

Nos. 95-2808  
95-3618

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

**FIRST BANK (N.A.),**

**Plaintiff-Appellant,**

**v.**

**ERRATA SHEET**

**RUSSELL CLEARY, JOHN MOONEY, SABINA BOSSHARD,  
WILLIAM BOSSHARD, as the Personal Representatives  
of the Estate of John Bosshard, ALEX SKOVER AND  
JOSEPH WEBB,**

**Defendants-Respondents.**

Marilyn L. Graves  
Clerk of Court of Appeals  
231 East, State Capitol  
Madison, WI 53702

Peg Carlson  
Chief Staff Attorney  
119 Martin Luther King Blvd.  
Madison, WI 53703

Court of Appeals District I  
633 W. Wisconsin Ave., #1400  
Milwaukee, WI 53203-1918

Court of Appeals District II  
2727 N. Grandview Blvd.  
Waukesha, WI 53188-1672

Court of Appeals District III  
740 Third Street  
Wausau, WI 54403-5784

Court of Appeals District IV  
119 Martin Luther King Blvd.  
Madison, WI 53703

Jennifer Krapf  
Administrative Assistant  
119 Martin Luther King Blvd.  
Madison, WI 53703

Hon. Robert W. Wing  
Pierce County Courthouse  
Ellsworth, WI 54011

Pamela Radtke, Trial Court Clerk  
La Crosse County Courthouse  
400 North Fourth Street  
La Crosse, WI 54601

Peter Lancaster  
Dorsey & Whitney  
220 S. Sixth Street  
Minneapolis, MN 55402

Anne Reed  
Reinhart, Boerner, Van Deuren  
1000 N. Water, Suite 2100  
Milwaukee, WI 53202-3186

Christopher T. Hale  
Hale and Lein, S.C.  
205 E. Wisconsin Ave., #300  
Milwaukee, WI 53202

Kim Grimmer  
Jeanette C. Lytle  
Solheim, Billing & Grimmer  
P.O. Box 1644  
Madison, WI 53701

Kevin C. O'Keefe  
O'Keefe & Jacobson  
201 Main St., First Floor  
La Crosse, WI 54601

John H. Schroth  
Parke O'Flaherty, Ltd.  
201 Main St., 10th Floor  
La Crosse, WI 54601

PLEASE TAKE NOTICE that the attached pages 6 and 7 are to be substituted for pages 6, 7 and 8 in the above-captioned opinion which was released on March 6, 1997.

Dated this 24th day of December, 2006.

that Bosshard, acting as attorney for the respondents, acknowledged and consented to the guarantees before closing. Respondents contested that interpretation of Bosshard's written statement, and presented disputed evidence that they signed guarantees under duress and threat of cancellation. These, too, are issues not capable of resolution on summary judgment.

First Bank also contends that the respondents have no defense because they agreed to unconditional liability at closing and waived any "circumstance whatsoever that might otherwise constitute a legal or equitable discharge or defense of a surety or guarantor." We do not construe that provision as a waiver on the issues of duress or lack of consideration. See *Midwest Corp. v. Global Cable, Inc.*, 688 F. Supp. 872, 875 (S.D.N.Y. 1988) (unconditional waiver of defenses does not preclude lack of consideration defense).

First Bank has not waived its right to appeal. The Bosshard estate contends that First Bank cannot pursue this appeal against the estate because it filed a third-party complaint against the estate in the second action, rather than pursuing efforts to amend the complaint in this action.<sup>1</sup> We disagree. The estate cites the proposition that when a party commences a second action in the trial court based upon the same cause of action, it waives its appeal rights. *Richie v. Badger State Mut. Cas. Co.*, 22 Wis.2d 133, 137-38, 125 N.W.2d 381, 383 (1963). Here, as explained by the parties, First Bank's cause of action in the second action is different because it is based on the note and not on the guarantees.

Additionally, the estate cites the proposition that the right to appeal is waived by one who causes or induces the judgment to be entered. *County of Racine v. Smith*, 122 Wis.2d 431, 437, 362 N.W.2d 439, 442 (Ct. App. 1984). Here, First Bank did not induce or cause the judgment dismissing its complaint. Although First Bank could have moved to amend its complaint, it reasonably chose not to after the trial court held that it could raise its alternative

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<sup>1</sup> At the time the trial court stated that it would not grant leave to amend the complaint to add a cause of action based on the note, there was no motion to amend before the court. Presumably the estate means First Bank should have filed a motion to amend to preserve the issue, and then appealed the denial of the motion.

claims in the newly filed action. The trial court so held after counsel for the other four respondents confirmed the availability of that alternative, and counsel for the estate remained silent. While the estate is not bound by the representations of counsel for the other respondents, it is bound both by its failure to object to the trial court's ruling, and its failure to appeal, if aggrieved by it.

*By the Court.* – Judgments reversed and causes remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.