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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-001809

Skywaves I Corporation, ...Appellant/Respondent,

v.

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

And

James Edahl, ... Respondent,

RESPONDENT/APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

Respondent/Appellant Branch Banking & Trust Company ("BB&T") respectfully requests rehearing of two issues decided by the Court in its opinion issued May 2, 2018 (No. 5557). First, BB&T seeks rehearing as to the Court's dismissal of BB&T's cross-appeal of the order denying summary judgment on the claims of Appellant/Respondent Skywaves I Corporation ("Skywaves") for breach of contract and breach of contract accompanied by a fraudulent act (together, "the contract claims"). Second, BB&T seeks rehearing as to the Court's reversal of the order striking Skywaves' demand for a jury trial.[1]

BACKGROUND

The Court's Opinion accurately states the undisputed facts, which are as follows. In March 2005, Skywaves entered into a factoring agreement (the "Factoring Agreement") with BB&T, pursuant to which BB&T agreed to purchase, at 80 percent of face value, invoices for telecommunications structures built by Skywaves and shipped to customers. BB&T was entitled to terminate the Factoring Agreement upon the occurrence of an "Event of Default" such as violation of Skywaves' financial covenants, including its inability to pay its debts as they came due in the ordinary course of business; Skywaves' failure to comply with its obligations under the Factoring Agreement; and BB&T "for any other reason deem[ing] itself insecure or the Collateral impaired." (R. p. 412, Factoring Agreement ¶ 12).

Skywaves never fully met its obligation to have its customers make payments directly to BB&T, asserting that some customers were unable or unwilling to do so. At the same time, Skywaves claimed that BB&T had authorized it to retain misdirected payments for up to 30 days. This claim was not supported by any documentary evidence and, in fact, was

[1] If the Court grants rehearing as to the contract claims and concludes that BB&T is entitled to summary judgment, the jury-waiver issue will become moot.

affirmatively contradicted by BB&T's repeated admonitions and warnings that Skywaves' chronic failure to promptly remit payments could be treated as a violation of the Factoring Agreement.

The Factoring Agreement was modified several times over the course of the parties' relationship, including by increasing Skywaves' maximum credit, decreasing the minimum monthly commissions owed to BB&T, and increasing the amount BB&T paid Skywaves for each invoice. In 2006, BB&T agreed to Skywaves' request for advancement of funds based on purchase orders. In mid-2007, BB&T accommodated Skywaves' request for advancement of funds against certain site plans for structures to be ordered and built in the future pursuant to a government contract.

Despite BB&T's ongoing support, Skywaves' business was failing. In every quarter of 2007, Skywaves failed to meet—or even come close to—its financial projections, even after revising the projections *downward* mid-year. Skywaves' revised financial projections estimated that it would end 2007 with a net profit of $1.4 million. Instead, in January 2018 Skywaves informed BB&T that it had actually ended 2007 with a net *loss* of ($1.4 million)—$2.8 million *less* than its revised projection. This was not the only evidence that Skywaves was in deep financial trouble. It is undisputed, for example, that a January 2018 field audit showed that Skywaves had failed to remit to BB&T $340,000 paid by Verizon on factored invoices and that Skywaves was not paying its bills in the ordinary course of business.

On January 25, 2008, BB&T notified Skywaves that it was in default of the Factoring Agreement. (R. pp. 454-455, Default Letter). The default letter identified three events of default, all based on the January field audit and each an independently sufficient basis for a default under the terms of the Factoring Agreement:

> 1. ... in violation of Paragraph 8 of the Agreement, [Skywaves] has received payment of Accounts (as defined in the Agreement) and has failed to immediately turn those payments over to BB&T as required by the Agreement;
>
> 2. ... Skywaves may not be paying its debts as they mature in the ordinary course of business (with approximately 37% of its payables over 60 days);
>
> 3. ... BB&T has a good faith belief that the prospects of payment to it or performance of the Obligations (as defined in the Agreement) is impaired.

(*Id.*). Skywaves ultimately declared bankruptcy.

Skywaves filed suit against BB&T in late 2009, nearly a decade ago, asserting numerous claims. With the exception of the contract claims, all of Skywaves' claims have failed as a matter of law.

ARGUMENT

I. THE COURT SHOULD GRANT REHEARING AND REVIEW THE DENIAL OF SUMMARY JUDGMENT ON THE CONTRACT CLAIMS

After Skywaves appealed the orders striking the jury demand and granting summary judgment to BB&T on the tort claims, BB&T cross-appealed the denial of summary judgment on the contract claims. This Court dismissed the cross-appeal, reasoning that in *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003) ("*Olson II*"), the South Carolina Supreme Court abolished the exception permitting review of otherwise-unappealable orders in conjunction with review of closely related, appealable orders. Slip Op. at 21. Rehearing is warranted because the Court read the decision in *Olson II* too broadly.

In *Olson II*, the Supreme Court granted certiorari to review this Court's decision in *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001) ("*Olson I*"). The opinion in *Olson I* recognized "that generally, the denial of a motion for summary

judgment is not immediately appealable," *Id.* at 216, 544 S.E.2d at 49, but also cited several cases in which the Court of Appeals held that a denial of summary judgment or non-appealable order was properly before the Court because it was accompanied by an appealable issue, *see id.* at 216-18, 544 S.E.2d at 49-50. Three of the cases cited as examples were *Garrett v. Snedigar*, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992), and *Tanner v. Florence City–County Bldg. Comm'n*, 333 S.C. 549, 553, 511 S.E.2d 369, 371 (Ct. App. 1999). The Court also observed, however, that recent decisions by the Supreme Court cast doubt on the continuing viability of the rule. *See Olson I*, 344 S.C. at 218-19, 544 S.E.2d at 51. In the course of its discussion, the Court also noted, but did not apply, the rule articulated in *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985), in which the South Carolina Supreme Court had held that "reviewing the denial of summary judgment was proper to resolve protracted litigation." *Olson I*, 344 S.C. at 218, 544 S.E.2d at 50. Ultimately, the Court in *Olson I* declined to review the denial of summary judgment in view of its doubts regarding the continued viability of *Garrett* and similar cases. *Id.* at 219, 544 S.E.2d at 51.

In *Olson II*, the Supreme Court affirmed the Court of Appeal's refusal to review the denial of summary judgment and specifically overruled *Garrett*, *Anthony*, and *Tanner*. *See Olson II*, 354 S.C. at 168 & n.8, 580 S.E.2d at 444 & n.8. Notably, however, the Supreme Court distinguished, but did not overrule, *Davis*.

The *Olson II* Court's treatment of *Davis* indicates that the rule against appellate review of a denial of summary judgment is not absolute. Certainly, *Olson II* makes clear that a denial of summary judgment is not properly before the Court simply because it is accompanied by a reviewable order. The continuing viability of *Davis*, however, makes it

equally clear that this Court has the *discretion* to review an otherwise-unappealable order in conjunction with its review of an appealable order, when doing so will advance the resolution of long-pending litigation. *See Davis*, 287 S.C. at 243, 335 S.E.2d at 799 (accepting appeal of denial of summary judgment "[b]ecause of the need for final resolution" in a long-pending medical malpractice action.

Discretionary review of the denial of summary judgment on the contract claims is warranted to bring finality to the parties' dispute. The events giving rise to this litigation occurred more than a decade ago, in 2007 and early 2008, and the case has been pending since December 2009. The circuit court has dismissed or granted summary judgment on all of the numerous tort claims asserted by Skywaves, leaving only the contract claims. As explained in BB&T's briefs, however, those claims also fail as a matter of law. Therefore, reviewing—and reversing—the denial of summary judgment on those claims will fully resolve this litigation.

The exercise of discretion is also appropriate because the denial of summary judgment is "closely connected" to the issues raised in Skywaves' appeal. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002). As our Supreme Court recognized in a related case, this litigation "at its core ... revolves around the contractual relationship between BB&T and its customer, Skywaves." *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014). And, as the circuit court recognized in its summary judgment order, all of Skywaves' claims allege a single wrong committed by BB&T: a failure "to honor its obligations to capitalize [Skywaves'] needs." (R. p. 58, Order). In granting summary judgment on Skywaves' claims for negligence and negligent misrepresentation, the circuit court found no evidence that BB&T lied or that Skywaves

justifiably relied on BB&T's alleged representations. These same allegations are central to Skywaves' contract claims.

Finally, the issues have been fully briefed. Consequently, no party will be prejudiced by the Court's consideration of the merits.

For these reasons, BB&T asks the Court to grant rehearing and to rule on the merits of BB&T's cross-appeal of the denial of summary judgment on the contract claims.

II. THE COURT SHOULD GRANT REHEARING AND AFFIRM THE ORDER STRIKING SKYWAVES' DEMAND FOR A JURY TRIAL

BB&T also seeks rehearing as to the Court's reversal of the order striking Skywaves' demand for a jury trial.[2] Rehearing is warranted because the Court misapprehended the binding force of the jury-waiver provision, under which Skywaves *and* BB&T "knowingly, intelligently and expressly waive[d] ... trial by jury and the right to trial by jury," and the Factoring Agreement's choice-of-law provision, specifying North Carolina law. (R. p. 416, Factoring Agreement ¶ 25 (choice of law), ¶ 29 (jury waiver)). Skywaves contended, and the Court agreed, that the jury-waiver provision is unenforceable under N.C. Gen. Stat. § 22B-10, which provides that contractual jury waivers are "unconscionable as a matter of law."

As BB&T explained in its brief, the right to a jury trial is procedural and thus is governed by the law of the forum, *i.e.*, South Carolina. As a general rule, "[t]he local law of the forum determines whether an issue shall be tried by the court or by a jury." *Restatement (Second) of Conflict of Laws* § 129 (1971). This rule applies regardless of the existence of a contractual choice-of-law provision, because such provisions apply only to substantive issues, while procedural issues are governed by the law of the forum. *See* 17A Am. Jur. 2d

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

Contracts § 264 (citing *Terrace Group v. Vermont Castings, Inc.*, 753 A.2d 350 (R.I. 2000)); 43 Am. Jur. 2d *Insurance* § 331 (citing *Burge v. Mid-Continent Cas. Co.*, 933 P.2d 210 (N.M. 1996)). North Carolina courts have recognized and applied this principle. *See, e.g.*, *Taylor v. Abernethy*, 174 N.C. App. 93, 103, 620 S.E.2d 242, 250 (2005) (holding that the law of the forum governs procedural issues even if another state's law governs substantive issues). Accordingly, South Carolina law governs the enforceability of the jury trial waiver in the Factoring Agreement.

Matters related to the right to a jury trial are inherently procedural. The law of the forum determines, for example, the number of jurors, the procedures for impaneling a jury, what questions are decided by the jury, and whether or not a civil verdict must be unanimous. In a case pending in a South Carolina court, all of these matters are determined under South Carolina law, even if the elements of the plaintiff's claims are governed by the law of another state. If the parties, by agreement, decide that the jury should function differently—for example, by agreeing that the case will be tried by four jurors instead of six, *see* S.C. Code Ann. § 14-9-180—they are making an agreement regarding procedural rights governed by South Carolina law. By the same token, an agreement to waive trial by jury in a South Carolina forum is an agreement for the waiver of a South Carolina procedural right.

Rehearing is warranted even if one accepts the Court's view that the issue here is more about the enforceability of a contract than it is about the procedural right to a jury trial. Slip Op. at 11. Skywaves is unfairly attempting to use the Factoring Agreement as both a sword and a shield. It is seeking damages for BB&T's alleged breach of the Factoring Agreement while simultaneously repudiating the jury waiver provision. At least one court has refused to countenance such tactics. *See James River Mgmt. Co. v. Kehoe*, 2010 WL

431473, at *4 (E.D. Va. Feb. 5, 2010) (refusing to apply N.C. Gen. Stat. § 22B-10 because "[i]t would be inequitable to allow James River to retain the benefits of the Employment Agreement without having, at the same time, to live with its other provisions").

The jury waiver provision is clear and conspicuous. It appears in the Factoring Agreement as the last separately numbered paragraph on the page immediately preceding the signature page. The signature page does not include any additional paragraphs, and only includes a signature block for both Skywaves and BB&T. Moreover, the jury waiver is unambiguous and bilateral. In simple and direct terms, the provision states that Skywaves and BB&T waive "trial by jury and the right to trial by jury on any issue in any way pertaining to this agreement." (R. p. 416, Factoring Agreement ¶ 29).

As BB&T explained in its Final Respondent's Brief of Respondent/Appellant, there can be no doubt that Ronald Konersmann, who executed the Factoring Agreement as Skywaves' founder and CEO, was fully capable of understanding the waiver. Konersmann not only holds an MBA from the University of Notre Dame (R. pp. 328-329, Konersmann Dep. 27:11-28:5), he also had substantial prior experience with factoring agreements. (R. pp. 334-335, Konersmann Dep. 122:10–123:2).

For these reasons, and if the Court does not grant rehearing and reverse the denial of summary judgment on the contract claims, BB&T asks the Court to grant rehearing and affirm the order striking Skywaves' demand for a jury trial.

CONCLUSION

For the reasons set forth above, BB&T respectfully asks the Court to grant rehearing and to exercise its discretion to review the circuit court's denial of BB&T's motion for summary judgment on Skywaves' claims for breach of contract and breach of contract

accompanied by a fraudulent act. Further, the Court should reverse the circuit court and remand with instructions for the circuit court to enter summary judgment in BB&T's favor on those claims, finally resolving nearly a decade of litigation. Alternatively, the Court should grant rehearing on the jury-waiver issue, and should affirm the circuit court's order striking Skywaves' demand for a jury trial.

Respectfully submitted,

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Columbia, South Carolina
May 17, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

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Skywaves I Corporation, ... Appellant/Respondent,

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And

James Edahl, ... Respondent,

PROOF OF SERVICE

I, Julio E. Mendoza, Jr., Esquire, hereby certify that on the 17th day of May, 2018, I served a copy of the RESPONDENT/APPELLANT'S PETITION FOR REHEARING, submitted by Respondent/Appellant Branch Banking and Trust Company, Successor in Merger to Branch Banking and Trust Company of SC, a/k/a BB&T, on counsel for the Appellant/Respondent and on counsel for Respondent James Edahl via United States Mail, postage prepaid, and addressed as follows:

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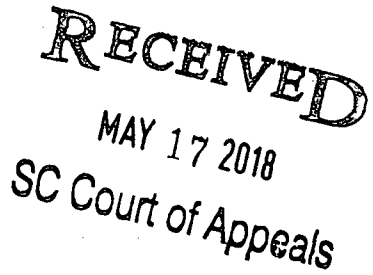
May 17, 2018



VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Skywaves I Corporation v. Branch Banking and Trust Company, et al.*
Appellate Case No. 2015-001809

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Respondent/Appellant's Petition for Rehearing, with proof of service attached to the petition, in the above-referenced appellate case. Also enclosed is an additional copy of the petition, to provide a "clocked-in" copy of the document for my firm's files. Please file the petition and provide a "clocked-in" copy to me.

Thank you for your assistance. Please do not hesitate to contact me if you need any further information.

With best regards,

Julio E. Mendoza, Jr.

cc: Counsel of Record

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