THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Commons Pleas

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

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT CORRECTLY DISMISS ALL CLAIMS AGAINST EDAHL?

II. DID THE TRIAL COURT CORRECTLY STRIKE SKYWAVES' DEMAND FOR A JURY TRIAL?

III. DID THE TRIAL COURT CORRECTLY DENY SKYWAVES' MOTION TO STRIKE DEFENDANTS' ANSWERS?

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

Appellant Skywaves I Corporation ("Skywaves") initiated this action on December 3, 2009, in the Court of Common Pleas for Charleston County against Respondent/Appellant Branch Banking and Trust Company, Successor in Merger to Branch Banking and Trust Company of SC a/k/a BB&T ("BB&T") and its agent and employee, Respondent James Edahl ("Edahl"). Skywaves filed an amended complaint on December 8, 2011, alleging eight (8) causes of action: (1) breach of contract (against BB&T); (2) breach of contract accompanied by fraudulent acts (against BB&T); (3) promissory estoppel (against BB&T); (4) breach of covenant of good faith and fair dealing (against BB&T); (5) negligent misrepresentation (against BB&T and Edahl); (6) fraudulent misrepresentation (against BB&T and Edahl); (7) negligence (against BB&T and Edahl); and (8) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") (against BB&T and Edahl). (R. pp. 89-98).

Following rulings on BB&T and Edahl's motions to dismiss and Skywaves' motion for reconsideration (in 2011 and 2012, respectively), the remaining causes of action against Edahl were: (1) negligence and (2) negligent misrepresentation. (R. pp. 33-43; R. pp. 44-49). In 2014, BB&T and Edahl moved to strike Skywaves' jury demand; the trial court granted the motion by Order filed February 9, 2015. (R. pp. 53-57). In 2015, BB&T and Edahl moved for summary judgment on the remaining causes of action. Skywaves, in turn, moved to strike BB&T and Edahl's answers. On July 27, 2015, the trial court entered an Order which addressed all outstanding motions. (R. pp. 58-71). In relevant part, this order: granted Edahl's motion for summary judgment in full; granted BB&T's motion for

summary judgment in part (allowing the contract claims against BB&T to survive); denied Skywaves' motion to reconsider the order striking the jury demand; and denied Skywaves' motion to strike the answers. (R. pp. 58-71).

As against Edahl, Skywaves has appealed those portions of the order: (1) granting summary judgment on the remaining claims against him (negligence and negligent misrepresentation); (2) granting Edahl's motion to strike the jury demand; and (3) denying Skywaves' motion to strike Edahl's answer. Skywaves has also appealed (4) the prior dismissal of the SCUTPA claim, which was asserted against both BB&T and Edahl. Skywaves has appealed the same issues as against BB&T. For its part, BB&T has cross-appealed the portion of the trial court's order denying summary judgment on the contract claims asserted against BB&T only.[1]

II. FACTS

This case arises out of BB&T's termination of its lending relationship with Skywaves. BB&T terminated the lending relationship with Skywaves only after it became apparent that Skywaves was a sinking ship. A start-up company founded in the early-2000s, Skywaves manufactured "shelters" to house communications equipment for cell phone towers. Like many start-up companies, Skywaves needed cash to fund its operations and to purchase construction materials for the shelters. (R. p. 151, lines 5- 24). BB&T provided the majority of its funding for Skywaves through a factoring agreement executed in March 2005 (the "Factoring Agreement"), among other agreements. (R. pp. 404-417).

[1] Additional aspects of the procedural history are discussed where applicable in the argument section of the brief.

Per the terms of the Factoring Agreement, as ultimately amended, BB&T advanced 85% to Skywaves on factored invoices, which invoices were effectively purchased by BB&T and then payable to BB&T in full. (R. p. 423). By late 2006, BB&T had also begun to advance funds (ultimately at 65%) based upon customer *purchase orders* sent to Skywaves.[2] (R. p. 425). Through Edahl, who worked for BB&T and served as the relationship manager on the Skywaves account, BB&T also approved advancing funds on certain "sites" identified by Skywaves' customer, General Dynamics. The "sites" were locations where General Dynamics anticipated needing shelters for purposes of a contract with the State of New York. (R. p. 359, line 9 – p. 360, line 4). This is what Skywaves now refers to as "site plan financing," though the "sites" were financed under the terms applicable to the "purchase order financing." During the second half of 2007, BB&T advanced funds to Skywaves on the basis of the General Dynamics "site plans" under the terms applicable to purchase orders.

The factoring relationship began with an agreement to provide up to $1.5 million in credit to Skywaves. As of March 2007, the credit extended under the agreement had been increased to provide up to $3.5 million (with a sublimit of $2 million for purchase orders). (R. pp. 404-417; R. p. 423). By the end of 2007, however, Skywaves had effectively exhausted its credit limit with BB&T. (R. pp. 451-452).

Although already unprofitable in 2006, Skywaves took a turn for the worse in 2007. Though it projected a profit of $1.4 million for 2007, Skywaves revised its estimates in

[2] In other words, rather than purchasing an invoice reflecting money actually owed for a shelter built by Skywaves, BB&T agreed to advanced funds to Skywaves on the basis of a customer's order for a shelter, yet to be built. When the shelter was built and the purchase order became an invoice, BB&T paid Skywaves the difference between the advance rate for purchase orders and the rate for invoices.

September 2007 to project an annual loss of approximately $120,000. (R. p. 394, line 21 – p. 395, line 1; R. p. 351, lines 5-7). Then, at year's end, it turned out that Skywaves had suffered an actual loss of $1.4 million. *Id.* Thus, by the end of 2007, Skywaves was deeply unprofitable, and the company's management had missed its original projections by $2.8 million.

Also at this time, BB&T learned that Skywaves – contrary to the factoring agreement and as a sign of its cash shortage – had failed to promptly remit payment to BB&T of over $340,000 in payments received on factored invoices. (R. pp. 468-471). BB&T ultimately discovered over $400,000 in diverted funds. Skywaves was also failing, admittedly, to make prompt payments on other bills in the regular course of its business. (R. p. 401, line 24 – p. 402, line 7).

BB&T ultimately came to the conclusion that Skywaves' ability to repay BB&T was impaired. As a result, BB&T declared a default in January 2008. (R. pp. 454-455). Instead of refuting or attempting to cure the defaults identified by BB&T, Skywaves enlisted a third party, Earle Hewlette, to express Skywaves' "sincere appreciation and regret for the mistakes made in the past dealing with the bank" and to propose a "rescue plan." (R. pp. 457-458). Hewlette's "rescue plan," however, was only for BB&T to extend additional credit to Skywaves on top of what BB&T had already agreed to do. BB&T was not willing to agree to these terms, nor could the parties reach any other agreement. Sometime thereafter, Skywaves declared bankruptcy. Blaming BB&T and Edahl for its financial misfortunes, Skywaves initiated the instant lawsuit in 2009.[3]

[3] For additional detail, Edahl incorporates by reference BB&T's Statement of the Case contained in its Appellant's Brief.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED ALL CLAIMS AGAINST EDAHL.

Skywaves' Amended Complaint alleged four (4) causes of action against Edahl: (1) negligent misrepresentation; (2) fraudulent misrepresentation; (3) negligence; and (4) violation of the South Carolina Unfair Trade Practices Act. (R. pp. 86-99). The trial court initially dismissed all claims against Edahl. (R. pp. 33-43). On reconsideration, the trial court permitted Skywaves to proceed on its claims for negligence and negligent misrepresentation only. (R. pp. 44-49). Ultimately, the trial court granted Edahl's motion for summary judgment on the remaining claims for negligence and negligent misrepresentation. (R. pp. 58-71). Skywaves now appeals the trial court's order granting summary judgment on the negligence and negligent misrepresentation claims and also appeals the initial dismissal of its SCUTPA claim.[4]

A. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE REMAINING NEGLIGENCE AND NEGLIGENT MISREPRESENTATION CLAIMS AGAINST EDAHL.

The trial court granted summary judgment on the claims against Edahl based on three (3) separately enumerated grounds: (1) Skywaves' claims fail under the economic loss doctrine; (2) Skywaves' claims fail on the elements; and (3) Skywaves' claims are statutorily barred under S.C. Code Ann. § 37-10-107. (R. pp. 65-68). Skywaves, however, has only appealed one of the three grounds on which the trial court granted summary judgment in favor of Edahl. Further, as to the one ground on which it appeals (the

[4] Skywaves has not appealed the dismissal of its fraudulent misrepresentation claim. (R. pp. 33-44). The trial court correctly dismissed Skywaves' claim for fraudulent misrepresentation for all the reasons stated herein.

elements), Skywaves neglects to directly address all of the applicable elements and otherwise falls short on the law.

1. Skywaves' Appeal of the Summary Judgment Order is Barred by the Two Issue Rule.

"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, 903-04 (2010). The "two issue" rule is just as applicable to court orders as it is to jury trial verdicts. *See id.*; *see also Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) ("For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the 'two issue' rule if the plaintiff failed to appeal both grounds . . ."); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding that an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

Here, Skywaves has failed to appeal two of the three grounds on which the trial court granted summary judgment in favor of Edahl. Specifically, the trial court held that Skywaves' claims for negligence and negligent misrepresentation were barred by (1) the economic loss doctrine and (2) the provisions of S.C. Code § 37-10-107. (R. pp. 65-68). These arguments were briefed extensively by Edahl at the summary judgment stage, and the trial court squarely ruled upon them in granting summary judgment. Nonetheless, Skywaves' appellate brief is entirely devoid of any mention of these distinct grounds for summary judgment – much less any legal argument on their merits. For this reason, the two unappealed grounds for summary judgment constitute "the law of the case," and this Court should affirm summary judgment in favor of Edahl under the well-established "two

issue" rule. *See Jones*, 387 S.C. at 346, 692 S.E.2d at 903-04 (affirming trial court's ruling under two issue rule where petitioner failed to specifically address the trial court's finding of statutory immunity in favor of the defendant); *Anderson*, 323 S.C. at 525, 476 S.E.2d at 477 (affirming dismissal where appellant only challenged one of the two grounds relied upon by the trial court).

2. Skywaves' Claims Against Edahl Are Barred by the Economic Loss Doctrine.

Though Skywaves' failure to preserve the issue renders further analysis unnecessary, the trial court was nonetheless correct in determining that the economic loss doctrine bars Skywaves' claims for negligence and negligent misrepresentation. "The purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009); *see also Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1054 (D.S.C. 1993) ("South Carolina law has long recognized the principle that no tort claim will lie where the parties' duties are defined by a contract").

In this case, Skywaves itself has taken the position that "[A]ll of Defendants' tortious conduct, promises and representations occurred within the context of the Factoring Agreement." (R. p. 776) (emphasis added). Along the same lines, in a parallel action brought by Skywaves' investors against BB&T and Edahl, the Supreme Court held that the underlying facts at issue here "revolve[] around the contractual relationship between BB&T and its customer, Skywaves." *Kerr v. Branch Banking and Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014) (emphasis added). Plainly, this dispute centers on the parties' contractual obligations and on the *economic losses* – if any – arising from the termination of the relationship with Skywaves. For these reasons, the trial court properly

applied the economic loss rule to bar Skywaves' tort claims. *See Wilson Group, Inc. v. Quorum Health Resources, Inc.*, 880 F. Supp. 416, 429 (D.S.C. 1995) ("The court must be vigilant in preventing the 'inevitable efforts of lawyers to turn every breach of contract into a tort'").

In its holding, the trial court correctly found that the rationale applied with equal force to both BB&T and Edahl. The trial court rejected the assertion – abandoned by Skywaves on appeal – that the rule somehow would not apply to Edahl as the employee or agent of the contracting party. South Carolina has not limited the doctrine in such a manner, and case law from other jurisdictions illustrates the applicability of the rule to agents of the contracting party. *See, e.g., Ben-Yishay v. Mastercraft Development, LLC*, 553 F. Supp. 2d 1360, 1370-71 (S.D. Fla. 2008) (relying upon the economic loss rule to dismiss claims against corporate officer who negotiated the agreement at issue, noting that alleged misrepresentations were "inseparable from the essence of the parties' agreement"). Indeed, "[t]o find otherwise would lead to [the] incongruous result that the economic loss rule would bar applicable tort claims against a corporation, but not against the directors or officers who negotiated the agreement." *Id.* at 1371 (noting that such an outcome "would be inconsistent with the rationale of the economic loss rule and would eviscerate its application . . .").

Accordingly, the trial court properly applied the economic loss doctrine to grant summary judgment on Skywaves' claims against Edahl as well as BB&T.

3. Skywaves' Claims Against Edahl Are Barred by S.C. Code Ann. § 37-10-107.

The trial court correctly relied upon S.C. Code Ann. § 37-10-107 as an additional basis for granting summary judgment in favor of Edahl as well as BB&T. Again, Skywaves

has not appealed this ground, and this Court need not reach the issue. Nonetheless, the trial court correctly applied the statute to bar Skywaves' claims. Skywaves' claims are based on an alleged failure to perform purported promises with respect to an underlying factoring agreement provided by BB&T to Skywaves. Section 37-10-107 bars such claims unless they are set forth in writing and signed by the party to be charged. Indeed, subsection (2) explicitly precludes, *inter alia*, actions based upon theories of a "fiduciary relationship" or "negligent misrepresentation." S.C. Code Ann. § 37-10-107(2)(a) and (2)(d) (emphasis added).[5]

While Skywaves has also left the statute's applicability to Edahl unchallenged on appeal, Skywaves previously suggested that Edahl should somehow be exempted from the immunity provided thereunder. The plain language of the statute, however, makes no exception for agents and employees. Instead, the statute focuses on the types of claims which may not be brought. Section 37-10-107 begins: "No person may maintain an action for legal or equitable relief based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement: (a) to lend or borrow money . . . or (c) to renew, modify, amend or cancel a loan of money or any provision with respect to a loan of money . . . ." *See* S.C. Code Ann. § 37-10-107(1) (emphasis added). The language of the statute is clear and unambiguous. It simply states that no actions based on such theories

[5] The statute no doubt reflects a policy determination that commercial actors at the level of sophistication present in this case are well-equipped to protect themselves by codifying their expectations and, otherwise, should not be heard to complain. The statute does not, for example, apply to loans for "personal, family or household purposes." S.C. Code Ann. § 37-10-107(3)(a).

"may [be] maintain[ed]." *Id.* Accordingly, the trial court's order granting summary judgment in favor of Edahl should be affirmed.[6]

4. Skywaves Failed to Establish the Requisite Elements of Its Tort Claims Against Edahl.

Though this Court need not, and should not, reach Skywaves' argument on the elements of the subject tort claims, the trial court correctly found that Skywaves failed to establish the elements of negligence and negligent misrepresentation. (R. pp. 66-67).

a) The Trial Court Correctly Granted Summary Judgment on Skywaves' Negligence Claim.

The trial court properly found that Skywaves' negligence claim failed for want of a legal duty. (R. pp. 66-67). In so holding, the trial court noted that Skywaves had presented its claim as one for breach of "fiduciary duty" and not identified the standard of conduct required or otherwise breached. (R. pp. 66-67; R. pp. 786-787). On appeal, Skywaves appears to take a different tact, arguing for the existence of a more amorphous "duty" based, primarily, on the fact that BB&T designed the financing provided to Skywaves.

The existence of a duty, whether fiduciary or otherwise, is a question of law for the court. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. *RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-336, 732 S.E.2d

[6] In reaching its conclusion, the trial court also correctly determined that South Carolina law applied and that the underlying arrangement constituted a loan for purposes of the statute. (R. p. 68). Skywaves similarly has not appealed these findings.

166, 173 (2012). To establish negligence, a plaintiff must prove (1) a duty of care owed by the defendant to the plaintiff, (2) a breach of that duty by a negligent act or omission, and (3) damage proximately resulting from the breach. *See Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011). Skywaves failed to establish each of these elements.

"It is well-established that banks owe a limited duty of care to their customers." *Kerr*, 408 S.C. at 333, 759 S.E.2d at 726; *Regions Bank v. Schmauch*, 354 S.C. 648, 670-671, 582 S.E.2d 432, 444 (2003). The suggestion that Edahl, as an agent and employee of BB&T, somehow morphed into financial advisor to Skywaves – giving rise to purported fiduciary obligations – is without evidentiary support in the record. As discussed further below, Skywaves was managed by educated and sophisticated businessmen who understood the respective roles of Skywaves and BB&T in the lending relationship. *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986) (noting, in context of dealing with a bank employee, that "mere respect for another's judgment or trust in his character is usually not sufficient to establish a [fiduciary] relationship"). Because Skywaves has not demonstrated facts sufficient to justify a departure from the long-established rules governing this area, the trial court correctly granted summary judgment on Skywaves' negligence claim.[7]

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[7] In its brief, Skywaves adds an odd argument that the existence of a duty is somehow the "law of the case" because of the trial court's earlier order denying BB&T and Edahl's 12(b)(6) motion to dismiss the negligence count. First, this argument was not raised or ruled upon by the trial court and, therefore, cannot be considered on appeal. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Second, the argument is without merit because different standards apply under Rules 12(b)(6) and 56(c), SCRCP. The denial of a motion to dismiss under Rule 12(b)(6) does nothing to preclude a party from later prevailing on a motion for summary judgment under

Separately, Skywaves has failed to come forward with more than mere conjecture as to any proximately caused damages at issue. Though the trial court did not need to reach this issue, it was raised to the trial court (R. pp. 282-284) and may be considered an additional sustaining ground on appeal. *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000) ("[A]n appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal"); *see also* Rule 220(c), SCACR. Specifically, Skywaves has not established that it could and would have been able to survive and profit had BB&T maintained the terms of credit in January 2008 – terms that were effectively maximized at that time. Indeed, the undisputed evidence demonstrates that Skywaves was grossly underperforming – even measured against its own projections – and, in fact, lost $1.4 million dollars in 2007 alone. (R. p. 394, line 21 – p. 395, line 8). It was also withholding funds due to BB&T and otherwise failing to pay its business bills on time. (R. p. 401, line 24 – p. 402, line 7). BB&T admittedly had no obligation to renew the factoring agreement, which was set to expire in March 2008, at which time the entire debt would have become due and owing. (R. p. 396, line 16 – p. 397, line 8).

In order to meet its burden on this element of its case, Skywaves must point to more than mere conjecture, speculation, or self-serving, conclusory statements on the part of its management. Indeed, the "crucial requirement in lost profits determinations is that they be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative." *Drews Co., Inc. v. Ledwith-Wolfe Associates, Inc.*, 296 S.C.

Rule 56(c) when the plaintiff fails to come forward with admissible facts sufficient to support a claim.

207, 213, 371 S.E.2d 532, 536 (1988). In this case, the evidence falls far short of the "reasonable certainty" standard necessary to demonstrate lost profits. Skywaves has proffered no expert testimony, for example, on this point, nor is Skywaves otherwise able to meet its burden based on the record before this Court. Accordingly, for this additional reason, the trial court's order granting summary judgment should be affirmed.[8]

b) The Trial Court Correctly Granted Summary Judgment on Skywaves' Negligent Misrepresentation Claim.

To prove a claim for negligent misrepresentation, a plaintiff must 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. *Quail Hill, LLC v. County of Richland;* 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010). The trial court correctly granted summary judgment because Skywaves cannot demonstrate a genuine issue of material fact on each element of this claim.

To begin with, a claim for negligent misrepresentation must be predicated upon the existence of a false statement. Further expounding upon this element, the Court of Appeals has clarified that, "to be actionable, the representation 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

[8] Skywaves' failure to come forward with sufficient evidence on this element of its negligence/breach of fiduciary duty claim is also an additional sustaining ground for summary judgment on all claims at issue on appeal.

407, 413 (Ct. App. 1999) (citing *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App.1993) (emphasis added)). "The representation cannot ordinarily be based on unfulfilled promises or statements as to future events." *Id.*

Here, the trial court correctly concluded that Skywaves failed to come forward with evidence of a false statement of present or pre-existing fact made to Skywaves. Skywaves' allegations of "unfulfilled promises" about what BB&T would do for Skywaves in the future do not suffice, as a matter of law. *See id.* Skywaves consistently returns to Edahl's agreement on behalf of BB&T to treat certain "site plans" the same as purchase orders in advancing funds to Skywaves under the Factoring Agreement. Even if this were a statement of fact and not a promise related to future financing, the undisputed reality is that BB&T did, in fact, advance the funds based upon the "site plans." Nobody, however, agreed to continue funding Skywaves in perpetuity and without limit, no matter how precarious Skywaves' financial condition became. Skywaves has not established, and cannot establish, any agreement or representation to the contrary.

Additionally, the trial court correctly determined that Skywaves had not established the requisite element of "justifiable reliance." (R. p. 67). As noted by the Supreme Court in *Kerr*, "[w]here 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." 408 S.C. at 333, 759 S.E.2d at 727 (citing *Florentine Corp. v. PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985)). "This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." *Id.* at 334, 759 S.E.2d at 727 (citing *Thomas v. Am. Workmen*, 197 S.C. 178, 182–83, 14 S.E.2d 886, 887–88

(1941)). Referring to the very individuals who invested in Skywaves, the Supreme Court noted that they were "sophisticated investors who, between the six of them, invested almost $1.5 million . . . over a protracted period of time." *Id.* at 334, fn. 8, 759 S.E.2d at 727, fn. 8. These investors included Ron Konersmann and John Voytko, who were, respectively, the CEO and CFO of the company.[9] Thus, as noted by the trial court, the Supreme Court has, in effect, already determined that Skywaves' management team was of the degree of sophistication sufficient to negate any purported "right to rely." *Id.* (quoting *Poco–Grande Invs. v. C & S Family Credit, Inc.*, 301 S.C. 323, 325, 391 S.E.2d 735, 736 (Ct. App. 1990) for the proposition that "sophisticated and mature businessmen" have no such right to rely). Accordingly, the trial court correctly granted summary judgment on Skywaves' negligent misrepresentation claim, and its ruling may be affirmed on this ground alone.

Finally, as stated above, Skywaves has failed to come forward with evidence sufficient to establish their alleged lost profits with the reasonable certainty required by the law. *Drews Co.*, 296 S.C. at 213, 371 S.E.2d at 536. As such, the dismissal may be affirmed on this ground as well.

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[9] Konersmann, the CEO, also served as Chairman of the Board and ultimately owned approximately 44% of the company. He was one of Skywaves' initial founders and brought decades of experience in both owning and operating businesses, including experience in wireless telecommunications. He holds an undergraduate degree in engineering from Memphis State and an MBA from Notre Dame. He is currently involved in the developmental stages of a new business to develop apps for the soccer industry. (R. p. 326, line 13 – p. 327, line 18; p. 328, line 4 – p. 329, line 5; R. pp. 346-347; R. p. 331, line 24 – p. 332, line 19; R. p. 483). Speaking directly to the relationship codified in the Factoring Agreement, CEO Ron Konersmann acknowledged, "a lot of it is protecting the bank, which is fine, you know, it's their money and we're borrowing it . . . ." (R. p. 346, line 22 – p. 347, line 4). Voytko, the CFO, joined Skywaves in 2005 at age 50. He had a degree in accounting, an inactive license as a CPA, and a background in the telecommunications industry. After Skywaves, he joined a franchise that provides CFO services to companies "up to the 20- to 25-million-dollar range." (R. p. 369, line 23 – p. 370, line 12; p. 371, lines 4-23; pp. 372, line 9 – p. 373, line 4).

B. THE TRIAL COURT CORRECTLY DISMISSED SKYWAVES' CLAIM FOR VIOLATION OF THE SCUTPA.

In its order of November 8, 2011, the trial court correctly dismissed Skywaves' claim under the South Carolina Unfair Trade Practice Act. (R. pp. 33-43). Skywaves moved to reconsider this order, while simultaneously filing a notice of appeal. On June 15, 2012, the trial court entered a second order pursuant to which the SCUTPA claim remained dismissed. (Again, as to Edahl, the second order reinstated Skywaves' claims for negligence and negligent misrepresentation only.) (R. pp. 44-49). Thereafter, Skywaves moved to dismiss its appeal to this Court as "moot," due to its apparent satisfaction with the second order. (R. pp. 171-179).

Now, over three years after the dismissal of its prior appeal, Skywaves seeks a second bite at the appellate apple with respect to the dismissal of its SCUTPA claim in 2011.[10] Skywaves' current position strains credulity, however, in light of its pronouncement to the trial court that it should not have asserted a claim under the SCUTPA. (R. pp. 663-664). Specifically, on April 13, 2015, Skywaves filed a motion to amend its first amended complaint to include a claim for violation of the *North Carolina* Unfair and Deceptive Trade Practices Act ("NCUDTPA"), N.C. Gen. Stat. §§ 75-11 *et seq.* (R. pp. 640-657). In so moving, Skywaves declared:

> As this case has proceeded, it has become apparent to [Skywaves] that the NCUDTPA should apply to govern the unfair trade practices of Defendants. . . . In any event, Skywaves seeks now to clarify that it is asserting a claim under the NCUDTPA, pursuant to the parties' choice of law provision in their factoring agreement.

[10] BB&T and Edahl previously moved to dismiss this portion of the current appeal. This Court denied the motion by order filed December 14, 2015.

(R. p. 664). The trial court correctly denied Skywaves' motion to "clarify" that "it [was] asserting a claim under the NCUDTPA." (R. p. 68). Skywaves has not appealed this issue. While Skywaves' argument under the North Carolina statute was ill-conceived, Skywaves was correct in its apparent realization that it could not prevail under the South Carolina statute.

To be actionable under the 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); S.C. Code Ann. §§ 39-5-10 *et seq*. 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). 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." (R. p. 42). Accordingly, the question for this Court is whether the facts alleged, and reasonable inferences from those facts, "constitute a cause of action." *See Rydde v. Morris,*

381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Here, the trial court correctly concluded that Skywaves failed to adequately allege a claim for relief under the SCUTPA.

Skywaves' 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." (R. p. 98 ¶ 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. In sum, Skywaves alleges that BB&T promised to fund Skywaves' financing needs, but then did not fulfill that promise. Even when viewed in the light most favorable to Skywaves, the allegations of the amended complaint give no hint of any public impact. 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 [the SCUTPA's] embrace." *Ardis v. Cox*, 314 S.C. 512, 518, 431 S.E.2d 267, 271 (Ct. App. 1993); *see also Woodson*, 406 S.C. at 530, 753 S.E.2d at 435 (reiterating that the SCUTPA "is not available to redress a private wrong"). Because this case involves a private, commercial dispute, the trial court's dismissal of Skywaves' SCUTPA claim should be affirmed.

II. THE TRIAL COURT CORRECTLY STRUCK SKYWAVES' DEMAND FOR A JURY TRIAL AGAINST EDAHL.

For all of the foregoing reasons, the trial court correctly dismissed all causes of action against Edahl. Therefore, as to Edahl, all remaining issues on appeal are moot and need not be reached by this Court. *See generally Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

Nonetheless, the trial court properly found that Skywaves has waived its right to a jury trial against Edahl to the same extent that it has waived its right to a jury trial against BB&T.

A. SKYWAVES EXECUTED ENFORCEABLE JURY TRIAL WAIVERS.

As argued by Skywaves to the trial court, "all of Defendants' [alleged] tortious conduct, promises and representations occurred within the context of the Factoring Agreement." (R. p. 776). Pursuant to the Factoring Agreement, as well as at least five other agreements and notes signed by Skywaves, Skywaves agreed to waive its right to a jury trial for claims arising out of the lending relationship at issue. (R. pp, 403-417, 484-519).

"A party may waive the right to a jury trial by contract." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014) (quoting *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002)). Further, "although the right to a trial by jury is a substantial right, and [the court will] 'strictly construe' such waivers, a person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." *Id.* (citing *Regions Bank v. Schmauch*,

354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003)). A plaintiff cannot overcome a waiver by arguing that he was "unaware" of the provision. *Id.* at 333, fn. 8, 755 S.E.2d at 443, fn. 8 (finding that the waiver in question was conspicuous and unambiguous). In this case, Skywaves' officers were sophisticated and educated individuals who were fully capable of reading and understanding what it means to waive one's right to trial by jury. *See Kerr v. Branch Banking and Trust Co.*, 408 S.C. 328, 334, fn. 8, 759 S.E.2d 724, 727, fn. 8 (2014) (finding that Skywaves was funded by "sophisticated investors").

In an effort to bypass the binding effect of the jury trial waivers, Skywaves argues that North Carolina law applies to the Factoring Agreement.[11] Since North Carolina law does not permit jury trial waivers, Skywaves maintains that the waiver provision in the Factoring Agreement was void when written. First, this argument is irrelevant to the five other waivers signed by Skywaves, which are governed by South Carolina law. (R. pp. 484-519). The waiver provisions in these five other documents, which are substantially the same, apply to all claims arising "out of the conduct of the relationship" between parties. (R. pp. 484-519). Given a plain and ordinary reading, these waivers would apply to the claims asserted by Skywaves in this case. *See Beach Co.*, 351 S.C. at 64, 566 S.E.2d at 866 (enforcing a jury trial waiver and stating that "terms in a contract provision must be construed using their plain, ordinary and popular meaning"). Second, as to the Factoring Agreement, while North Carolina law may control as to any substantive provisions at issue, procedural rights in this case are determined by the law of the forum. *See* 17A Am. Jur. 2d *Contracts* § 264; *Restatement (Second) Conflict of Laws* § 129 (1971). North Carolina

[11] 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." (R. pp. 403-417).

procedural law related to jury trial waivers does not apply, just as the North Carolina Rules of Civil Procedure do not govern the underlying proceedings. Accordingly, the trial court correctly found that the jury trial waivers were enforceable.[12]

B. THE JURY TRIAL WAIVERS APPLY TO ALL CLAIMS ASSERTED AGAINST EDAHL AS WELL AS BB&T.

Skywaves argues that Edahl may not rely upon the jury trial waiver provisions because he is sued in tort and is not a signatory to the documents containing the provisions. Skywaves' argument is misplaced and without precedential support. The waiver provisions apply to all claims and inure to the benefit of Edahl as well as BB&T.

1. The Waiver Provisions Apply to Skywaves' Tort Claims.

The jury trial waivers apply to all of Skywaves' causes of action, whether based in contract or in tort. First, nothing in the waiver provisions purports to limit their scope in the manner suggested by Skywaves. The waiver in the Factoring Agreement, for example, applies not only to claims arising under the agreement, but to "*any issue in any way pertaining* to this Agreement or any *transactions or occurrences arising hereunder* . . . ." (R. pp. 403-417) (emphasis added). Again, Skywaves contends that all of alleged "tortious conduct . . . occurred within the context of the Factoring Agreement." (R. p. 776). Thus, under Skywaves' own argument, the tort causes of action are covered by a plain reading of the jury trial waivers.

The South Carolina Supreme Court recently applied a jury trial waiver to various tort claims asserted in a case involving loan documents containing a jury trial waiver

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[12] Edahl further incorporates herein by reference any additional arguments advanced by BB&T in favor of the enforceability of the jury trial waivers, which arguments are equally applicable to Edahl for all the reasons set forth in Section (II)(B), herein.

provision. *See Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014). Specifically, in *Blackburn*, the defendant asserted numerous torts (as well as contract and equitable claims) as counterclaims to a foreclosure action. *Id.* Though trial by jury is automatically waived when permissive counterclaims are asserted in an equitable action, the Court also found that trial by jury was waived to the extent the counterclaims were compulsory because they were encompassed by the otherwise valid and enforceable jury trial waiver. *Id.* at 332, 755 S.E.2d at 443. Notably, the claims at issue included those for negligent misrepresentation, breach of fiduciary duty, and fraud/fraud in the inducement. *Id.* at 325, 55 S.E.2d at 440. Thus, recent case law supports the application of the waivers to Skywaves' tort claims as well as its contractual claims. *Id.*; *see also Zaklit v. Global Linguist Solutions, LLC*, 53 F. Supp. 3d 835, 857 (E.D.Va. 2014) (applying jury trial waiver to tort claims, including fraud, where they were "an outgrowth of the contractual relationship"). Skywaves cites no precedent to the contrary, and its argument to "carve out" the tort claims from the ambit of the jury trial waivers was correctly rejected by the trial court.

2. The Waivers Inure to the Benefit of Edahl As An Agent and Employee of BB&T.

The trial court properly applied the law to grant Edahl's motion to strike Skywaves' jury demand. In pointing to the fact that Edahl was not himself a signatory to the subject agreements, Skywaves overlooks the relevance of Edahl's status as an *agent and employee* of BB&T. Where a corporate principal has signed a contract containing a valid jury trial waiver, its agents and employees may also enforce the provision as agents of the corporation. *See Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 222–25 (3rd Cir. 2007). Though South Carolina's appellate courts do not appear to have addressed this

issue, it was squarely decided by the U.S. Court of Appeals for the Third Circuit in *Tracinda,* and since that time, numerous other courts have followed its well-reasoned approach allowing nonsignatory agents to invoke jury waivers in contracts entered into by their corporate principals. *See Mowbray v. Zumot*, 536 F. Supp. 2d 617 (D. Md. 2008) (holding that nonsignatory agent of corporation may enforce jury trial waiver provision and that rationale of *Tracinda* is based upon the same common law agency principles in Fourth Circuit law); *Andre v. Sellstate Realty Sys. Network, Inc.*, 2010 WL 3259415, at *3 (M.D. Fla. July 30, 2010) (holding that nonsignatory individual defendants, who were CEO and president, could invoke jury trial waiver contained in promissory note and included by reference in other agreements between plaintiff and corporate defendant because they were sued as agents of signatory corporation); *Price v. Cushman & Wakefield, Inc.*, 808 F. Supp. 2d 670, 707 (S.D.N.Y. 2011) (holding that nonsignatory real estate broker could invoke jury trial waiver in company's contract); *Hamilton v. Sheridan Healthcorp., Inc.*, 2014 WL 537343, at *3 (S.D. Fla. Feb. 11, 2014) (citing *Tracinda* and holding that nonsignatory individual defendants, doctors sued based on their actions as agents of signatory hospital, could enforce jury trial waiver in employment agreement between plaintiff and hospital); *SBAV LP v. Porter Bancorp, Inc.*, 2014 WL 1922874, at *3 (W.D. Ky. May 14, 2014) (citing *Tracinda* and holding that individual defendants, who were chairman and president/CEO of bank, could invoke jury trial waiver contained in securities purchase agreement between plaintiff and defendant bank); *Boardakan Restaurant LLC v. Atlantic Pier Associates, LLC*, 2014 WL 4058723, at *5, n. 6 (E.D. Pa. Aug. 15, 2014) (citing *Tracinda* and holding that nonsignatory corporate and individual defendants, as agents of signatory corporate entity, had standing to enforce jury waiver). Additionally, state court

cases are further in accord: *See In re Credit Suisse First Boston Mortg. Capital, L.L.C.*, 273 S.W.3d 843, 848 (Tex. Ct. App. 2008) (applying *Tracinda*'s extension-through-agency rationale under Texas law); *Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.*, 251 P.3d 9, 26-27 (Colo. App. 2010) (applying *Tracinda*).

Rather than address the persuasive authority on point, Skywaves cites to the truism that an individual is liable for his own tortious conduct. This point is simply irrelevant to the issue at hand. The application of a jury trial waiver results in a non-jury proceeding before a trial court; it does not immunize anyone from suit. Skywaves also points to the Supreme Court's statement in *Kerr* that the choice of law provision in the Factoring Agreement did not apply to the tort claims asserted by the Skywaves investors, who were not parties to the Factoring Agreement.[13] *Kerr*, 408 S.C. at 333, fn. 7; 759 S.E.2d at 727, fn. 7. While the *Kerr* Court was correct, this point is immaterial to the applicability of the jury trial waivers to Edahl under sound principles of agency law. *See Tracinda*, 502 F.3d at 223; *see also Goer v. Jasco Industries*, 395 F. Supp. 2d 308 (D.S.C. 2005) (finding that plaintiff-signatories to arbitration agreement were equitably estopped from claiming that nonsignatory, individual defendants could not enforce arbitration agreement signed by their corporate entity).

Finally, if a nonsignatory agent of a signatory corporation were *not* allowed to invoke a contractual jury waiver, such provisions would be "of little practical value" because they could be easily circumvented by naming individuals as defendants instead of

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[13] Skywaves' citation to the *Kerr* Court's ruling on the inapplicability of North Carolina law is ironic, at best, in light of Skywaves' now-abandoned argument to the trial court that North Carolina law somehow governed the tort claims against Edahl. (R. pp. 753, 781-785). Edahl, on the other hand, has consistently maintained that South Carolina law applies to all claims against him. (R. pp. 838-840).

(or in addition to) the corporate entity itself. *See Tracinda,* 502 F.3d at 225. Here, it is undisputed that Edahl was acting at all times as an agent and employee of BB&T in dealing with Skywaves. Further, but for the financing relationship between Skywaves and BB&T, Skywaves would have had no interaction with Edahl or purported claims against Edahl. Under such circumstances, this Court should follow the persuasive authority on this issue and find that the jury trial waivers apply to the claims against Edahl as well as those against BB&T. Accordingly, the trial court's order striking Skywaves' demand for a jury trial should be affirmed.

III. THE TRIAL COURT CORRECTLY DENIED SKYWAVES' MOTION TO STRIKE DEFENDANTS' ANSWERS.

In what was perhaps an effort to deflect from its tenuous legal positions, Skywaves twice attempted to bypass any resolution on the merits by asking the trial court to "strike" the answers of BB&T and Edahl. (R. pp. 180-190, R. pp. 668-720). The trial court correctly applied its measured judgment to reject Skywaves' over-zealous call for sanctions on both occasions. Skywaves now appeals the trial court's refusal to strike the amended answers that the trial court expressly authorized in its order denying Skywaves' first motion to strike.[14] (R. pp. 51-52).

As against Edahl, Skywaves focuses on Edahl's position with respect to what the parties have commonly called "site plan financing." Skywaves' counsel first deposed Edahl on September 19, 2013. In his deposition, Edahl admitted that he had agreed to advance funds under the Factoring Agreement based on certain "sites" identified in a General Dynamics contract with Skywaves. And, in 2007, BB&T did, in fact, advance funds on these "site plans" as if they were purchase orders. (The Factoring Agreement had already been extended to provide for financing based on purchase orders, and the "site plans" were treated as purchase orders for purposes of financing.)

Edahl further testified he did not, prior to his deposition, recall the agreement to finance site plans. In February 2014, Edahl corrected this statement, by affidavit, stating that he was, in fact, aware in January 2008 that he had agreed to treat certain "site plans" the same as purchase orders under the Factoring Agreement. (R. pp. 191-192). Edahl

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[14] As argued above, the trial court correctly dismissed all causes of action against Edahl. Therefore, this Court need not reach the issue of whether the trial court correctly denied Skywaves' motion to strike the answers as a sanction against BB&T and Edahl. *See generally Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

further explained that he was afraid to disclose this information in January 2008 because BB&T was exposed to such a large financial loss from Skywaves. (R. pp. 191-192). When, after receiving Edahl's affidavit, Skywaves asked to re-depose Edahl, Edahl cooperated and fully answered all questions posed by Skywaves' counsel.

In sum, Edahl chose to tell the truth in his deposition regarding the terms of the "site plan financing." The only issue was whether he had always remembered the terms of that agreement or whether his memory had recently been refreshed. Edahl more than corrected the record on this issue by voluntarily submitting an affidavit and undergoing a second deposition. Despite Skywaves' efforts to vilify him, Edahl set the record straight on this nondispositive issue.

As is often the case in litigation, Skywaves established the truth *of one fact among many* that it sought to prove in this case. As noted by the trial court, this is why the litigation process exists. Further, Edahl amended his answer – with the approval of the trial court – to concede that he agreed to "finance site plans, to a limited extent." (R. p. 236 ¶ 14). Though Skywaves may not be satisfied with the amendment, Edahl and BB&T simply did not agree to finance site plans *ad infinitum*, nor have Skywaves' own witnesses alleged as much. In any event, BB&T did, in fact, finance the subject "site plans."

While Skywaves seeks to distract from the merits with this issue, it does not change the result or somehow illegitimatize Edahl's dispositive defenses. The striking of an answer is a drastic remedy, which should only be considered, much less imposed, in the most extreme circumstances. *See Germofert Mfg. Co. v. Castles*, 97 S.C. 389, 81 S.E. 665, 666 (1914) (stating that the power to strike an answer "should be sparingly used, and only in cases free from doubt"). Respectfully, as recognized by the trial court, the circumstances

of this case fall far short of what would be required to strike Edahl's answer as a sham. *See Ins. Co. of N. Am. v. Hyatt*, 290 S.C. 159, 163, 348 S.E.2d 532, 535 (Ct. App. 1986) ("Motions to strike an answer or defense as sham are not favored in law and should be granted only where the evidence demonstrates that the pleading is manifestly false and made in bad faith"). Moreover, this Court should review the trial court's determination on this motion under an abuse of discretion standard. *See Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) (noting that the imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the lower court). For all of the foregoing reasons, the trial court acted well within its sound discretion in denying Skywaves' motion to strike the answers and should be affirmed.

CONCLUSION

For all of the reasons stated herein and any others the Court may deem just and proper, the decision of the trial court should be AFFIRMED.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Commons Pleas

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.

PROOF OF SERVICE

I certify that I have served the foregoing **FINAL BRIEF OF RESPONDENT** and **CERTIFICATE OF COUNSEL** on all parties of record by depositing a copy of the same in the United States Mail, postage prepaid, on August 31, 2016, addressed to their attorneys of record as follows:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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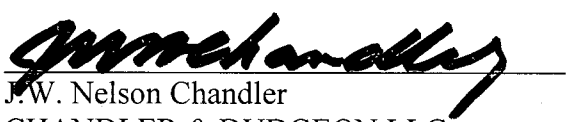
Successor in merger to Branch Banking
and Trust Company of SC, a/k/a BB&T..... Respondent/
Appellant,

and James Edahl, ...
Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

August 31, 2016



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