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

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,

# INITIAL RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT

Kirsten E. Small
Julio E. Mendoza, Jr.
Molly Hughes Cherry
Nexsen Pruet, LLC
Post Office Drawer 10648
Greenville, SC 29603
(864) 370-2211

*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*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**RULES**

## TREATISES

## STATEMENT OF THE CASE

Respondent/Appellant Branch Banking and Trust Company ("BB&T") adopts the Statement of the Case from its Appellant's Brief of Respondent/ Appellant.

## SUMMARY OF ARGUMENT

Skywaves' entire case is premised upon the idea that BB&T called a default under the Factoring and Security Agreement (the "Factoring Agreement") for what it deems a "pretextual" reason, even though there has never been any doubt that Skywaves actually was in default for all the reasons identified by BB&T in its January 2008 Default Letter (Default Letter, Jan. 25, 2008) Specifically, Skywaves was keeping for itself payments on factored invoices, money that rightfully belonged to BB&T; it was not paying its bills as they came due; and its prospects of paying BB&T the amount owed under the Factoring Agreement—approximately $3.5 million—were effectively nonexistent. By January 2008, BB&T knew that Skywaves was losing huge sums of money month after month, had not had a profitable month since January 2007, and had failed to meet its projected income in every single month of 2007, despite having revised its projections mid-year. BB&T also knew that while Skywaves had predicted a net profit of $1.4 million for 2007, it actually ended 2007 with a total net *loss* of $1.4 million—a difference of *$2.8 million*. In light of these circumstances, there can be no doubt that BB&T was entitled to declare a default under the terms of the Factoring Agremeent, as it did on January 25, 2008.

Rather than face this reality, Skywaves attempts to divert the Court's attention. In particular, Skywaves seeks to capitalize on Respondent James Edahl's admission, during the course of discovery, that he had approved financing on site plans, although he denied it to BB&T at the time. However, Edahl's admission is entirely irrelevant to the merits of this case. Regardless of what Edahl said (or didn't say) in 2008, there can be no dispute that (a) BB&T actually did provide funding on

the basis of site plans submitted by Skywaves customer General Dynamics, exactly as promised; and (b) there were ample reasons, aside from the sit-plan funding, for BB&T to declare a default.

Skywaves seems to believe that regardless of the terms of the Factoring Agreement, and notwithstanding its disastrous financial condition, BB&T was obligated to continue lending money to Skywaves in hopes that the situation would one day improve. This belief—that BB&T had no right to protect itself or its share-holders from a massive loss—underlies all of Skywaves' claims in this litigation.

## ARGUMENT

### I. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO BB&T ON SKYWAVES' TORT CLAIMS.[1]

The circuit court granted BB&T's motion for summary judgment on Skywaves' tort claims for negligence and negligent misrepresentation.[2] (Order of July 27, 2015) In its appeal, Skywaves challenges only the grant of summary judgment as to the tort claims for negligence and negligent misrepresentation. This Court should affirm the circuit court, for two independent reasons. First, Skywaves failed to appeal all bases for the circuit court's ruling, and therefore affirmance is required by the two-issue rule. Second, the circuit court correctly ruled that Skywaves' tort claims fail on their merits.[3]

---

[1] BB&T is addressing the summary judgment issue first because if the Court agrees that the lower court correctly granted summary judgment to BB&T, there will be no need to reach the question of whether Skywaves waived its right to a jury trial (the issue presented first in Skywaves' Brief).

[2] The lower court also granted summary judgment on Skywaves' claim for breach of the covenant of good faith and fair dealing, reasoning—correctly—that this claim was subsumed by Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act. (Order, at 8); *see RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) ("[T]he implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract.") Skywaves does not challenge this ruling in its Appellant's Brief, presumably because the circuit court denied summary judgment on Skywaves' contract claims. BB&T, however, has cross-appealed the circuit court's denial of summary judgment on the contract claims. For the reasons explained in BB&T's Appellants' Brief of Respondent/Appellant, BB&T is entitled to summary judgment on all aspects of Skywaves' contract claims.

Additionally, the circuit court granted summary judgment on Skywaves' promissory estoppel claim. Skywaves has not appealed this ruling.

[3] Skywaves argues, Br. at 18, that the order granting summary judgment "conflicts with the law of this case," namely, the circuit court's earlier order ruling that Skywaves had stated claims sufficient to survive dismissal under Rule 12(b)(6), SCRCP. As this Court well knows, Rule 12(b)(6) and Rule 56(c), SCRCP provide different standards, and a ruling that a complaint adequately states a claim (the

When reviewing the grant or denial of summary judgment, this Court applies the same standard used by the circuit court. *See Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). That standard is found in Rule 56(c), SCRCP, which provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When considering a motion for summary judgment, "the evidence and all inferences which can *reasonably* be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Grimsley v. S.C. Law Enf. Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015) (internal quotation marks omitted; emphasis in original). "Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Id.* (internal quotation marks omitted).

**A. Skywaves' tort claims are goverened by South Carolina law.**

The Factoring Agreement provides that "[a]ll acts, transactions, rights and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina." (Factoring Agreement ¶ 25). Choice of law clauses are generally honored in South Carolina,

---

standard to avoid dismissal under Rule 12(b)(6)) does not later preclude the trial court from ruling that the undisputed facts entitle the defendant to summary judgment (the standard under Rule 56(c)). Indeed, if Skywaves were correct, no court could ever grant summary judgment after denying a motion to dismiss—a result surely not intended by the law of the case doctrine.

unless application of the designated state's law would result in a violation of South Carolina public policy. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 249, 717 S.E.2d 103, 108-09 (Ct. App. 2011). In this case, North Carolina law applies to Skywaves' claims for breach of contract (at issue in BB&T's cross-appeal). Skywaves' claims for negligence and negligent misrepresentation, however, are governed by South Carolina law. This is because North Carolina choice-of-law rules require application of the substantive law of the state where the injury occurred. *See Harco Nat'l Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 692, 698 S.E.2d 719, 722-23 (2010) ("For actions sounding in tort, the state where the injury occurred is considered the situs of the claim."). Skywaves was headquartered in South Carolina, and all of its alleged tort injuries occurred in this state. Therefore, South Carolina law governs the tort claims.

### B. The two-issue rule requires affirmance of summary judgment on Skywaves' tort claims.

The circuit court provided several reasons for dismissing Skywaves' tort claims, but Skywaves has not argued all of these grounds on appeal. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). As this Court recently noted, while the two-issue rule is discussed most often in the context of appellate review of general jury verdicts, the rule applies with equal force to dispositive orders of the trial court. *See Wofford v. City of Spartanburg ex rel. S.C. Municipal Ins. Trust*, 415 S.C. 152, 781 S.E.2d 146, 149 (Ct. App. 2015). In *Wofford*, the Court gave the example of the trial court granting a directed verdict on

the basis of the statute of limitations and contributory negligence, noting that affirmance would be required if the plaintiff failed to appeal *both* grounds. *See id.* (citing *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420 n.1, 472 S.E.2d 253, 255 n.1 (1996)).

In this case, the circuit court articulated more than one reason for granting summary judgment to BB&T on Skywaves' claims for negligence and negligent misrepresentation:

- **Negligence**
  - This claim is barred by the economic loss doctrine;
  - This claim is barred by S.C. Code Ann. § 37-10-107;
  - Skywaves failed to prove the existence of a duty owed by BB&T to Skywaves.
- **Negligent Misrepresentation**
  - This claim is barred by the economic loss doctrine;
  - This claim is barred by S.C. Code Ann. § 37-10-107;
  - Skywaves failed to present evidence of a false statement of existing fact;
  - Skywaves failed to establish justifiable reliance.

(Order, *passim*)

Because each of the grounds listed above is an independently adequate basis for summary judgment, the two-issue rule requires Skywaves to raise and argue all of these grounds on appeal. In its brief, Skywaves argues at length that the circuit court erred in ruling that Skywaves had not shown any duty owed by BB&T to Skwyaves, but it completely ignores the other grounds for the summary judgment ruling.

"[A]n unappealed ruling, right or wrong, is the law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Thus, even if Skywaves' argument on the existence of a duty had merit (it does not, as discussed below), its failure to address any of the other grounds for the circuit

court's ruling is fatal to its appeal. For this reason alone, this Court should affirm the grant of summary judgment to BB&T on Skywaves' tort claims.

### C. The circuit court correctly ruled that Skywaves' tort claims fail on their merits.

#### 1. Skywaves' tort claims are barred by South Carolina's lender liability statute of frauds.

Skywaves' claims for promissory estoppel, negligence and negligent misrepresentation appear to be based upon an alleged oral promise to "provide capital financing to Skywaves" or to "provide ... funding [for] all of its financial needs." (Am. Comp. ¶¶ 41, 56) To the extent these claims are for alleged oral promises outside the confines of the Factoring Agreement, they are barred by S.C. Code Ann. § 37-10-107, which is "essentially a statute of frauds" for lender liability claims. *Sea Cove Dev., LLC v. Harbourside Comm. Bank*, 387 S.C. 95, 105, 691 S.E.2d 158, 163 (2010).[4] Section 37-10-107 prohibits any claim against a lender, whether in contract or in tort, that is not based on a written agreement signed by the parties. *Id.* Specifically, § 37-10-107 provides, in relevant part:

> (1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

---

[4] As the *Sea Cove Development* Court explained,

> Many states have now enacted such lender liability limitation provisions ... barring the enforcement of oral lending agreements in the absence of a signed writing. *See* John L. Culhane, Jr., *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 Bus. Law. 1779 (1990) ... South Carolina's statute is based directly on the Model Lender Liability Limitation Statute prepared by the Joint Task Force of the Committees on Consumer and Commercial Financial Services. *See id.* at 1792 (reviewing the provisions of the model statute).

*Id.*

(a) to lend or borrow money;

(b) to defer or forbear in the repayment of money; or

(c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

(a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;

(b) promissory or equitable estoppel;

(c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or

(d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

Skywaves' claims are all based upon alleged *oral* statements, promises, or representations made by BB&T, *e.g.*, that BB&T "was fully committed to providing the present and future banking needs of Skywaves." (Am. Compl. ¶ 53) But Skywaves has not provided, and cannot provide, anything in writing from BB&T to evidence the material terms and conditions of the alleged promises or representations made to it by Edahl or anyone on behalf of BB&T. Skywaves' claims for negligence and negligent misrepresentation are therefore barred by § 37-10-107.

**2. Skwyaves' tort claims are barred by the economic loss doctrine.**

Skywaves' claims for negligence and negligent misrepresentation seek damages arising from the parties' contractual relationship. Under the economic loss

doctrine, however, a plaintiff may not recover in tort for violation of contractual duties. "A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54-55, 463 S.E.2d 85, 88 (1995). Thus, when parties are in privity of contract, South Carolina law permits a tort action only if the plaintiff can establish the existence of a duty "arising independently of any contract duties between the parties." *Id.*

Skywaves' tort claims seek to recover for the alleged "loss of a bargained-for" financing arrangement "based on a commercial transaction," which is a loss adequately protected by contract law. *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1049 (D.S.C. 1993), *aff'd mem.*, 46 F.3d 1125 (4th Cir. 1995); *see also Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009) ("Contract law seeks to protect the expectancy interests of the parties. Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property."). Further, Skywaves has not established the existence of any duty arising independently of the Factoring Agreement. Therefore, the economic loss doctrine bars Skywaves' tort claims as a matter of law. *See Palmetto Linen Serv. v. U.N.X., Inc.*, 205 F.3d 126, 129 (4th Cir. 2000) (applying South Carolina law to find that the economic loss doctrine barred any tort claims arising solely from a vendor-vendee relationship); *Trevillyan v. APX Alarm Sec. Sys., Inc.*, No. 2:10-1387-MBS, 2011 U.S. Dist. LEXIS 694, at *23 (D.S.C. Jan. 3, 2011) (rejecting negligence claim where no duty was shown to arise independent of the parties' contract).

### 3. Skywaves' negligence claim fails on its merits because Skywaves cannot prove BB&T owed it a duty of care.

To establish its claim for negligence, Skywaves must prove: (1) that BB&T owed Skywaves a duty of care, (2) that BB&T breached that duty, and (3) that Skywaves suffered damages proximately caused by the breach. *See Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011). Skywaves' claim fails on the first element because it failed to establish the existence of a duty of care.

"Duty is generally defined as the obligation to conform to a particular standard of conduct toward another." *Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). The existence of a duty must be established through proof of relevant facts; "'[p]roof of negligence in the air, so to speak, will not do.'" *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001) (quoting *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99, 99 (1928)). "The existence of a duty owed is a question of law for the courts." *Houck v. State Farm Fire & Cas. Ins. Co.*, 620 S.E.2d 326, 329 (S.C. 2005).

The circuit court correctly ruled that "Skywaves' claim for negligence, which it presents as a claim for breach of 'fiduciary duty,' fails for want of any duty." (Order at 9) "[T]he normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature." *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003). "In limited circumstances," however, "a fiduciary relationship may be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers." *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986). Proving a fiduciary

relationship requires more than evidence of "respect for another's judgment or trust in his character." *Id.* Rather, Skywaves must identify "facts and circumstances ... indicat[ing] that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party." *Id.* Moreover, Skywaves must also prove that BB&T *knew* that Skywaves had reposed a special trust in it. *See Regions Bank*, 354 S.C. at 671, 582 S.E.2d at 444.

The relationship between Skywaves and BB&T was clearly stated in the Factoring Agreement. Skywaves alleges that BB&T's agreement to provide financing based on purchase orders and site plans "gave rise to a special relationship between the parties" (cite), but there are no facts in the record indicating that the modifications of the Factoring Agreement altered the basic debtor-creditor relationship between Skywaves and BB&T. Skywaves' principals, Ron Konersmann and John Voytko, are experienced businessmen, and Voytko is a licensed CPA. Nothing in the record suggests that either of them lacked the sophistication needed to understand the terms of the Factoring Agreement and the modifications they asked BB&T to make.

In sum, the circuit court properly granted summary judgment to BB&T on the basis that Skywaves failed to establish the existence of a fiduciary duty. Additionally, Skywaves failed to establish any of the other elements of its negligence claim, including proximate cause and damages.

### 4. Skywaves' negligent misrepresentation claim fails because Skywaves cannot prove a false statement or justifiable reliance.

To prevail on its negligent misrepresentation claim, Skywaves must prove that (1) BB&T made a false representation to the Skywaves; (2) BB&T had a pecuniary interest in making the statement; (3) BB&T owed a duty of care to see that it communicated truthful information to Skywaves; (4) BB&T breached that duty by failing to exercise due care; (5) Skywaves justifiably relied on the representation; and (6) Skywaves suffered a pecuniary loss as the proximate result of its reliance. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003). The circuit court granted summary judgment because Skywaves failed to show either that BB&T made a false representation to Skywaves or that it justifiably relied on any such representation. This ruling was correct and should be affirmed.

#### (a) There is no evidence of a false statement.

First, Skywaves has no evidence that BB&T made a false representation to Skywaves. The tort of negligent misrepresentation is premised "on the transmission of a negligently made false statement." *Armstrong v. Collins*, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005) (internal quotation marks omitted). A speaker with a pecuniary interest in a transaction owes "a duty to exercise reasonable care in giving information," *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App. 2003), and may be liable for damages if "a party suffers either injury or loss as a consequence of relying upon the misrepresentation." *Winburn v. Ins. Co. of N. Am.*, 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985).

Critically, the alleged misrepresentation "must relate to a present or pre-existing fact and be false *when made*." *Koontz v. Thomas*, 333 S.C. 702, 713, 511 S.E.2d 407, 413 (Ct. App. 1999) (emphasis added). "Representations based on statements as to future events or unfulfilled promises are not usually actionable." *Sauner*, 354 S.C. at 408, 581 S.E.2d at 167 ; *see Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993) ("The representation cannot ordinarily be based on unfulfilled promises or statements as to future events.").

The circuit court correctly determined that Skywaves failed to present any evidence of a false statement of existing fact. Moreover, to the extent Skywaves bases its claim on BB&T's alleged promises to fund its future needs, there is no evidence that BB&T did not intend to fulfill any such promises. *Cf. Davis v. Upton*, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967) ("[W]here one promises to do a certain thing, having at the time no intention of keeping his agreement, it is a fraudulent misrepresentation of a fact, and actionable as such."). "Evidence of mere non-performance of a promise is not sufficient to establish either fraud or a lack of intent to perform." *Woods v. State*, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct. App. 1993). "An inference of a lack of intent to perform a promise can *only* be made when non-observance of a promise is coupled with other evidence." *Turner*, 392 S.C. at 124, 708 S.E.2d at 770.

Any promises BB&T made, it kept. As for financing Skywaves' future business needs, BB&T did in fact provide financing. BB&T financed Skywaves' site plans throughout 2007, as identified by Skywaves, and continued to finance

Skywaves[5] needs throughout the remainder of 2007, many months after the alleged promise was made in the spring of 2007.

Skywaves does not contend, and could not prove, that BB&T promised never to cease providing funds or never to declare a default under the Factoring Agreement, no matter how dire Skywaves' financial condition became. The terms of the relationship between Skywaves and BB&T were clearly spelled out in the Factoring Agreement, and under those terms, BB&T was entitled to protect its interests by declaring the loan in default. Indeed, Skywaves admitted that the terms of the Factoring Agreement "protect[ed] the bank, which is fine, you know, it's their money and we're borrowing it so if anything happens, they should be the person to try to, you know, get all of their money back." (Konersmann Dep. 169:24-170:4)

**(b) There is no evidence of justifiable reliance.**

Second, Skywaves' negligent misrepresentation claim fails because Skyaves cannot prove it had a right to rely on any representation inconsistent with the written terms of the Factoring Agreement. "Where there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely, and the party has not stated a claim for negligent misrepresentation or fraudulent inducement." *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014).[6] The Factoring Agreement expressly provided that it "constitute[d] and expresse[d] the entire understanding between the parties hereto ... and supersede[d] all prior and contemporaneous agreements and

---

5

[6] The law of North Carolina is the same. *See Jordan v. Earthgrains Cos.*, 155 N.C. App. 762, 767, 576 S.E.2d 336, 340 (2003).

understandings ... and supersede[d] any course of performance." (Factoring Agreement ¶ 24) In light of this clear language, Skywaves could not *reasonably* have relied on any representation not consistent with the express terms of the Factoring Agreement. *See DeHart v. Dodge City of Spartanburg, Inc.*, 311 S.C. 135, 139-40, 427 S.E.2d 720, 722 (Ct. App. 1993) (holding plaintiff who failed to read contract "as a matter of law ... did not have the right to rely on statements" inconsistent with contract's terms); *see also Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (Ct. App. 1994) ("The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document."). Accordingly, the circuit court was correct in its ruling that Skywaves' negligent misrepresentation claim failed as a matter of law for lack of justifiable reliance.

## II. THE CIRCUIT COURT CORRECTLY DISMISSED SKYWAVES' SCUTPA CLAIM BECAUSE THERE IS NO PUBLIC IMPACT.

Skywaves' First Amended Complaint included a claim for violation of the South Carolina Unfair Trade Practices Act, 39 S.C. Code Ann. §§ 39-5-10 to -180 (1976 & Supp. 2015). (Am. Compl. ¶¶ 91-100) The circuit court dismissed this claim, with prejudice, because Skywaves "merely offer[ed] a conclusion of law" that BB&T's alleged conduct affected the public interest, failing to allege "any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition." (Order of Nov. 8, 2011, at 8) Skywaves' appeal of this ruling is without merit.[7]

To be actionable under SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *See Noack Enters., Inc. v. Country Corner Interiors Inc.*, 290 S.C. 475, 478-79, 351 S.E.2d 347, 349 (Ct. App. 1986). Therefore, "an unfair or deceptive act that affects only the parties to the transaction is beyond the scope of the SCUTPA." *Woodson v. DLI Props., LLC*, 406 S.C. 517, 530, 753 S.E.2d 428, 435 (2014). This limitation on the reach of the act reflects the General Assembly's intention, in adopting SCUTPA, "to control and eliminate the large scale use of unfair and deceptive trade practices within the state of South Carolina." *Noack Enters.*, 290 S.C. at 477, 351 S.E.2d at 349 (internal quotation marks omitted).

[7] BB&T notes that after Skywaves moved for reconsideration of the November 8 order, the circuit reinstated several of the claims it had dismissed, but it did not reinstate the SCUTPA claim. (Order of Jul. 27, 2015, at 12) Subsequently, Skywaves moved to amend its First Amended Complaint to "clarify" that the claim should have been made under the *North Carolina* Unfair Trade Practices Act. (Mem. in Support of Mot. to Amend, at 6) The circuit court denied the Motion to Amend. (Order of Jul. 27, 2015, at 11-13) Rather than appeal that denial, Skywaves has reversed course, and now argues that it properly pleaded a claim under the *South Carolina* act.

The public interest requirement may be satisfied by a showing that the acts or practices complained of have the potential for repetition. *See Hollman v. Woolfson*, 384 S.C. 571, 580, 683 S.E.2d 495, 499 (2009). The potential for repetition, in turn "may be proven by showing: (1) the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) the defendant's procedures created a potential for repetition of the unfair and deceptive acts." *Id.*

In this case, the circuit court dismissed Skywaves' SCUTPA claim on the basis that Skywaves failed to allege "any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition." (Order of Oct. 26, 2011, at 8) In reviewing this ruling, this Court must apply the same standard as the circuit court. *See Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426. Accordingly, the question for this Court is whether the facts alleged, and reasonable inferences from those facts, "constitute a cause of action." *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014). "A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint." *Disaboto v. S.C. Ass'n of Sch. Admins.*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013). The circuit court correctly concluded that Skywaves failed to adequately allege a claim for violation of SCUTPA.

Skywaves' First Amended Complaint contains no factual allegations regarding past actions of BB&T, nor are there any factual allegations regarding a potential for repetition created by BB&T's procedures. The only reference to the public interest requirement is a single, conclusory sentence:

> The unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition.

(Am. Compl. ¶ 97) Even under the liberal standard applicable on a motion to dismiss, a mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient. *See Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986).

Read as a whole, Skywaves' Complaint alleges no more than a dispute between the parties to a particular transaction—Skywaves alleges, in sum, that BB&T promised to fund Skywaves' financial needs, but then did not fulfill that promise. Even when viewed in the light most favorable to Skywaves, the allegations of the Complaint give no hint of any public impact from Respondents' alleged conduct. This is fatal to Skywaves' claim, because "[a]n unfair or deceptive act or practice that affects only the parties to a trade or commercial transaction is beyond [SCUTPA's] embrace." *Ardis v. Cox*, 314 S.C. 512, 518, 431 S.E.2d 267, 271 (Ct. App. 1993). Ultimately, Skywaves' SCUTPA claim rests entirely upon BB&T's alleged breach of the Factoring Agreement. However, even "[a] deliberate or intentional breach of a valid contract, without more, does not constitute a violation of SCUTPA. Otherwise, every intentional breach of a contract within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages." *Id.*

For the foregoing reasons, the circuit court's dismissal of Skywaves' SCUTPA claim should affirmed.

## III. SKYWAVES WAIVED ITS RIGHT TO A JURY TRIAL.

Skywaves demanded a jury trial in its Complaint and First Amended Complaint. However, when it entered into the Factoring Agreement, Skywaves waived its right to a jury trial:

> To the fullest extent permitted by applicable law, [Skywaves] hereby **knowingly, intelligently and expressly waives ... trial by jury and the right to trial by jury** on any issue in any way pertaining to this Agreement or any transactions or occurrences arising hereunder or governed hereby (which right BB&T likewise waives)[.]

(Factoring Agreement ¶ 29) Based on this provision, BB&T and Edahl moved to strike Skywaves' jury demand, and the circuit court granted this motion. (Order of Feb. 9, 2015). This Court should affirm that ruling.[8]

### A. This issue is governed by South Carolina law.

In addition to the jury trial waiver, the Factoring Agreement contains a choice of law provision, which states that "[a]ll acts, transactions, rights and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina." (Factoring Agreement ¶ 25) Based on this provision, Skywaves contends that the validity of the jury trial waiver is governed by North Carolina law, which prohibits such waivers. Br. at 5-7; *see* N.C. Gen. Stat. § 22B-10 ("Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable."). Skywaves is wrong, however, because availability of a jury trial is a procedural issue. As such, it is governed by the law of the forum, South Carolina, under which contractual jury trial waivers are allowed and enforceable. *See*

[8] Of course, the Court does not need to reach this issue if it agrees with BB&T that it is entitled to summary judgment on all of Skywaves' claims.

*Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 332-33, 755 S.E.2d 437, 443 (2014).

As a general rule, "[t]he local law of the forum determines whether an issue shall be tried by the court or by a jury." *Restatement (Second) of Conflict of Laws* § 129 (1971). This rule applies regardless of the existence of a contractual choice-of-law provision, because such provisions apply only to substantive issues, while procedural issues are governed by the law of the forum. *See* 17A Am. Jur. 2d *Contracts* § 264 (citing *Terrace Group v. Vermont Castings, Inc.*, 753 A.2d 350 (R.I. 2000)); 43 Am. Jur. 2d *Insurance* § 331 (citing *Burge v. Mid-Continent Cas. Co.*, 933 P.2d 210 (N.M. 1996)). North Carolina courts have recognized and applied this principle. *See, e.g.*, *Taylor v. Abernethy*, 174 N.C. App. 93, 103, 620 S.E.2d 242, 250 (2005) (holding that the law of the forum governs procedural issues even if another state's law governs substantive issues). Accordingly, South Carolina law governs the enforceability of the jury trial waiver in the Factoring Agreement.

### B. Skywaves knowingly and voluntarily waived its right to a jury trial.

South Carolina law recognizes that the right to a jury trial may be waived. *See Blackburn*, 407 S.C. at 332-33, 755 S.E.2d at 443; *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.* 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002). In *North Charleston Joint Venture*, the South Carolina Supreme Court cited with approval a Fourth Circuit decision that contained the following reasoning:

> The seventh amendment right is of course a fundamental one, but it is one that can be knowingly and intentionally waived by contract. Where waiver is claimed under a contract executed before litigation is

> contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed.

*Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832-33 (4th Cir. 1986) (citations omitted). In determining the enforceability of a jury trial waiver, the South Carolina Supreme Court has looked to whether the waiver is (1) conspicuous, and (2) unambiguous in its wording. *Blackburn*, 407 S.C. at 333 n.8, 755 S.E.2d at 443 n.8.

**1. The waiver provision is conspicuous.**

In determining whether a jury trial waiver is conspicuous, the Court has looked to such factors as: (1) whether the heading of the waiver is in bold typeface or underlined, (2) whether the language of the waiver is in all-capital letters, (3) whether the waiver is near the signature page or buried within the contract, and (4) whether the jury trial waiver stands out in some way from the other paragraphs in the contract. *See id.* Consideration of these factors demonstrates that the jury trial waiver in the Factoring Agreement is conspicuous.

The jury trial waiver in the Factoring Agreement appears in bold typeface as the last separately numbered paragraph on the page immediately preceding the signature page. The signature page does not include any additional paragraphs, and only includes a signature block for both Skywaves and BB&T. Thus, the jury waiver provision is sufficiently conspicuous to support a finding of waiver.

**2. The waiver provision is unambiguous.**

"A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices,

usages and terminology as generally understood in the particular trade or business." *Williams v. GEICO*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (Ct. App. 2014) (internal quotation marks omitted). Based on this standard, it is clear that the jury trial waiver is unambiguous. Its language is simple and direct, stating in plain terms that Skywaves waives "trial by jury and the right to trial by jury on any issue in any way pertaining to this Agreement." (Factoring Agreement ¶ 29). In fact, the language of the Factoring Agreement is nearly identical to the language approved by the Supreme Court in *Blackburn*. Further, there can be no doubt that Konersmann, who executed the Factoring Agreement on behalf of Skywaves, was fully capable of understanding the waiver. Konersmann not only holds an MBA from the University of Notre Dame (Konersmann Dep. 27:11-28:5), he also had substantial prior experience with factoring agreements. (*Id.* 122:10–123:2)

In view of the foregoing, the circuit court correctly struck Skywaves' demand for a jury trial.

## IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING SKYWAVES' MOTION TO STRIKE DEFENDANTS' ANSWERS.

"A motion to strike is addressed to the sound discretion of the trial judge and will not be disturbed in the absence of a clear showing of prejudicial error." *S.C. Dep't of Health & Envtl. Control v. Fed-Serv Indus., Inc.*, 294 S.C. 33, 39, 362 S.E.2d 311, 314-15 (Ct. App. 1987). The burden of showing an abuse of discretion rests on the party appealing the grant or denial of a motion to strike. *See Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Id.*

Distilled to its essence, Skywaves' argument is that the circuit court should have struck BB&T's entire Amended Answer, as well as Edahl's—thereby placing *both* defendants in default—because Skywaves is unsatisfied with how BB&T amended its Answer when, in the ordinary course of discovery, one of numerous contested facts was proven true.

### A. Skywaves misleadingly presents some facts and altogether ignores others.

Skywaves actually filed two motions to strike Respondents' answers, both of which were denied by the circuit court. In its first motion to strike, filed in January 2014, Skywaves asserted that BB&T's Answer was as a "sham." (1st Motion to Strike at 1) The motion arose out of Respondent Jim Edahl's deposition testimony that in the spring of 2007 he had agreed for BB&T to provide financing based on site plans from a particular Skywaves customer as though they were purchase orders. (Edahl

Dep. (9/19/2013) 46:15-50:22). Edahl further testified that when the issue of site-plan financing arose in January 2008, he did not recall having made this agreement. (*Id.* at 80:21-81:11)

Several months later, Skywaves filed the first Motion to Strike. Although nothing in the law or the rules of procedure requires a party to amend a pleading every time new information comes to light during discovery, Skywaves complained that BB&T had failed to amend its Answer in light of Edahl's deposition testimony. BB&T therefore moved to amend its Answer. Subsequently, the circuit court denied Skywaves' Motion to Strike and granted BB&T's Motion to Amend its Answer. (Order (Mar. 17, 2014))

Skywaves filed its second Motion to Strike on April 16, 2015, mere days before the hearing on summary judgment. The second motion sought to strike BB&T's Amended Answer—the very pleading BB&T filed in response to Skywaves' first Motion to Strike, and which the circuit court had allowed. Skywaves' second motion did not raise any new substantive issues or theories that were unknown or unavailable to Skywaves when it filed its first Motion to Strike.

The circuit court denied Skywaves' second Motion to Strike on July 23, 2015. (Order, at 13)

### B. The circuit court correctly rejected Skywaves' demand to sanction BB&T for refusing to capitulate to Skywaves' distorted view of the facts.

Skywaves' appellate brief, like its second Motion to Strike, is inappropriate and inflammatory. It appears to be an effort to gain an advantage in this appeal by smearing mud on Respondents and their counsel. To that end, Skywaves presents a

misleading and unfounded statement of relevant events. Skywaves' revisionist history ignores the evidence.

Skywaves contends, first, that BB&T "knowingly perpetrated a fraud on the court" by denying Skywaves' allegation, in its Complaint, that BB&T had, through Edahl, approved funding based on site plans. Br. at 29. The factual allegations at issue are found in Paragraphs 18 and 19 of Skywaves' First Amended Complaint:

> 18. Between March and December of 2007, Skywaves and BB&T exchanged a series of emails, letters and documents, which memorialized the relevant and material terms of a new and expanded factoring agreement (or a modification of the prior agreement).
>
> 19. Under this modified factoring agreement, BB&T agreed, among other things, to provide capital infusions based on invoices, purchase orders, contracts and site plans.

(Am. Compl. ¶¶ 18, 19) BB&T's original Answer, filed in February 2010, denied these allegations. (Answer ¶ 12 ("Defendant denies the allegations of paragraphs 16, 17, 18, 19, 20, 21 and 22.")) BB&T's response was consistent with Rule 8(b), SCRCP, which requires only that a defendant's answer "shall admit or deny the averments upon which the adverse party relies." The response also served the fundamental purpose of an answer to a complaint: to "apprise the opponent of those allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable the plaintiff to prevail." 5 Charles Alan Wright, et al., *Federal Practice & Procedure* § 1261 (3d ed.).

Moreover, the evidence shows that BB&T had a good faith belief, at the time of its original Answer, that Skywaves had submitted site plans as purchase orders on behalf of General Dynamics. In January 2008, BB&T declared a default under the terms of the Factoring Agreement based on Skywaves' ever-deteriorating financial

condition, its inability to pay its debts as they came due, and its continuing noncompliance with its contractual obligation to remit to BB&T any funds received on factored invoices. (Default Letter) At that time, the only information BB&T had regarding site plan financing was that there should have been, but were not, purchase orders supporting advances based on Skywaves' expected sales to General Dynamics. At that time, BB&T's problem loan administrator, Mike Hennessy, was unaware that site-plan financing had been approved. It is undisputed that Edahl did not say that he had approved the site-plan financing.

What little information BB&T did have—much of it from Skywaves itself—seemed to indicate that advances based on site plans should not have been made:

- When a third-party examiner inquired about the "purchase order line" during a routine field exam on January 22, 2008, Skwyaves CFO John Voytko told her that Skywaves "currently does **not** have purchase orders to support $1,971,355 of the amounts listed under General Dynamics (GD). Per John Voytko, the controller, *the company is working with GD to obtain a purchase order to support these.*" (Field Examiner's Report at 2 (italics added; bold & underlining original))
- After Konersmann and Voytko told Hennessy about the site plan financing, Skywaves' consultant, Earl Hewlette, approached BB&T with proposals to repay BB&T for the "non-conforming" advances. (Email from Hewlette to Hennessy (Feb. 2, 2008)). Hewlette assured BB&T that Skywaves' management had "a sincere appreciation and regret for the mistakes made in the past in dealing with the bank." (*Id.*)
- On February 11, 2008, counsel for BB&T wrote to Konersmann, rejecting Hewlette's proposals and identifying several issues that had to be resolved before the bank could consider not enforcing its rights under the Factoring Agreement. (Letter from Licata to Konersmann (Feb. 11, 2008)) One of the issues was "funding by BB&T on what it understood to be purchase orders" but which the field exam had revealed to be only "contractual obligations of General Dynamics ... a stage of the process at which BB&T had never agreed to provide funding." (*Id.* at 3) Notably, Skywaves made no attempt to correct this misunderstanding.

This was the information BB&T had when Skywaves filed its complaint in December 2009, alleging that BB&T had agreed "to provide capital infusions based on invoices, purchase orders, contracts and site plans" (Am. Compl. ¶ 19), and when BB&T filed its Answer in February 2010, denying that allegation.

When he was deposed in September 2013, Konersmann testified that he had asked, and Edahl had agreed, for BB&T to advance funds on General Dynamics' site plans as a "gap filler" for the latter half of 2007. (Konersmann Depo. 304:13-22) During his own deposition the following week, Edahl testified that Konersmann's testimony had reminded him (Edahl) that he had agreed to provide funds based on the General Dynamics site plans. (Edahl Dep. 80:24-81:21) At that time, Edahl testified that in 2008, he had not remembered agreeing to site plan financing. (Edahl Dep. 78:20-79:15) Several months later, Edahl swore an affidavit admitting that he "was aware in January 2008 that [he] had agreed to treat certain site plans of General Dynamics the same as purchase orders with respect to funding under BB&T's factoring agreement with Skywaves, but did not reveal this information to BB&T or anyone out of fear and panic of the situation." (Edahl Aff. ¶ 4)

Shortly thereafter, BB&T moved to amend its Answer to admit the limited site plan financing. As amended, BB&T's answer to the allegations of Paragraph 19 states:

> Responding to Paragraph 19, Defendant admits only that the March 22, 2005 Factoring Agreement was amended to allow for factoring of invoices and purchase orders. Defendant further admits that it agreed to finance site plans, to a limited extent, with certain limitations on the amounts being factored. Defendant denies the remaining allegations of Paragraph 19.

(Am. Answer ¶ 14)

Skywaves contends that BB&T's *entire* Amended Answer should be struck because it does not "fully and unequivocally" admit the allegations of Paragraph 19. Br. at 31. But Skywaves is not entitled to dictate the language of BB&T's pleadings. For the Amended Answer to be sanctionable, Skywaves must show that the Amended Answer was false, and that BB&T knew it was false. Skywaves cannot make such a showing, and indeed it does not even attempt to do so.

Skywaves also complains, Br. at 28, about BB&T's denial of Skywaves' broadly stated allegation that "[a]t *all times* relevant hereto, Defendant Edahl was the agent, servant and employee of Defendant BB&T, and acted within the scope and course of his employment." (Am. Compl. ¶ 52 (emphasis added); *see* Am. Answer ¶ 30 (denying, *inter alia*, the allegations of ¶ 52)) Skywaves ignores, however, that BB&T's Answer and Amended Answer both admitted Skywaves' allegation that "James Edahl is an officer of BB&T who does business in Charleston County and is a citizen and resident of South Carolina." (Am. Compl. ¶ 4; *see* Answer ¶ 5 ("Defendant admits the allegations of ¶ 4."); Am. Answer ¶ 5 (same)) This admission necessarily establishes that Edahl was BB&T's agent when acting within the course and scope of his employment—a point which BB&T has never disputed. Further, there is nothing underhanded or improper about BB&T's denial of Paragraph 52, which essentially alleges that *everything* Edahl did with respect to Skywaves was *always* within the course and scope of his employment.

Finally, Skywaves incorrectly and misleadingly contends that BB&T "dishonestly answered an interrogatory" by stating that it declared Skywaves in

default on January 25, 2008.[9] Br. at 32. According to Skywaves, the "reality" is that BB&T declared Skywaves in default on January 18, when Edahl spoke with Konersmann and Voytko by telephone and told them an overadvance "had put [Skywaves] in default ... and that they would be getting written notice of the same." (Second Motion to Strike, at 5) However, Edahl did not have the authority to declare a default, and Skywaves knows it. In its Supplemental Interrogatory Number 4, Skywaves asked BB&T to "[i]dentify ... the person(s) who had the authority to declare the Skywaves account in default in January, 2008." (BB&T's Answers to Supp. Interrogatories, at 2) In response, BB&T identified Mike Hennessy, Walt Denning, and Mike Burke—but not Jim Edahl. (*Id.*) More importantly, Skywaves ignores the plain terms of the Factoring Agreement, which require a declaration of default to be in writing. (Factoring Agreement ¶ 20 ("All notices, requests and demands to or upon a party hereto shall be in writing.")) Skywaves' complaint regarding the interrogatory answer is entirely unfounded.

[9] Specifically, Skywaves' Supplemental Interrogatory Number 5 asked, "Did BB&T declare the Skywaves account in default prior to the letter of January 25, 2008? If so, what was the claimed default?" BB&T responded, "No." (BB&T's Answers to Supp. Interrogatories, at 2)

## CONCLUSION

For the foregoing reasons, the circuit court's rulings should be affirmed.

Respectfully submitted,

Kirsten E. Small, Esquire
NEXSEN PRUET, LLC
55 E. Camperdown Way, 4th Floor (29601)
Post Office Drawer 10648
Greenville, SC 29603
Telephone: 864.370.2211
Email: ksmall@nexsenpruet.com

Molly Hughes Cherry, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
Post Office Box 486
Charleston, SC 29402
Telephone: 843.577.9440
Email: 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
Email: rmendoza@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*

Greenville, South Carolina
March 17, 2016