

THE STATE OF SOUTH CAROLINA
In The Supreme Court
No. 2012-205647

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-07515, 2009-CP-10-07517,
2009-CP-10-07518 and 2010-CP-10-09959

2009-CP-10-07515

James J. Kerr, Crayton Walters, and J.T. Main, LLC, Appellants,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

2009-CP-10-07517

Ron Konersmann, Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

2009-CP-10-07518

John Voytko, Appellant,

v.

Branch Banking & Trust Company, successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

2010-CP-10-09959

Patricia Konersmann, Appellant,

v.

Branch Banking & Trust Company, Successor in merger to Branch Banking
& Trust Company of SC, a/k/a BB&T, and James Edahl, Respondents.

APPELLANTS' MOTION TO RECONSIDER THEIR
MOTION TO SUPPLEMENT RECORD ON APPEAL
OR REMAND TO THE HONORABLE ROGER M. YOUNG

These Appellants, James J. Kerr, Crayton Walters, J.T. Main, and Patricia Konersmann filed their MOTION TO REMAND TO THE HONORABLE ROGER M. YOUNG OR TO SUPPLEMENT RECORD ON APPEAL on October 23, 2013. It was opposed; this Court denied this Motion on October 29, 2013. In this Motion, these Appellants ask this Court to reconsider its denial on the following grounds.

I. INTRODUCTION

In BB&T and Edahl's Memorandum in Support of their SCRPC 12(b)(6) Motion, and in the oral arguments in favor of their Motion, BB&T and Edahl argued that the only controlling agreement was the written factoring agreement. Judge Young accepted the arguments advanced by BB&T and Edahl in their brief and at oral argument and concluded that Appellants were attempting to modify the factoring agreement. Judge Young in his Order made the following findings:

- "... Skywaves entered into a certain factoring agreement with BB&T in the spring of 2005 whereby BB&T would purchase certain receivables of Skywaves at a discount and payment of those receivables would then be made to BB&T." (Record @ 0395)
- "In January of 2008, BB&T declared a default by Skywaves under the factoring agreement." (Record @ 0395)
- "All of Plaintiffs' claims are all based upon alleged statements, promises, or representations made by BB&T or Edahl to Skywaves that BB&T 'would fund all [Skywaves'] financial needs.' Each of the claims is based upon the alleged representations made by Defendants to Skywaves." (Record @ 0397)

- "... Plaintiffs have made a number of allegations regarding writings purportedly between BB&T and Skywaves ..." (Record @ 0397)
- Plaintiffs make general reference to representations made "in writing;" but Plaintiffs have not alleged any material terms or conditions of any agreement with Defendants nor have Plaintiffs specifically alleged that any such agreement was in fact received by them. Plaintiffs have made a number of allegations regarding writings purportedly between BB&T and Skywaves, but Plaintiffs, although investors in Skywaves, cannot rely on such writings to defeat the plain wording of Section 37-10-107 which, as stated above, requires in pertinent part that "the party seeking to maintain the action or defense [receive] a writing from the party to be charged ...(Record 0397-0398)

II. Appellants' Actual Claim

Having heard oral arguments, this Court knows that these Appellants' suit is not based upon representations of BB&T and Edahl to Skywaves, rather representations made directly to Appellants. Appellants' claim for relief based upon negligent misrepresentation is succinctly characterized in this Court's holding in Gilliland v. Elmwood Properties, 301 SC 295, 391 S.E.2d 577 (1990)

"A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction.' *Winburn v. Insurance Co.*, 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App.1985). 'The recovery of damages may be predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation.' *Id.* These general rules have been applied, in every case this Court has located, to support the recognition of a negligent misrepresentation claim where the misrepresented fact(s) induced the plaintiff to enter a contract or business transaction." [emphasis added]

“We follow the reasoning of the *Formento* court and hold that neither the parol evidence rule nor the merger or integration clause in the parties’ contract prevents Elmwood from proceeding on its negligent misrepresentation theory.

Judge Young’s entire premise in his order is wrong. The suit is not based upon representations of BB&T and Edahl to Skywaves but rather directly to these Appellants and yes, this alone requires a reversal and does not require that this Motion of Appellants be granted.

III. But

Judge Young’s premise that the factoring agreement controlled, that it was the writing and could not be modified, moved him to dismiss this action pursuant to Section 37-10-107 S.C. Code of Laws. The evidence submitted in support of this Motion (see Motion to Remand and Supplement dated October 23, 2013) makes apparent the following:

1. The written factoring agreement was not the actual agreement rather the agreement was as testified to by Mr. Edahl.
2. The sworn testimony of Edahl takes Appellants’ claims out of any and all Statutes of Frauds. *Bore, Inc. v. Jenkins*, 282 S.C. 189, 193, 318 S.E.2d 371, 373 (Ct. App. 1984); *Walker v. Preacher*, 188 S.C. 431, 199 S.E. 675, 677 (S.C.1938); *Barranco v. Barranco*, 91 Md. App. 415, 420, 604 A.2d 931, 934 (1992)
3. The Statutes of Frauds are evidentiary rules. *Exchange Bank of Ft. Valley v. McMillan et al.*, 76 S.C. 561, 57 S.E. 630 (1907), and as a matter of sound judicial policy, a SCRC 12(b)(6) motion should not be granted as a subsequent pleading or sworn testimony can take the case out of the Statutes of Frauds.

At oral argument a policy argument was advanced by BB&T and Edahl that Appellants' claims "would open the flood gates."¹ The bench at oral argument was looking for a practical way forward. So, what really is at stake is Judge Young would not have granted this Motion if he knew the basis of BB&T and Edahl's argument was not true. But that is not the question. Rather, might he have reached another conclusion if he had known the true facts; should he not be given the opportunity to decide this case on the true facts? Appellants agree that there is a strong policy issue in play. BB&T and Edahl are trying to hold on to Judge Young's Order that is based upon a now known misrepresentation to the lower court and this infringes the integrity of the judicial process.

IV. Conclusion

Opening the flood gates, no. Opening the record, yes. Giving Judge Young an opportunity to decide this case on the true facts is sound policy as is not permitting an evidentiary rule to serve as the basis to grant a SCRPC 12(b)(6) motion.

The Appellants ask this Court to grant this Motion to Reconsider and remand to Judge Young so that this case can be decided on the actual facts.

ANDREW K. EPTING, JR., LLC.

By: Andrew K Epting Jr
Andrew K. Epting, Jr., Esq.
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401
(843) 377-1871 Fax: (843) 377-1310
ake@epting-law.com

¹ Not true, as the claims here are so unique because BB&T and Edahl's actions relate to advice and representations in which BB&T vied for and received the nod over Hunt Capital and Wachovia to essentially take this company public. Even Edahl characterized the parties' agreement as unique.

BARNWELL WHALEY PATTERSON &
HELMS, LLC

M. Dawes Cooke, Jr., Esq.
John W. Fletcher, Esq.
288 Meeting Street, Suite 200 (29401)
P. O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708
*Attorneys for Appellants Patricia Konersmann,
James J. Kerr, Crayton Walters, and JT Main,
LLC*

Date: November 12, 2013
Charleston, South Carolina

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PROOF OF SERVICE

I certify that I have served APPELLANTS' MOTION TO RECONSIDER THEIR MOTION TO SUPPLEMENT RECORD ON APPEAL OR REMAND TO THE HONORABLE ROGER M. YOUNG by depositing a copy of it in the United States Mail, Postage prepaid, on November 12, 2013, addressed to their attorney of record as follows:

Molly Hughes Cherry, Esquire
Nexsen Pruet, LLC
PO Box 486
Charleston, SC 29402

ANDREW K. EPTING, JR., LLC


Andrew K. Epting, Jr., Esquire

Michelle N. Endemann, Esquire
46A State Street
Charleston, SC 29401
P: 843-377-1871
F: 843-377-1310
ake@epting-law.com
mne@epting-law.com

*Attorneys for Appellants Patricia Konersmann,
James J. Kerr, Crayton Walters, and JT Main,
LLC*

BARNWELL WHALEY PATTERSON &
HELMS, LLC

M. Dawes Cooke Jr., Esquire
John W. Fletcher, Esquire
Barbara J. Wagner, Esquire
288 Meeting Street, Ste 200
Charleston, SC 29401
P: 843-577-7700
F: 843-577-7708

Attorneys for Appellants