Bank's Br. 34-35; WBA Br. 2,4,12]. Yet, they present no evidence to prove that claim, such as evidence of the cost of loans in Georgia and California, which do not allow pre-litigation jury waivers.

III. THE JURY WAIVER CLAUSE IN THE PROMISSORY NOTE IN THIS CASE WAS UNCONSCIONABLE.

The Bank and WBA argue that the jury waiver clauses have become commonplace [Bank Br.34,36; WBA Br. 2,4,12]. WBA argues that the Promissory Note employed standard language for the jury waiver clause. [WBA Br.12]. However, there is no evidence in the Record to show that all jury waiver clauses use the same language as the jury waiver in this case. One of the things that led the court of appeals to find that this waiver was substantively unconscionable is that it is overbroad. It waives the right to have a jury resolve "*any"* dispute that is "in *any* way related to this document, *any* other related document, or *any* relationship between the borrower and the lender.*"* [P.Ap.00084]. This constitutes "contract terms that are unreasonably favorable" to the Bank. *See* ***Wisconsin Auto Loans, Inc. v. Jones***, 2006 WI 53, ¶32, 290 Wis.2d 514, 714 N.W.2d 155.

The court of appeals found that the procedural context under which Taft signed the jury waiver clause made the clause procedurally unconscionable. The Parsons' have alleged and shown facts that constitute extraordinary, criminal pressure to get Taft to sign the Promissory Note at

issue in this case. At the Bank's insistence that the Parsons take out a Home Equity Loan (HELOC) prior to a construction loan, the Parsons had borrowed $40,000 under the HELOC for the start-up costs in Phase I of the construction of the Stark Street Rowhouses. Taft claims that he was pressured by Aaron Moeser to sign the construction loan "soon," even though he kept telling Moeser that none of the Phase I work he had paid for with the Home Equity loan had been done, and that the construction loan commitment letter had required that Phase I be completed before the construction loan. [Ap. 221,¶12]. Yet, Taft claims Moeser continued to pressure him into agreeing to a date to close on the construction loan "soon" or he would lose the loan. [Ap.221,¶12]. And Taft further claims that at the closing on May 26, 2004, Moeser told him he would lose the construction loan if he did not agree to sign the closing papers "immediately." [Ap.222,¶18].

The Bank's brief [Br. 8] says that Taft's affidavit "conflicts regarding the circumstances of the loan execution." They seem to be trying to suggest that the affidavit is untruthful because of the use of the seemingly conflicting words "soon" in paragraph 12 and the word "immediately" in paragraph 18 to describe the pressure that was put on

Taft to sign the construction loan papers. However, these words apply to two different time periods. While the two different time periods are not stated in the affidavit, they become clear when the affidavit is compared to the Amended Complaint, which uses those same two words – "soon" in paragraph 41 and "immediately" in paragraph 56. [Ap. 230-232]

In the Amended Complaint, paragraph 41 uses the word "soon" when it says that, although the preconstruction activities were not done that were to precede a construction loan under the terms of the construction loan commitment letter, Taft began being pressured by Moeser, as well as by the construction company which had not yet done the pre-construction work, to take out the construction loan "soon." [Ap.230] Next, paragraph 42 [Ap. 230] describes an appraisal conducted in early May 2004 (dated May 4, 2004 in R. 21,Exhibit E). Thus, the pressure to take out the construction loan "soon" came before that appraisal in early May. The following paragraphs in the Amended Complaint, paragraphs 44-55 [Ap.230-232], present allegations of the circumstances surrounding the actual signing of the construction loan papers at the closing on May 26, 2004. Among other things, these paragraphs describe the discrepancies among the loan documents as to the

amount of the loan the Parsons were to receive and the discrepancies between the amount in some of these documents and the amount promised to the Parsons in the loan commitment letter the previous year. After describing these discrepancies, there is the allegation that the Parsons were not given time to review the documents or consult with an attorney. Finally, in paragraph 56, the word "immediately" is used, saying that Moeser, the Bank officer, told Taft that the Bank would withdraw its support for the project if he did not sign the loan documents "immediately." Thus, the Amended Complaint explains the use of the two seemingly contradictory words of "soon" and "immediately" in Taft's affidavit [Ap.220-222].

Both the Amended Complaint and the affidavit show that the Parsons were under pressure for several months to sign the construction loan papers or lose the construction loan .[4] Losing the loan would have

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[4] It is curious why there was this pressure from Moeser for the Parsons to sign the construction loan, even though the Phase I work was not completed. Since Moeser was later indicted in federal court for having a personal stake in the similar 5th Street project, involving the same construction company the Parsons were using but which had done none of the Phase I work for the Parsons, it raises the question whether Moeser wanted the Parsons' loan money made available to the contractor to help fund that other project. When the Bank produces its investigative report on Moeser, which the circuit court ordered the bank to produce in 2014. [R.47], perhaps this question will be answered

meant the Parsons would have lost the $30,000 they had already spent from the HELOC on the preliminary costs of the project, since John Bowles and CCC had not done any of the preliminary work. Moreover, they would have been left with a lien on their house. The only reason the Parsons had borrowed and spent that money from the HELOC was because the Bank's construction loan commitment letter [Ap. 257-58], dated the same day as the HELOC loan commitment letter [Ap. 255-56], made them believe that they would receive a construction loan and so their HELOC loan would be money spent toward the construction of the townhouses. The two loans were tied together.

Taft's freedom was diminished when he signed the Promissory Note with the jury waiver clause, even if he had noticed it. Thus, there could not be a voluntary relinquishment of a known right. The Bank actually engaged in a bait and switch action with the Parsons. The Bank baited them into signing the construction loan documents by giving them the HELOC loan for preconstruction costs, which had no jury waiver clause in its documents, and then the Bank switched to documents with a jury waiver clause for the construction loan. Taft had to sign that document no matter what clauses it contained, if he did not want to lose

the $30,000 for which he was already indebted and for which there was a lien on his house, as well as lose his dream to build the Stark Street Rowhouses.

The Bank's position is that none of this matters, that knowledge and voluntariness are irrelevant burdens and that this kind of procedure is not unconscionable. The supreme court should reject that argument.

IV. THERE WAS NO ARBITRATION CLAUSE IN THE LOAN DOCUMENTS AT ISSUE IN THIS CASE AND THUS ARBITRATION IS NOT ANALOGOUS TO THIS CASE BECAUSE ARBITRATION IS CONTROLLED BY STATUTE.

The Bank has argued that pre-litigation agreements to arbitrate involve the waiver of a jury trial and that arbitration agreements have been approved by Wisconsin courts [Br..22-23]. Arbitration does fall under the provision of the Constitution that ''a jury trial may be waived in the manner prescribed by law.'' Wis. Const. Art I, sec.5. The arbitration statutes, Wis. Stat. chap. 788, are a ''manner prescribed by law.'' However, that is irrelevant in this case because neither of the Parsons ever signed an agreement to arbitrate. There is no arbitration clause in any of the loan documents. Moreover, the regulations for arbitration in chapter

788 do not cover a blanket jury waiver that has nothing to do with arbitration, such as the jury waiver clause in the Promissory Note in this case. Thus, the fact that arbitration is statutorily authorized in Wisconsin does not serve to deprive the Parsons of their constitutional right to a jury trial in this case.

The Bank argues that arbitration clauses take away more rights than a jury waiver clause so the court should approve all jury waiver clauses and make them a matter of preferred public policy. However, while the supreme court has said it is is policy to enforce arbitration clauses *in contracts with arbitration clauses,* the court has never said that jury and bench trials should be abolished and all cases decided by arbitration. Moreover, the difference between arbitration clauses and jury waiver clauses is that a person who signs an arbitration clause has the protection of the arbitration statutes in Wisconsin. A person who signs a jury waiver clause has no protection other than Wis. Stat. § 805.01 and the knowing and voluntary requirements that have been imposed by the court of appeals. The Bank wants the knowing and voluntary protection to be removed by the supreme court. Unless and until the legislature gives statutory protections like the arbitration statutes to people who sign pre-

litigation jury waivers, the supreme court should not take away the knowing and voluntary protection that is standard protection for waivers of constitutional rights and which was recognized by the court of appeals in this case.

IV. THE BANK DID NOT OBJECT TO THE PARSONS' JURY DEMAND IN A TIMELY MANNER.

The Bank argues that it was entitled to rely on the jury waiver clause, which meant there would be no jury trial but a bench trial. However, Wis. Stat. § 805.01(2) and (3) require that a party with an entitlement to a certain mode of trial, whether that be a jury trial or a bench trial, demand that mode prior to the scheduling conference or the entitlement is waived. The Bank had two chances in this case to assert its claimed entitlement to a bench trial, before the first scheduling conference or before the second scheduling conference. It did not assert its claim either time. The court of appeals concluded that the Bank was bound by Wis. Stat. § 805.01 to assert its objection to a jury trial and its claim for a bench trial before the scheduling conference.

Wis. Stat. § 805.01(2) and (3) provides fairness to both parties in litigation. It means that an opposing party who does not want a jury trial

is bound by the same deadline as the party who asserts their constitutional right by making a timely jury demand. It would undermine the justice system and make it appear that courts are allowing attorneys to engage in sharp practices, if a defendant can prevail in a motion to strike plaintiff's jury demand after defendant delayed for 3 years to make this Motion, no matter what kind of documents form the basis for the motion. As the court of appeals concluded, the principles of equitable estoppel, as well as Wis. Stat. § 805.01, preclude the Bank from making its claim for a court trial three years after the original Complaint was filed.

It is interesting to note that this Wis. Stat. § 805.01 addresses the rights of both parties in litigation. The Federal Rules of Civil Procedure, Rules 38 and 39, do not similarly do so. The federal rules address only the procedure for demanding a jury. That is an additional reason why the cases like ***IFC Credit Corp*** and its progeny should not be followed in this case. They were federal cases and there is no federal rule comparable to Wis. Stat. § 805.01 which governs both parties in litigation. The federal rules and cases allow an objection to a jury trial to be made on the eve of trial. Wisconsin law does not permit that.

Moreover, even apart from the requirement in Wis. Stat. § 805.01 that the Bank should have requested a bench trial before one of the scheduling conferences, the CCAP record in this case shows all the other opportunities the Bank had to object to a jury in the three years prior to when the Bank filed its Motion to strike the Parsons jury demand on 5/14/14. [CCAP in ascending order at Ap. 211-219]. The Parsons' position is that, besides waiving its rights because of failure to comply with Wis. Stat. § 801.05, the Bank waived any right it might have had to object to plaintiffs' jury demand by failing to object to a jury trial in the 3 years after the Complaint was filed (1) in any of defendant's own filings, (2) in any of defendant's appearances in court, (3) to any of the scheduling orders which set deadlines for plaintiff to pay the jury fee, or (4) when plaintiffs actually paid the jury fee 16 months before defendant raised an objection to a jury.

The Bank is not a poor, defenseless party to a lawsuit who was proceeding *pro se* for 3 years. The Bank is a large, sophisticated institution which is represented by many able attorneys. Even without the requirements of Wis. Sta. § 805.01(2) and (3), the Bank's had numerous opportunities to object to the Parsons' jury demand. Yet, the Bank voiced

no objection until almost 3 years after plaintiffs first made their jury demand in their Complaint and 16 months after plaintiffs actually paid the jury fee.

In ***Import Alley of Mid-Island, Inc. v. Mid-Island Shopping Plaza, Inc.***, 103 App. Div. 2d 797, 477 N.Y.S. 2d 675 (1984), the court recognized that jury trial waivers in leases were valid under New York statutes, except for personal injury or property damage. However, the court concluded that the landlord waived the jury trial waiver in the lease in that case because the landlord did not assert it until the eve of trial. Similarly, in ***Moskowitz v. Keith Sales Corp.***, 99 N.Y.S. 2d 173 (1948), a landlord delayed asserting a jury waiver clause for 2 years until the case was on the calendar for a jury trial. The court concluded that a jury waiver is not a threat to be used at the landlord's whim and that the landlord had assented to a jury by his delay. The instant case is similar to those two cases. Even apart from its failure to follow the requirements of Wis. Stat. § 805.01, the Bank's delay in claiming a jury waiver should be deemed an abandonment of its claim and an assent to a jury trial.

The Bank claims that the court of appeals' opinion deciding that it should have objected to a jury trial sooner, limited the trial court's ability

to manage its calendar. [Br. 35] However, the Bank's argument puts a trial court in the position of having its calendar completely upset by a three year delay in the assertion that a jury trial was waived by one of the parties. The court of appeals correctly concluded that "[t]o change the mode of trial three years into the case is detrimental not only to the Parsons, but also to the reasonable and efficient administration of a court."

CONCLUSION

For all the reasons stated in this Brief, the Parsons request the supreme court to affirm the court of appeals decision recognizing the Parsons right to a jury trial so that this case can finally return to the circuit court for a jury trial.

The supreme court should conclude that the Bank lost any right it may have had to object to the Parsons' jury demand because the Bank did not claim its right to a bench trial before one of the scheduling conferences in this case, as it was required to do by Wis. Stat. 805.01(2) and (3).

The supreme court should also affirm the court of appeals on the knowing and intelligent standard for evaluating jury waivers in those cases where the drafter and holder of a jury waiver does follow the requirements of Wis. Stat. § 805.01 but there is a dispute about whether the jury waiver applies in the case. The burden of proof should be on the party which claims the waiver.

The supreme court should also affirm the court of appeals that the allegations and sworn statements of pressure and fraud surrounding the Promissory Note and the overbroad language of the waiver make the waiver in this case unconscionable.

Dated this __31st____ day of October, 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is _10,939____ words.

Dated: October __31_____, 2016

Signed:_____/s/_____
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ELECTRONIC COPY CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: October _31_____, 2016

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Signed:_____/s/_____
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(3)(b) and that contains a table of contents.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: October __31_____, 2016.

Signed:_____/s/_____
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STATE OF WISCONSIN
SUPREME COURT

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CAROL PARSONS,
Plaintiffs-Appellants,

District 1
Appeal No. 2014AP002581

v.

Circuit Court Case No.
2011CV008389

ASSOCIATED BANC-CORP.,
Defendant-Respondent-Petitioner,

XYZ INSURANCE COMPANY,
Defendant.

Appeal From The Circuit Court
For Milwaukee County, Wisconsin
Case No. 2011CV008389
The Honorable Jeffrey A. Conen, Presiding

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER ASSOCIATED BANC-CORP.

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ARGUMENT

I. The Parsons Do Not Have a Constitutional Right to a Jury Trial.

The Parsons have intertwined their two remaining claims through the Wisconsin Organized Crime Control Act ("WOCCA"), which does not afford the constitutional right to a jury trial. In *Village Food & Liquor Mart v. H&S Petroleum Inc.*, 2002 WI 92, 254 Wis.2d 478, 647 N.W.2d 177, this Court clarified when a constitutional jury trial right is triggered:

> A party has a ***constitutional*** right to have a ***statutory*** claim tried to a jury when: (1) the cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848 and (2) the action was regarded at law in 1848.

Village Food, 2002 WI 92 at ¶11 (emphasis added). Parsons cannot fit either of their claims within this framework.

Parsons equate a ***statutory*** right to a jury trial with a ***constitutional*** right. However, they cite no authority to make this leap. Because neither of Parsons' claims were known or recognized in 1848, they do not qualify for constitutional protection.

Wisconsin Statute Section 946.83(1), provides the basis for Parsons' "racketeering" claim under WOCCA, which was enacted by the legislature in 1981 in response to "a severe problem posed in this state by the increasing

organization among certain criminal elements and the increasing extent to which criminal activities and funds acquired as a result of criminal activity are being directed to and against the legitimate economy of the state." Wis. Stat. Sec. 946.81. The statute requires far more than common law fraud or conspiracy:

> It is not the intent of the legislature that isolated incidents of misdemeanor conduct be prosecuted under this act, but only an interrelated pattern of criminal activity the motive or effect of which is to derive pecuniary gain.

Id.

To shore up their constitutional claim, Parsons conclude, without any support, that "racketeering is basically a fraud and conspiracy cause of action." (*See* Parsons' Response Brief, p. 29). Claims under WOCCA and RICO[1] are purely creatures of statute and require elements which are well outside common law fraud or conspiracy:

> The fate of any RICO claim turns on the definitions of the terms "pattern," "racketeering activity," and "enterprise."

Michael A. Gardiner, The Enterprise Requirement: Getting to the Heart of Civil RICO, 1988 Wis.L. Rev. 663, 665. Predicate acts asserted may

[1] Case law interpreting the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1964 ("RICO") is persuasive authority for interpreting WOCCA. *State v. Mueller*, 201 Wis.2d 121, 144, 549 N.W.2d 455 (Ct.App. 1996).

certainly root back to common law, but the RICO/WOCCA claim itself does not:

> . . . RICO is designed to remedy injury caused by a pattern of racketeering, and "[c]oncepts such as RICO "enterprise" and "pattern of racketeering activity" were simply ***unknown to common law***.

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 149-50, 107 S.Ct. 2759, 2764, 97 L.Ed.2d 121 (1987), citing *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 348 (3rd Cir. 1986). WOCCA "became effective in 1982 [and] ***is not part of the common law***" for purposes of the survival statute which was enacted in 1849. *Schimpf v. Gerald, Inc.*, 2 F.Supp.2d 1150, 1153 (E.D. Wis. 1998).

Parsons also argue that their claim for negligent hiring, training, and supervision is somehow founded on the common law of negligence of an employer in regard to the wrongful actions of an employee. However, unlike a common law claim of respondeat superior, which requires that the servant acted "within the scope of employment". (*See*, e.g., *Olson v. Connerly*, 156 Wis.2d 488, 498, 457 N.W.2d 479, 483 (1990)), a negligent hiring training and supervision claim arises when the agent has acted ***outside*** the scope:

> [T]he import of the separate cause of action [for negligent hiring] generally arises only when an agent, servant or employee ***steps beyond*** the recognized scope of his employment to commit a tortious injury upon a third party.

Simmons, Inc. v. Pinkerton's, Inc., 762 F.2d 591, 600 (7th Cir. 1985), citing *Tindall v. Enderle*, 162 Ind. App. 524, 320 N.E.2d 764 (3d Dist. 1974)(internal quotations omitted, emphasis added), abrogated on other grounds by *Glickenhaus & Co. v. Household Inter., Inc.* 787 F.3d. 408, N12 (7th Cir. 2015). The negligent hiring, training and supervision claim is not at all derived from common law respondeat superior but presents something completely different.

More importantly, as part of this claim, Parsons must prove an "underlying wrongful act committed by the employee." *Miller v. Wal-Mart Stores, Inc.*, 219 Wis.2d 250, 580 N.W.2d 233 (1998). Parsons have alleged that the "racketeering" activity of Moeser is the "wrongful act". (*See* R.21; Amended Complaint, para. 154, 155; Parsons App. 245-246). Accordingly, the negligent hiring, training, and supervision claim is rooted in and dependent upon the WOCCA claim. Since there is no constitutional right to a trial by jury for WOCCA claims, there should not be the right on negligence claims for allowing WOCCA violations.

II. This Clear, Plain-Language Jury Waiver is not Unconscionable and the Parsons had Months of Opportunity to Seek Review.

Parsons never raised unconscionability in the trial court.[2] Despite this, the Court of Appeals ventured to consider unconscionability because it anticipated that the issue "may well arise during trial. . . ." *Parsons v. Associated Banc Corp.*, 2016 WI.App. 44, ¶32, 370 Wis.2d, 112, 881 N.W.2d 793. This record fails to support a conclusion of "oppression or unfair surprise," which is an "underlying principle" of unconscionability. *Wisconsin Title Loans, Inc. v. Jones*, 2006 WI 53, ¶32, 290 Wis.2d 514, 533, 714 N.W.2d 155.

The timeline now acknowledged by Parsons demonstrates that the loan execution was not procedurally unconscionable. In August, 2003, Parsons received commitment letters which conditioned the loan upon signing "State Financial Bank's loan forms." (R.21, Ex. B and C, Parsons App. 256, 258). Parsons now claim that Taft was told before May 4, 2004, that the construction loan needed to be completed "soon." (*See* Parsons Response Brief, p. 41). Then, weeks went by before the Parsons attended a

[2] The party seeking to invalidate the contractual provision "has the burden of proving facts that justify a court's reaching the legal conclusion that the provision is invalid." *Wisconsin Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶3, 290 Wis.2d 514, 714 N.W.2d 155 (footnote omitted).

closing on May 23, 2004, when Taft Parsons was advised that the documents needed to be signed "immediately." (*See* Parsons Response Brief, p. 42).

This was not a situation in which the Parsons were unexpectedly pressured to sign documents on a moment's notice. By Parsons' own admission, this evolved over several months – August 2003 to May 2004. Parsons had ample opportunity to request and review documents, engage counsel, or conduct whatever diligence they deemed necessary.[3]

Taft Parson's affidavit hardly demonstrates "extraordinary, criminal pressure to sign the Promissory Note" (*See* Parsons' Response Brief, p. 39-40). This is simply at odds with the basic factual information in this record – particularly: (a) the extended time period between the August commitment letters and the May closing; and (b) the indication weeks before closing that documents needed to be signed "soon."

With Parsons' newly explained and expanded timeline, the Court of Appeals may not have improperly focused only on the "relevant procedural

[3] Parsons construct a straw man, suggesting that under Associated's argument, even if a gun was placed at the head of the signor, a jury trial waiver in the document would be enforceable. This is ridiculous. Associated seeks to preserve existing rules of contract interpretation. To demonstrate duress, the party must show it has been the victim of a wrongful act or threat which deprives the party of unfettered will. *Wurtz v. Fleischman*, 97 Wis.2d 100, 109, 293 N.W.2d 155 (1980). While this certainly applies to Parsons' "gun to the head" scenario, it does not when a party acknowledges that it entered into the deal "with the hope of obtaining a gain" as the Parsons have done. *Id.*

context [] ***when Taft signed*** the Promissory Note with the waiver clause." *Parsons*, 2016 WI App. 44 at ¶35. The Court of Appeals concluded on Taft's affidavit that he was blindsided at the closing table: "According to the evidence Taft has presented (the affidavit), when the thirty pages of documents were presented to him, his objections were met with threats from Moeser to pull the construction loan and leave the Parsons with tremendous debt." *Parsons,* 2016 WI App. 44 at ¶ 35 (emphasis added). The months and weeks leading to the closing show there was no "unfair surprise."

While the trial court did not expressly explore unconscionability – it considered the entire scope of the transaction, and applied recognized presumptions surrounding the execution: "Wisconsin courts presume that a party to a contract had knowledge of it and consented to its terms [and that] a person is presumed to know those things which reasonable diligence on his part would bring to his attention." (R.45, P.App.48).

III. The Parsons Fail to Reconcile Their Position with Existing Wisconsin Public Policy That Encourages Arbitration Clauses.

There is no dispute that the jury waiver trial clause here is not an agreement to arbitrate. This fact does not distinguish Wisconsin's often stated public policy of ***encouraging*** parties to select a method of dispute resolution – arbitration – that undisputedly waives far ***more*** than the right to

a jury trial. When a party signs a contract with an arbitration clause, it waives not only the right to a jury trial, but also the right a trial before a Wisconsin tribunal, the right to discovery, the right to protection under Wisconsin Civil Procedure rules, and, very significantly, the right to appeal. It is undisputed that this Court has never imposed a "knowing and voluntary" requirement with respect to arbitration clauses. Parsons attempt to distinguish this policy on the grounds that a party subject to an arbitration clause has the protection of the arbitration statutes is not compelling – particularly from a party that would continue to enjoy the protection of discovery, civil procedure, and appeal.

IV. Parsons Fail to Distinguish – or Even Mention – this Court's Holding in *RAO v. WMA Securities, Inc*.

This Court has already determined outside of the context of a pre-litigation contractual waiver that a party's "waiver" of the right to a trial by jury "need not be a 'waiver' in the strictest sense of that word, that is, an 'intentional relinquishment of a known right.'" *RAO v. WMA Securities, Inc.*, 2008 WI 73, ¶22, 310 Wis.2d 623, 634, 752 N.W.2d 220. In *RAO*, the Court recognized that a party can certainly lose the constitutional right to a trial by jury by failing to timely assert the right or pay the jury fee, even though such actions "plainly [do] not evince the intent to relinquish a right

known. . . ." *Id.* at ¶29. "This form of 'waiver' is more akin to 'forfeiture' than to 'waiver' in its strictest sense as an intentional relinquishment of a known right." *Id.* at ¶24.

Parsons point to *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, 325 Wis.2d 135, 785 N.W.2d 302, to extend a "knowing and voluntary" requirement to the jury trial waiver. That case is distinguishable. In *Brunton*, the claim was asserted by the consumer, and was subject to the Wisconsin Consumer Act's ("WCA") venue rules. *Id.* at ¶23. The WCA provides that its terms are to be "liberally construed and applied to promote their underlying purposes and policies." *Id.* at ¶26, citing Wisconsin Statute Section 421.102. This was the backdrop for the Court's entire decision:

> ***At the heart*** of each of the underlying purposes and policies of the Wisconsin Consumer Act is the ***protection of customers***. Accordingly, we interpret Wis. Stat. Section 421.401(2) in light of the stated legislative purpose of protecting customers.

Brunton, 2010 WI 50 at ¶26 (internal citations omitted, emphasis added).

Within these constraints, the Court determined that the "waiver" of venue in consumer actions truly required the intentional relinquishment of a known right. *Id.* at ¶37. However, our existing cases interpreting the constitutional right to a civil jury trial, and existing civil rules as reflected in *RAO v. WMA Securities*, do not require "waiver" in the "strictest sense."

RAO, 2008 WI 73 ¶22. The Parsons want to extend the *Brunton* holding without the link to the heart of the purposes and policies of the WCA.

If a party can lose the right to a jury trial through procedural misstep, how is it inconsistent to allow parties to agree to relinquish that right through operation of contract? In addition, should the court discard well-established rules of contract interpretation and enforcement? Application of the Seventh Circuit's approach in *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989 (7th Cir. 2008) requires no new law in Wisconsin, but only application of existing rules of contract interpretation and the permissible waiver or forfeiture of rights under Article I, Section 5 of the Constituion.

V. Carol Parsons Cannot Avoid the Jury Trial Waiver.

The trial court properly recognized that the Parsons' argument that Carol Parsons was not subject to the jury waiver was "superficial." (R.45; P.App.49). The court may decline to address issues for which a party has provided a lack of analysis in the trial court and on appeal. *Chernetski v. American Family Mut. Ins. Co.*, 183 Wis.2d 68, 79-80, 515 N.W.2d 283, 288 (Ct. App. 1994).

While no Wisconsin court has specifically addressed this issue, other states have held that parties in privity are subject to an arbitration clause even if they have not signed the operative document. (*See*, e.g. *Sanford v. Castleton Health Care Center, LLC*, 813 N.E.2d 411, 420 (Ind.App. 2004)(estate bound to arbitration clause as party in privity with party to contract)). In Wisconsin, contractual privity "implies a connection, mutuality of will, and interaction of parties." *Wrenshall State Bank v. Shutt*, 202 Wis. 281, 232 N.W.2d 530 (1930). Privity may exist where one has such an identification or alignment of interest with a named party as to represent the same legal right which was litigated. (*See*, e.g. *Paige K.B. ex. rel. Peterson v. Steven G.B.*, 226 Wis.2d 210, 226-7, 594 N.W.2d 370 (1999)).

For example, privity between husband and wife has been found to support continuity for adverse possession. *Mielke v. Dodge*, 135 Wis. 388, 115 N.W. 1099 (1908). It is significant that the privity between Taft and Carol Parsons arises not simply because of their relationship as husband and wife, but as parties intending to borrow funds together, develop property together, and derive a profit together. (*See* generally, R.21; Amended Complaint, para. 10, 44; P.App.53, 58-59). In fact, they have now elected to present claims together and are each bound by the clear terms of the waiver.

VI. Wisconsin Statute Section 805.01 Does Not Revive the Right to a Jury Trial When a Party is Not Entitled to One.

Given Section 805.01 is a civil procedure rule established by the Courts and not the Legislature (*See RAO*, 2008 WI 73 at ¶35), this Court is perfectly positioned to provide further guidance on its application in the trial court's management of its docket and parties' scheduling of their case.

On a routine basis, trial court judges at the scheduling conference inquire whether a jury demand has been made, and if not, provide the parties a deadline to make such demand by paying the jury fee, all as part of the scheduling order. (*See*, e.g. Washington County Circuit Court Rules Sec. IE (requiring jury demand prior to or at time of scheduling conference "or at such time as ordered by the court.")). According to the Court of Appeals, this would be reversible error. If the trial court can set a date after the scheduling conference to make such an election, then the Court of Appeals should not have reversed the trial court's decision to hear Associated's jury objection after the conclusion of the scheduling conference. This Court should allow trial courts to manage their dockets in this respect, including deciding motions on the mode of trial. Associated believes the trial court is best situated on a case by case basis to do this, without the "use it or lose it" interpretation adopted by the Court of Appeals.

This Court can further clarify Section 805.01 by expressly stating what Wisconsin civil procedure already implies: bench trials are the default if a jury is not requested by an entitled party or is otherwise waived. Section 805.01 does not provide what happens if a party does not elect a jury, or otherwise waives the right to jury, and the other party fails to make any election. By implication, if neither party requests a jury trial or a trial to the court, the result is a trial to the court. However, the Court of Appeals made the exception the rule, deciding that if a party waives the right to a jury but the other party fails to demand trial by the court, the party waiving the right to a jury can reinstate its right, by electing as set forth in Section 805.01, and paying the fee.

While this case involves a contractual jury waiver, and not a waiver by rule or stipulation, Section 805.01 only allows an ***entitled*** party to demand the election mode of trial. Because of the contractual waiver, Parsons were ***not*** entitled. Even if Associated did not demand trial by the court before the scheduling conference, then neither party would be entitled to elect the desired trial mode, and the bench trial default would apply.

CONCLUSION

Associated Banc-Corp. respectfully requests that the Court reverse the decision of the Court of Appeals, affirm the trial court's decision and remand this matter for a court trial.

Respectfully submitted this 16th day of November, 2016,

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CERTIFICATION – FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (d) for a brief and appendix produced with a proportional serif font. The length of this brief is 2963 words.

Dated at Menomonee Falls, Wisconsin this 16th day of November, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirement of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Menomonee Falls, Wisconsin, this 16th day of November, 2016.

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SUPREME COURT OF WISCONSIN

TAFT PARSONS, JR., and
CAROL PARSONS,

Plaintiffs-Appellants, Respondent,

Appeal No.
2014AP002581

vs.

ASSOCIATED BANC-CORP,

Defendant-Respondent, Petitioner.

XYZ INSURANCE COMPANY,
Defendant.

Appeal From The Circuit Court
For Milwaukee County, Wisconsin
Case No. 2011CV008389
The Honorable Jeffrey A. Conen, Presiding

BRIEF OF WISCONSIN BANKERS ASSOCIATION AS *AMICUS CURIAE*

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INTRODUCTION

The Wisconsin Bankers Association ("WBA") appears in this appeal to urge the Supreme Court to overturn the decision of the Court of Appeals ("Decision"). The Decision holds that a typical jury waiver provision found in commercial loan agreements (the actual waiver in this case is called the "Waiver" here) was procedurally and substantively unconscionable. This, despite the Waiver being mutual and clear on its face about the scope of the Waiver, and despite being agreed to by a sophisticated, well-educated engineer and commercial property developer ("Borrower") who could choose to walk away from the loan if he did not like the terms, and a bank willing to put funds at risk on terms that included the Waiver. The decision also imposes on Bank the burden of proving Borrower knowingly and voluntarily waived his right to a jury, without providing clear guidance as to what constitutes an enforceable "knowing and voluntary" waiver, and in contravention of the strong commitment in Wisconsin law to freedom of contract and the presumption that parties to a contract have knowledge of and agree to its content. The Decision calls into question the enforceability of jury waivers in current commercial loan agreements, which were priced and entered into by lenders with the expectation that the parties were mutually choosing to have their disputes

decided by a judge, thereby reducing litigation costs and enhancing efficiency in resolving disputes. These waivers appear in commercial loan agreements throughout Wisconsin, and the Decision is contrary to the expectations of parties to such loan agreements as they are interpreted under well-settled Wisconsin contract law.

In the future, given the lack of guidance in the Decision, lenders face uncertainty regarding how to "show" that a borrower "understood" and had "actual knowledge" of the jury waiver independent of the contract as a whole, and that the waiver was in fact "voluntary." Lenders will be required to take measures that unnecessarily drive up the cost and administrative burden of commercial lending. The Decision also alters the established standards for unconscionability.

WBA disagrees with the Court of Appeals' interpretation of Wisconsin law, and believes that, if allowed to stand, the Decision will result in bad policy and harm to Wisconsin's economy. If the law governing jury waivers in commercial contracts will be different than the law governing contract provisions generally in Wisconsin, WBA believes the Court should provide clarity to contracting parties about what in fact is required for a valid and enforceable jury waiver. WBA agrees with the

Circuit Court on the correct way to analyze these issues, and urges this Court to overturn the decision of the Court of Appeals.

INTEREST OF THE AMICUS CURIAE

WBA is an organization of state and national banks, savings banks and savings and loan associations with offices in Wisconsin. WBA regularly represents the interests of its membership in significant judicial proceedings, including by appearing as *amicus curiae* in appeals before the Wisconsin Supreme Court. Commercial lending is a major part of banks' business and a major driver of the state's economy, and banks regularly make loans to real estate developers and other commercial borrowers which contain jury waivers similar to the Waiver. Commercial lenders and their borrowers negotiate the whole package of terms under which the parties are willing to enter into the arrangement, including loan amount, pricing, information requirements, timeline, collateral, events of default, remedies, and how and where disputes about the contract will be decided. Under well settled Wisconsin law, lenders believe that jury waivers with commercial borrowers are enforceable and regularly include them in their loan contracts. The Decision calls into question waivers already part of commercial lending agreements throughout the state, and creates great

uncertainty for lenders going forward about what is needed for a waiver to be enforceable.

The issues raised in this appeal are highly relevant and of statewide concern to banking interests, and this Court's decision will significantly affect those interests.

STATEMENT OF THE CASE

Jury waivers are very common in commercial transactions. Loans containing jury waivers similar to the Waiver are regularly made to commercial borrowers throughout the state. The relevant facts have been summarized in detail in the Petition, Bank's Brief and Decision, and will not be repeated here at length.

WBA would like to highlight certain facts it believes to be very important. This was not a consumer case. The borrower was a national board certified engineer who owned his own business for decades, and he was seeking almost $800,000 for a sophisticated real estate development project. This is not a case of a homeowner of limited means, who lacks the education, experience or financial ability to defend himself against the disproportionate resources of the bank. The Court, if concerned about the expansion of its holding to consumer lending situations, can clarify that it is

not considering in its decision on this case the use of jury waivers in loans governed by the Wisconsin Consumer Act.

The Waiver itself is important. This is not an ambiguous contract provision, and it is not placed in the promissory note ("Note") in a way to minimize its visibility. Whether in a pre-printed form or not, the Waiver is in all capital letters (the only provision in all capital letters), on the same page as and a little above Borrower's signature. In plain English it says, without qualification, that Borrower and Bank "voluntarily, knowingly, irrevocably waive any right to have a jury participate in any dispute (whether based upon contract or otherwise) between or among the borrower and the lender arising out of or in any way related to this document, any other related document, or any relationship between the borrower and the lender." It is crystal clear under the Waiver language that no dispute will be decided by a jury. The Note also contains a statement immediately above the signature line that Borrower "read and understood" the note, and specifically "agrees to the terms of the note." This case does not involve a confusing, overly-legal, tiny-type provision in a document signed by an unsophisticated consumer. This case involves a clear, plain-English waiver of the right to a jury (which the Wisconsin constitution specifically allows)

by an educated, sophisticated borrower for a complex, expensive development project.

Borrower had the right to refuse to enter into the loan agreement if he did not like the package of terms offered by Bank. Freedom of contract means freedom *not* to enter into the contract, which is a fundamental right held by both Borrower and Bank. The fact that Borrower's project was in trouble, and that no progress had been made (pointed out by the Court of Appeals), is not relevant. He was a sophisticated, educated businessman, and if he did not like what was being offered or the timing Bank required, he could have demanded time to review the documents, and if denied, could have simply said "no" or looked for another lender.

Finally, Borrower was not waiving his right to trial, as he would have under an arbitration clause (which *is* presumed to be enforceable). In the name of a more efficient and cheaper resolution of disputes for both parties, he and Bank simply agreed to litigate disputes to a trained, experienced, qualified judge instead of in front of a jury.

The trial court found the Waiver is enforceable. The Court of Appeals disagreed, holding that Bank had the burden of proving that Borrower knowingly and voluntarily gave up his rights (which the court decided Bank did not meet), and further that the Waiver was procedurally

and substantively unconscionable. WBA absolutely agrees with Bank that the Decision is not supported under Wisconsin law, and is bad policy. Allowing it to stand will create great ambiguity about what a lender needs to do for a jury waiver to be enforceable.

ARGUMENT AND POLICY CONCERNS

WBA agrees with the decision of the Circuit Court, and with the analysis of law provided by the Circuit Court and Bank with respect to the facts of this case.

I. THIS COURT SHOULD MAKE IT CLEAR THAT UNDER WISCONSIN LAW, PARTIES MAY AGREE BY CONTRACT, BEFORE LITIGATION, TO WAIVE THEIR RIGHT TO TRIAL BY JURY.

The parties and both courts acknowledge that there are no Wisconsin cases deciding whether the right to trial by jury may be waived contractually by the parties prior to litigation. While the Wisconsin Constitution provides for a right to a jury trial, it explicitly states that the parties have the right to waive a jury trial in all cases in the manner prescribed by law. Given this clear constitutional language, and the fact, as discussed in detail by Bank, that Wisconsin encourages efficient resolution of disputes without a jury trial, WBA requests that the Court make it absolutely clear that Wisconsin law allows parties to agree, by contract,

before litigation, to waive their constitutional or statutory right to a trial by jury.

II. A PARTY SEEKING TO ENFORCE A CONTRACTUAL JURY WAIVER SHOULD NOT BE REQUIRED TO PROVE THAT THE WAIVER WAS VOLUNTARY OR SPECIFICALLY NEGOTIATED, OR THAT THE BORROWER HAD "ACTUAL KNOWLEDGE."

WBA agrees with Bank regarding the application of Wisconsin law to this case, and with the authority cited by Bank. It believes the Decision imposes an unfair and unnecessary burden on lenders to prove in the *commercial* lending context that sophisticated borrowers are capable of understanding what it means to waive a jury trial, that they actually read and understood the jury waiver, that the parties specifically negotiated the jury waiver provision, that the borrower was either an attorney or had access to an attorney, and, at least based on the facts recited by the Court of Appeals, that the borrower was under no significant external pressure to get the specific loan closed (which is particularly troubling, as the Decision seems to say that because Borrower's project happened to be in trouble, the fact that Bank imposed a hard deadline on Borrower foreclosed Bank's right to freely contract about the terms under which it would deploy its loan funds).

WBA believes standard Wisconsin contract law principles, founded on freedom of contract, should apply to jury waivers in the commercial lending context. These have been enumerated by Bank: parties to a contract are presumed to have knowledge of the contents of a contract and to have consented to its terms; are presumed to know things that reasonable diligence would reveal; have the right to govern their own affairs; and have the right to decide what they want in their contracts without courts re-writing them because the court believes (with hindsight) that the contract terms were unfair. In addition, it is a principle of contract law that "a party seeking to invalidate a provision in a contract (here the borrower) has the burden of proving facts that justify a court's reaching the legal conclusion that the provision is invalid." *Wisconsin Auto Title Loans, Inc. v. Jones*, 2006 WI 53, ¶30, 290 Wis.2d 514, 714 N.W.2d 155.

The Court should find that standard Wisconsin contract law principles apply to jury waivers in the commercial lending context, and that Bank does not have the heightened burdens imposed by the Court of Appeals.The Decision is particularly anomalous given that, as demonstrated by Bank, Wisconsin courts consistently presume valid and favor arbitration agreements — which constitute a much greater waiver of rights and necessarily include a waiver of *any* court trial — and given that a

party can accidentally lose its right to a jury trial as a result of a mistake, such as inadvertent failure to meet a scheduling deadline.

III. IF THE COURT DECIDES TO IMPOSE A HEIGHTENED BURDEN ON LENDERS SEEKING TO ENFORCE JURY WAIVERS, IT SHOULD PROVIDE CLEAR GUIDANCE ON WHAT IS REQUIRED TO MEET THAT BURDEN.

The Decision creates great uncertainty about what evidence a lender seeking to enforce a jury waiver would need to provide. The Court of Appeals makes the point that Borrower is not an attorney, and that an engineer is not presumed to understand the law. Does this mean that a jury waiver is invalid if a non-lawyer borrower is unrepresented? Although a boondoggle for lawyers, this would be an enormous change from long-standing freedom of contract principles. If a borrower needs "time" to consult with an attorney or otherwise evaluate the waiver, how much time is acceptable? Many commercial borrowers come to lenders with very tight timelines for closing a loan, and many choose not to be represented. In those cases, what does the lender need to do to have an enforceable waiver?

Similarly, what evidence is required to show the waiver language was specifically negotiated? Should the borrower sign a statement confirming that he discussed and negotiated the waiver with the lender, and if so, how does this provide more certainty than the borrower signing a

promissory note containing a prominent, clear waiver which also says above the signature line that the borrower "read and understood the note?" What if the borrower then claims at trial that he just signed this "we negotiated" statement to get the loan, but that such negotiations did not really happen?

Finally, with respect to relative bargaining power, the Court of Appeals seems to summarily conclude Bank had the upper hand because Borrower's project was in trouble. What are the standards for relative bargaining power in a commercial loan?Here, Borrower was a sophisticated, educated, experienced business owner taking on a complex project, in a state where there are plenty of lenders, and had the right to walk away from the loan if he did not like the terms or the timing. How much more bargaining power is required for a borrower, and how does the bank ascertain it? Is it the case that whenever a prospective borrower may have time pressures due to an external situation, or may be seeking a bank's money in circumstances that make finding another lender difficult, the bank that works with him now is prevented from getting a jury waiver?

WBA believes this Court should remove the ambiguity created by the Decision. If the Court decides to impose a "knowing and voluntary" standard, or some other affirmative subjective burden on the lender seeking

to enforce a jury waiver, the Court should provide very clear guidance on what will be required to meet this subjective standard. The ambiguity created by the Decision not only throws into question jury waivers in thousands of commercial loan documents currently existing in the state (for which many banks presumably cannot meet the standards imposed by the Decision because they did not know the standards applied), but also will result in lenders having no idea what steps they should take in negotiating and closing a loan to end up with a valid and enforceable jury waiver. This will result in increased costs and burdens in commercial lending. Lenders will have to take into account the possibility of having to litigate before a jury, which requires more time and money, when pricing and underwriting commercial loans.

IV. THIS COURT SHOULD CLARIFY THAT THIS JURY WAIVER WAS NOT SUBSTANTIVELY OR PROCEDURALLY UNCONSCIONABLE, OR CLARIFY HOW TO AVOID UNCONSCIONABLENESS.

WBA believes the Waiver, which contains standard language used in commercial lending agreements throughout Wisconsin, is not substantively or procedurally unconscionable, and agrees with the arguments asserted by Bank. As discussed above, WBA does not believe this experienced, educated, business-owning borrower should be deemed a weaker party.

Despite the language of the Court of Appeals, this was not a "contract of adhesion." This was a commercial contract between two sophisticated parties with the ability to protect themselves and freedom to choose not to enter into the contract or take their business elsewhere. That Borrower decided to waive a jury trial in all disputes *was his choice,* and the Waiver was unambiguous about what he was waiving. Although the Waiver is broad, the Wisconsin Constitution clearly gives parties the right to waive a jury trial (which they may decide to do to get the other benefits of the contract).

WBA disagrees with the Court of Appeals' blanket conclusion that Bank gave up nothing of value to get the Waiver. How does the court know what the pricing for the loan would have been without the Waiver *(i.e.* if Bank had to account for a possible expensive and lengthy jury trial in the future), or whether Bank would have made the same underwriting decision? Bank was willing to put its money at risk with this borrower for this project, but under the *package* of terms and conditions stated in the loan documents. Importantly, it also gave up its own right to a jury trial.

WBA agrees with Bank that the Decision changes current Wisconsin law on procedural unconscionability. Now, if a sophisticated commercial borrower is under external pressure to close a loan (and borrowers often

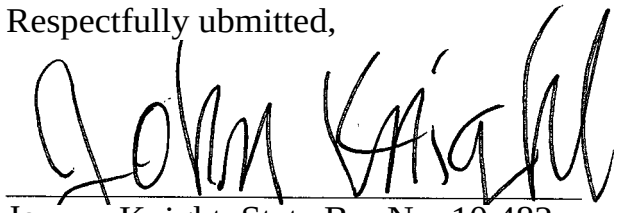
will be, and the pressures may be unknown to the bank) and faces a tight timeline (whether because of the lender's or borrower's requirements, or the nature of the project being funded), it appears the borrower may be able to assert procedural unconscionability. The Court of Appeals stated that Borrower's age, education, intelligence and business acumen made no difference here in assessing whether there was a real and voluntary meeting of the minds, despite being important factors for the analysis under long-standing Wisconsin law. This Court should find that the Waiver was not unconscionable, and if it decides the Waiver is unconscionable, should clarify what a lender needs to do in order for it not to be unconscionable. The same kinds of questions arise from the Court of Appeals' unconscionability analysis as from its subjective "knowing and voluntary" analysis discussed above, with the same adverse consequences to commercial lending in Wisconsin.

CONCLUSION

For the reasons provided herein, WBA respectfully urges this Court to overturn the decision of the Court of Appeals.

Dated this 17th day of October, 2016.

Respectfully ubmitted,



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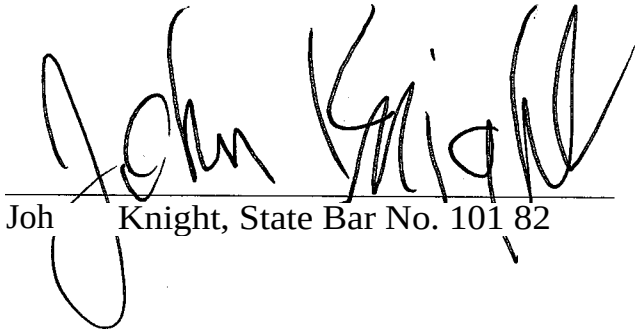
CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using the following font: proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quote and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,968 words.

Dated: October 17, 2016.



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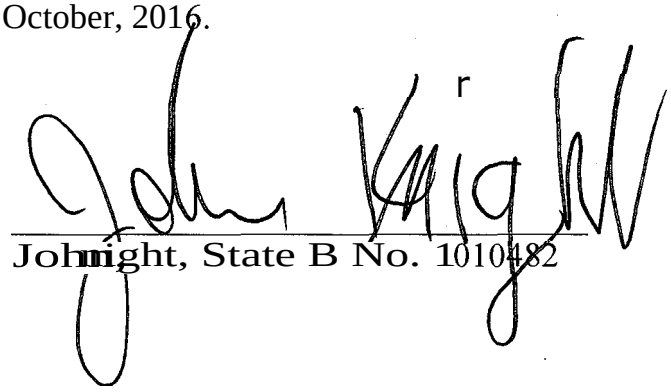

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SUPREME COURT OF WISCONSIN

TAFT PARSONS, JR., and
CAROL PARSONS,

Plaintiffs-Appellants,

v. Appeal No. 2014AP2581

ASSOCIATED BANC-CORP,

Defendant-Respondent-Petitioner,

XYZ INSURANCE COMPANY,
Defendant.

BRIEF OF WISCONSIN ASSOCIATION FOR JUSTICE

Appeal from the Circuit Court of Milwaukee County
Honorable Jeffrey A. Conen Presiding
Circuit Court Case No. 2011CV8389

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INTRODUCTION

The Petitioner, Associated Banc-Corp, and Wisconsin Bankers Association, as amicus curiae, make many appeals to this Court based upon public policy and what they believe the law ought to be, but the Wisconsin Association for Justice points out that the longstanding Wisconsin authority governing the fundamental constitutional right to a jury trial must be applied and should control the outcome in this case. Under the circumstances at issue here, arguments about what the law should or should not be are more properly directed to the Legislature, not this Court.

As we now demonstrate, well-established Wisconsin law shows that the Legislature has been and is vested with the power to determine the circumstances under which the fundamental right to a jury trial may be waived. Further, the law in this State mandates that a litigant waive the fundamental right to a jury trial knowingly and voluntarily and that the doctrines of forfeiture and estoppel clearly apply to contracts as a matter of law.

ARGUMENT

I.

The Wisconsin Constitution Vests the Legislature, Not the Courts, with the Power and Authority to Declare When the Right to a Jury Trial Has Been Waived.

Article I, § 5 of the Wisconsin Constitution provides that the "right of trial by jury shall remain inviolate," provides that the right may be waived as "prescribed by law," and limits the manner in which the Legislature may restrict the right to trial by jury:

> The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. *Provided, however, that the legislature may*, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof.

In other words, with regard to the restrictions and limitations that may be placed on the right to a jury trial, the Wisconsin Constitution speaks to the power and authority of the Legislature, which, of course, exercises plenary power under our constitutional framework.[1] *See, e.g.*, *Libertarian Party v. State*, 199 Wis. 2d 790, 546 N.W.2d 424 (1996) ("Our

[1] In interpreting constitutional provisions, this Court first looks to the text of the provision and the plain meaning of the words in the context that the words are used. *Bd. of Educ. v. Sinclair*, 65 Wis. 2d 179, 182–83, 222 N.W.2d 143 (1974).

legislature has plenary power except where forbidden to act by the Wisconsin Constitution.").

And, indeed, the Legislature has exercised its authority by providing specific circumstances under which the right of trial by jury may be waived. For example, under Wis. Stat. § 805.01, the right to a jury trial is considered waived if a party fails to make a jury demand "at or before the scheduling conference or pretrial conference, whichever is held first." The right may also be waived under § 805.01 "if the parties or their attorneys of record, by written stipulation file[] with the court" consent to trial by the court or when "an oral stipulation [is] made in open court and entered in the record." Section 814.61(4) further provides that a jury fee must be paid to the court within the time permitted for a jury demand and that no jury may be called if the fee is not paid. If a procedurally valid demand for trial by jury has been made, however, the statutes provide that the demand "may not be withdrawn without the consent of the parties." *Id.* § 805.01(3).

Over time, this Court has been called upon to determine whether the right to a jury was waived in a "manner prescribed by law," but each time this Court has considered the issue, the waiver resulted from a party's failure to comply with a duly enacted law. More specifically, this Court has concluded that the statutory requirement that a jury be demanded within a set time is not an unreasonable regulation, *State v. Brittich*, 7 Wis. 2d 353, 359, 96 N.W.2d 337 (1959), that the statutory imposition of a jury fee is permissible, *County of Portage v. Steinpreis*, 104 Wis. 2d 466, 475–76, 312 N.W.2d 731 (1981), and that the right to a

jury trial may be waived as the result of the failure to comply with §§ 804.12(2) (discovery sanctions) and 806.02 (default judgments), *Rao v. WMA Securities, Inc.*, 2008 WI 73, ¶ 55, 310 Wis. 2d 623, 752 N.W.2d 220. In short, none of the parties involved here have cited to a single case in which the waiver of the right to jury trial was expanded through the common law.

Not only is the judicial expansion of jury waivers unprecedented, but this Court has specifically refused to enforce jury-trial waivers as "contractual" in nature:

> *Moreover, a stipulation waiving a jury trial is a procedural stipulation, rather than a contractual one.* "The manner in which the right of a jury is exercised or waived is a matter of procedure." In *Paine v. Chicago & N.W. R. Co.*, this court reaffirmed the rule that procedural stipulations "are always understood to have reference to the trial then pending, and not as stipulations which shall bind at any future trial." More recently, we have held that procedural stipulations "have vitality only within the context of the litigation for which they were entered into."

Tesky v. Tesky, 110 Wis. 2d 205, 327 N.W.2d 706 (1983) (emphasis added; internal citations omitted). Indeed, no positive law allows for the right to a trial by jury to be waived as part of a standard form adhesion contract, and this Court has never found such a restriction, if it existed, to be reasonable.

Ultimately, it is and has been the Legislature's prerogative to determine the limited circumstances under which the fundamental right to a jury trial may be waived, and if the Legislature sees fit to authorize contractual jury

waivers—as it has done in the context of arbitration provisions, *see* § 788.01, for example—it is certainly entitled to do so, subject to constitutional scrutiny. But absent any other direction from the Legislature, it is neither this Court's duty nor obligation to enforce private restrictions on access to jury trials in this State. Instead, where, as here, a procedurally proper jury demand has been made, this Court should recognize that the demand "may not be withdrawn without the consent of the parties," *see* § 805.01(3), and the Court should enforce the right to trial by jury.

II.

Wisconsin Law Mandates That Any Jury-Trial Waiver Permitted at Law Be Made Knowingly and Voluntarily.

Secured by the Wisconsin Constitution alongside the inherent rights to equal treatment and life, liberty, and the pursuit of happiness, the prohibition against slavery, and the right to free speech, the right to trial by jury in civil and criminal cases is one of the hallmarks of our democracy. *See* WI Const., Article I, §§ 1–7. As a result, Wisconsin courts have recognized that "[t]he right to a jury trial is a fundamental right." *State v. Anderson*, 2002 WI 7, ¶ 23, 249 Wis. 2d 586, 638 N.W.2d 301 (citing *State v. Villarreal*, 153 Wis. 2d 323, 326, 450 N.W.2d 519 (Ct. App. 1989)).

For important constitutional rights like the right to a jury trial, the prevailing rule of law is that such a right cannot be lost unless it has been knowingly and voluntarily relinquished. *See State v. Ndina*, 2009 WI 21, ¶ 31, 315 Wis.

2d 653, 761 N.W.2d 612 (2009); *Anderson*, 2002 WI 7, ¶ 23. The prevailing Wisconsin rule appropriately recognizes the significance of "fundamental rights"[2] as well as the established legal principle that a "waiver" may only result from the "intentional relinquishment or abandonment of a known right or privilege." *Anderson*, 2002 WI 7, ¶ 23; *see also* Black's Law Dictionary 1611 (8th ed. 2004) (definition of "waiver" recognizes that "[t]he party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it").

In the criminal context, based on the "recognition that a jury trial involves a fundamental right," this Court has mandated the "use of a personal colloquy in *every* case where a criminal defendant seeks to waive his or her right to a jury trial." *Anderson*, 2002 WI 7, ¶ 23 (emphasis added). Indeed, this Court has found that "[a] colloquy is the clearest means of determining that the defendant is knowingly, intelligently, and voluntarily waiving his right to a jury trial, and a

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[2] This Court in *Ndina* reasoned as follows:

> In contrast, some rights are not lost by a counsel's or a litigant's mere failure to register an objection at trial. These rights are so important to a fair trial that courts have stated that the right is not lost unless the defendant knowingly relinquishes the right. As the court explained in *State v. Huebner*, . . . "a criminal defendant has certain fundamental constitutional rights that may only be waived personally and expressly," including "the right to the assistance of counsel, the right to refrain from self-incrimination, and the right to have a trial by jury. . . . Such rights cannot be forfeited by mere failure to object."

2009 WI 21, ¶ 31.

colloquy documents the valid waiver for postconviction motions and appellate proceedings." *Id.* To prove a valid waiver, circuit courts are required to conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; (2) was aware of the nature of a jury trial, such that it consists of a panel of 12 people that must agree on all elements of the crime charged; (3) was aware of the nature of a court trial, such that the judge will make a decision on whether or not he or she is guilty of the crime charged; and (4) had enough time to discuss this decision with his or her attorney. *Id.* ¶ 24. "If the circuit court fails to conduct a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver . . . ." *Id.* In short, the law recognizes that, for a waiver of the right to trial by jury to be enforced, the waiver must have been made knowingly, intelligently, and voluntarily. *Id.*

Like the fundamental right to a jury trial in criminal cases, the Wisconsin Constitution preserves the fundamental right to a jury trial in civil cases, *see* WI Const., Article I, §§ 5 & 7, and considering the magnitude of the rights involved, the same principles must be applied if a jury waiver is to be enforced in either the criminal or civil context. In other words, for a waiver to be valid under prevailing law, the party seeking to enforce the waiver must be able to prove that the waiver was the product of a deliberate, intelligent, and calculated decision made by the parties.

In our view, should this Court sanction the use of a contractual jury-trial waiver in this State, the Court of Appeals applied the proper standard and reached the

appropriate conclusion in this case: Jury-trial waivers must be made based on knowing and voluntary decisions, and not procured through the use of contractual provisions buried in standard form adhesion contracts.

III.

Wisconsin Law Has Long Recognized That Contracts Are Subject to the Doctrines of Forfeiture and Estoppel.

The Petitioner argues that the Court of Appeals improperly interpreted § 805.01(3) with respect to its application of forfeiture and estoppel principles to this matter, but we note that Wisconsin law clearly recognizes that parties may forfeit or be equitably estopped from enforcing contractual rights.

Take, for example, the situation involving insurance contracts. As Wisconsin law recognizes, an insured may forfeit its rights to coverage based on a failure to timely provide notice to an insurer, and the insurer may be equitably estopped from attempting to enforce the forfeiture if it has proceeded on a different track. *See generally Maxwell v. Hartford Union High Sch. Dist.*, 2012 WI 58, 341 Wis. 2d 238, 814 N.W.2d 484 (extensive discussion of principles of forfeiture and estoppel as applied to insurance contracts). In other words, there is no question that, under existing Wisconsin law, the doctrines of forfeiture and estoppel apply in the context of contract rights.

Consequently, whether by virtue of § 805.01(3) or under the generally prevailing principles of contract law, the Court of Appeals was correct to apply the doctrines of forfeiture and estoppel in this matter.

CONCLUSION

The Court of Appeals improvidently concluded that contractual jury-trial waivers are enforceable in Wisconsin, and because such a determination must come from the Legislature, not the Courts, the decision should be overturned.

Dated this 11th day of November, 2016.

WISCONSIN ASSOCIATION FOR JUSTICE

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Dated: November 10, 2016

By 

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