

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-001809

RECEIVED

OCT 19 2015

SC Court of Appeals

Skywaves I Corporation,Appellant/Respondent,

v.

Branch Banking and Trust Company,
Successor in Merger to Branch Banking and Trust
Company of SC, a/k/a BB&T, Respondent/Appellant,

And

James Edahl, Respondent,

**JOINT REPLY IN SUPPORT OF MOTION OF RESPONDENT/APPELLANT
AND RESPONDENT TO STRIKE APPELLANT/RESPONDENT'S AMENDED
AND SUPPLEMENTAL NOTICE OF APPEAL**

Respondent/Appellant Branch Banking and Trust Company, Successor
in Merger to Branch Banking and Trust Company of SC, a/k/a BB&T and
Respondent James Edahl (individually, "BB&T" and "Edahl"; collectively,
"Movants") hereby submit this Reply in support of their motion for entry of
an order striking the "Amended and Supplemental Notice of Appeal" filed by
Appellant/Respondent Skywaves I Corporation ("Skywaves").

ARGUMENT

Skywaves' Amended and Supplemental Notice of Appeal purports to appeal, *inter alia*, orders entered by the circuit court in 2011 and 2012. By order dated November 8, 2011, the circuit court granted in part BB&T's motion for partial dismissal of Skywaves' First Amended Complaint, dismissing with prejudice Skywaves' claims for breach of contract accompanied by a fraudulent act (claim 2); negligent misrepresentation (claim 5); fraudulent misrepresentation (claim 6); negligence (claim 7); and violation of SCUTPA (claim 8). The November 8 order also granted Edahl's motion to dismiss, dismissing with prejudice all claims against him. (*Id.*) Skywaves moved for reconsideration of this order on November 18, 2011, asking the circuit court to enter an order denying both motions to dismiss in their entirety.

While Skywaves' motion for reconsideration was pending, it filed a notice of appeal from the November 18, 2011 order. On June 15, 2012, the circuit court granted, in part, Skywaves' motion to reconsider. The June 15 order reinstated Skywaves' claims for breach of contract accompanied by a fraudulent act (claim 2, against BB&T); negligent misrepresentation (claim 5, against BB&T and Edahl); and negligence (claim 7, against BB&T and Edahl), and granted Skywaves leave to proceed with those claims. The court did not change its ruling on Skywaves' claims for fraudulent misrepresentation (claim 6, against BB&T and Edahl) and violation of SCUTPA (claim 8, against BB&T and Edahl).

Thus, the June 15 order narrowed the issues on appeal to the dismissal of claims 6 and 8. If Skywaves wished to preserve its challenge to the dismissal of those claims, as of June 15, 2012 it had two options: it could proceed with the already pending appeal, or it could request that the appeal be dismissed without prejudice and await final judgment. Rather than taking either of these courses, Skywaves elected to tell the Court that its appeal was moot and should be dismissed. Taking Skywaves at its word, this Court dismissed the prior appeal.

Three years later, and appealing another interlocutory order, Skywaves is now attempting to avoid the consequences of its earlier appeal and representation to this Court. The core of Skywaves' Return to the Motion to Strike is its repeated plea for this Court to disregard the actual words of its prior filing, and to deny the Motion to Strike on the basis of what Skywaves should have written or what it intended to write.

A. Skywaves is bound by its previous representation to this Court that it was not aggrieved by the November 18, 2011 order, as modified by the June 15, 2012 order.

Skywaves first urges the Court to disregard the actual words of its motion to withdraw the prior appeal. Skywaves explains that when it told this Court that its appeal of the November 18 order was rendered "moot" by entry of the June 15 order, it didn't really mean it. What it meant, Skywaves claims, is that the November 18 order "no longer controlled as written and was not appealable in that form." (Return, at 6.) In actuality, an order is

either appealable or it is not. Both before and after entry of the June 15 order granting partial reconsideration, the November 18 order was appealable under S.C. Code Ann. § 14-3-330. The June 15 order narrowed the possible issues on appeal, but it did not make the November 18 order “unappealable.” Skywaves also asserts that it “believed it was required to appeal [the November 18] Order immediately, because it dismissed all claims against Defendant Edahl.” (Return, at 6.) Skywaves’ purported belief is both incorrect¹ and irrelevant to the issue presently before the Court. What matters, for purposes of this Motion to Strike, is that Skywaves elected to abandon the appeal after the circuit court granted partial reconsideration on June 15, 2012. Skywaves could have pursued the appeal as to claims 6 and 8, both of which remained dismissed after entry of the June 12 order. Instead, Skywaves told this Court that its appeal was “moot” in view of the circuit court’s June 15 order. The word “moot” has a plain and particular meaning, namely, that there is no reason to move forward with a proceeding because “the issues have ceased to exist.” BLACK’S LAW DICT. 697 (abr. 6th ed. 1991). Through its *post hoc* semantics in the Return, Skywaves asks the Court to rely on what Skywaves *should have written* in its motion to withdraw (*i.e.*, that it wanted to withdraw its appeal without prejudice), rather than what it *actually wrote* in that

¹ Though the November 18 order was appealable, Skywaves was not, in fact, required to appeal because it had filed a motion for reconsideration, which tolled the time for filing a notice of appeal from the November 18 order. See Rule 203(b)(1).

motion (that its appeal was moot, *i.e.*, that no disputed issues remained after entry of the June 15 order).

Skywaves is bound by its prior representations to this Court. Skywaves told the Court that its appeal was “moot.” Mootness is not an esoteric concept. To state that an appeal is “moot” is to state that the appellant has “received its requested relief,” *Southeastern Housing Found. v. Smith*, 380 S.C. 621, 628 n.2, 670 S.E.2d 680, 684 n.2 (Ct. App. 2008), and that there is no point in further proceedings. Skywaves is judicially estopped from attempting to assert a contrary position in the current appeal.

B. The Amended and Supplemental Notice of Appeal is procedurally improper.

In the Motion to Strike, Movants argued that Skywaves’ Amended and Supplemental Notice of Appeal was procedurally improper for at least two reasons. (Motion to Strike, at 9-11.) First, Rule 260, SCACR does not permit reinstatement of an appeal that has been voluntarily withdrawn. Skywaves voluntarily withdrew its original appeal, and therefore, under Rule 260, the Amended and Supplemental Notice of Appeal cannot be treated as a reinstatement of the original appeal. Second, by statute an interlocutory order is appealable after final judgment only if it has not previously been appealed. *See* S.C. Code Ann. § 14-3-330(1). Skywaves previously appealed the November 18 order and therefore is precluded, under § 14-3-330(1), from appealing it again.

Skywaves contends that these rules should not apply here, because it “was not obligated to immediately appeal the Original Order as corrected by the Modifying Order” and because it withdrew the prior appeal before briefing. (Return, at 10.) Skywaves’ first argument is non-responsive. Regardless of whether Skywaves was “obligated” to immediately appeal, Skywaves did, in fact, immediately appeal. Skywaves effectively argues that its prior appeal should not “count” for purposes of § 14-3-330(1) because the appeal was withdrawn prior to briefing. Skywaves cites no authority for its second argument, which ignores the text of § 14-3-330(1) To accept Skywaves’ second argument, the Court would have to rewrite the statute so that a second appeal is barred only when a prior appeal has reached the briefing stage—something the Court plainly cannot do. *See Fort Hill Natural Gas Auth. v. City of Easley*, 310 S.C. 346, 349, 426 S.E.2d 787, 788-89 (1993) (“The purpose of construction of a statute is to ascertain the legislative intent from the words used, and if they are susceptible to any sensible meaning, the court cannot add to them other words which would give them a different meaning without making, instead of construing, the statute.”). Skywaves’ current appeal is barred as procedurally impermissible.

CONCLUSION

Skywaves’ Return to the Motion to Strike, in effect, asks the Court to save Skywaves from itself by pretending that the prior appeal was never filed, or by rewriting the motion to withdraw the prior appeal so that the withdrawal is without prejudice. The reality is that Skywaves filed the prior

appeal and thereafter withdrew it on the basis of mootness. Having done so, Skywaves has forfeited any right to reprise its appeal of these three-year-old orders. Movants therefore ask the Court to enter an order striking Skywaves Amended and Supplemental Notice of Appeal.

Respectfully submitted,

Nelson Chandler
J.W. Nelson Chandler *KEJ*
E-mail: nelson@corriganchandler.com
CORRIGAN & CHANDLER LLC
P.O. Box 547
Charleston, SC 29402
Phone: 843.577.5430
Fax: 843.577.5650

Attorneys for Respondent James Edahl

Kirsten E. Small
Molly Hughes Cherry, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
Post Office Box 486
Charleston, SC 29402
Telephone: 843.577.9440
Facsimile: 843.414.8209
E-mail: mcherry@nexsenpruet.com

Julio E. Mendoza, Jr., Esquire
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
Telephone: 803.540.2026
Facsimile: 803.727.1478
E-mail: rmendoza@nexsenpruet.com

Kirsten E. Small
NEXSEN PRUET, LLC
55 E. Camperdown Way, 4th Floor
P.O. Drawer 10648 (29603)
Greenville, SC 29601
Telephone: 864.370.2211
Facsimile: 864.282.1177
E-mail: ksmall@nexsenpruet.com

*Attorneys for Respondent/Appellant
Branch Banking and Trust Company,
Successor in Merger to Branch Banking
and Trust Company of SC, a/k/a BB&T*

Charleston, South Carolina
October 15, 2015

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And

James Edahl, Respondent,

**PROOF OF SERVICE FOR JOINT REPLY IN SUPPORT OF MOTION OF
RESPONDENT/APPELLANT AND RESPONDENT TO STRIKE
APPELLANT/RESPONDENT'S AMENDED AND SUPPLEMENTAL NOTICE OF
APPEAL**

I, Kirsten E. Small, Esquire, hereby certify that on the 15th day of October, 2015, I served a copy of the JOINT REPLY IN SUPPORT OF MOTION OF RESPONDENT/APPELLANT AND RESPONDENT TO STRIKE APPELLANT/RESPONDENT'S AMENDED AND SUPPLEMENTAL NOTICE OF APPEAL, submitted by Respondent/Appellant Branch Banking and Trust Company, Successor in Merger to Branch Banking and Trust Company of SC, a/k/a BB&T and Respondent James Edahl, on counsel for the

Appellant/Respondent via United States Mail, postage prepaid, and addressed as follows:

M. Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
BARNWELL WHALEY PATTERSON
& HELMS, LLC
288 Meeting Street, Suite 200
Charleston, SC 29401

Attorneys For Plaintiff/Appellant

Brian C. Duffy, Esquire
John P. Linton, Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Attorneys For Plaintiff/Appellant

J.W. Nelson Chandler, Esquire
CORRIGAN & CHANDLER LLC
P.O. Box 547
Charleston, SC 29401

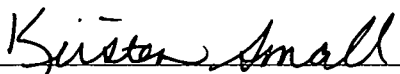
Attorneys For Defendant/Respondent
James Edahl

George J. Kefalos, Esquire
George J. Kefalos, PA
46A State Street
Charleston, SC 29401

Attorneys For Plaintiff/Appellant

Andrew K. Epting, Jr., Esquire
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401

Attorneys For Plaintiff/Appellant



Kirsten E. Small, Esquire

NEXSEN | PRUET

Kirsten E. Small
Member
Admitted in SC, NC, MD

October 15, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals

Re: Skywaves I Corporation v. Branch Banking and Trust Company, et al.
Appellate Case No. 2015-001809

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Joint Reply in Support of the Joint Motion of Respondent/Appellant and Respondent to Strike Appellant/Respondent's Amended and Supplemental Notice of Appeal, along with the Proof of Service.

I would appreciate your filing the original and six (6) copies of the Reply and returning a filed stamped copy to me via the enclosed stamped and self-addressed envelope.

By copy of this letter and as evidenced by the attached Proof of Service, we are serving Appellant/Respondent and counsel of record with a copy of the same.

Very truly yours,



Kirsten E. Small

Enclosures

cc: M. Dawes Cook, Jr., Esquire
John W. Fletcher, Esquire

- Charleston
- Charlotte
- Columbia
- Greensboro
- Greenville**
- Hilton Head
- Myrtle Beach
- Raleigh

The Honorable Jenny Abbott Kitchings
October 15, 2015
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George J. Kefalos, Esquire
Brian C. Duffy, Esquire
John P. Linton, Esquire
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J.W. Nelson Chandler, Esquire
Julio E. Mendoza, Jr., Esquire
Molly Hughes Cherry, Esquire

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a/k/a BB&T, and James Edahl, Defendants,

Branch Banking and Trust Company,
Successor in Merger to Branch Banking and Trust
Company of SC, a/k/a BB&T, Respondent/Appellant,

And

James Edahl, Respondent,

CONSENT ORDER STAYING BRIEFING

Appellant/Respondent filed an Amended and Supplemental Notice of Appeal on August 25, 2015. On September 18, 2015, Respondent/Appellant and Respondent jointly moved to strike the Amended and Supplemental Notice of Appeal. Respondent/Appellant and Respondent also jointly moved for entry of an order staying all briefing deadlines for all parties until 30 days after this Court rules on the Motion to Strike. Appellant/Respondent consent-

ed to entry of such an order in its Return to the Motion to Strike. In short, all parties consent to entry of a stay pending resolution of the Motion to Strike.

WHEREFORE, the Court hereby orders that all briefing deadlines in this appeal and cross-appeal are stayed until 30 days after entry of this Court's ruling on the Motion to Strike.

FOR THE COURT:

CLERK

WE CONSENT:

J. W. Nelson Chandler *
J.W. Nelson Chandler
E-mail: nelson@corriganhandler.com
CORRIGAN & CHANDLER LLC
P.O. Box 547
Charleston, SC 29402
Phone: 843.577.5430
Fax: 843.577.5650

Attorneys for Respondent James Edahl

** by J. E. Mendoza Jr pursuant to authorization given by Mr. Chandler.*

Julio E. Mendoza Jr
Julio E. Mendoza, Jr.
Molly Hughes Cherry
Kirsten E. Small
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
Post Office Box 486
Charleston, SC 29402
Telephone: 843.577.9440
Facsimile: 843.414.8209
E-mail: rmendoza@nexsenpruet.com
E-mail: mcherry@nexsenpruet.com
E-mail: ksmall@nexsenpruet.com

Attorneys for Respondent/Appellant Branch Banking and Trust Company, Successor in Merger to Branch Banking and Trust Company of SC, a/k/a BB&T

John W. Fletcher *
M/Dawes Cooke, Jr., Esquire
John W. Fletcher, Esquire
BARNWELL WHALEY PATTERSON & HELMS, LLC
288 Meeting Street, Suite 200
Charleston, SC 29401

** by Julio E. Mendoza Jr pursuant to authorization given by Mr. Fletcher.*

George J. Kefalos, Esquire
George J. Kefalos, PA
46A State Street
Charleston, SC 29401

Brian C. Duffy, Esquire
John P. Linton, Esquire
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401

Andrew K. Epting, Jr., Esquire
Andrew K. Epting, Jr., LLC
46A State Street
Charleston, SC 29401

Columbia, South Carolina
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*Attorneys for Appellant/Respondent
Skywaves I Corporation*