

AS

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals  
No. 2015-001809

**RECEIVED**

OCT 07 2015

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
In The Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-07516

Skywaves I Corporation, ..... Appellant/Respondent,

v.

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

and James Edahl, ..... Respondent.

RETURN TO JOINT MOTION OF RESPONDENT/APPELLANT AND  
RESPONDENT TO STRIKE APPELLANT/RESPONDENT'S AMENDED AND  
SUPPLEMENTAL NOTICE OF APPEAL

AND NOW COMES Appellant-Respondent Skywaves I Corporation ("Skywaves") and files the following Return to Joint Motion of Respondent/Appellant and Respondent to Strike Appellant/Respondent's Amended and Supplemental Notice of Appeal:

### **INTRODUCTION**

Defendants Branch Banking & Trust Company ("BB&T") and James Edahl ("Edahl") have filed the instant Motion to Strike, seeking to prevent Skywaves from pursuing all of the issues it has properly perfected for appeal. Defendants have also filed a Motion for Stay of Appeal pending resolution of the instant Motion. Skywaves does not object to the staying of all aspects of this appeal pending resolution of the instant Motion to strike portions of this appeal.

Skywaves filed this lawsuit alleging that BB&T failed to honor its obligations to capitalize its needs and improperly declared Skywaves in default of its obligations under the controlling agreements. Skywaves also asserts tort theories, including claims that BB&T and Edahl misrepresented that the parties' written agreements had been modified, as well as claims that BB&T and Edahl acted in bad faith before and after declaring a default. Plaintiff/Appellant Skywaves asserted the following claims in its First Amended Complaint in this matter: (a) breach of contract (BB&T); (b) breach of contract accompanied by a fraudulent act (BB&T); (c) promissory estoppel (BB&T); (d) breach of the implied covenant of good faith and fair dealing (BB&T); (e) negligent misrepresentation (BB&T and Edahl); (f) fraudulent misrepresentation (BB&T and Edahl); (g) negligence (BB&T and Edahl); (h) violation of the South Carolina Unfair Trade Practices Act (BB&T and Edahl).

This matter is presently on appeal to this Court from various orders entered by the Honorable Roger Young. Specifically, Skywaves' Amended and Supplemental Notice of Appeal seeks review of the following orders:

- (a) ORDER GRANTING BRANCH BANKING AND TRUST COMPANY OF SC, a/k/a BB&T'S PARTIAL MOTION TO DISMISS AMENDED COMPLAINT AND JAMES EDAHL'S MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE, which the Honorable Roger M. Young signed on October 26, 2011 and filed on November 8, 2011 ("Original Order").
- (b) ORDER GRANTING SKYWAVES MOTION TO RECONSIDER, which the Honorable Roger M. Young signed on June 14, 2012 and filed on June 15, 2012 ("Modifying Order"); and
- (c) ORDER denying Plaintiff's Motion to Strike and granting Defendants' Motion to Amend Answers, which the Honorable Roger M. Young signed on March 13, 2014 and filed on March 17, 2014 ("Order Refusing to Strike Answers");
- (d) ORDER GRANTING DEFENDANT BB&T AND DEFENDANT EDHAL'S (sic) MOTION TO STRIKE PLAINTIFF'S DEMAND FOR JURY TRIAL, which the Honorable Roger M. Young signed and filed on or about February 9, 2015 ("Jury Trial Order"); and
- (e) ORDER GRANTING IN PART DEFENDANT BB&T'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT EDAHL'S MOTION MOTION (sic) FOR SUMMARY JUDGMENT[;] DENYING PLAINTIFF'S MOTION TO RECONSIDER; DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT; AND DENYING PLAINTIFF'S MOTION FOR COMMISSION OF (sic) ISSUANCE OF A SUBPOENA TO DEPOSE JOHN ALLISON, which the Honorable Roger M. Young signed and filed on or about July 23, 2015 ("Omnibus Order");

These orders appealed in this matter may be briefly summarized as follows:

<b><u>ORDER</u></b>	<b><u>EFFECTS</u></b>
Original Order	<ul style="list-style-type: none"> <li>• Dismissed all claims against Defendant Edahl</li> <li>• Dismissed all claims against Defendant BB&amp;T except for breach of contract, promissory estoppel and breach of the covenant of good faith and fair dealing</li> </ul>
Modifying Order	<ul style="list-style-type: none"> <li>• Reinstates claim for breach of contract accompanied by a fraudulent act</li> <li>• Reinstates claim for negligence and negligent misrepresentation as to Defendants BB&amp;T and Edahl</li> </ul>

<b><u>ORDER</u></b>	<b><u>EFFECTS</u></b>
Order Refusing to Strike Answers	<ul style="list-style-type: none"> <li>• Despite Defendants' willful fraud upon the trial court, the trial judge refused to strike Defendants' misleading Answers and allowed them to amend their answers to rectify their misstatements</li> </ul>
Jury Trial Order	<ul style="list-style-type: none"> <li>• Granted Defendants' Motions to Strike Jury Trial Demands, on the ground that Skywaves waived its right to a jury trial</li> </ul>
Omnibus Order	<ul style="list-style-type: none"> <li>• Denied Skywaves' motion to reconsider Order #4 (right to jury trial)</li> <li>• Denied in part and granted in part Defendants' Motions for Summary Judgment</li> <li>• Denied Skywaves' request for leave to amend its complaint</li> </ul>

Of relevance to the instant Motion, Skywaves filed a previous appeal to this Court ("Prior Appeal"), seeking review of the Original Order, which granted, in part, Defendants' motions to dismiss. Skywaves filed that appeal contemporaneous with its motion asking Judge Young to reconsider the Original Order. Judge Young granted that motion and entered the Modifying Order, which restored claims against Edahl and some claims against BB&T but permitted the Original Order to stand in certain respects. In essence, the Modifying Order superseded and drastically changed the Original Order as Judge Young had initially written it. In light of the Modifying Order, on or about July 17, 2012, Skywaves filed a Motion to Withdraw Appeal, stating:

Plaintiff/ Appellant Skywaves I Corporation, pursuant to Rule 260 of the South Carolina Appellate Rules, moves this court for an order dismissing this appeal. The grounds for this request are that the order subject to this appeal has been reconsidered by the lower court and the Honorable Roger M. Young, entered a new Order dated June 14, 2012 and filed on June 15, 2012, (attached hereto as Exhibit A), rendering this appeal moot.

(See Defs.' Joint Mot. Ex. C). Skywaves did not state or suggest that it intended to abandon or waive appellate review of the partial grant of Defendants' motions to dismiss. The Court granted that Motion and dismissed the Prior Appeal.

Defendants' instant Joint Motion seeks to exclude the Original Order and Modifying Order from this appeal. The instant Joint Motion does not ask the Court to

strike Skywaves' appeal from the other orders, *i.e.*, the Omnibus Order, the Jury Trial Order or the Order Refusing to Strike Answers. It does not seek to dismiss this appeal in its entirety. For the reasons that follow, the Court should deny the instant Joint Motion and permit Skywaves to appeal all ruling identified in its Amended and Supplemental Notice of Appeal.

## ARGUMENTS

### **A. Skywaves Was Aggrieved by the Original and Modifying Orders**

Defendants argue that Skywaves may not appeal the Original Order and Modifying Orders because it was not "aggrieved" by those orders. Defendants base this argument on the Prior Appeal in this matter. Specifically, Defendants posit that, by using the word "moot" in its Motion to Withdraw Appeal, Skywaves intended to state that it was not "aggrieved" by those Orders. For the reasons that follow, Defendants' argument wholly lacks merit and would impose a substantial injustice upon Skywaves.

Skywaves is cognizant that, in general, "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal." *See* S.C.A.C.R., Rule 201(b). This Court has defined what this rule means by the word "aggrieved":

A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest. *Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970); *Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970). The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation. *Id.* A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests.

*See Beaufort Realty Co. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589-90 (Ct. App. 2001) (finding no standing where party's injury was "purely conjectural and hypothetical"). Defendant cannot refute that the Original Order and Modifying Orders "aggrieved" Skywaves, insofar as they dismissed certain of Skywaves' claims. The orders plainly impacted Skywaves' rights in a way that was not merely hypothetical or

conjectural. Defendants cannot possibly contend in good faith that the Original Order and Modifying Orders did not aggrieve Skywaves, where they dismissed certain claims.

Defendants posit that, because Skywaves used the word "moot" in its withdrawal of its Prior Appeal, Skywaves somehow stopped the Original Order and Modifying Orders from aggrieving it. Judge Young began his Modifying Order by stating that he intended to "modify my previous ruling dated November 1, 2011 as follows." (See Defs.' Joint Mot. Ex. B). That Modifying Order restored certain causes of action that the Original Order had dismissed, while omitting others and substantially altered the Original Order. In a sense, the two orders combined to become the operative orders from which an appeal would have to be taken, rendering the Original Order standing alone "moot." Because Judge Young used the Modifying Order to materially alter the Original Order, the Prior Appeal from the Original Order alone was technically "moot." Skywaves' use of the word "moot" in its Motion to Withdraw Appeal simply correctly noted that the unaltered Original Order no longer controlled as written and was not appealable in that form. When Judge Young signed the Modifying Order, he rendered the Original Order, as written (and any appeal therefrom) moot.

Skywaves believed that it was required to appeal that Original Order immediately, because it dismissed all claims against Defendant Edahl. *See Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 214, 544 S.E.2d 38, 48 (Ct. App. 2001), *aff'd*, 354 S.C. 161, 580 S.E.2d 440 (2003) ("The order expressly ruled that all of Olson's claims against the University were barred by the statute of limitations. This ruling therefore adjudicated all of the claims as to the University. Faculty House did not assert the statute of limitations as a defense. Olson's claims against Faculty House were thus separate and discrete from her claim against the University. The fact Olson had continuing claims against Faculty House was irrelevant to the dismissal of the University. Nothing short of direct appeal could resurrect the action against the University."). Thus, out of an abundance of caution, Skywaves appealed the Original Order to preserve its

right to appeal as to Edahl. Defendants cannot show that, in withdrawing its prior appeal because the original order had been rendered "moot" for appeal in that form, Skywaves intended to waive any future right to appeal or waived any defects in the Original Order and Modifying Orders.

When Judge Young entered his Modifying Order, he reinstated a number of claims that he had previously dismissed — and restored Edahl as a party defendant. Unsurprisingly, this greatly changed the environment regarding appeal. In light of Judge Young's Modifying Order, Skywaves properly did not not to pursue an immediate appeal at that time. Consequently, it filed a Motion to Withdraw the Prior Appeal and proceeded with its case in the trial court. Defendants cite no authority requiring Skywaves to continue prosecuting its Prior Appeal under these circumstances — after the Original Order had been rendered moot as written — or forever waive appellate review. To the contrary, Skywaves was entitled to do exactly what it did: withdraw the Prior Appeal and await the appropriate time to seek appellate review of the trial court's disposition of Defendants' motions to dismiss.

Defendants now take the position that by using the word "moot" in its Motion to Withdraw Appeal, Skywaves conclusively accepted, for all purposes and for all time, the Original Order and Modifying Orders as the law of the case. Defendants cite no authority supporting this contention. Moreover, Defendants have no evidence that Skywaves intended to waive appellate review of the Original Order.

For the foregoing reasons, this Court should deny Defendant's instant Motion and permit Skywaves to perfect and argue its appeal as noticed.

**B. Defendants' Argument That the Supplemental and Amended Notice Is Procedurally Improper Lacks Merit**

Defendants next argue that Skywaves' Amended and Supplemental Notice of Appeal should be stricken in part because Skywaves is barred from appealing the

Original Order and Modifying Orders under South Carolina law. For the reasons that follow, Defendants' argument wholly lacks merit.

First, Defendants argue that this is an improper "reinstatement" of a dismissed appeal. Specifically, Defendants rely on S.C.A.C.R., Rule 260, which states:

(a) Involuntary Dismissal and Reinstatement. Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties. The clerk shall remit the case to the lower court or administrative tribunal in accordance with Rule 221 unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal (the day of filing being excluded).

(b) Agreed Dismissal. If the parties to an appeal or other proceeding shall sign and file with the clerk of the appellate court an agreement that the proceeding be dismissed, the appellate court may enter an order of dismissal. The agreement may contain a provision altering the costs to be assessed under Rule 222 and/or other settlement terms subject to the provisions of Rule 261.

(c) Withdrawal. An appeal or other proceeding may be dismissed on motion of the appellant or petitioner upon such terms as may be fixed by the court.

Defendants construe these rules to prohibit the appeal from the Original Order and Modifying Orders.

Defendants' argument seriously mischaracterizes what Skywaves has done. Skywaves did not simply file an appeal from a final judgment and withdraw that appeal. Rather, it filed a permissive appeal from an order partially granting a motion to dismiss. The trial judge agreed to reconsider that Original Order and reinstated numerous tort claims against BB&T and all claims against Defendant Edahl. In light of that mooted Original Order as written, Skywaves withdrew its Prior Appeal at that time. Skywaves does not now seek to "reinstatement" a prior appeal. It now seeks to appeal the

Original Order and Modifying Orders as part of an otherwise proper appeal. Defendants cite no authority prohibiting Skywaves from doing so.

Defendants next argue that Skywaves inclusion of the Original Order and Modifying Orders is prohibited by S.C. Code § 14-3-330, which provides:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

Defendant's argument focuses on subsection (1), which permits a party appealing from an appealable judgment to also seek "review [of] any intermediate order or decree necessarily affecting the judgment not before appealed from." Defendants conclude that by filing and withdrawing the Prior Appeal, Skywaves "appealed from" the Original Order and Modifying Orders. Under subsection (1), an appeal is generally permissible even if the party had a right to file a prior permissive appeal from the order. *See Link v. School Dist. of Pickens Cnty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990)

Defendants' argument defies logic, in that it ignores that Skywaves was not obligated to immediately appeal the Original Order as corrected by the Modifying Order and did not receive appellate review of those orders. Skywaves is not seeking a second bite at the apple, it seeks review of plainly reviewable prior orders that the Court has not already reviewed. Skywaves recognizes that "[u]nder the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *See Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). However, the Prior Appeal does not bar appellate review of the Original Order and Modifying Orders, as the Prior Appeal was withdrawn before it was even briefed. Defendants cite no authority that the mere filing and withdrawal of a notice of appeal is sufficient to constitute an "appeal[]" from" an earlier order.

Defendants cite *Hudson ex rel. Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 754 S.E.2d 486 (2014), for the proposition that "Skywaves voluntarily abandoned its previous appeal." (*See* Defs.' Joint Mot., at 11). However, unlike the party in *Hudson*, Skywaves did not "abandon" its appeal from the Original Order and Modifying Orders by failing to appeal a final order. To the contrary, Skywaves merely deferred review of those orders until the proper time. It not obligated to immediately appeal the Original Order and Modifying Orders and its withdrawal of the Prior Appeal after the entry of the Modifying Order does not bar subsequent appellate review of those orders.

**CONCLUSION**

For the foregoing reasons, Appellant/Respondent Skywaves respectfully requests that this Court deny the Joint Motion of Respondent/Appellant and Respondent to Strike Appellant/Respondent's Amended and Supplemental Notice of Appeal.

October 5, 2015

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v.

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

and James Edahl, ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Return to Joint Motion of Respondent/Appellant and Respondent to Strike Appellant/Respondent's Amended and Supplemental Notice of Appeal on the above-referenced Respondent/Appellant and Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 5, 2015, addressed to their attorneys of record:

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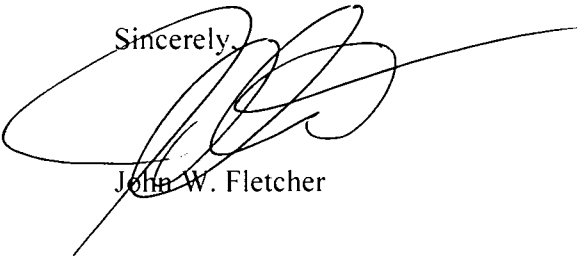
OCT 07 2015  
SC Court of Appeals

RE: Skywaves v Branch Banking  
Appellate Case No. 2015-001809  
BWPH File No.: 3496.001

Dear Ms. Kitchings,

Enclosed please find the original and seven copies of a Return to Joint Motion of Respondent/Appellant and Respondent to Strike Appellant/Respondent's Amended and Supplemental Notice of Appeal and Proof of Service. Please file the original Return to Motion and Proof of Service and return a clocked copy of each to us in the enclosed self-addressed, stamped envelope provided for your convenience.

By copy of this to all counsel of record I am serving them with a copy of the Return to Joint Motion and Proof of Service thereof.

Sincerely,  
  
John W. Fletcher

JWF/jgc  
Enclosure

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