THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-001809

Skywaves I Corporation.....Appellant/Respondent

v.

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

Of which Branch Banking & Trust Company, successor in merger to Branch Banking and Trust Company of SC, a/k/a BB&T is the .....Respondent/Appellant

AND

Of whom James Edahl is the .....Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER SOURCES

INTRODUCTION

In their Respondent Briefs, Respondent/Appellant Branch Banking and Trust Company of SC, a/k/a BB&T ("BB&T") and Respondent James Edahl ("Edahl") (collectively "Defendants") miscast the appeal filed by Appellant/Respondent Skywaves I Corporation ("Skywaves"). This appeal — as opposed to Defendants' cross-appeal — does not involve a contract dispute. For the purpose of *this* appeal, Skywaves does not challenge BB&T's claim Skywaves was in breach of the loan agreement. Indeed, for the purpose of this appeal, the Court may assume that Skywaves was in default of the parties' agreement. Setting aside the question of default, this appeal posits that Defendants should bear the responsibility *in tort* for having placed Skywaves in the position in the first instance where BB&T could even claim a default.

By way of example, assume that a customer goes to the bank to borrow money to purchase a dump truck for a new business. The customer signs a loan agreement and explains to the bank that the truck will generate income sufficient to service the loan. However, the customer wrecks the truck and is unable to generate income to repay the loan. The bank calls the loan in default. Such a customer would remain obligated on the loan and could not avoid the loan agreement simply because it wrecked the truck (harming its ability to run its business).

On the other hand, if the same customer went to the bank to borrow money to purchase the same dump truck, but the bank officer provided advice as to the best way to use the truck to maximize the customer's business. The bank officer gets behind the wheel of the dump truck to demonstrate and wrecks it. The customer is again unable to generate income to pay the loan and the bank calls a default. Irrespective of whether the customer might remain liable on the loan in that case, the customer would have an independent *tort* cause of action against the bank and its agent.

Such is the case Skywaves' tort claims. Skywaves does not seek to change or modify the parties' contract for purposes of this appeal. It does not challenge its

obligation to pay under any loan or contract with BB&T. In this appeal, Skywaves only argues that Defendants' "crashed" its business; as a result, Skywaves may sue Defendants independent of any contract.

ARGUMENTS

I. THE COURT SHOULD REVERSE THE GRANT OF SUMMARY JUDGMENT AS TO SKYWAVES' TORT CLAIMS

A. The "Two Issue" Rule Does Not Require the Court to Affirm the Grant of Summary Judgment on Skywaves' Tort Claims

Defendants BB&T and Edahl argue in this appeal that this Court must affirm the grant of summary judgment on Skywaves' tort claims under the "two issue" rule. Specifically, BB&T and Edahl argue that Skywaves did not adequately address two grounds for summary judgment that Judge Young appeared to rely upon for the grant of summary judgment: (a) the economic loss doctrine; and (b) the statute of frauds under S.C. Code § 37-10-107.

However, for the reasons discussed in the following sections, those issues are not implicated in Skywaves' arguments in this appeal. To the contrary, Judge Young's holdings that are relevant to this appeal are his conclusions that: (1) there is not a scintilla of evidence of a duty of care; (2) Skywaves had not presented a scintilla of evidence of false statements of existing fact; and (3) Skywaves had not presented a scintilla of evidence of justifiable reliance. Skywaves has appealed and briefed those issues in full in its Appellant's Brief.

1. The "Two Issue Rule" Does Not Apply with Regard to the "Economic Loss Doctrine"

Defendants' suggestion that the instant appeal implicates the question of whether Skywaves' tort claims are barred by the economic loss doctrine" is nonsensical. The economic loss doctrine does not apply to tort claims; it applies to preclude breach of contract claims disguised as tort claims. Judge Young ruled that the doctrine bars the recovery of tort damages for a duty imposed by contract. In this appeal, Skywaves does not dispute Judge Young's citation of the "economic loss" rule, which would only apply to the extent Skywaves seeks tort damages for conduct in breach of the parties' contract. In that respect, this is not an additional sustaining ground for dismissal of the tort claims;

rather, it is a statement by Judge Young that the economic loss doctrine would preclude Skywaves' tort claims *to the extent they merely restate breach of contract claims.*

Under North Carolina law, the economic loss rule would not apply here. One judge has noted several "guideposts" to assist in understanding the economic loss rule in North Carolina:

> 1. A tort action generally will not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. . . .
>
> 3. That bar, however, does not extend to claims alleging negligent misrepresentation. . . .
>
> 4. Moreover, where a breach of contract "'smack[s] of tort because of the fraud and deceit involved,'" North Carolina law will allow a party to pursue punitive damages based on the fraudulent act. . . .
>
> 5. The North Carolina appellate courts have yet to extend the application of the economic loss doctrine to bar claims based on fraud.

See Club Car, Inc. v. Dow Chem. Co., 2007 WL 2570088, at *3-4 (N.C. Super. May 3, 2007) (citations omitted).

Skywaves' claim is not simply that Defendants failed to perform their contract. In fact, as Edahl has argued repetitively, he is not even a party to any contract; as a result, he could not logically obtain the benefit of the economic loss rule. In any event, Skywaves does not simply allege improper performance of contractual duties. Instead, it claims that Defendants breached duties going *beyond* those imposed in contract. Discovery has disclosed that Defendants undertook duties beyond those expressly spelled out in the agreement. For example, Defendants advised Skywaves concerning the most suitable capitalization options. In doing so, Defendants reached beyond any express contractual obligations. The keystone of Skywaves' claims is that Defendants engaged in *fraudulent* conduct — not simply that they failed to comply with the contract. Consequently, under North Carolina law, the economic loss rule would not apply.

Moreover, South Carolina's version of the "economic loss" does not apply here. *Laidlaw Env'l Servs., (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401, 1414-15 (D.S.C. 1996), discusses South Carolina law on economic loss:

> The economic loss rule is founded on the theory that parties to a contract may allocate their risks by agreement and do not need the special protections of tort law to recover for damages caused by a breach of contract. [Citations omitted.] . . . "[T]he 'economic loss rule' will ... apply where duties are created *solely by contract*. In that situation, no cause of action in negligence will lie." [Citation omitted.] In *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995), the Supreme Court of South Carolina reaffirmed its conclusion that the economic loss rule applies to bar a tort claim if the parties' obligations are grounded exclusively in contract, explaining that "[a] breach of duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie." *Id.* 463 S.E.2d at 88. Thus, "[i]n most instances, a negligence action will not lie when the parties are in privity of contract." *Id.* The *Tommy L. Griffin* court observed, however, that the rule will not apply "*if there is a special relationship between the alleged tortfeasor and the injured party not arising in contract.*" *Id.* If a "special relationship" is present, a tort action will lie. *See id.*

See id. at 1414-15 (emphasis added). The economic loss doctrine would not apply to the extent Defendants undertook duties beyond those in a contract. *See Simons v. Wal-Mart Stores East, L.P.*, 2013 WL 393998, at *5 (D.S.C. Jan. 31, 2013) ("The economic loss rule does not bar tort claims where a defendant voluntarily assumes a duty to use due care over and above the duty required by the contract.").

Despite the doctrine, South Carolina law has long imposed tort liability on those who render negligent educated advice to clients. *See e.g., Tommy L. Griffin Plumbing & Heating v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88-89 (1995) (design professionals may have tort duty); *Beachwalk Villas Condo. Ass'n v. Martin*, 305 S.C. 144, 146-47, 406 S.E.2d 372, 374 (1991) (special duty for architects); *Lloyd v. Walters*, 276 S.C. 223, 226, 277 S.E.2d 888, 889 (1981) (attorney liable for economic loss to corporate shareholder). Skywaves' claims here are no different from claims that have long been permitted under South Carolina law. Just as a client may sue his attorney

— with whom he has a contractual relationship — in tort for breaching a duty to advise or engaging in fraudulent conduct, Skywaves may sue Defendants for violating duties that the law imposed. As a result, which Judge Young correctly noted that the economic loss doctrine bars claims to the extent they are within the parties' contract, his holding on that subject would not extend to the claims at issue in this appeal.

2. The "Two Issue Rule" Does Not Apply with Regard to the Statute of Frauds

Judge Young concluded that the "lender liability" statute of frauds bars any effort to prove oral modification of the Factoring Agreement with allegations of negligent misrepresentation. However, in this appeal, Skywaves does not challenge this finding. Indeed, in *this* appeal, Skywaves does not seek to enforce an agreement to loan money, forbear the repayment of money, or modify a loan. The tort action for negligence and negligent misrepresentation does not implicate the statute of frauds. While the claims here are obviously in the context of agreements, the specific tort claims are unrelated to the performance of the parties' agreement. The statute of frauds does not prevent Skywaves from proving the agreement was induced by fraud or negligence. The statute of frauds is not an additional sustaining ground for dismissal of the tort claims, but rather is a limitation on the scope of those claims.

Skywaves does not claim BB&T failed to perform a promise or a commitment to loan, to defer the repayment of money or renew a loan. Skywaves does claim that Defendants engaged in tortious conduct when they designed a capitalization arrangement "unique" to Skywaves. This is the classic case of fraud in the inducement. The statute of frauds simply would not apply, and the fact that Skywaves did not initially brief that issue has no effect on Skywaves appeal from the dismissal of its tort claims.

Likewise, Skywaves does not challenge the court's finding that the economic loss rule bars a tort claim for economic loss when the *only* duty arises out of contract. As Skywaves explained in its brief, Defendants' duty did not solely arise out of contract.

Instead, Defendants' duty of care arose from Defendants' mishandling of the undertaking to provide an appropriate capitalization vehicle. In that regard, the statute of frauds, as considered by Judge Young, would not be implicated in Skywaves' appeal.

In any event, even if the statute of frauds is implicated in this appeal, it is clear that it does not apply to bar Skywaves' claims.

a. Defendants Admit That an Agreement Existed

Section 37-10-107 does not apply because Defendants admitted in pleadings and testimony that there were contracts in effect under the terms alleged by Skywaves (including site plan financing). *See Gibson v. Arnold*, 288 F.3d 1242, 1246-47 (10th Cir. 2002) ("[V]irtually every court that has addressed the issue during the last twenty-five years has held that judicial admissions are an exception to the statute of frauds."); *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 142 (6th Cir. 1983) (applying exception to statute of frauds in context of deposition admission); *Litzenberg v. Litzenberg*, 307 Md. 408, 514 A.2d 476, 480 (1986) (recognizing exception to statute of frauds applying to admissions by sworn testimony, deposition, or pleadings); *Powell v. City of Newton*, 200 N.C. App. 342, 684 S.E.2d 55 (N.C. Ct. App. 2009) (enforcing settlement made orally in open court).

This result follows under South Carolina law, which recognizes that a party may judicially admit an agreement, thereby obviating a statute of frauds:

> In South Carolina, a pleading admitting a parol agreement that is within the statute of frauds may constitute a sufficient writing within the statute so as to enable the court to enforce the contract [*Smith v. Brailsford*, 1 S.C.Eq. (1 Desauss.) 350 (1794)]; however, the pleading must be sufficiently definite and certain and it must be signed by the party to be charged or by his agent or attorney on his behalf. *Walker v. Preacher*, 188 S.C. 431, 199 S.E. 675 (1938); *see also* 72 Am. Jur. 2d Statute of Frauds § 307 at 826 (1974). A pleading can be regarded as a sufficient writing within the statute even if the pleader at the same time sets up and relies upon the statute as a defense. *Wallace v. Dowling*, 86 S.C. 307, 68 S.E. 571 (1910). To be sufficient, the alleged oral contract must be substantially the same as the contract purportedly admitted in the pleading.

> The written admission must contain all the essential elements of the contract, and the terms and conditions must be stated with reasonable certainty, that is, all material parts must be contained in the memorandum, and it is insufficient where it omits an essential term. [Citation omitted.] It is obvious that the terms stated or admitted must be those mutually agreed to by the parties. Otherwise there is no complete agreement.
>
> *Walker v. Preacher*, 199 S.E. at 677; 72 Am. Jur. 2d Statute of Frauds § 339 at 862 (1974).

See Robert Harmon & Bore, Inc. v. Jenkins, 282 S.C. 189, 193, 318 S.E.2d 371, 373-74 (Ct. App. 1984).

Defendants' Amended Answers to the Amended Complaint admitted "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 be factored." (*See* R. pp. 236-37 ¶ 21 and 267 ¶ 21). Defendants further admitted that BB&T and Skywaves "memorialized certain written modifications to the March 22, 2005 Factoring Agreement." (See R. pp. 236 ¶ 13 and 267 ¶ 13). Defendants admitted that BB&T "agreed to factor a certain percentage on purchase orders up to a certain limit, with the goal of the purchase orders converting to invoices." (See R. pp. 238 ¶ 35 and 269 ¶ 35). These admissions are sufficient to satisfy any potentially-applicable statute of frauds.

b. South Carolina Code § 37-10-107 Does Not Apply Because the Factoring Agreement Selects North Carolina Law

While Defendants argue that Section 37-10-107 governs the enforceability of the BB&T-Skywaves agreements, this is inconsistent with the choice of North Carolina law that BB&T selected to govern the parties' agreement. The Factoring Agreement, the basis of Skywaves' contractual claims, includes the following choice of law provision:

> All 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.

(See R. pp. 897-911). Defendants' argument that South Carolina Code § 37-10-107 applies in this case are unavailing. All of Defendants' tortious conduct, promises and representations — though not coming flowing from a breach of such agreement — occurred in the context of the Factoring Agreement.

c. Section § 37-10-107 Does Not Apply to Skywaves' Claims Against Edahl

The South Carolina statute of frauds does not apply as to Defendant Edahl. South Carolina Code Section 37-10-107(1) provides that: "[n]o 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 . . . ." This statute, on its face, does not apply to the claims asserted against Edahl because the claims against him sound in tort and are not "based upon" an agreement to which he was a party. "It is well settled that the protection afforded by the statute of frauds is a personal privilege of the parties to the agreement [citation omitted], and a stranger to an oral contract cannot avail himself of the fact that the statute of frauds renders the contract unenforceable." *See Hatcher v. Harleysville Mut. Ins. Co.*, 266 S.C. 548, 553, 225 S.E.2d 181, 183 (1976) (*citing Walker v. Preacher*, 188 S.C. 431, 199 S.E. 675 (1938)); *accord Hobgood v. Pennington*, 300 S.C. 309, 315 n.1, 387 S.E.2d 690, 693 n.1 (Ct. App. 1989) ("The statute of frauds is not pertinent to this case because a stranger to an oral contract cannot avail himself of the fact that the statute of frauds renders the contract unenforceable."); *accord Tupper v. Dorchester Cty.*, 326 S.C. 318, 324, 487 S.E.2d 187, 190 (1997) ("[T]he purpose of the statute of frauds is to protect the promisor . . . .").

> It is the intent and purpose of the Statute of Frauds to give to the party to an oral contract, against whom the enforcement of the contract is sought by the other party, the right to assert the Statute as a defense to his or her own liability. A third party should not be able to assert the invalidity of such transactions unless he or she is an assignee or successor to a party to the contract. The defense of the Statute is a personal one available only to a party to the contract to which the Statute is alleged to apply and his representatives and privies. Its benefits cannot be claimed by one who is

> not a party or privy to the oral contract and is not sought to be charged personally on the contract.

See Williston on Contracts § 27:12 (4th ed.) (emphasis added); accord Restatement (Second) of Contracts § 144 ("Only a party to a contract or a transferee or successor of a party to the contract can assert that the contract is unenforceable under the Statute of Frauds."). Stated otherwise:

> Tortfeasors and fraudulent intermeddlers will not be permitted to use the statute of frauds as a defense to a wrongful act or as a means of consummating a fraudulent design. Under this rule, one who . . . commits other such tortious acts cannot defend upon the ground that the plaintiff's right or interest exists only by virtue of a contract unenforceable under the statute of frauds, where the other party to the contract has not rescinded or repudiated the contract upon the ground that he or she is not bound by the contract. . . . If fulfillment of contracts with third persons is prevented by false and fraudulent representations of the defendant, an action will lie although the contract is within the statute of frauds, where it plainly appears that the contract would have been performed except for such representations.

See 73 Am. Jur. 2d, Statute of Frauds § 492 (emphasis added); *accord Greenfield v. Heckenbach*, 797 A.2d 63, 82 (Md. Ct. App. 2002) ("[T]he statute of frauds does not bar a tort suit for either fraud or negligent misrepresentation because those counts are not based 'on ... [the] contract' between the parties but are based on misrepresentations that induced the contract").

As the Supreme Court has held in a related action, Section 37-10-107 "only applies to suits between lenders and borrowers, such as that between Skywaves and BB&T." *See Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 332, 759 S.E.2d 724, 726 (2014). A contrary construction of Section 37-10-107(1) would insulate a non-contracting party from suit in tort simply because he happened to commit torts in the context of a loan; this is not a reasonable construction of the statute. *See Carolina Power & Light Co. v. Town of Pageland*, 321 S.C. 538, 543, 471 S.E.2d 137, 140 (1996).

d. Section 37-10-107 Does Not Preclude Any Claims Because a Qualifying Writing Was Signed by the Party to Be Charged

Defendant Edahl's argument fails because a writing was signed by the party to be charged, BB&T. The relevant part of the statute states that "the party seeking to maintain the action or defense has received a writing from the party to be charged . . . and the party to be charged, or its duly authorized agent, has signed the writing." See S.C. Code § 37-10-107(1)(c). This provision does not require that Skywaves have received a writing signed by *Edahl* to support tort claims against him.

The "party to be charged" with the agreement is BB&T, not Edahl. While Edahl's liability relates to BB&T's contract with Skywaves, Skywaves does not claim that Edahl was in direct contractual privity with it. As set forth below, Skywaves has proffered sufficient evidence that Skywaves received a writing signed by BB&T — the party to be charged with enforcement of the agreement — satisfying the statute.

e. The Parties' Part Performance Satisfies S.C. Code § 37-10-107(2)(c)

The South Carolina statute provides that the absence of a qualifying writing does not preclude an action based on part performance "to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement." See S.C. Code § 37-10-107(2)(c). As discussed throughout the briefs in these appeals, there is significant evidence that Skywaves and BB&T performed as if an agreement existed until BB&T wrongfully terminated it in 2008.

f. Section 37-10-107 Does Not Apply Because the Parties' Agreement Was Not an Agreement to Lend or Borrow Money

Section 37-10-107 requires writings to evidence agreements to "lend or borrow money" or modifications to "loans of money." BB&T and Skywaves were in a factoring agreement and business capitalization relationship. This was not an archetypical loan,

with BB&T providing money to Skywaves and Skywaves repaying with interest at agreed-upon times. Instead, Skywaves sold receivables to BB&T in order to obtain working capital; BB&T was to collect those receivables from Skywaves' customers and earn administrative fees. This unique arrangement was designed to provide Skywaves with working capital. BB&T and Skywaves were working together to find creative ways to fund Skywaves' operations. Because this was not a traditional "loan," it was not an agreement to "lend or borrow money" implicating Section 37-10-107.

g. S.C. Code § 37-10-107(2)(c) Does Not Extend to Plaintiff's Tort Claims

The South Carolina statute states that a failure to properly memorialize a contract within the statute precludes claims under 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.

See S.C. Code § 37-10-107(2). At least some of Skywaves' tort claims are not included in the list of precluded claims. "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000).

h. The Parties' Agreement Is Governed by a Different Statute of Frauds

Under the South Carolina statute, "[i]n the event of a conflict between this section and any other provision of law of this State relating to the requirement of a signed

writing, the provisions of the other provision of law shall control." *See* S.C. Code § 37-10-107(4). Another statute of frauds might apply to the parties' agreement:

> No action shall be brought whereby . . . [t]o charge any person upon any agreement that is not to be performed within the space of one year from the making thereof; [u]nless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

See S.C. Code § 32-3-10(5). The Factoring Agreement has a minimum term of one year and one day. (*See* R. p. 908 ¶ 19). Thus, if a South Carolina statute of frauds applies, it would be Section 32-3-10(5), not Section 37-10-107.

B. The Trial Court Erred in Granting Summary Judgment on Skywaves' Negligence Claims

1. There Is At Least a Scintilla of Evidence of a Duty

In North Carolina and South Carolina, a fiduciary duty arises when "there has been a special confidence reposed in one who in equity and good conscious is bound to act in good faith and with due regard to the interest of the one reposing confidence." *See Curl v. Key*, 331 N.C. 259, 264 316 S.E.2d 272, 275 (1984); *compare Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990); *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). Borrowers' breach of duty claims have been found to actionable where the circumstances created an issue of fact whether a fiduciary relationship was formed. *See WNC Holdings, LLC v. Alliance Bank & Trust Co.*, 2012 WL 4713722 (N.C. Super. Ct. Oct. 2, 2012).

In *WNC*, the borrowers sought a loan to purchase and develop real property. The lender served as a financial and development advisor, reviewed project documents and suggested changes, performed inspections of the property and development, and on more than one occasion prepared pro forma feasibility statements for the borrowers. *Id.* The

court denied the lender's motion to dismiss, stating that the borrowers had pled facts beyond that of the typical debtor-creditor relationship and holding that the borrowers could state claims of claims of negligence, fraud by misrepresentation, fraud by concealment, constructive fraud, breach of the covenant of good faith and fair dealing, unfair and deceptive trade practices, and punitive damages. *Id.*

South Carolina requires a duty of care as an element of a negligence cause of action:

> In order to establish a claim for negligence the plaintiff must prove the following elements: 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty by the defendant's negligent act or omission; 3) the plaintiff was damaged; and 4) the damages proximately resulted from the breach of the duty. *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The issue of whether the law recognizes a particular duty is an issue of law to be decided by the court. *Ellis by Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996).
>
> Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." *Shipes v. Piggly Wiggly St. Andrews*, 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977). Ordinarily, the common law imposes no duty on a person to act. *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997). An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance. *Id.*

See Murray v. Bank of America, N.A., 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). The basis for a duty of care emanates from the relationship between Defendants and Plaintiff:

> "A tortfeasor's duty arises from his relationship to the injured party." *South Carolina State Ports Authority v. Booz–Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325–26 (1986). It is essential to liability for negligence to attach that the parties shall have sustained a relationship recognized by law as the foundation of a duty of care. 57A Am. Jur. 2d Negligence § 89 (1989). Where this relationship is "too attenuated," a duty will not arise. *South Carolina State Ports Authority*, 289 S.C. at 377, 346 S.E.2d at 326.

Ravan v. Greenville Cty., 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993).

In *Murray*, this Court concluded that a bank owed a duty of care to its customer because a duty was created by the nature of the relationship between the parties:

> On June 2, Murray went to the Bank and spoke with Thomas Wright, a former vice-president and banking center manager with the Bank. She testified that she requested the Bank close the fraudulent account and notify the merchants who submitted checks written on the account that the account was fraudulent. When she left, she felt assured that the Bank would handle the matter. Wright testified he notified the Bank's headquarters in Charlotte on May 21, 1997 that the account was overdrawn and requested its closure. The Bank did not close the account until June 30, 1997, which was almost a month after Murray requested it close the account and notify the merchants. Wright stated the Bank failed to follow its own procedures.
>
> We find a relationship between the Bank and Murray arose sufficient to impose upon the Bank a duty of care when Murray went to the Bank seeking closure of the account. The Bank failed to follow its own procedures, did not timely close the account, and did not notify any merchants that the account was fraudulent. We find sufficient evidence in the record from which the jury could determine the Bank breached its duty to Murray after this duty arose. Accordingly, we find the trial court did not err in denying the Bank's motion for a directed verdict.

See Murray, 354 S.C. at 343-44, 580 S.E.2d at 198.

Defendants cite *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986), for the proposition that banks typically do not owe tort duties to their customers. However, Burwell expressly observed that "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. Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." *See Burwell*, 288 S.C. at 40-41, 340 S.E.2d at 790. Thus, despite the fact that there is technically a bank-customer relationship, there may be a tort duty of care (negligence or fiduciary) if the bank takes steps beyond merely providing banking services such as accepting deposits or making loans.

The relationship between Skywaves and BB&T far exceeded the garden variety bank-customer relationship and extended to providing advice to Skywaves as to how it should capitalize and operate its business. There is significant evidence that Defendants undertook to design a funding plan, advise and guide Skywaves concerning the management and financing of its business operations. Skywaves relied upon Defendants to fairly and accurately advise it about its capitalization options. This relationship transcended a normal bank-customer or lender-borrower relationship. BB&T was more than a bank, it was an active participant in Skywaves' business operations, with Defendants lending professional expertise to Skywaves to assist it in its business.

As to Edahl, because Skywaves was not in a direct contractual relationship with him, *Burwell*'s observation that a bank normally does not owe a tort duty to customers would not apply. There is evidence that Edahl's relationship with Skywaves involved him advising Skywaves and giving it financial guidance. There is evidence that Skywaves relied on Edahl to provide such advice. Tort law would recognize that, where Edahl undertook to provide such services to Skywaves, he was under a duty to ensure that he did so with reasonable care.

2. <u>There Is At Least a Scintilla of Evidence of Damages</u>

Defendants next argue that there is no evidence of proximately caused damages. However, this is simply not the case.

Skywaves has presented at least a scintilla of evidence that, as a result of Defendants' tortious actions, it has sustained crippling financial losses. Because of Defendants' actions, Skywaves was deprived of promised capitalization and was, as a result, unable to continue operations or find a buyer. It was also deprived of the opportunity to seek alternative capitalization.

Skywaves did not know it at the time, but BB&T was not equipped to finance Skywaves growth as Edahl had structured it. (*See* R. p. 1041 ("[W]e in the factoring

group weren't equipped to do it."); *accord* R. p. 1073 ("BB&T is not equipped to finance purchase orders anywhere in the bank if we are relying on purchase orders for repayment.")). Further, unbeknownst to Skywaves, Edahl's supervisors never approved loaning money on the basis of site plans. (*See* R. p. 1016 ("Q: Did you approve the loan — loaning money on site plans? A. No."); *accord* R. p. 1042 ("I was shocked, very concerned and had an empty feeling in my stomach")).

Because of the misrepresentations and negligent advice provided by Defendants, Skywaves passed on alternative capitalization options. One such proposal came from a group known as Hunt Capital, who offered to purchase of 30% of Skywaves stock for $4 million; this would have been more than adequate to capitalize Skywaves' expansion. (*See* R. p. 1029-35). In other words, instead of being abandoned without any financing or ability to carry on its business, Skywaves would have at least had the opportunity to carry on its business. While Defendants question whether Skywaves would have been actually been successful, that is merely proof of the existence of a triable issue of fact.

As a result of these various injuries and harms, Skywaves was ultimately forced to declare bankruptcy.

C. The Trial Court Erred in Granting Summary Judgment on Skywaves' Negligent Misrepresentation Claim

Under South Carolina law, the elements of a negligent misrepresentation claim are well-settled:

> To prove a claim for the common law tort of negligent misrepresentation, Quail Hill was required to establish the following elements:
>
> > (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000). *See Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 241, 692 S.E.2d 499, 509 (2010). "For purposes of proving negligent misrepresentation, evidence that a statement was made in the course of the defendant's business, profession, or employment is sufficient to prove the defendant's pecuniary interest in making the statement, even though the defendant received no consideration for it." *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 267, 536 S.E.2d 399, 406-07 (Ct. App. 2000). "'A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction.'" *Armstrong v. Collins*, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005) (citation omitted).

Defendants argue that there was no actionable misrepresentation because any statements related to future intention, not presently existing facts. While the general rule is that misrepresentations must relate to a presently existing fact, the rule is not absolute. *See Parker v. Shecut*, 340 S.C. 460, 482, 531 S.E.2d 546, 558 (Ct. App. 2000), *rev'd on other grds.*, 349 S.C. 226, 562 S.E.2d 620 (2002) ("An exception to the general rule is recognized for unfulfilled promises which were made by a party who never intended to fulfill the promise and only made it to induce the performance of another party.") (emphasis added); *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). There is substantial evidence that Defendants BB&T and Edahl made actionable false representations of fact to Skywaves.

Specifically, there exists the following evidence creating a genuine issue of material fact as to whether Defendants made misrepresentations:

- There is evidence that Defendants represented to Skywaves that Defendant BB&T had authorized and had the present intention to fund Skywaves based on site plans and/or purchase orders. Defendant Edahl, BB&T's agent, represented that he had obtained BB&T's approval for such an approach when, in fact, he had not.

- There is evidence that Defendants represented to Skywaves that BB&T had the present intention to fulfill Skywaves financing needs when, in fact, BB&T did not have such an intention.

- There is evidence that Defendants represented to Skywaves that it did not need to seek alternative sources of capitalization.

- There is evidence that BB&T represented that it would not treat the alleged defaults that it now relies upon in this case as a ground for termination of the agreement.

- There is evidence that Defendants represented to Skywaves that BB&T's present intention was to treat the Factoring Agreement as terminable only upon reasonable cause when, in fact, BB&T did not have such an intention.

Moreover, there is evidence that Skywaves reasonably relied upon these representations. For example, Skywaves elected to forego seeking alternative forms of capitalization from, for example, Hunt. These alternatives were very real, solid opportunities that the Defendants, through their misrepresentations, convinced Skywaves not to pursue. Defendant Edahl represented to Skywaves that it did not need to pursue any alternative source of financing because financing that met Skywaves' needs had been approved. In addition, when BB&T initially funded Skywaves based on site plans and purchase orders, Skywaves undertook substantial investment and expenditure in reliance, including hiring a second shift and key employees and undertaking other expenses for expansion of its operations. Skywaves did so in reliance on the belief that BB&T had properly approved site plan and purchase order financing, which was untrue at that time.

II. THE COURT ERRED IN DENYING SKYWAVES ITS CONSTITUTIONAL RIGHT TO A JURY TRIAL

A. Under the Terms of the Contract Upon Which BB&T and Edahl Rely, North Carolina Law Governs the Enforceability of the Putative Jury Trial Waiver, Which Is Repugnant to Governing Statutory Law

Defendants BB&T and Edahl argue that — notwithstanding BB&T's choice of North Carolina law in the contractual documents — the enforceability of the claimed prospective jury trial waiver is governed by South Carolina law because "the availability

of a jury trial is a procedural issue." (*See* BB&T's Init. Resp. Br., at 20). However, Defendants' argument misses the mark and misconstrues the issue.

First, contrary to BB&T's and Edahl's suggestion, the issue in this case is not the general right to a jury trial. Instead, the real issue is one of legal substance — the enforceability of a contractual term, which so happens to involve the right to a jury trial. North Carolina law, *which BB&T itself selected to govern the contractual documents*, makes clear that contracts that prospectively deprive a party of the right to a jury trial are unenforceable, as a matter of contract law.

In an unpublished case, this Court has considered the precise issue here and concluded that the North Carolina statute did not apply, but *not* because the right to a jury trial is procedural. Instead, this Court concluded that the enforceability of the waiver of the right to a jury trial should be governed under the law applicable to the contract generally, and considered the parties' contractual choice of Connecticut law:

> Roberts argues North Carolina law applies under the law of *lex loci rei sitae* because North Carolina was the principal place of business and the state of Borrowers' organization. We disagree. A guarantor's liability is a separate contractual obligation, independent of the obligation on the original note. *TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 295, 478 S.E.2d 63, 65 (Ct. App. 1996). Additionally, parties may contractually choose the law that will govern the transaction. *See Lybrand v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 321 S.C. 70, 74, 467 S.E.2d 745, 747 (Ct. App. 1996) (enforcing a choice of law provision in an arbitration agreement); S.C. Code Ann. § 36-1-105(1) (2003) (providing that the parties to a transaction may choose by agreement which state's law will apply). Furthermore, a number of the loans in this case were secured by property located in South Carolina. We agree with the trial court's finding that the guaranties were governed by either South Carolina or Connecticut law.
>
> Under Connecticut law, contractual jury trial waivers are presumptively valid. *L & R Realty v. Connecticut Nat'l Bank*, 715 A.2d 748, 755 (Conn.1998)

See GMAC Commercial Mortgage Corp. v. Roberts, No. 2005-UP-542, 2005 WL 7084823, at *2 (Ct. App. Oct. 12, 2005).

Likewise, in this case, the Court should first look to the parties' choice of law in the Factoring Agreement and apply North Carolina law to the putative jury trial waiver. Additionally, irrespective of the choice of law provision in the Factoring Agreement, traditional South Carolina choice of law rules further dictate that "contracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view." *See Lister v. NationsBank of Del, N.A.*, 329 S.C. 133, 144, 494 S.E.2d 449, 455 (Ct. App. 1997) (*quoting Livingston v. Atlantic Coast Line R.R.*, 176 S.C. 385, 391 180 S.E. 343, 345 (1935)); *see also Witt v. American Trucking Associations, Inc.*, 860 F. Supp. 295 (D.S.C. 1994) (in contract actions, South Carolina courts apply substantive law of place where contract was formed as to issues concerning contract formation, interpretation, or validity; however, as to performance, law of place of performance governs). In addition to the choice of law provision in Paragraph 25, the Factoring Agreement states that it is "effective when duly executed by Client and thereafter accepted by BB&T in High Point, North Carolina...and, when so accepted, shall be deemed a contract made in the State of North Carolina and shall be governed in all respects and construed in accordance with the internal laws of the state of North Carolina." (*See* R. pp. 591 ¶ 11; *accord* R. p. 587 ¶ 5). Thus, as the Factoring Agreement was made in North Carolina and is deemed a North Carolina agreement, as to the issue of validity of the contract provisions, North Carolina law should apply to the question of the enforceability of the claimed jury trial waiver.

Additionally, even following Defendants' "procedural-substantive" approach, there is significant authority suggesting that the right to a jury is not a mere procedural issue, but goes to the substance of a party's rights. For example, the South Carolina Supreme Court has stated, with regard to the right to trial by jury: "orders affecting the mode of trial (by jury) *affect substantial rights* ... and must therefore, be appealed immediately. *See Lester v. Dawson*, 327 S.C. 263, 265, 491 S.E.2d 240, 241 (1997)

(emphasis added); *accord North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992) ("Trial by jury is a substantial right and any waiver thereof must be strictly construed."). The South Carolina Supreme Court has further stated that:

> Constitutional provisions guaranteeing the right of trial by jury are addressed to the preservation of *substance rather than form*, the object being to preserve the *substantive right rather than to describe the details of the method* by which it shall be exercised and enjoyed."

McGlohon v. Harlan, 254 S.C. 207, 224, 174 S.E.2d 753, 761 (1970) (emphasis added) (*citing* 47 Am. Jur. 2d, Jury § 18).

Similarly, North Carolina law refers to "the *substantive* right to a jury trial found in article I of the original Constitution." *See Kiser v. Kiser*, 325 N.C. 502, 506, 385 S.E.2d 487, 489 (1989) (emphasis added). North Carolina law also dictates that "[n]o Rule of *procedure or practice* shall abridge *substantive rights or limit the right of trial by jury*." *See Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994) (emphasis added).

For all of these reasons, the trial court should have applied (and this Court should apply) North Carolina law to the issue of the enforceability of the claimed jury trial waiver. As Skywaves has plainly shown in its Appellant's Brief, North Carolina law plainly prohibits such a prospective waiver of the constitutional right to a trial by jury.

B. Defendant Edahl May Not Obtain the Benefits of the Claimed Jury Trial Waiver

(Assuming South Carolina law applies) Defendant Edahl oddly argues that he may obtain the benefit of the putative jury trial waiver, even though he was — and he has repeatedly insisted throughout this case — not himself a party to the Factoring Agreement (or any other agreement between Skywaves and BB&T). In support of this contention, he relies on a number of cases from outside of South Carolina holding that an agent may take advantage of a jury trial waiver in its principal's agreement (to which the agent is not a party).

South Carolina law is clear that, while a party may contractually waive the right to a jury, such a waiver will be restricted:

> A party may waive the right to a jury trial by contract. *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). Such a waiver *must be strictly construed as the right to trial by jury is a substantial right. Id.* However, terms in a contract provision must be construed using their plain, ordinary and popular meaning. *Fritz–Pontiac–Cadillac–Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994).

See Beach Co. v. Twillman, Ltd., 351 S.C. 56, 63-64, 566 S.E.2d 863, 866 (Ct. App. 2002) (emphasis added). South Carolina law is clear that someone must be a *party to* a contract to enforce that contract:

> "Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff." *Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994).

See Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (emphasis added), *cited in Clardy v. Bodolosky*, 383 S.C. 418, 429-30, 679 S.E.2d 527, 533 (Ct. App. 2009) ("Though Land-Magnolia was a necessary party to the present action, it was not a party to the real estate contract at issue. Consequently, Land-Magnolia cannot now be responsible for attorney's fees given there is no privity of contract.").

Edahl has not cited any South Carolina authority that would permit him, a stranger to the agreement, to enforce the putative jury trial waiver here to deprive Skywaves of its constitutional right to a jury trial on its tort claims.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's grant of summary judgment as to Skywaves' tort claims.

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