THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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

APPELLANT/RESPONDENT'S CORRECTED FINAL RESPONDENT'S BRIEF

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COUNTERSTATEMENT OF ISSUES ON APPEAL

I. **Should this Court dismiss BB&T's cross-appeal for lack of jurisdiction because the denial of a motion for summary judgment is never appealabe?**

Suggested Answer: *Yes.*

II. **Did the trial court properly deny BB&T's Motion for Summary Judgment as to Skywaves' breach of contract claim where there is evidence that BB&T breached its promise to Skywaves?**

Suggested Answer: *Yes.*

III. **Did the trial court properly deny BB&T's Motion for Summary Judgment as to Skywaves' breach of contract claim where there is at least an issues of fact as to whether BB&T had grounds to terminate the agreement?**

Suggested Answer: *Yes.*

IV. **Did the trial court properly deny BB&T's Motion for Summary Judgment as to Skywaves' breach of contract accompanied by a fraudulent act claim?**

Suggested Answer: *Yes.*

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Skywaves I Corporation ("Skywaves") filed this action on December 3, 2009 in the Court of Common Pleas for Charleston County against Defendant Branch Banking and Trust company, Successor in merger to Branch Banking and Trust Company of South Carolina ("BB&T"); it sued BB&T and James Edahl ("Edahl") for breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, fraudulent inducement, and lender liability.

Defendants removed this case to the United States District Court for the District of South Carolina on January 14, 2010. The District Court remanded to the Court of Common Pleas for Charleston County on June 21, 2010 and imposed sanctions for Defendants' wrongful removal. Skywaves filed a First Amended Complaint on December 12, 2010, alleging claims of: (1) breach of contract; (2) breach of contract accompanied by fraudulent act; (3) promissory estoppel; (4) breach of the covenant of good faith and fair dealing; (5) negligent misrepresentation; (6) fraudulent misrepresentation; (7) negligence; and (8) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). The case was assigned to the Business Court for Charleston County on January 6, 2011.

BB&T filed a Partial Motion to Dismiss and Edahl filed a Motion to Dismiss the First Amended Complaint on or about February 10, 2011. On November 8, 2011 the Business Court initially granted those Motions in part, and denied them in part. Specifically, the trial court dismissed Plaintiff's claims against Edahl and five of Plaintiff's eight causes of action against BB&T (breach of contract accompanied by a fraudulent act, negligent misrepresentation, fraudulent misrepresentation, negligence and SCUTPA).

Skywaves filed a Motion to Reconsider, Alter or Amend Dismissal and for Relief from Judgment concerning the November 8, 2011 Order on November 18, 2011. At the

same time (and out of an abundance of caution), Skywaves filed a Notice of Intent to Appeal the November 8, 2011 Order on December 28, 2011. On or about June 15, 2012 the Business Court granted Plaintiff's Motion to Reconsider and modified the November 8, 2011 Order so as to permit Plaintiff to proceed on its claim for breach of contract accompanied by a fraudulent act against BB&T and claims for negligence and negligent misrepresentation against BB&T and Edahl. Plaintiff then filed a Motion to Withdraw its Appeal, (July 17, 2012) as the June 15, 2012 Order rendered that appeal moot.

Discovery proceeded and revealed that Edahl had perjured himself at deposition — and that numerous material allegations of Defendants' pleadings (and statements contained in affidavits) were demonstrably untrue. On January 17, 2014 Skywaves filed a Motion to Strike BB&T's and Edahl's Answers ("First Motion to Strike"), on the ground that they were sham pleadings. Subsequently, BB&T and Edahl filed Motions to Amend their answers to address Edahl's false statements, though they did not admit the true state of facts without condition. On March 17, 2014 the trial Court denied Plaintiff's First Motion to Strike and granted the Defendants' Motions to Amend.

BB&T and Edahl filed Motions for Summary Judgment and Motions to Strike Plaintiff's Demand for a Jury Trial on July 24 and 28, 2014 respectively.

On February 9, 2015, the Court issued an Order granting Defendants' Motions to Strike the Jury Trial Demand. On February 18, 2015, Skywaves filed a Motion to Reconsider the Order Striking the Jury Trial Demand. Out of an abundance of caution, Skywaves also filed a Notice of Appeal from that Order on March 10, 2015. In light of the pendency of the Motion to Reconsider, the Court of Appeals dismissed that Appeal without prejudice on April 27, 2015. Defendants filed Memoranda in Opposition to Plaintiff's Motion to Reconsider the Order Striking the Jury Trial Demand.

Plaintiff filed a Motion to Amend its complaint on April 16, 2015 and a second Motion to Strike Defendants' Answers on April 16, 2015 ("Second Motion to Strike").

On April 23, 2015, Skywaves filed a Memorandum in Opposition to Motions for Summary Judgment (Revised and Annotated to Identify the Exhibits). On April 29, 2015, Skywaves filed its Notice of Filing of Exhibits to Plaintiff's Memorandum in Opposition to Motions for Summary Judgment (with exhibits). (*See* R. pp. 895-1089).

On July 27, 2015 the trial court filed an Order (1) Granting in Part BB&T's Motion for Summary Judgment; (2) granting Edahl's Motion for Summary Judgment; (3) denying Skywaves motion to Amend the Complaint; (4) denying Skywaves Motion to Strike the Answer of BB&T and Edahl; and (5) denying Skywaves Motion to Reconsider the Order Striking the Demand for a Jury Trial. Of relevance to this brief, this Order denied BB&T's Motion for Summary Judgment as to Skywaves' claims of breach of contract and breach of contract accompanied by a fraudulent act.

On and after August 24, 2015 Skywaves filed the instant Notice of Appeal and Amended and Supplemental Notice of Appeal, appealing the Order of July 27, 2015, along with the Orders of November 8, 2011, June 15, 2012, March 13, 2014, and February 9, 2015. BB&T filed a notice of cross-appeal, purporting to appeal from the partial denial of its Motion for Summary Judgment. For the reasons that follow, this Court should either dismiss BB&T's appeal for lack of appellate jurisdiction or affirm the trial court's denial of summary judgment.

II. BACKGROUND

A. Summary of the Parties' Position in the Cross Appeal

Skywaves has discussed the underlying facts of this case — and the parties' complex relationship — in detail in its Appellants' Brief, which it incorporates herein by reference as if set forth at length.

In its cross-appeal, BB&T primarily argues that the trial judge erred in denying summary judgment as to Skywaves' contractual claims (breach of contract and breach of contract accompanied by a fraudulent act) because: (a) BB&T had complied with its

contractual obligations; and (b) BB&T was justified in terminating its agreement with Skywaves because Skywaves was in default of the parties' agreement. Particularly, BB&T contends that Skywaves had failed to timely remit payments from customers to BB&T, that Skywaves could not pay its debts as they came due and that BB&T had a good faith basis for insecurity.

However, BB&T's claim that Skywaves breached the parties' agreement (initially embodied in the Factoring Agreement) ignores the fact that BB&T and Skywaves had agreed to modify or alter their agreement through a series of oral promises, emails, memos, and course of dealing. Skywaves relied upon all of these to its ultimate detriment. Before BB&T could plausibly argue that Skywaves breached the parties' agreement, it would have overcome the genuine issues of material fact regarding the actual terms of the loan agreement.

Even if BB&T's version of the loan agreement is correct, BB&T must still prove that the claim of default was occasioned by Skywaves' claimed breach. None of the issues regarding Skywaves' alleged breach of contract raised by BB&T today was material or important to BB&T at the time, that is, until one of BB&T's employees falsely accused Skywaves of having obtained $1.2 million by fraud. Not surprisingly, this accusation of fraud distorted BB&T's perception of Skywaves financial condition and resulted in a wrongful default, which BB&T tries to justify today by revising history.

B. Underlying Facts

In the early 2000's, Skywaves developed and patented a unique and highly sought-after product in the 3G telecommunications industry. The product consisted of a lightweight pre-engineered shelter containing all the electronics necessary for the operation of a cell phone tower. With this invention, it was no longer necessary for a cell phone provider to hire contractors to construct a building at the base of a tower and separate contractors to install the devices necessary for the tower's operation. They could

instead purchase a turnkey shelter from Skywaves for less than what it would cost to build the shelter piecemeal. This technology was groundbreaking and by 2007, having secured contracts from national accounts such as Verizon, General Dynamics and Homeland Security, Skywaves had a bright future and unlimited growth potential. (*See* R. p. 962). Indeed, the successor to Skywaves' book of business using this technology has become extremely successful.

Skywaves' relationship with BB&T began on March 22, 2005 when it entered into a Factoring and Security Agreement ("Factoring Agreement") with BB&T. Under the Factoring Agreement as written, BB&T purchased Skywaves' invoices at a discount and Skywaves was required to repay the sums when it received payment from the customer. (*See* R. pp. 897-911). Through this Factoring Agreement, Skywaves could obtain prompt partial payment of invoices and repay the advance once the customer paid the invoice in full.

Skywaves' growth proceeded so quickly that, by May of 2006, it had achieved over $6 million in revenue and "[l]ike many startup companies, Skywaves needed cash to fund its operations and to purchase construction materials for the shelters." (*See* BB&T's Initial Appellant's Br., at 2). Indeed, Ronald Konersmann testified that Skywaves planned a significant capital expansion to increase production capacity: "[W]e had a three plant strategy from day one." (*See* R. p. 968). Mr. Konersmann further testified that "it was a time when in order to meet the needs of when the business was ready and we were going to get the orders, we needed to expand the plant and make some major capital changes." (*See* R. p. 970).

By 2007, Skywaves found that the factoring model — which advanced money only after Skywaves had actually manufactured a product — was not suitable for a company that needed money for capital expansion to meet anticipated orders. As a result, Skywaves sought alternative ways to capitalize its expansion: "we were looking for people who would be interested in looking at our situation." (*See* R. p. 971). One of

these included an offer from a private investment firm to invest $4 million for 30% of the company. (*See* R. pp. 972-73; R. pp. 1029-35).

In the banking boom years of 2006 & 2007, BB&T was anxious to keep the Skywaves account and felt competitive pressure from others banks: "Two other banks are looking at this as well. We will want to respond promptly to shut down competition." (*See* R. p. 932). BB&T had such confidence in Skywaves' future that it talked about taking Skywaves to an IPO. (*See* R. p. 975; R. p. 1055 ("Will begin to get the capital markets involved")).

As a result, BB&T offered sweeping modifications to its conventional factoring arrangement and made dramatic changes to the written factoring agreement in an effort to keep Skywaves' business. The evidence of these changes is contained in BB&T's files[1], the admissions of BB&T representatives at deposition and the parties course of conduct.

BB&T has testified that financing program it proposed was "unique" to Skywaves and did not "fit the mold." (*See* R. p. 1072). It has further expressed that the program was "out of the ordinary for Skywaves exclusively." (*See* R. pp. 1008-11). It was "a great departure from what BB&T would do for a typical client." (*See* R. p. 922). It offered a funding proposal that had never before been offered, "I'm not aware of – of it being done [before]." (*See* R. p. 1057).

BB&T salted this new proposal with a series of incentives designed to keep Skywaves' business. For example, it increased the borrowing limit, it increased the advance rate, it unilaterally reduced its commissions, and it made loans for equipment. (*See* BB&T's Br., at 6-7, 13-14). However, the biggest incentive came when BB&T

[1] BB&T's argument that the changes to the financing agreement are not enforceable because they were not memorialized in writing is disingenuous since BB&T deliberately omitted reference to the side agreements in the formal writing: "I did not include the new $2,000,000 PO sub-limit or the 65% PO advance rate in the amendment as this is typically not part of BB&T's standard contract (it is something out of the ordinary for SkyWaves exclusively). I didn't want to potentially expose SkyWaves to any legal fees for counsel to create a document." (R. pp. 1008-11).

offered to modify the original written loan agreement and to abandon the factoring model altogether for what amounted to unsecured lending.

Under the original factoring agreement, BB&T agreed to purchase Skywaves invoices for 80% (later 85%) of face value of an invoice. (*See id.*). Skywaves was required to repay the amount advanced when it received payment, but in no event could repayment be delayed longer than 60 days from the invoice due date. (*See* R. pp. 897-911). At all times BB&T maintained a security interest in the invoice. (*See id.*).

Under the new agreement, BB&T agreed to loan money, (60% later 65%) of the value of a *purchase order.* (*See* BB&T's Init. Br., at 6-7, 13-14). This meant that instead of buying *invoices* in which it took a security interest, BB&T agreed to allow Skywaves to draw down on the line of credit every time it received a purchase order. Repayment of such money was not due until the purchase order converted to an invoice. (*See* BB&T's Init. Br., at 6-7, 13-14). Additionally, there was no time limit for a purchase order to convert to an invoice. (*See* R. p. 995).

Unlike the factoring agreement for financing *invoices*, there was no security for loans made on a *purchase order*: "There wasn't an asset that you [BB&T] were lending on so you are giving a company – basically you're [BB&T] an investor. You're [BB&T] giving the company money that's unsecured." (*See* R. p. 1043).

Later, in the summer of 2007, orders related to a contract from one of Skywaves' major customers General Dynamics, were delayed. (*See* BB&T's Init. Appellant's Br., at 18). This resulted in a reduction of cash inflow and caused Skywaves to miss its financial projections. (*See id.*, at 19). BB&T was aware of the issue, but felt confident that since the General Dynamics contract remained in place, it was just a matter of time before the orders recommenced:

> Q. And basically what you have, from a business standpoint, you considered that the money will be there, it's just a matter of timing when the purchase order will be based and then the thing will be made?

A. Yes. Ron assured us that purchase orders would be forthcoming soon and that he really wanted to get production started on these units. And so, yes, we felt that under those circumstances it was reasonable to consider advancing on sites.

(*See* R. p. 934).

As a result, BB&T made further significant modifications of the loan agreement in order to carry Skywaves over the shortfall. Under the agreement as further modified, BB&T agreed to loan 65% of the value of an anticipated future sale when Skywaves identified cell tower sites where future sales were expected. (*See* R. p. 934). As with purchase orders, the money loaned for site plans was unsecured, but this agreement went further. BB&T agreed that money loaned for site plans was subject to no payment schedule! (*See* R. p. 1016). Not only that, the time to repay money advanced for invoices was extended (to allow Skywaves to use the money) to 60 days after Skywaves received payment as long as Skywaves paid the interest. (*See* R. p. 977; R. p. 992).

By the end of 2007, BB&T had advanced approximately $1.2 million under this agreement for site plans and another $2 million for purchase orders and invoices and the original factoring agreement was no longer recognizable. The lending agreement had evolved from a secured transaction with specific dates for repayment to a loan without security and no specific date for repayment. Skywaves complied with the terms of this agreement as modified.

BB&T's claim it "had a good faith basis for deeming itself insecure" at the end of 2007 is belied by the facts and BB&T's position at the time. (*See* BB&T's Init. Appellant's Br., at 32). As a result, there is a genuine question of fact whether BB&T had a good faith belief that "the prospects of payment to it or the performance of the Obligations (as defined in the Agreement) is impaired." (*See* R. pp. 1083-85).

In December 2007 and early January 2008, BB&T met with Skywaves and reviewed the missed projections and cash flow issues. Fully cognizant of Skywaves financial condition, (the same condition that it claims today justified a default), BB&T

took no action. It did not call a default or even raise a concern over the so-called late remittances. Castlen Morris, the factors manager supervising the account was aware of late remittances[2] and testified that as long as there was no fraudulent invoice and Skywaves sent the money after he brought the delay to its attention, there was no reason to document the event. (*See* R. p. 1060). He explained he felt "pretty comfortable that they [the outstanding purchase orders] were going to come through and materialize as actual sales." (*See* R. p. 1062).[3]

BB&T did not assert a default until mid-January 2008, when James Edahl falsely accused Skywaves of defrauding the bank of over $1.2 million.

James Edahl was the BB&T vice president who had arranged to loan money on the basis of site plans (*See* R. p. 944). Apparently, however Edahl lacked the authority to make such advances (*See* R. p. 923) and when the existence of the advances became known, he became frightened for his job. (*See* R. p. 941). He lied to his superiors and denied any knowledge of the agreement to fund site plans. (*See id.*).

From that point, things spiraled out of control. Incredible as it might sound Edahl, the man who had approved the site plan funding, denied knowledge of the approval and declared a default for the very plan he had approved! (*See* R. p. 945 ("As we discussed Friday neither you or I had any idea that the GD NYST purchase orders funded from July through October were not documented and funded exactly like the other purchase orders we had received and funded over the last two years from General Dynamics, Nextel, Verizon, et cetera.")). The only difference in Skywaves' financial condition between early January and mid-January 2008 was Edahl's accusation of fraud.

BB&T's claim that the site plan funding was not the reason for the default is not supported by the record. The record shows Edahl declared a default on January 18, 2007

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[2] The delay in remittance occurred at least three times during the summer and fall of 2007: $350,000 in May, $259,000 in July, and $325,000 in September. (*See* R. p. 1061).

[3] And no wonder. Skywaves had a massive contract with General Dynamics to provide cell tower shelters for the New York State Police and it was just a matter of when, not if the orders began. (*See* R. p. 934).

because of the over advance on the site plan funding. He confirmed this default in a memo of January 18, 2007 when he wrote that he had called Skywaves:

> to formally tell them the over advance has put them in default of the commercial finance loan and they would be getting a written notice of same shortly. Could you please send me a form Notice letter? I would like to get it out ASAP. Thanks."

(*See* R. pp. 1074-75; R. p. 945 (emphasis added)).

It is true that on January 28, 2008, a week after Edahl gave Skywaves what he described as "formal" notice of default, BB&T sent a letter to Skywaves purporting to declare a default on different grounds and never mentioned the $1.2 million over advance. This does not change the fact there is evidence in the record that a default on these grounds was not justified, and that but for the fraud allegation BB&T would not have declared a default.

It should come as no surprise that this accusation distorted BB&T's entire view of the Skywaves account and resulted in an improper cancellation of the line of credit. Mike Hennessey was the head of the credit department and authored the January 28, 2008 letter of default. He testified that, if he had known of Edahl's accommodation for site plan funding in January of 2008, he would not have considered Skywaves in default of the site plan funding. (*See* R. p. 1020). Hennessey also testified that had he known the allegation of fraud was false and that Edahl had approved the advances for site plans, he would have done a "360." (*See* R. p. 1081).

Michael Burke said he would have dealt with the account "differently" had he known that the site plan funding was approved:

> Q. Might your reaction have been different back in January of -- of '08 had you known that Mr. Edahl had approved this funding?
>
> A. If BB&T had approved that type of funding and I didn't know about it, my reaction would have been different. I would have gone back and said, what is this, how are we doing this and dealt with it differently.

(*See* R. pp. 1049-50).

ARGUMENTS

I. THIS COURT DOES NOT POSSESS JURISDICTION OVER BB&T'S CROSS APPEAL

Initially, BB&T argues that this Court possesses jurisdiction over BB&T's cross-appeal of the denial of its Motion for Summary Judgment as to Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act.

As BB&T concedes, the denial of a motion for summary judgment is not subject to direct appeal. *See Silverman v. Campbell*, 326 S.C. 208, 211, 486 S.E.2d 1, 2 (1997). However, BB&T suggests that — notwithstanding this rule — it is somehow entitled to an immediate appeal because "the courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable." (*See* BB&T's Init. Br., at 17 (*citing Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct. App. 2001)). However, the South Carolina Supreme Court has definitively rejected BB&T's contention; irrespective of whether there are some issues properly on appeal before the court, the denial of summary judgment is **never appealable**.

In fact, in the subsequent appeal in *Olson*, the very case BB&T relies upon, the South Carolina Supreme Court rejected BB&T's contention and adhered to the rule that denials of summary judgment are not appealable, even if other issues have been properly appealed:

> The Court of Appeals recognized that the denial of a motion for summary judgment is not immediately appealable. *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). In *Ballenger, supra*, we stated,
>
> > This Court has repeatedly held that the denial of summary judgment is not directly appealable. *Willis v. Bishop*, 276 S.C. 156, 276 S.E.2d 310 (1981); *Mitchell v. Mitchell*, 276 S.C. 44, 275 S.E.2d 1 (1981); *Neal v. Carolina Power and Light*, 274 S.C. 552, 265 S.E.2d 681 (1980); *United States Fidelity & Guaranty Co. v.*

> *City of Spartanburg*, 267 S.C. 210, 227 S.E.2d 188 (1976); *Medlin v. W.T. Grant, Inc.*, 262 S.C. 185, 203 S.E.2d 426 (1974); *Greenwich Savings Bank v. Jones*, 261 S.C. 515, 201 S.E.2d 244 (1973); *Geiger v. Carolina Pool Equipment Distributors, Inc.*, 257 S.C. 112, 184 S.E.2d 446 (1971); *see also Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986); *Associates Financial Services Co. of South Carolina, Inc. v. Gordon Auto Sales*, 283 S.C. 53, 320 S.E.2d 501 (Ct. App. 1984). A majority of the other jurisdictions have reached this same conclusion. 4 C.J.S. Appeal and Error, § 98 (1993); 4 Am.Jur.2d Appeal and Error, § 104 (1962 & Supp.1993); 15 A.L.R.3d 899 (1967 & Supp.1993). Further, this Court has held that the denial of summary judgment is not reviewable even in an appeal from final judgment. *Raino v. Goodyear Tire*, 309 S.C. 255, 422 S.E.2d 98 (1992); *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986).
>
> 313 S.C. at 476-77, 443 S.E.2d 379. *Ballenger* specifically overruled two cases which were inconsistent with this rule, and noted that "the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable." 313 S.C. at 477-78, 443 S.E.2d 379. *See also Silverman v. Campbell*, 326 S.C. 208, 486 S.E.2d 1 (1997) (reiterating that denial of summary judgment is not appealable, even after final judgment). The only recent exception to this rule by this Court was in a case prior to *Ballenger*, *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985), in which we allowed the appeal of the denial of summary judgment to proceed in the third appeal of a medical malpractice action which had been pending for thirteen years.
>
> We adhere to recent precedent and hold that the denial of a motion for summary judgment is not appealable, even after final judgment. To the extent the cases cited by the Court of Appeals are inconsistent, they are expressly overruled. Accordingly, the Court of Appeals' refusal to consider the merits of Faculty House's appeal is affirmed.

See Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 167-68, 580 S.E.2d 440, 443-44 (2003). Skywaves notes that another case that BB&T relies upon to support its baseless claim of jurisdiction over its cross-appeal is *Davis v. Lunceford*, which the Supreme Court has noted is outdated law.

Under the Supreme Court's clear holding in *Olson*, this Court simply may not obtain review of the denial of summary judgment, even if Skywaves has properly raised

appealable issues. In this case, BB&T is not simply seeking to obtain an early appeal of an interlocutory order; rather, it is seeking appellate review of an order that is **never appealable**. *See Watson v. Underwood*, 407 S.C. 443, 459 n.12, 756 S.E.2d 155, 164 n.12 (Ct. App. 2014) ("The denial of summary judgment is never appealable, even after final judgment.") (*citing Olson*); *Bank of New York v. Sumter Cty.*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010) ("[I]t is well-settled that an order denying summary judgment is never reviewable on appeal.) (*citing Olson*). The Supreme Court has made that abundantly clear. If BB&T wishes to seek review of the merits of Skywaves' contractual claims, it must await a verdict at trial.

Notably, BB&T has not cited a single case following the Supreme Court's clear statement in *Olson* that did not come **before** that decision. It has not done so because the Supreme Court has definitively foreclosed the appealability of summary judgment. There is no current law that supports BB&T's effort to obtain appellate jurisdiction in this matter.

For the foregoing reasons, this Court should decline to exercise jurisdiction over BB&T's cross-appeal in this matter and should not review the trial court's unreviewable denial of summary judgment as to Skywaves' contract-based claims.

II. THE TRIAL COURT PROPERLY DENIED SUMMARY JUDGMENT ON SKYWAVES' CONTRACT CLAIM BECAUSE THERE IS EVIDENCE THAT BB&T BREACHED ITS CONTRACT WITH SKYWAVES

BB&T does not dispute that the Factoring Agreement was modified, and it agreed to advance money on the basis of sites identified on a General Dynamics map. (*See* BB&T Init. Br., at 19). It failed to do so. Instead, BB&T argues that it did not breach this agreement because it fully funded all sites identified. (*See id*). However, BB&T ignores the fact that monies advanced on the basis of site plans had **no specific due date** for the repayment.

> Q. ...For those loans that were made on the site plans, the advances, when were they due to be paid to the bank from SkyWaves?

A. There is not a due date on them.

(*See* R. p. 1016). Skywaves was not obligated to repay any of the money advanced on site plans until the line of credit expired in April 2008. (*See id.*). Nonetheless, on January 25, 2008, BB&T terminated the parties' agreement and demanded the immediate repayment of all advances that BB&T had made to Skywaves. (*See* R. pp. 1083-85). Although several hundred thousand dollars were available on Skywaves' line of credit, BB&T refused any further disbursement.

BB&T cannot deny that it breached its agreement to fund the site plans when it demanded repayment of the advances before they were due. BB&T admitted as much when Hennessey, BB&T's Rule 30(b)(6), designee testified that, as he presently understands it, Skywaves was not in breach of the site plan funding agreement:

> Q: Is it your testimony today that based upon the accommodation that was reached by Mr. Edahl that SkyWaves did not breach the site plan funding at all?
>
> A: Yes.

(*See* R. p. 1017).

Given these events, there is, at the very least, a scintilla of evidence creating a genuine issue of material fact regarding whether BB&T breached the agreement to fund site plans when it demanded early payment.

III. BB&T DID NOT HAVE GROUNDS TO TERMINATE THE PARTIES' AGREEMENT

A. Skywaves Did Not Breach the Parties' Altered or Modified Agreement

1. Skywaves Did Not Fail to Remit Payments to BB&T

BB&T claims that, despite its agreement to fund site plans (which it did not do), its default was justified because (a) Skywaves failed to pay debts to third-parties when they came due; (b) Skywaves failed to immediately remit customer payments to BB&T and "commingled" such payments with other funds; and (c) BB&T deemed itself insecure

of Skywaves' performance. This ignores the fact that the it admits the terms of the agreement were changed, notwithstanding the absence of a formal writing:

> Q. But in terms of the use of those proceeds, there was nothing at all that was agreed to in writing; is that correct?
>
> A. Not in writing.

(*See* R. p. 941).

Although BB&T argues that, the Factoring Agreement only permits modification by signed writing, under North Carolina law, irrespective of such a provision, parties are free to modify their agreements orally or by their conduct:

> It is well established under our law that: The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract have been modified or waived, even though the instrument involved provides that only written modifications shall be binding. *W.E. Garrison Grading Co. v. Piracci Construction Co., Inc.,* 27 N.C. App. 725, 221 S.E.2d 512 (1975), *rev. denied*, 289 N.C. 296, 222 S.E.2d 695 (1976).

Son-Shine Grading Co. v. ADC Constr. Co., 63 N.C. App. 417, 315 S.E.2d 346 (N.C. Ct. App. 1984). "The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof. . . . The hand that pens a writing may not gag the mouths of the assenting parties." *See Angel Med. Ctr., Inc. v. Abernathy*, 159 F. Supp. 2d 215, 222 (W.D.N.C. 2000) (citation omitted)). "A modification to a contract occurs if there is mutual assent to the terms of the modification and consideration supporting the modification." *Brumley v. Mallard,* LLC, 154 N.C. App. 563, 567-68, 575 S.E.2d 35, 38 (2002).

Ron Konersmann, Skywaves' Chief Executive Officer, testified that Edahl agreed to modify the factoring agreement such that it provided funding comparable to a capital

investment. (*See* R. p. 972). Despite its claim that it never agreed to such modifications, BB&T can hardly dispute that it funded Skywaves exactly as it agreed[4]:

> Q: And so that I'm clear on it, the site plans were designated as potential sites with no specified schedule of when those orders would be placed; is that right?
>
> A: That's right.
>
> Q: Okay. And that is a working capital loan in banking terms, isn't it?
>
> A: I guess could be construed that way.

(*See* R. p. 936).

Indeed, Mike Hennessy, BB&T's credit manager, testified the lending was akin to equity financing, except that BB&T did not receive an equity interest in Skywaves. He testified that he felt the lending agreement was the equivalent of a "permanent working capital loan." (*See* R. p. 1018).

Tol Broome, BB&T's president of Commercial Finance described the lending arrangement in a memo of March 26, 2008 as "essentially providing venture capital." (*See* R. p. 1073).

Michael Burke, the BB&T Account Executive responsible for the Skywaves account, described the loan as "venture capital" and at one point referred to it as "equity financing," except BB&T did not get an "interest" in the company. (*See* R. p. 1046).

Simply put, under the agreement as modified and implemented, BB&T permitted Skywaves to draw down on the $3.5 million line of credit, based on invoices, purchases orders and site plans. Under the parties' agreement as modified, there was no specific due date for money advanced for purchase orders and site plans. Remittance of money advanced for invoices was extended to 60 days past the date Skywaves received payment.

[4] Skywaves maintains BB&T it abandoned the factoring model in favor of an open line of credit, (with no fixed date for repayment) akin to venture capital.

2. BB&T Has Not Shown Beyond a Genuine Issue of Material Fact That Skywaves Could Not Pay Its Debts as They Came Due

BB&T next argues that it was justified in terminating the parties' agreement, because Skywaves could not pay its debts as they came due. This argument also lacks merit.

BB&T contends that Skywaves breached a representation or warranty in the Factoring Agreement to the effect that: "Client is able to pay, does pay and will continue to pay its debts as they mature in the Ordinary Course of Business." (*See* R. p. 903-04 ¶ 7). However, BB&T has not shown that Skywaves breached this provision of the Factoring Agreement.

First, BB&T has not proffered evidence that Skywaves, at the time it signed the Factoring Agreement, was not able to and did not pay debts as they matured. In other words, there is no evidence that, at the time Skywaves allegedly made that representation, it was untrue. Moreover, BB&T does not proffer any evidence, other than its own default letter, to show that Skywaves was late in paying any debts. It does not present any documentation showing the specific alleged overdue accounts. Additionally, at most, BB&T argues that some accounts were past due. It does not present any evidence that this was an ongoing issue or otherwise explain why the alleged overdue accounts justified its baseless declaration of Skywaves in default. Simply, BB&T has not shown that Skywaves breached the Factoring Agreement by failing to pay debts as they came due.

3. BB&T Has Not Shown Beyond a Genuine Issue of Material Fact That It Had a Good Faith Basis to Believe It Was Insecure

Finally, BB&T argues that it was entitled to terminate the parties' agreement because it deemed itself insecure. For the reasons that follow, this Court should affirm the trial court's denial of summary judgment.

To support this argument, BB&T relies on the Factoring Agreement's "catch-all" provision for an occurrence of default: "An Event of Default shall be deemed to have

occurred . . . and BB&T shall be entitled to take such action as is elsewhere provided herein, if . . . BB&T shall for any other reason deem itself insecure." (*See* R. p. 906 ¶ 12(*l*)).

However, BB&T does not cite any binding law supporting its right to terminate the Factoring Agreement simply because it subjectively feels "insecure." In support of this argument, BB&T cites numerous provisions of North Carolina's adoption of the Uniform Commercial Code. *See e.g.*, N.C. Gen. Stat. Ann. §§ 25-1-309; 25-1-201(b)(20); S.C. Code § 36-1-309. However, BB&T has never argued and has made no showing that the parties' agreement here falls within any of the Articles of the Uniform Commercial Code:

- Article 2 – Sales
- Article 2A – Leases
- Article 3 – Negotiable Instruments
- Article 4 – Bank Deposits and Collections
- Article 4A – Funds Transfers
- Article 5 – Letters of Credit
- Article 6 – Bulk Transfers
- Article 7 – Documents of Title
- Article 8 – Investment Securities
- Article 9 – Secured Transactions

BB&T has never cited to the Uniform Commercial Code as governing the parties' agreement to date. Now that BB&T seeks to rely on an unenforceable, baseless, self-serving contract provision, it suddenly injects the Uniform Commercial Code into this dispute. There is no legal or factual basis for this Court to rely on the statutory provisions that BB&T cites. Even the lone South Carolina case BB&T cites in this argument was decided under the Uniform Commercial Code's provisions governing negotiable

instruments. *See South Carolina Nat'l Bank v. S. Polymers, Inc.*, 313 S.C. 246, 249, 437 S.E.2d 148, 149 (Ct. App. 1993) (dealing with promissory note).

Moreover, even if the statute BB&T cites applied, it certainly does not permit a party to terminate an agreement simply because they feel insecure, reasonably or otherwise:

> A term providing that one party or that party's successor in interest may *accelerate payment or performance or require collateral or additional collateral* "at will" or when the party "deems itself insecure," or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised.

See e.g., N.C. Gen. Stat. Ann. § 25-1-309 (emphasis added); *accord* S.C. Code § 36-1-309.

Therefore, because BB&T has not cited to any authority permitting it to terminate the Factoring Agreement based on subjective feelings of "insecurity," the trial court properly concluded that Skywaves should be permitted to go to the jury on its contract claims.

B. BB&T Has Not Shown, Beyond Any Genuine Issue of Material Fact, That Skywaves *Materially* Breached the Parties' Agreement

Even if the factoring agreement was not changed in any way, and even a*ssuming that everything BB&T claims is true,* an issue of fact exists as to whether Skywaves' alleged defaults were "material" so as to justify termination and excuse of BB&T's performance, or were "waived." Defendant's representatives testified that the claimed deficiencies were viewed as minor at the time, and did not justify a default in light of the parties' entire relationship. (*See* R. pp. 1056, 1060).

Moreover, there is evidence that grounds for default asserted in the January 2008 letter were mere pretext to excuse a wrongful default. The real reason for the default was BB&T's mistaken belief that Skywaves had committed fraud.

Consequently, there is real dispute whether BB&T called default because it had a good faith concern about Skywaves' financial viability and whether it would have declared a default had it known the truth. Skywaves is entitled to have a jury determine whether its putative breaches were material so as to excuse BB&T from its obligations and allow it to terminate the Factoring Agreement.

The Restatement (Second) of Contracts provides that a party's contractual duties may be excused by the other party's *uncured material* breach. *See* Restatement (Second) of Contracts § 237. Thus, under North Carolina law:

> [a] party may not insist upon the performance of a contract or a provision of it where that party is personally guilty of a material or substantial breach of that contract or provision. The other party's duty to perform is excused by a material failure to perform contractual obligations or a material breach. Therefore, in the case of bilateral contracts, if either party commits a material breach of the contract, the other party should be excused from the obligation to perform further.

See Ebert v. Ebert, 2012 WL 5857386, at *2-*3 (N.C. Ct. App. Nov. 20, 2012) (citations omitted); *accord Monster Daddy, LLC v. Monster Cable Prods., Inc.*, 2012 WL 2311831, at *4 (4th Cir. June 19, 2012) (South Carolina law) ("This doctrine only excuses a non-breaching party's performance when such obligations were dependent upon the promises that the breaching party failed to perform. [Citation omitted.] Thus, a party's breach of one promise does not discharge the non-breaching party's duties with respect to unrelated or independent promises to perform under the parties' contract.").

A material breach is one "going to the heart of the contract." See *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 705, 682 S.E.2d 726 (N.C. Ct. App. 2009). A breach is material where the provision breached "is such an essential part of the bargain that the failure of it must be considered as destroying the entire contract; or where it is such an indispensable part of what both parties intended that the contract would not have been made with the covenant omitted." See *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240 (1964) (emphasis added); accord *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4

(N.C. Ct. App. 2003) ("[Material breach] substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform."); see also *Brazell v. Windsor,* 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009) ("A breach of contract claim warranting rescission of the contract must be so substantial and fundamental as to defeat the purpose of the contract." (citation omitted)).

"[W]hether failure to perform a contractual obligation is so material as to discharge the other parties' performance is *a question of fact* for the jury or for the trial court without a jury." *Opsahl v. Pinehurst Inc.,* 81 N.C. App. 56, 64-65, 344 S.E.2d 68, 74 (N.C. Ct. App. 1986) (emphasis added) ("[W]e cannot determine from the record as a matter of law whether defendant's delay here constitutes a material breach justifying rescission."); *accord Allison v. Davidson,* 2011 WL 6036140, at *3 (N.C. Ct. App. Dec. 6, 2011) (stating that question of whether breach is material is question of fact) *(citing Millis Constr. Co. v. Fairfield Sapphire Valley,* 86 N.C. App. 506, 512, 358 S.E.2d 566, 570 (N.C. Ct. App. 1987)); *Crosby v. Bowers,* 87 . N.C. App. 338, 345, 361 S.E.2d 97, 102 (N.C. Ct. App. 1987); *Coleman v. Shirlen,* 53 N.C. App. 573, 577,281 S.E.2d 431,434 (N.C. Ct. App. 1981).

Under North Carolina law, parties can waive contractual rights by acting to show an intent to relinquish such rights:

> It is well settled in North Carolina that a "party may waive a contractual right by any intentional and voluntary relinquishment." *McNally v. Allstate Ins. Co.*, 142 N.C.App. 680, 683, 544 S.E.2d 807, 809-10 (2001) (citation omitted). "The essential elements of waiver are (1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit." *Fetner v. Granite Works*, 251 N.C. 296, 302, 111 S.E.2d 324, 328 (1959) (citation omitted).
>
> "The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up." *Klein v. Insurance Co.,* 289 N.C. 63, 68, 220 S.E.2d 595, 599 (1975). For example, this Court held that a party may

> waive a condition precedent by performing on the contract despite knowledge that a condition has not occurred. *Fletcher v. Jones*, 314 N.C. 389, 333 S.E.2d 731 (1985).

Demeritt v. Springsteed, 204 N.C. App. 325, 328-29, 693 S.E.2d 719, 721 (N.C. Ct. App. 2010). "[U]nlike modification of a contract, the efficacy of a waiver of contractual rights is generally not thought to require special tokens of reliability, such as a writing, consideration, reliance, judicial screening, or a heightened standard of proof." *See Plasma Ctrs. of Am., LLC v. Talecris Plasma Res., Inc.*, 731 S.E.2d 837, 842 n.1 (N.C. Ct. App. 2012) (citation omitted).

BB&T argues that Paragraph 23 of the Factoring Agreement excuses its waiver of Skywaves' putative breaches. That provision provides that BB&T's failure to exercise any contractual right will not "operate as a waiver thereof" and should not "be construed as an agreement to modify the terms of this Agreement." However, "[t]he general view is that a party to a written contract can waive a provision of that contract by conduct expressly or surrounding performance, despite the existence of a so-called anti-waiver or failure to enforce clause in the contract." *See 42 East, LLC v. D.R. Horton, Inc.*, 218 N.C. App. 503, 511, 722 S.E.2d 1, 7 (N.C. Ct. App. 2012) (citation omitted) ("[T]he non-waiver clause in the Agreement does not preclude a determination that Horton waived the 'time is of the essence' clause."). Consequently, the claimed "non-waiver" provision does not assist BB&T, since it could waive that provision.

Consider the testimony of Castlen Morris, the BB&T Vice President in charge of a commercial lending division of BB&T and responsible for Skywaves' account. He was aware of Skywaves' alleged failure to promptly remit payments on account of invoices and characterized it as unimportant. The delay in remittance occurred at least three times during the summer and fall of 2007: $350,000 in May, $259,000 in July, and $325,000 in September. (*See* R. p. 1061). Mr. Morris did not write up *any* of those incidents as a default or report them to his superiors. He testified that, as long as there was no fraudulent invoice and Skywaves sent the money after he brought the delay to its

attention, there was no reason to document the event. (*See* R. p. 1060). He explained that such slow payment was not uncommon for a start-up like Skywaves: "They were a small start-up company. They were cash-strapped, of course. Every small company I deal with is cash-strapped, so, you know, every dollar is important." (*See* R. p. 1056).

BB&T understood that Skywaves could not control the timing for converting proposed orders to contracts and that the "NY State Police [General Dynamics] contract was slowed by weather and other delays." (*See* Sealed R. p. S-45 to S-47). BB&T was not concerned because of the confidence that proposed purchase orders would be finalized as contracts. (*See* R. p. 935; *accord* Sealed R. p. S.45 to S-47). As Mr. Edahl wrote in his memorandum to Walter Denning, dated September 20, 2007: "While this goal has been delayed, it appears that just with the contract work in hand with General Dynamics that we will be able to accomplish this goal in 2008."

Mr. Morris too felt "pretty comfortable that they [the outstanding purchase orders] were going to come through and materialize as actual sales." (*See* R. p. 1062).

In early January 2008 Edahl met with Michael Burke and reviewed the 2007 year-end financials. These showed a year-end loss of $1.4 million —as well as the substantial accounts receivable and payable. Despite this Edahl remained convinced of Skywaves' viability:

> Q. I mean, based on what you knew January 16th, 2008, would you have expected to continue the credit with Skywaves?
>
> A. Yeah, hopefully so.

(*See* R. p. 948). Nothing in Skywaves' financial profile gave Edahl reason to call a default:

> Q. But that concern was not a concern about whether they were in default but just a concern about the --
>
> A. The general direction of the company, correct.
>
> Q. Right? You said that right?

A. That's correct.

(*See* R. p. 935). In fact, Edahl was so confident about Skywaves viability that, in December 2007, (with full knowledge of revenue shortfalls) he advised Skywaves to prepare a three-year expansion plan for formal presentation to be used for an initial public offering. (*See* R. pp. 1026-27 ¶¶ 11-12).

Even Mike Hennessey, the credit manager who authored the default letter, changed his position regarding Skywaves so called financial distress after he had an opportunity to review Skywaves' financials:

> Mr. Hennessey told me he had completed his review of Skywaves financial position and was convinced that Skywaves was viable and if permitted to continue operations, was capable of paying the BB&T debt in full.

(*See* R. p. 1086-89).

Michael Burke, the account executive assigned to Skywaves' account, testified that the business plan showed that in January 2008 Skywaves was going "to have a large increase in volume and be profitable." (*See* R. p. 1048). Burke was so optimistic that he solicited equity investors:

> "I also told him that I would try to help by making some calls to equity groups that may be willing to put some money into his company but again, that will take a solid plan that shows a realistic turnaround."

(*See* Sealed R. p. S-51 to S-53).

Even after the accusation of fraud, Burke testified he felt so good about Skywaves' prospects that he would be willing to "work with" Skywaves on continuing funding if Skywaves could reduce BB&T's exposure. (*See id.*; *accord* R. p. 1048).

There is compelling evidence to support the proposition that the only reason BB&T called default was the allegation of fraud. The only difference between Skywaves finances in early January, when BB&T was comfortable continuing the lending and mid-January, when BB&T called default was the false accusation of fraud.

Michael Burke the BB&T factoring account representative testified he would have dealt with the account "differently" had he known that the site plan funding was approved:

> Q. Might your reaction have been different back in January of -- of '08 had you known that Mr. Edahl had approved this funding?
>
> A. If BB&T had approved that type of funding and I didn't know about it, my reaction would have been different. I would have gone back and said, what is this, how are we doing this and dealt with it differently.

(*See* R. pp. 1049-50).

Michael Hennessey was the credit manager in charge of the Skywaves account and the author of the January 28, 2008 letter of default. Hennessy testified that had he known Edahl had approved the advances for site plans he would have done a "360":

> A. Never once did anybody ever tell me about an oral modification to a contract. Never once did anybody ever tell me they have 60 days. Had they done that, I probably would have had to do a 360. . . . I would have had to change my whole stance.

(*See* R. p. 1081). He further testified that, if he had known of Edahl's accommodation for site plan funding in January of 2008, he would not have considered Skywaves in default on the site funding. (*See* R. p. 1020).

IV. THE TRIAL COURT PROPERLY DENIED BB&T'S MOTION FOR SUMMARY JUDGMENT AS TO SKYWAVES' CLAIM FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT

The trial judge properly held that summary judgment was improper as to Skywaves' claim for breach of contract accompanied by a fraudulent act. BB&T now argues that this claim fails because there is no evidence of a "fraudulent act" supporting such claim. BB&T's argument is without merit.

Under North Carolina law, punitive damages may be recovered in a breach of contract claim where the case "smacks" of fraud:

In *Oestreicher v. Stores*, our [the North Carolina] Supreme Court held:

> In cases involving fraud, our Court has consistently used language such as the following: Punitive damages are never awarded, except in cases where there is an element either of fraud, malice, ... or other causes of aggravation in the act or omission causing the injury .. · .. In the so-called breach of contract actions that smack of tort because of the fraud and deceit involved, we do not think it is enough just to permit defendant to pay that which the lease contract required him to pay in the first place. If this were the law, defendant has all to gain and nothing to lose. If he is not caught in his fraudulent scheme, then he is able to retain the resulting dishonest profits. If he is caught, he has only to pay back that which he should have paid in the first place.

290 N.C. 118, 136, 225 S.E.2d 797, 808-809 (1976) (internal citations omitted).

See Zubaidi v. Earl L. Pickett Enterps., Inc., 164 N.C. App. 107, 114-15, 595 S.E.2d 190, 194-95 (2004). Similarly, South Carolina law recognizes a claim for breach of contract accompanied by a fraudulent act:

> In order to maintain a claim for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: (1) a breach of contract; (2) "[f]raudulent intent relating to the breaching of the contract and not merely to its making;" and (3) "[a] fraudulent act accompanying the breach." *Floyd v. Country Squire Mobile Homes, Inc.,* 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct.App.1985) (citations omitted). "The fraudulent act is any act characterized by dishonesty in fact or unfair dealing." *Conner v. City of Forest Acres,* 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002).
>
> > "Fraud," in this sense, "assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence."
>
> *Id.* (quoting *Sullivan v. Calhoun,* 117 S.C. 137, 139, 108 S.E. 189, 189 (1921)). "Breach of contract accompanied by a fraudulent act ... requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making. Such proof may or may not involve false representations." *Ball v. Canadian Am. Express Co.,* 314 S.C. 272, 276,

> 442 S.E.2d 620, 623 (Ct.App.1994) (citation omitted). "Fraudulent intent is normally proved by circumstances surrounding the breach." *Floyd,* 287 S.C. at 54, 336 S.E.2d at 503-04. "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." *Id.* at 54, 336 S.E.2d at 504.

See Zinn v. CFI Sales & Mktg., Ltd, 415 S.C. 93, 111, 780 S.E.2d 611, 620-21 (Ct. App. 2015).

There is at least a genuine issue of material fact as to whether BB&T engaged in a "fraudulent" act in connection with its breach of the 2005 factoring agreement. As set forth above (and in Skywaves' Appellant's Brief), there is at least a scintilla of evidence that BB&T did not have a basis to terminate the parties' agreement. The record is replete with evidence that BB&T misrepresented its motive for terminating the agreement and used a pretext. Although it claims that its termination was motivated by Skywaves' alleged breaches, there is evidence supporting the conclusion that BB&T actually terminated the agreement because Defendant Edahl had agreed to terms that it simply did not like (funding based on site plans). It also, through its agent Edahl, misled Skywaves about whether site plan financing had been properly approved. When the relationship tanked, BB&T then accused Skywaves of engaging in fraudulent conduct. This evidence is at least sufficient to permit Skywaves to press its claim at trial.

Moreover, the evidence supported that, in connection with the termination of the parties' agreement, BB&T made false, threatening and accusatory claims against Skywaves, going so far as to suggest that Skywaves was involved in illegal activities. Again, this is sufficient evidence to support Skywaves' claim for breach of contract accompanied by a fraudulent act.

CONCLUSION

For the foregoing reasons, Plaintiff Skywaves respectfully requests that this Honorable Court dismiss this appeal for lack of jurisdiction. In the alternative, this Court should affirm the trial court's denial of Defendants' Motions for Summary Judgment as set forth above.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Appellant/Respondent's Corrected Final Respondent's Brief complies with Rule 210(b), SCACR.

The undersigned notes that the following block quote, which was included in its Initial Respondent's Brief, has been removed from this Corrected Final Respondent's Brief because the supporting documentation was inadvertently not designated for inclusion of matter in the Record on Appeal:

> As I mentioned to you verbally on Friday I communicated to Ron Konersmann, President, and John Voytko, CFO by telephone last Friday that Skywaves was in default of the factoring loan and that a written notice of default would be coming to them soon.

September 6, 2016

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(3)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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

PROOF OF SERVICE

I certify that I have served the Appellant/Respondent's Corrected Final Respondent's Brief on the above-referenced Respondent/Appellant and Respondent by depositing a copy of it in the United States Mail, postage prepaid, on September 6, 2016, addressed to their attorneys of record:

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