

NO. A09-876

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State of Minnesota  
**In Court of Appeals**

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Jeffrey M. Schoenwetter,

*Appellant,*

v.

BankCherokee, a Minnesota corporation,

*Respondent.*

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REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF  
APPELLANT JEFFREY M. SCHOENWETTER

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Appellant Jeffrey M. Schoenwetter submits this reply brief in further support of his appeal.

### INTRODUCTION

The district court granted Respondent's motion for summary judgment because it did not believe Respondent obtained Schoenwetter's personal guaranty through fraud. In doing so, it overlooked strong circumstantial evidence presented by Schoenwetter that he was defrauded. The district court also improperly weighed Schoenwetter's credibility and failed to make all inferences in his favor as the nonmoving party. Respondent, not surprisingly, agrees with the district court's determinations. On appeal, Schoenwetter seeks remand for a jury trial on the factual issues that were decided at summary judgment.

In addition, Schoenwetter challenges Respondent's assertion that Minn. Stat. § 513.33 applies to affirmative defenses. This position is not supported by the law, nor is it consistent with the purpose of the statute. Schoenwetter also challenges Respondent's arguments on the issue of promissory estoppel. Schoenwetter's oral agreement with Respondent to forbear collection is not directly contradicted by the purported guaranty. And promissory estoppel claims are not barred by Minn. Stat. § 513.33. Finally, on remand, it is appropriate to allow Schoenwetter's requested discovery regarding the FDIC's investigation of BankCherokee in order for Schoenwetter to further support his defenses.

## ARGUMENT

### I. THE TRIAL COURT INAPPROPRIATELY MADE ITS OWN CREDIBILITY DETERMINATION AND FAILED TO CONSTRUE ISSUES OF MATERIAL FACT IN FAVOR OF SCHOENWETTER ON THE QUESTION OF FRAUD IN THE EXECUTION.

Respondent, and the trial court, inappropriately rely on a single fact in concluding Schoenwetter was not defrauded. That fact is the signature block of the disputed guaranty. The signature block reads:

GUARANTOR

\_\_\_\_\_  
Jeffrey M. Schoenwetter  
Individually

Schoenwetter concedes this is a bad fact for him. In isolation, this fact may represent a “strong ‘wall of evidence’” for Schoenwetter to overcome. *See McCall v. Bushnell*, 42 N.W. 545, 546 (Minn. 1889). But the disputed guaranty cannot be viewed in a vacuum because it does not take into account the sworn testimony of Schoenwetter that the disputed guaranty is *not* the same document he reviewed and agreed to sign and Respondent’s representative twice assuring him he was signing a corporate guaranty.

At summary judgment, Schoenwetter presented clear and satisfactory evidence of his defense of fraud in the execution. Moreover, as the non-movant, all disputed facts—including whether Respondent’s agents switched documents—were to be construed in Schoenwetter’s favor. Instead, the trial court made an inappropriate credibility determination and rejected Schoenwetter’s sworn testimony.

Schoenwetter unequivocally testified BankCherokee defrauded him:

The renewal note and guarant[y] attached to BankCherokee's Summons and Complaint are not the same documents that I agreed to sign. I recall reviewing a guarant[y] that made me liable in my corporate capacity only, as Chief Manager of Insignia. Mr. Elden must have switched the loan documents I reviewed with different set of documents.

(APP-249.) At his deposition, Schoenwetter further testified under oath regarding how Respondent may have defrauded him:

But somebody either inadvertently hit the print button or somebody, by perhaps mistake, shoved this into the loan documents. Or we can be a little more evil and we can think that someone switched the corporate guaranty and put in [a] personal one. Or that somebody typed the word individual under my signature line. Or if you ask me to go down the evil trail, I have to sit here and go, did somebody intend to hook me up to this bad deal, and did they do it with intent to defraud me and malice and all those evil things. You'd have to ask the person that put the guaranty, in this form, into my loan package. \* \* \* But I'm telling you for the umpteenth time, and I want to be respectful, a personal obligation of Jeff [Schoenwetter] wasn't part of this deal.

(APP-180 to APP-181.)

Respondent attempts to characterize Schoenwetter's sworn testimony as a "bald-faced speculative claim" and "inadmissible speculation." Significantly, though, Respondent failed to submit anything in the record rebutting Schoenwetter's repeated assertions and sworn testimony that BankCherokee defrauded him. Respondent could have submitted unequivocal affidavits from its representatives refuting Schoenwetter's sworn testimony that critical pages of the disputed guaranty had been switched, but it failed to do so.

Respondent wants this Court to ignore un rebutted, sworn testimony and look at the the disputed guaranty in isolation. Schoenwetter, on the other hand, would like a jury to weigh his credibility after hearing all of the pertinent facts and evidence.

**A. Under any Substantive Evidentiary Standard of Proof, Schoenwetter Presented Facts that Entitle him to Jury Trial on the Merits.**

Respondent incorrectly relies on *Minneapolis, St. Paul & Saulte Ste. Marie Ry. Co. v. Chisolm*, 57 N.W. 63 (Minn. 1893) for the proposition that evidence of fraud in the execution must be “clear and convincing” at the summary judgment stage of proceedings. (Respondent’s Br. p. 15.) Respondent is mistaken for several reasons. First, the *Chisolm* case applies evidentiary standards of “clear and satisfactory” and “clear and persuasive,” *not* a “clear and convincing” standard as stated by Respondent. *Id.* at 64. Second, the evidentiary standard applied in the *Chisolm* case was applied *after a full trial* and *not* at the summary judgment stage of proceedings. *Id.* at 64. And third, the *Chisolm* case was decided over 100 years ago, before the modern rules of civil procedure were enacted and before the trilogy of cases decided by the U.S. Supreme Court in 1986 which brought the summary judgment standard into the modern era.<sup>1</sup>

The *Chisolm* case is also distinguishable on its face factually. In *Chisolm*, the “recollection of the defendants was evidently not very distinct.” *Id.* Moreover, the defendants “did not read” the contract at issue or require that the contract be read to them, although “they had ample opportunity to read it if they chose.” *Id.* On that record, the

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<sup>1</sup>See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

*Chisolm* court held the “evidence was ample and undisputable.” *Id.* In this case, however, Schoenwetter’s testimony is unequivocal, he did read the contracts at issue, he was assured by two separate representatives of BankCherokee that the guaranty had been changed to a corporate guaranty rather than a personal guaranty, and BankCherokee possessed substantial motive to engage in fraud.

Respondent also cites several other cases for the mistaken proposition that a “clear and convincing” quantum of evidence must be produced at the summary judgment stage of proceedings. (Respondent’s Br. p. 15-16.) However, those cases are all distinguishable on their face as none involve a claim of fraud in the execution. Moreover, none of the cases cited by Respondent applied a “clear and convincing” evidentiary standard at the summary judgment stage of proceedings; rather, with one possible exception, each case cited by Respondent applied the “clear and convincing” evidentiary standard after a full trial.<sup>2</sup>

Neither Appellant nor Respondent cites a controlling Minnesota case deciding the issue of whether a “clear and convincing” or “clear and satisfactory” evidentiary standard is applied to a claim for fraud in the execution at the summary judgment stage of proceedings. This appears to be an open question of law this Court may need to decide if

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<sup>2</sup> *Hous. & Redev. Auth. of City of St. Paul v. Alexander*, 437 N.W.2d 97 (Minn. Ct. App. 1989), cited by Respondent, was a declaratory judgment action. It is unclear whether the court ruled following a motion, or after a full trial by the court. However, the court’s analysis regarding a “clear and convincing” evidentiary standard is *dicta* because it is provided in the context of addressing a claim which had not been raised in the defendant’s answer to the plaintiff’s complaint. *Id.* at 100.

it determines Schoenwetter did not supply the proper quantum of evidence to defeat summary judgment.

Respondent's focus on the standard of proof is a red herring. Regardless of the evidentiary standard of proof at trial, the trial court is required to construe all issues of material fact in favor of the non-movant at the summary judgment stage. Under Minnesota Rule of Civil Procedure 56.03, judgment shall be entered only if there is no genuine issue of material fact. Here, Schoenwetter did not rest on mere averments or denials, but presented specific facts by affidavit and through sworn deposition testimony unequivocally demonstrating genuine issues of disputed material fact for trial. On the other hand, Respondent generally denied Schoenwetter's affidavit testimony related to fraud in the execution, identified no specific contrary facts in the record, and provided no affidavit testimony rebutting Schoenwetter's factual assertions concerning Respondent's acts constituting fraud in the execution.

Respondent relies heavily on the United States Supreme Court case of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) for whether the evidentiary burden of proof should be considered by the trial court at summary judgment. Respondent omits, however, the critical language of the *Anderson* holding, which is controlling in the present case:

**Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions *does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,* whether he is ruling on a**

motion for summary judgment or for a directed verdict. *The evidence of the nonmovant is to be believed*, and all justifiable inferences are to be drawn in his favor.

*Id.* at 255 (citations omitted) (emphasis added). Under this framework—the full holding from *Anderson*—Schoenwetter’s sworn testimony and other evidence presented at summary judgment was sufficient to make out a valid defense of fraud in the execution as a matter of law.

**B. In Addition to Schoenwetter’s Sworn Testimony, Respondent’s Haphazard Handling of Guaranties Demonstrates Why a Reasonable Jury Could Find Fraud in the Execution.**

Respondent incorrectly argues there “is not one e-mail, letter, internal bank document, draft document, note, memorandum or any other writing of any sort” supporting Schoenwetter’s assertion he was to sign a corporate guaranty and not a personal guaranty. Respondent makes this argument because it has no formal or informal policies for handling guaranties, and therefore it knows Schoenwetter cannot present evidence of whether Respondent followed any policies relative to the disputed guaranty. Indeed, there is no “smoking gun” document because Respondent does not generate any documents when a party is released from a personal guaranty. Respondent’s representative, Bob Platzer, admits Respondent regularly releases personal guaranties on a case-by-case basis absent any formal or written policy:

Q. Is there like a manual or a sheet or anything written that describes how that process works in getting somebody out of a personal guaranty?

A. No, there is not.

Q. And so would it just be sort of a case-by-case basis?

A. Uh-huh. Commercial loans are much different than consumer loans. They're very creative, and they need to be very flexible. So for a bank of our size to write a policy to include all of those, it would be virtually impossible. So the flexibility is needed for the people that oversee that area.

(APP-42B to APP-43.) With respect to Schoenwetter's guaranty for the Eden View and Victory Pass properties, Platzer admits Schoenwetter was simply released by virtue of restructuring the debt on those properties:

Q. \* \* \* But it's your testimony that Mr. Sebold separately restructured his agreements on Eden View and Victory Pass?

A. Yes.

Q. And in doing so, Mr. Schoenwetter was released from his personal guaranties in those properties?

A. Correct.

Q. Did he have to do anything or provide anything to be released?

A. No.

(APP-41A.) Based on Platzer's testimony, therefore, Respondent possesses no formal process for releasing guaranties which would create a paper trail, and when Respondent does release guarantors, there is no confirming documentation showing when, who, and what was released.

Under BankCherokee's established *modus operandi*, there obviously would be no "e-mail, letter, internal bank document, draft document, note, memorandum or any other writing of any sort" showing whether Schoenwetter agreed to be a corporate or individual

guarantor of Insignia. However, Schoenwetter did provide undisputed testimony that he never would have agreed to renew the loan at issue if a personal guaranty was part of the deal. Schoenwetter's evidence was sufficient to defeat summary judgment.

1. *An Objective Look at Schoenwetter's Rationale for Paying \$34,325.23 for the 2007 Renewal Creates Genuine Issues of Material Fact.*

According to Respondent, "[e]very writing in this record, including the July 31, 2007 bank loan committee minutes, is one hundred percent consistent with Respondent's position that it was accommodating the settlement between Schoenwetter and his business partner Sebold." However, the 246-page final settlement agreement entered into between Schoenwetter and Sebold is not in the record. Neither the three-page "Mediated Settlement Agreement" that preceded it, nor the 246-page final settlement agreement, contain any requirement that Respondent release Sebold from his personal guaranty on the Insignia line of credit.<sup>3</sup> On this issue, the "Mediated Settlement Agreement" provides only as follows:

Schoenwetter will use reasonable efforts to have Sebold removed as personal guarantor on TNNL and the hotel. Sebold will use reasonable efforts to get Schoenwetter removed as personal guarantor on [Bank]Cherokee debt related to Victory Pass and Eden View.

(SAPP-7.) Respondent points to no evidence in the record supporting its unfounded claim that its actions furthered any settlement agreement between Sebold and

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<sup>3</sup> The "Mediated Settlement Agreement" Respondent put into the record is misleading because on its face it incorporates a document (*i.e.*, the Mediation Agreement) that is not in the record and because it contemplates the subsequent 246-page formal settlement agreement signed by Sebold and Schoenwetter. *See, e.g.*, Minn. R. Evid. 106.

Schoenwetter. Rather, Respondent materially changed the parties' agreement by: releasing Sebold from his personal guaranty securing the Insignia line of credit;<sup>4</sup> making Schoenwetter the only guarantor; surreptitiously changing the guaranty at issue into a personal guaranty from a corporate guaranty; and releasing the Eden View and Victory Pass properties that cross-collateralized the loan. (*See also* APP-135 to APP-136, Schoenwetter Affidavit stating Platzer told him the loans were cross-collateralized.)

Moreover, Respondent totally ignores Schoenwetter's negotiation of the Insignia line of credit with Respondent in which he refused to pay \$34,325.23 to renew the note without something in return. What Schoenwetter demanded in return was a release from personal liability:

Conversations with Bob [Platzer], that he -- he was absolutely keenly aware, crystal clear, that I did not intend to guaranty the debts of Insignia Development. And wherever I could, I was negotiating either releases or not continuing to guaranty renewals. And there was no doubt in my mind that Bob Platzer understood that I did not intend to personally guaranty debts of Insignia.

(APP-173.)

And there's no way I would have paid 30 some thousand dollars in interest, that had accrued over the previous year, if -- if I wasn't being released personally. Just like I was from every other debt I had at BankCherokee.

(APP-177; *see also* APP-182.)

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<sup>4</sup> Respondent's release of Sebold from the Insignia line of credit likely means Schoenwetter was also released. At common law, the release of one joint obligor releases the debt of the other. *See Randahl v. Lindholm*, 89 N.W. 1129 (Minn. 1902); *see also* RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY, §§44 and 54 (Am. Law Inst. Publishers 1996).

In light of the fact Insignia's line of credit was already in default for nearly a full year, and there was little hope of Insignia making payments on the line of credit due to the economic conditions,<sup>5</sup> it is unfathomable to think Schoenwetter would have willingly paid \$34,325.23 to bring interest due, and that he would have accepted sole personal liability on \$400,000 worth of unsecured debt only to default and have that debt called due three months later. (APP-133 to APP-134; APP-356 to APP-357.)

2. *Respondent's Loan Committee Meeting Minutes Conflict with Its Position on Appeal and Create Genuine Issues of Material Fact.*

Although Respondent claims "every writing in this record . . . is one hundred percent consistent with Respondent's position," Respondent overlooks material issues of fact in its own documents. For example, Respondent's July 31, 2007 bank loan committee minutes only state that "[Schoenwetter] *will* guaranty the loan." (Rapp-43.) Notably, these committee notes were drafted before the first attempt to finalize the Insignia line of credit renewal on or about September 12, 2009—at which time Schoenwetter refused to sign the documents presented to him by Platzer specifically because they included a personal guaranty and not a corporate guaranty. (APP-248.) The documents Schoenwetter and Platzer marked up at their September 12, 2009 meeting were the documents created as a result of the July 31, 2007 the loan committee meeting minutes and reflected that, as of July 31, 2007, Respondent was unaware Schoenwetter

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<sup>5</sup> Contrary to Respondent's assertion, Insignia was forced into bankruptcy rather than entering into bankruptcy voluntarily. (APP-142 to APP-144.)

would refuse to renew Insignia's line of credit and pay \$34,325.23, unless his personal guaranty was released.

Significantly, Respondent conducted another loan committee meeting on September 27, 2007, purportedly to "ratif[y] structure changes to [the] relationship" between Insignia and Respondent. (SAPP-4.) This loan committee meeting occurred *after* Eldon brought the disputed guaranty dated September 12, 2007 to Schoenwetter's office for signature. According to Respondent's loan committee meeting minutes, Respondent clarified that "Jeffrey M. Schoenwetter provides a guaranty limited to the outstanding balance of the note." (*Id.*) However, this clarification occurred *after* the purported guaranty was signed. Thus, Respondent's own documents confirm Schoenwetter and Platzer did, in fact, meet subsequent to the July 31, 2007 loan committee meeting in order to mark-up the renewal documents to reflect a *different agreement*, including the terms of a guaranty different than what had previously been approved by Respondent's loan committee. The parties dispute the nature and scope of those changes—principally whether the guaranty would be a personal guaranty or a corporate guaranty. The parties also dispute whether the final disputed guaranty signed by Schoenwetter was supposed to be a corporate or a personal guaranty. But based upon Respondent's September 27, 2007 loan committee meeting minutes, it appears certain Respondent had not fully and finally been advised of, or approved of, the form of disputed guaranty signed by Schoenwetter. This lends further indicia of credibility to Schoenwetter's sworn testimony that he had agreed to, and reviewed, a corporate guaranty.

Because Respondent's loan committee had not yet approved the final form of guaranty to be signed, only Schoenwetter, Platzer and Eldon know the truth about whether the disputed guaranty was supposed to be a corporate guaranty. Significantly, only Schoenwetter has provided sworn testimony on this issue. Platzer and Elden have remained conspicuously silent.

The loan committee meeting minutes from September 27, 2007 also include a note reflecting Insignia's corporate guaranty is to be removed from the note on Victory Pass. When asked about this in his deposition, Platzer again demonstrates the haphazard and unreliable process Respondent employs for releasing guaranties:

A. Ah, "Insignia Development guaranty to be removed."  
So there might have been or there must have been a corporate guaranty from Insignia Development to Victory Pass, that's what that's telling me.

\* \* \*

Q. How does that happen, they just mail it to them and say this is no longer enforceable, you can have it back?

A. It might have been just a technicality here that when Jeff Schoenwetter was removed, the Insignia Development piece was just overlooked as far as a guaranty; and since Sebold no longer had an involvement in Insignia and Jeff no longer had an interest in the other two, it just got overlooked. So it was a[n] after-the-fact type thing.

Q. So it was a situation where somebody noticed this?

A. Uh-huh.

Q. Who would have noticed it?

A. It could have been myself, it could have been somebody internally.

Q. Do you recall noticing it?

A. I could have been—I can't—to be honest with you, I don't remember this request here of the guaranty being removed. Obviously, I approved it. So it was something that had to come up, so—anyway, it was released.

(APP-47.)

Amazingly, Platzer could not remember releasing this corporate guaranty, but he claims to specifically remember not agreeing to a corporate guaranty with respect to the loan at issue. The status quo for Respondent appears to be that guaranties can be released whenever and by whomever. There is no formal review process, no regulatory process, and no process by which the purported guarantor is given notice that a guaranty is released. The release or non-release of guaranties, whom is required to provide guaranties and whether a guaranty must be in one's personal capacity or in a corporate capacity appears to be determined on an *ad hoc* basis—in this case by Platzer who has not submitted an affidavit refuting Schoewnetter's sworn testimony concerning fraud in the execution.

Respondent's January 3, 2007 loan committee meeting minutes, which were presented to the loan committee by Platzer and initialed by Platzer, also demonstrate disputed issues of material fact. These meeting minutes explain: "All notes will be cross collateralized and cross defaulted." (APP-67.) In his deposition, however, Platzer tells a different story:

Q. And at that time [2007], or any time previous to that, had you cross-collateralized all three of the loans at

issue that we've been discussing, the Victory Pass, Eden View and the line of credit?

A. No.

Q. They had never been cross-collateralized?

A. No.

Q. Cross-defaulted?

A. No.

Q. Had never been proposed?

A. No.

(SAPP-3, Platzer dep. tr. at 88:10-22.) (*See also* APP-135-136, Schoenwetter Affidavit stating Platzer told him the loans were cross-collateralized.)

Whether the three loans were cross-collateralized and cross-defaulted is critical to Schoenwetter's defense because, without the real property holdings of Victory Pass and Eden View Estates to support Insignia's line of credit, that line of credit essentially became an unsecured line of credit for which Schoenwetter or his company, Insignia Development, LLC, would be left holding the bag under the terms of a guaranty.

Respondent's position it would not accept a corporate guaranty signed by Schoenwetter is premised on the assumption that Respondent was acting in the same manner as other banks would act, and that it would not engage in "unsafe and unsound" banking practices when it negotiated the renewal of Insignia's line of credit with Schoenwetter. As discussed in Schoenwetter's principal brief, however, Respondent was under tremendous pressure from the FDIC to clear non-accruing loans from its books.

The instant transaction where Platzer, on behalf of Respondent, dropped the cross-collateralization and cross-default conditions demonstrates the poor decision making that lead to Respondent being categorized as one of the twenty banks in the U.S. with the highest volume of non-performing construction loans as well as the FDIC's Cease and Desist Order based on "unsafe and unsound" banking practices.<sup>6</sup> (APP-62 to APP65, APP-50 to APP-61.) Platzer's inconsistent testimony about how all three loans were bundled further undermines any assertion that Respondent was acting in a manner that would be typical of banks following safe and sound banking practices.<sup>7</sup>

In spite of all this, Respondent asks the Court to believe that the record is one hundred percent clear that Schoenwetter agreed to sign the disputed personal guaranty. In reality, Respondent's documentation to prove its claims is equivocal at best, and the record before this Court contains the unrebutted and unequivocal testimony of Schoenwetter that he would not personally guaranty the Insignia line of credit.

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<sup>6</sup> Respondent's restructuring of the Insignia, Victory Pass and Eden View loans at issue resulted in Respondent releasing Schoenwetter's personal guaranty on the Eden View loan, Schoenwetter's personal guaranty on the Victory Pass loan, Sebold's personal guaranty on the Insignia Line of Credit, and Insignia's corporate guaranty on the Victory Pass note. Moreover, Respondent also did not cross-collateralize or cross-default these loans. All of which resulted in Respondent waiving substantial security—because it had a single minded focus and goal of obtaining the renewal of the Insignia line of credit in order to comply with FDIC regulations and in an attempt to improve their reporting status for nonaccruing loans reported to the FDIC.

<sup>7</sup> Further supporting the conclusion that all of the loans and both Schoenwetter and Sebold were considered a package deal, the top of each of the loan committee meeting minutes cited above list each loan separately, even as late as September 27, 2007 after Sebold and Schoenwetter were long separated and Respondent had purportedly released all cross-over guaranties between them and their respective entities. (Rapp-43; APP-67; SAPP-4.)

Respondent may deny it would have agreed to a corporate guaranty in unsworn documents, but as demonstrated by Platzer's own testimony and the loan committee meeting minutes he initialed, the bank does in fact accept corporate guaranties, including guaranties from Insignia—the very entity from which it now disputes it would accept a guaranty.

**C. Schoenwetter Did not Have an Opportunity to Know What he Was Signing because he Was Tricked by Fraud**

Respondent argues, "Appellant does not and cannot credibly argue that somehow a judge or jury could reasonably find that he did not have the opportunity to know what he was signing." Admittedly, Schoenwetter signed a signature block on the disputed guaranty that contains the word "individually." Respondent argues that because of this fact alone, there is no way Respondent could have engaged in fraud. This is an invitation to overlook fraud in one of its most heinous forms, which this Court should not accept.

The factual circumstances alleged by Schoenwetter demonstrate that, even a sophisticated business person with experience signing similar documents, could have been similarly tricked. Schoenwetter testified he reviewed a stack of renewal documents that included a promissory note, a disbursement authorization and cash summary, an agreement to provide insurance, a security agreement, and the disputed guaranty. Schoenwetter further testified that Jeff Eldon then handed him a copy of what he assumed to be the same stack of documents to sign. Schoenwetter signed the copy given to him by Eldon in a mechanical fashion quickly turning the pages to initial them or sign them as required. Schoenwetter did have an opportunity to re-check each document again. But it

was nonetheless reasonable for him to execute the renewal documents in the fashion he did. Eldon was pressuring him to sign the documents quickly. (APP-249, ¶ 11.) Regardless, he was tricked.

The opportunity to inspect is judged on a reasonableness standard. *See Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 31-32 (2nd Cir. 1997). Schoenwetter's execution of the renewal documents was reasonable. The trial court erred by failing to consider the circumstances of the signing following an inspection of what Schoenwetter confirmed was a corporate guaranty and assurances by two representatives of Respondent, and instead applied a bright line test of whether Schoenwetter had an opportunity to discover the fraud after having already inspected the documents moments earlier. (APP-139 at ¶30, APP-249 at ¶¶ 10-12.) These circumstances constitute "excusable ignorance of the contents of the writing signed." *Id.* (citations omitted); *see also Trustees of Twin City Bricklayers v. McArthur Tile*, 351 F.Supp.2d 921 (D. Minn. 2005) (ignorance was excusable because defendant relied on the representations by two of plaintiff's representatives).

In his principal brief, Schoenwetter cites several Minnesota cases directly addressing the level of inspection required by a party signing a contract. The Supreme Court's decision in *Phillips Petrol. Co. v. Roth* is particularly insightful:

Where, after a verbal agreement, one of the parties undertakes to prepare the written contract, and presents it to the other for signature, the presentation of the written instrument for signature is a representation that it is the same in effect as their verbal agreement. If the representation so made is false and fraudulent, the one induced thereby to sign the written contract may defend against the enforcement thereof by the

other, even though he was negligent in signing [the] same without reading it.

242 N.W. 629, 630 (Minn. 1932); *see also Finkelstein v. Henslin*, 188 N.W. 737, 737 (Minn. 1922); *City of Savage v. Varey*, 358 N.W.2d 102, 105 (Minn. Ct. App. 1984).

Schoenwetter also cited the Minnesota Supreme Court's decision in *C. Gotzian & Co. v. Truszinski*, 210 N.W. 880 (Minn. 1926). There, the Supreme Court admitted testimony demonstrating the guarantor was orally informed by the party presenting the guaranty for signature that it would not impose personal liability. *Id.* at 881-82. However, unlike Schoenwetter, the alleged guarantor in *C. Gotzian & Co. v. Truszinski* signed the personal guaranty—which had been mailed to him—without reading it. *Id.* The Supreme Court explained:

A party fraudulently induced to execute a written agreement upon the false and fraudulent representation that it expresses the agreement made can defend against its enforcement by the other contracting party though he was negligent in signing it.

*Id.* at 882. In this case, Schoenwetter was not negligent in signing the disputed guaranty. He reviewed the renewal documents and found them to be satisfactory, then signed what was purported to be a copy of the correct set of documents. But even if Schoenwetter was negligent—because he had an opportunity to know what he was signing—he was assured by both Platzer and Eldon that the documents he was signing contained all of the changes he had agreed to. Respondent has failed to distinguish this line of cases in a meaningful manner generally, and did not attempt to distinguish the facts of the *C. Gotzian & Co. v. Truszinski* at all.

Respondent argues Schoenwetter plead fraud in the execution, not fraud in the inducement. This Court should deny Respondent's invitation to engage in a game of semantics. These two types of fraud are different, but they carry a common theme: one party was tricked (*i.e.*, induced) into executing an instrument through another's fraudulent conduct. Platzer's and Eldon's assurances that the guaranty said one thing, but turned out to be another, fits both the fraudulent inducement and fraud in the execution analyses perfectly.<sup>8</sup> "Fraud is bad, it should not be permitted to go unchecked anywhere, and justice should always be able to penetrate its armor." *DeCrosse v. Armstrong Cork Co.*, 319 N.W.2d 45, 50-51 (Minn. 1982). Accordingly, no matter the variety of fraud, Respondent should not be allowed to escape justice on technicalities. Fraud is fraud; Schoenwetter should have his day in court with a jury assessing the credibility of the parties and all of the circumstances of the case.

**D. Fraud, By its Nature, is Proved Through Circumstantial Evidence Like that Presented By Schoenwetter in this Case.**

Schoenwetter may prove Respondent's fraudulent conduct through circumstantial evidence. In Minnesota, "where the existence of fraud depends upon a variety of circumstances arising from motive, intent, and inference from circumstantial evidence,

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<sup>8</sup> Respondent's brief cites *Trustees of Twin City Bricklayers v. McArthur Tile* as applicable rule of law on fraud in the execution. In *Trustees of Twin City Bricklayers*, the defendant successfully avoided a purported Union contract at trial because he relied on the representations from the other party making his ignorance excusable. 351 F.Supp.2d 921, 925 (D. Minn. 2005). Respondent's position, therefore—that Platzer's and Eldon's representations are inapplicable to Schoenwetter's fraud in the execution defense, is simply not supported by the law. Analysis of a parties' oral representations is not limited to the fraudulent inducement defense.

the court should submit the question to the jury, with proper instructions concerning the tests of fraud.” *Brown v. Bayer*, 91 Minn. 140, 142, 97 N.W. 736, 737 (Minn. 1903) (citations omitted). Indeed, “[w]rongful intent, as a state of mind, is rarely proved directly, *e.g.*, by an admission of bad faith, but is normally established through circumstantial evidence.” *Florenzano v. Olson*, 387 N.W.2d 168 (Minn. 1986); *see also* 4 MINNESOTA PRACTICE SERIES: MINNESOTA JURY INSTRUCTION GUIDES, CIVJIG 12.10 (Thompson West 2006, 5<sup>th</sup> ed.)

In *Cohen v. Appert*, 463 N.W.2d 787 (Minn. Ct. App. 1990), the plaintiff, Cohen, presented strong circumstantial evidence to support a fraud claim against her former attorney, Appert. For example, Cohen presented evidence related to whether \$14,000 was an unreasonably low settlement figure in an underlying suit, and whether she would have accepted this amount absent Appert’s fraudulent conduct. *Id.* at 790. The court correctly concluded the evidence Cohen presented was sufficient to withstand summary judgment on the elements of fraud. *Id.*

As in *Cohen*, Schoenwetter presented circumstantial evidence of fraud relating to the reasonableness of his own conduct in paying \$34,253.23, only to default and become solely personally liable a few months later for over \$400,000. Schoenwetter also presented circumstantial evidence of Respondent’s motive to commit fraud. Among the strongest circumstantial evidence, however, is Schoenwetter’s un rebutted, sworn testimony that he reviewed the renewal documents before signing them, but that his signature is affixed to something different than what he reviewed. Based on this circumstantial evidence, the trial court should have submitted the question to the jury,

with proper instructions concerning the tests of fraud. *See Brown*, 91 Minn. at 142, 97 N.W. at 737.

**II. RESPONDENT HAS NOT IDENTIFIED ANY CONTROLLING AUTHORITY THAT APPLIES MINNESOTA STATUTES § 513.33 TO BAR AFFIRMATIVE DEFENSES.**

Respondent's § 513.33 arguments rest entirely on *Rural Am. Bank of Greenwald v. Herickhoff*, 485 N.W.2d 702 (Minn. 1992). Schoenwetter cited this case to demonstrate § 513.33 does not bar affirmative defenses. Significantly, the Court in *Herickhoff* did not bar affirmative defenses under § 513.33. Rather, the bank sued Ben Herickhoff on a farm loan note and Herickhoff defended on the grounds that the bank failed to apply payments to his loan note in breach of a written agreement directing the priority of certain principal payments. *Id.* at 704. The court ultimately determined that Herickhoff's affirmative breach of contract claim was not barred under § 513.33. *Id.* at 708. Thus, despite Respondent's lengthy recitation of the facts and analysis in the *Herickhoff* case, it does not stand for the proposition that § 513.33 bars affirmative defenses. The opinion makes no mention of such an application, and the factual scenario is entirely distinct from the circumstances before this Court.

A close reading of *Herickhoff* demonstrates § 513.33 was expressly enacted "to protect lenders from having to litigate *claims [not affirmative defenses]* of oral promises to renew agricultural loans." *Id.* at 705 (emphasis added). The Supreme Court specifically explained the statute was designed to protect lenders from lawsuits initiated by farmers:

Numerous lawsuits arose over the bankers' alleged oral promises. The credit agreement statute was passed to prevent the litigation of such claims.

*Id.* at 705-06. Accordingly, both the legislative history and express language of § 513.33 demonstrate the statute only bars affirmative claims and not affirmative defenses.

Notwithstanding whether a personal guaranty falls within § 513.33,<sup>9</sup> Schoenwetter is allowed to plead the affirmative defenses of fraud, mistake, no meeting of the minds, and promissory estoppel because none of these claims, by themselves, attempt to create a new oral credit agreement. Rather, they seek only to avoid an existing written agreement. This is quite distinct from the application of § 513.33 in the *Herickhoff* case.

### **III. SCHOENWETTER'S PROMISSORY ESTOPPEL DEFENSE RELATES TO WHETHER RESPONDENT WOULD ENFORCE A PERSONAL GUARANTY, NOT TO WHETHER ONE EXISTED.**

Platzer admits Schoenwetter's belief that Respondent would not collect on the personal guaranties was not just reasonable, it was "understood."

Q. Did you ever tell Mr. Schoenwetter you wanted to, basically, work with Insignia until this was resolved, that you were going to not collect on their personal guaranties for a period of time?

A. I—I think that was probably understood, since we did not take an action immediately. . . .

(SAPP-2, Platzer dept r. at 75:2-9.) Based on this, and the ten bullet point items listed by Schoenwetter on pages 37-38 of his principal brief, the reasonableness of his reliance

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<sup>9</sup> Schoenwetter relies on the arguments in his moving brief for whether § 513.33 applies to personal guaranties.

should not be a concern at summary judgment. *See Northern Petrochemical Co. v. United States Fire Ins.*, 277 N.W.2d 408, 410 (Minn. 1979) (finding that the applicability of estoppel depends on the facts of each case and is ordinarily a question of fact for the jury).

On the issue of inconsistencies between alleged oral promises and the written terms of the agreement, the purported personal guaranty does not address the timing or the circumstances of collection, and therefore does not contradict Schoenwetter's assertion that Platzer, on behalf of BankCherokee, agreed to forbear collection against Schoenwetter personally. Indeed, the guaranty is silent regarding Respondent's and Platzer's agreement to work with Schoenwetter and not collect under the disputed personal guaranty. Thus, Schoenwetter's promissory estoppel claim assertion that Respondent would work with him though the difficult economic conditions is not contradicted by any documents in the record, and the trial court erred in denying this defense on these grounds.

Furthermore, § 513.33 does not bar a promissory estoppel defense. In *ALC Fin. Corp. v. Harrington*, No. C7-93-2523, 1994 WL284972 \*2 (Minn. Ct. App. June 28, 1994), cited by Respondent, the Minnesota Court of Appeals held that "[a]lthough the credit agreement [was] within Minn. Stat. § 513.33, the court acted within its discretion in allowing evidence of oral conversations to show that ALC should be equitably estopped from enforcing the lease agreement." *Id.* This is consistent with the holdings in *Berg v. Carlstrom*, 347 N.W.2d 809, 812 (Minn. 1984) (equitable estoppel, as a basis for enforcing an agreement, does not violate the statute of frauds) and *Resolution Trust Corp.*

*v. Flanagan*, 821 F.Supp. 572, 574 (D. Minn. 1993) (statute of frauds, Minn. Stat. § 513.33, does not bar application of equitable estoppel to enforce a contract).

**IV. RESPONDENT SHOULD BE COMPELLED TO PRODUCE DOCUMENTS RELATED TO THE FDIC REPORT AND EXAMINATION, AND A CORPORATE REPRESENTATIVE QUALIFIED TO TESTIFY ON FDIC ISSUES.**

Schoenwetter was diligent in discovery. His motion to compel was filed before the end of discovery and very soon after Respondent refused to produce a corporate representative to testify about the FDIC's investigation. Respondent, therefore, never provided the documents requested at that corporate representative deposition. Schoenwetter also moved the court, pursuant to Minn. R. Civ. Pro. 56.06 for a continuance to permit affidavits to be obtained, depositions to be taken, and discovery to be had, in order to present additional facts essential to his defenses.

Respondent's refusal to provide the requested FDIC-related materials and answer related deposition questions is unreasonable. The trial court's refusal to compel discovery was an abuse of discretion. Respondent's motive to engage in fraud, and to make promises that might otherwise not have been made, is critical to Schoenwetter's defenses. For example, if the FDIC required a guaranty on all loan renewals of a certain value or category, it would help to establish that Respondent's conduct was motivated by FDIC reporting requirements. It would also be helpful to know if the FDIC scrutinizes the type of guaranty in order to determine Respondent's statement that a corporate guaranty is "nonsensical." Most telling, if the FDIC had no requirement or position on guaranties, it may undercut Schoenwetter's defenses. Respondent should be compelled,

at least, to tell Schoenwetter what FDIC requirements, if any, relate to guaranties on corporate lines of credit.

Additionally, Respondent makes a bold statement that it was “simply impossible” for a February 2008 FDIC review to put pressure on Bob Platzer only four months earlier. If that was true, Respondent should explain to Schoenwetter and to the Court the time period the FDIC examined in its review. It is not unreasonable—and certainly not impossible—to think the FDIC would look at Respondent’s loan portfolio going back more than four months. If the review only looked at the fourth quarter of 2007 (October through December), then Respondent should share that information. But to boldly assert that it is “impossible,” is not an acceptable response, and it should not have been accepted by the trial court. Doing so was an abuse of discretion largely based on the trial court’s failure to give any credence to Schoenwetter’s fraud in the execution testimony and therefore rejecting any discovery supporting that defense.