

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Hon. Roger M. Young, Circuit Court Judge

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Opinion No. 5557 (S.C. Ct. App. filed May 2, 2018)

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Skywaves I Corporation, .....Respondent,

v.

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

And

James Edahl, ..... Respondent,

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PETITIONER'S APPENDIX  
VOLUME 1 OF 5

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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

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### **STATEMENT OF ISSUES ON APPEAL**

- A.** Did the trial court err in holding that Skywaves waived its constitutional right to a jury trial through contract language that was expressly prohibited by North Carolina law, which the parties selected to govern their agreement?
- B.** Did the trial court err in dismissing Skywaves' tort causes of action where Skywaves presented evidence that BB&T breached a duty by, *inter alia*, misrepresenting its then-existing commitment and in undertaking to design a financing vehicle that was wholly inappropriate and doomed to fail?
- C.** Did the trial court err in dismissing Skywaves SCUTPA claim, where the evidence showed that BB&T's misconduct was part of its method of doing business and affected the public interest through the financing of new businesses?
- D.** Did the trial court err in refusing to strike Defendants' Answers as a sanction for their dishonest conduct?

## **STATEMENT OF THE CASE**

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 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.

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. Collectively these Orders:

1. Grant BB&T & Edahl summary judgment on promissory estoppel; breach of the covenant of good faith and fair dealing; fraud; negligent misrepresentation; and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA");
2. Grant BB&T & Edahl motion to strike the demand for jury trial;
3. Deny Skywaves motion to strike BB&T's and Edahl's answers as sham.

## ARGUMENTS

### **I. THE TRIAL COURT ERRED IN HOLDING THAT SKYWAVES WAIVED ITS CONSTITUTIONAL RIGHT TO A JURY TRIAL, WHERE SUCH A CONTRACTUAL PROVISION WOULD VIOLATE GOVERNING LAW**

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This appeal presents numerous unique substantive issues, including the Rule 12 dismissal of claims, the granting of summary judgment and the district court's refusal to sanction Defendants for their dishonest misconduct. However, a distinct question from the substance of Skywaves' claims is Skywaves' appeal from the trial court's denial of Skywaves' right to a jury trial.

The trial court erroneously deprived Plaintiff of its constitutionally-protected right to a jury trial on the grounds that it had contractually waived that right under the parties' March 22, 2005 Factoring and Security Agreement ("Factoring Agreement"). (*See R.* pp. 897-911). The trial court compounded this error by extending this claimed waiver to deprive Skywaves of its right to a jury trial on its claims against BB&T employee Edahl, who was not a signatory to any agreement between BB&T and Skywaves.

#### **A. Boilerplate Language in the Factoring Agreement Purporting to Waive the Right to a Jury Trial Is Void Under Controlling North Carolina Law as to BB&T**

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There is only one agreement potentially forming the basis for Skywaves claims that is relevant to this issue: the Factoring Agreement, which contains two provisions relevant to the issue presented to this Court:

25. **Applicable Law.** This Agreement shall not become effective until accepted by BB&T in High Point, North Carolina. All acts, transactions, rights, and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina. ("Factoring Agreement").

29. **Waivers.** To the fullest extent permitted by applicable law, Client hereby knowingly, intelligently and expressly waives demand, protest, notice of protest, notice of default or dishonor, notice of payment or nonpayment, and notice of default, release, compromise, settlement, extension, or renewal of any instruments or guaranties held by BB&T on which Client may in any way be liable; trial by jury and the right to trial

by jury on any issue in any way pertaining to this Agreement or any transactions or occurrences arising hereunder or governed hereby (which right BB&T likewise waives); and notice of BB&T's acceptance of this agreement. ("Factoring Agreement").

(See R. p. 910). Accompanying these provisions are three important, undisputed facts: (1) BB&T drafted the Factoring Agreement; (2) it is BB&T's standard document; and (3) BB&T intended that North Carolina law apply to all substantive and legal issues. As BB&T's Rule 30(b)(6) designee testified, this provision expressed BB&T's intent to have North Carolina law apply "with regard to any substantive Issues or legal issues that would arise under the agreement." (See R. p. 543 (*quoting* Transcript of 30(b)(6) Deposition of BB&T, at 8:7-11 and 11:1-5)).

The parties' choice of law is generally binding on the court as long as they had a reasonable basis for their choice and the law chosen does not violate a fundamental public policy of the state or otherwise applicable law. *See King v. Bryant*, 225 N.C. App. 340, 737 S.E.2d 802 (2013). Under relevant North Carolina law, contractual waivers of the right to a jury trial are not enforceable. Specifically, N.C. Gen. Stat. Ann. § 22B-10 states:

Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable.

When a contract or any clause of the contract is, as a matter of law, unconscionable the Court should refuse to enforce the contract, or enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause as to avoid any unconscionable result. *See* N.C. Gen. Stat. Ann. § 25-2-302. "Unconscionability" relates to contract terms that are oppressive; it is applicable to one-sided provisions, denying a contracting party any opportunity for meaningful choice. *Billings v. Joseph Harris Co., Inc.*, 220 S.E.2d 361, 27 N.C. App. 689 (1975). Thus, North Carolina law voids the jury trial waiver contained in the Factoring Agreement.

The North Carolina Supreme Court “has held that where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect.” *Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). Judge Young correctly held “[c]ontracts are to be governed as to their nature, validity and interpretation of the law by the place where they are made, unless the contracting parties clearly appear to have some other place or in view” (*See R.* p. 54). It is clear from the facts in this case that not only did the parties have no other “place in view,” as evidenced by their choice to use North Carolina law for governing the contract, but also that North Carolina is where the contract became effective. (*See R.* p. 910 ¶ 25). The Court further correctly noted that “The right to freedom of contract is no small part of a citizen’s liberty, and this Court must enforce and maintain a contract between two experienced parties.” (*See R.* p. 56). However, Judge Young failed to recognize this tenet of contract law, as the parties’ agreement was that North Carolina law controlled and the jury trial waiver is void pursuant to North Carolina law.

**1. Lower Court Misapplies Legal Principles**

Although he correctly stated the law, Judge Young erred in that he incorrectly focused his analysis on whether the right to jury trial is procedural or substantive.<sup>1</sup> Specifically, he held incorrectly that the issue was procedural and thus South Carolina procedural law applied. Here, Judge Young’s logic “jumped the rails.” The procedural law of South Carolina as to jury trials is that a party is entitled to a jury trial; however, the issue of the permissible waiver of that right is a matter of contract. South Carolina allows parties to contractually waive the right to a jury trial. On the other hand, North Carolina law does not allow jury trial waivers in contracts. The question of the validity of a jury

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<sup>1</sup> Judge Young holds the issue of the right to a jury trial is determined by the forum state; South Carolina provides for a jury trial but what is in issue is not the procedural law of South Carolina rather the validity of a contractual waiver. (*See* 2/9/2015 Order, at 3).

trial waiver in a contract is a substantive legal issue, not a procedural issue in the first instance. Second, the issue is a matter of contract validity where, even in the absence of the parties' agreement to apply North Carolina law, it would be governed by the laws of North Carolina. The jury trial waiver in the Factoring Agreement is void under North Carolina law. It is not the law of the forum as to procedural questions that is at issue, (if this was the issue, South Carolina law gives parties the right to a jury trial), rather it is a matter of the validity of a contractual waiver that is at issue. Therefore, pursuant to the Factoring Agreement, the question of this specific clause's validity is governed by North Carolina Law.

## **2. Defendant's Attempt to Buttress The Factoring Agreement**

The Plaintiff and BB&T entered into two promissory notes, one loan agreement and the Factoring Agreement. All agreements, except for the Factoring Agreement, provide the applicable law is that of South Carolina. BB&T attempted to seduce Judge Young with the relevance of these other agreements and utterly failed as:

1. Plaintiff has sued only because of BB&T's breach of the modified Factoring Agreement. (*See generally* R. pp. 86-99).
2. Defendant BB&T has never declared Skywaves in breach of any other agreements. (*See generally* R. pp. 234-44, 265-73).
3. Defendant BB&T concedes in its Proof of Claim in Skywaves' bankruptcy that the basis for its claim is "Factoring." (*See* R. pp. 569-603).
4. The other agreements were not in default when this dispute arose over the Factoring Agreement terms. (*See* R. pp. 604-06).
5. The other notes were satisfied. (*See id.*)

BB&T attempts to cloak its nakedness in the Factoring Agreement by way of reference to the Jury Trial Waiver language in the promissory notes and loan agreement which provides:

the undersigned hereby waive the right to trial by jury on any matters of claims arising out of this document or out of the conduct of the relationships between the undersigned and BB&T.

BB&T urges that the choice of law provisions in the promissory notes and loan agreements somehow override the choice of law provision in the Factoring Agreement because the documents together establish “a relationship between BB&T and Plaintiff.”<sup>2</sup> While this argument lacks even facial appeal, more importantly it violates the Factoring Agreement, which provides that:

[t]his Agreement, together with any exhibits or supplements hereto and all assignment schedules executed in connection herewith, constitutes and expresses the entire understanding between the parties hereto with respect to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings, inducements and conditions, whether express or implied, oral or written. The express terms of this Agreement control and supersede any course of performance and/or usage of the trade inconsistent with any of the terms hereof. Neither this Agreement nor any portion or provision hereof may be changed, altered, waived canceled, terminated or amended orally or in any manner other than by an agreement in writing signed by the parties hereto. If any Rider is executed by the parties hereto with reference to this Agreement, such Rider shall be deemed incorporated into and made part of this Agreement, unless the terms of such Rider expressly otherwise provide.

(See R. p. 910 ¶ 24).

**B. Edahl May Not Benefit From the Waiver Provision In an Agreement To Which He Is Not a Signatory**

The trial court also held that, as Defendant Edahl was an employee of BB&T acting at all times within the scope of his employment, he too can obtain the benefit of the claimed jury trial waiver. Specifically, the lower court held that “[t]he claims are all causes in contract, breach of contract, promissory estoppel and breach of the covenant of good faith and fair dealing.” (See R. p. 56). Plaintiff plead tort claims against Defendant Edahl which were wrongfully dismissed by the lower Court (R. pp. 58-71; see further

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<sup>2</sup> To its full extension, if such language were contained in a retired 10 years old note and a present defaulted agreement failed to contain the waiver, the retired 10 year old note would be relevant; it is not relevant.

sections of this brief *infra*). Should the lower Court be reversed on this issue, Edahl is not entitled to rely on the jury trial waiver.

An individual is liable personally for his tortious conduct even if committed in a representative capacity. See *16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 347, 728 S.E.2d 448, 452-53 (2012). Skywaves has sued Edahl in tort, not for his breach of the Factoring Agreement, to which he was not a party. Consequently, that agreement is not directly controlling or material to Defendant Edahl's liability for his own tortious conduct. As the Court held in the related case of *Kerr, et al. v. BB&T and Edahl*: "Thus, despite Appellants' assertion to the contrary, the choice of law provision found in the Factoring Agreement regarding the selecting of North Carolina law, is irrelevant as Appellants are neither parties nor intended third-party beneficiaries to the Contract." (Appellants were investors in Skywaves suing for misrepresentations made to them by Edahl causing them to invest in Skywaves; this Court ruled that the investor Appellants could not rely on an agreement to which they were not parties.).

As Edahl is sued in tort and as he is not a signatory to the Factoring Agreement, Skywaves certainly did not intend to waive its right to a jury trial as to those claims against Edahl.

BB&T used its superior bargaining power to require in its standard manuscript document that North Carolina law apply to matters of contractual validity. Its 30(b)(6) designee testified that North Carolina Law governs all legal issues. Waiver of a jury trial is a contractual issue as to which North Carolina law controls. The waiver is void under North Carolina law, and Plaintiff is entitled to try its case before a jury.

**II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO SKYWAVES' TORT CLAIMS, AS THERE IS EVIDENCE THAT DEFENDANTS BREACHED A DUTY BY MISREPRESENTING THE SCOPE OF BB&T'S COMMITMENT AND BY DESIGNING AN INAPPROPRIATE FINANCING VEHICLE**

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Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.

*NationsBank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted). "An appellate court[, such as this one] reviews the granting of summary judgment under the same standard applied by the trial court." *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998).

**A. Facts Relevant to Skywaves' Tort Claims**

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 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 operation of the tower. 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, Skywaves had a bright future and unlimited growth potential.

Skywaves' relationship with BB&T had begun on March 22, 2005 when it entered into a conventional Factoring Agreement whereby BB&T purchased certain receivables

(invoices) of Skywaves at a discount and agreed to collect such receivables on Skywaves' behalf. (*See* R. pp. 897-911). Under this Factoring Agreement and other contractual documents, BB&T purchased the invoices for the individual products Skywaves manufactured, for 80% (*See id.*). This was later increased to 85% of face value (*See* R. pp. 1008-11). In this way, Skywaves could obtain prompt partial payment of its 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 planned a significant capital expansion to increase production capacity. (*See* R. p. 968 (“[W]e had a three plant strategy from day one”); *accord* R. p. 970 (“[I]t 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 . . . .”)). By 2007, Skywaves secured commitments for contracts from Verizon and General Dynamics that would assure continuing success. (*See* R. p. 969).

During this time Skywaves was being courted by other banks and venture capitalists offering various financing options. (*See* R. p. 971). One such proposal came from a group known as Hunt Capital, who offered to purchase of 30% of Skywaves stock for \$4 million; this would have been more than adequate to capitalize Skywaves' expansion. (*See* R. pp. 1029-35). Under “competitive pressure” from other banks who wanted to obtain Skywaves' business, BB&T was anxious to keep Skywaves' as a customer. (*See* R. p. 932).

At this time, Edahl was the exclusive “relationship officer” for Skywaves. Through this position, Edahl became the face of BB&T as to Skywaves. Edahl garnered the confidence of Skywaves' management and, with BB&T's knowledge and support,<sup>3</sup>

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<sup>3</sup> Edahl's role as a relationship manager is described in a summary that BB&T published, which stated that Edahl would bring “a level of expertise that earns the client's attention and loyalty by applying industry knowledge and perspective” to the client's existing and future needs; BB&T represented that Edahl would become “a trusted- and not easily replaced- source of advice and insight,” “providing continuity and leadership to your

convinced them that he understood Skywaves' business needs and had designed a custom funding vehicle that would provide for those needs:

So in my mind the bank had a strategy knowing who we were and what we were going to need, had the means to give me -- you know, to provide whatever financial need, you know, we had.

(See R. p. 975).

Edahl represented BB&T had devised a funding vehicle based on a factoring model that was unique<sup>4</sup> to Skywaves and was capable of providing for Skywaves' capital needs, and he knew that he knew Skywaves was relying on BB&T to do so. (See R. pp. 946-47).

Edahl's proposal included an agreement to loan money on the basis of purchase orders as well as sites identified for future construction of cell phone towers. (See R. p. 934). Under this new agreement, there was no time set for repayment of the money advanced for purchase orders or site plans. (See R. p. 936). This commitment was a radical departure from conventional factoring, and one that was largely unknown to BB&T management. (See R. P. 923 ("Q: Did you approve the loan—loaning money on site plans? A. No."); accord R. p. 1042 ("I was shocked, very concerned and had an empty feeling in my stomach")). BB&T had never used site plans to fund in similar circumstances, due to the risk involved. Site plan financing would essentially be secured

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entire BB&T relationship team" with "access to a full spectrum of related financial services" and "commitment to put those resources to work for you." (See R. pp. 916-17). Skywaves was "justified in believing that the relationship manager is speaking on behalf of the bank" that Skywaves could put its trust in Edahl, and because of the relationship, "a relationship manager should never mislead his customer or his regional loan administrator." (See R. p. 929).

<sup>4</sup> BB&T witnesses testified that the Skywaves' deal was a "unique situation in that it didn't fit the -- the mold for factoring that was the normal protocol." (See R. p. 929; accord R. p. 1055 (agreeing that "this financing program was tailor-made for Skywaves"))).

only by company's assets, since there was not an actual invoice in existence at the time (and one might never issue).

Based on Edahl's promises, Skywaves elected to forego an opportunity to obtain alternative sources of capital (*See* R. p. 972) and placed its trust instead in Edahl and BB&T. Skywaves did not know it at the time, but BB&T was not equipped to finance Skywaves growth as Edahl had structured it. (*See* R. p. 1041 ("[W]e in the factoring group weren't equipped to do it."); *accord* R. p. 1073 ("BB&T is not equipped to finance purchase orders anywhere in the bank if we are relying on purchase orders for repayment.")). Further, unbeknownst to Skywaves, Edahl's supervisors never approved loaning money on the basis of site plans. (*See* R. p. 923 ("Q: Did you approve the loan — loaning money on site plans? A. No."); *accord* R. p. 9042 ("I was shocked, very concerned and had an empty feeling in my stomach")). In other words, Skywaves passed up a legitimate opportunity to obtain alternate financing based on promises that Edahl never had the authority to make!

Later, after BB&T repudiated the parties' agreement and wrongfully declared Skywaves in default, BB&T likened its actions to "venture capital" lending, something BB&T would never have considered doing for Skywaves. (*See* R. pp. 1072-73; *accord* R. p. 1043). There is nothing to factor when lending money on a purchase order. (*See* R. p. 1054 ("I would not say it's factoring, no."); *accord* R. p. 1018 ("Because you can't factor an unsecured anything. I don't know what you're factoring.")). Under such circumstances, the arrangement was more akin to "unsecured lending." (*See* R. p. 1054). There is no security interest and no assignment of a chose in action as in a conventional factoring arrangement. (*See* R. p. 1041).

In addition to making these unachievable promises, the financing Edahl devised was wholly inappropriate for funding a startup company (something even Edahl's supervisors would later concede. (*See* R. p. 1073 (stating that using purchase order financing was not an "appropriate financing mechanism for Skywaves"))).

To reiterate, none of this was known to Skywaves at the time, nor could it have been. Skywaves is not in the banking or financing business. It should not be punished — and left without recourse — for relying on information provided to it regarding the intricate workings of an industry of which it possessed no knowledge, when it obtained that information from someone on whom it was reasonable to rely. Skywaves only knew that Edahl represented that BB&T had agreed to increase the line to \$3.5 million overall (*see* R. p. 996; *accord* R. p. 942) with a sub limit for purchase orders of \$2 million and (*see* R. p. 933) and no time set for repayment of the money advanced for purchase orders or site plans (*see* R. p. 936).<sup>5</sup>

Production proceeded under this new agreement until January 17, 2008 when Edahl and a new BB&T employee in the relationship, Mike Burke, visited Skywaves' warehouse. During that visit, Burke learned that BB&T had advanced \$1.2 million unsecured based on site plans. (*See* R. p. 1042). Burke had not known of Edahl's agreement to loan money on the basis of site plans and "was very shocked, very concerned" (*see id.*); he demanded to know why the money had been advanced. Edahl, "out of fear of losing [his] job," falsely denied knowledge of the agreement to fund site plans. (*See* R. p. 941). Then, in a breathtakingly Orwellian move, Edahl, the man who had agreed to the site plan funding, denied knowledge of the agreement to fund site plans:

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...

(*See* R. p. 945).

Edahl unbelievably then proceeded to declare that Skywaves in default of the Factoring Agreement because of the very site plan financing that he had approved!

Mike: I have spoken by telephone today with Ron Konersmann, President, and John Voytko, CFO to formally tell them the over advance has put

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<sup>5</sup> Ultimately, BB&T advanced \$1.2 million dollars, unsecured, on account of site plans in 2007. (*See* R. p. 1082).

them in default of the commercial finance loan and that they will be getting 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).

Edahl's dishonesty led BB&T to accuse Skywaves of diverting funds and engaging in fraud:

[T]he funds obtained based upon "purchase orders" from General Dynamics which did not exist were funds fraudulently obtained from BB&T for which Skywaves and all of its officers and employees who participated in the process would be liable.

(See R. pp. 1008-11; *accord* R. p. 1068 (referencing February 12, 2008 Watchlist Memorandum accusing Skywaves' management of fraud)).

Based on these meritless claims accusations that Skywaves engaged in misconduct, BB&T moved to accelerate payments and demanded that Skywaves provide immediate collateral for the \$1.2 million advanced on site plans:

As to the funds now carried on Ledger Account 7702 as described above, approximately \$1,200,000.00, these funds must be immediately collateralized by "hard" (real or personal property) assets acceptable to BB&T.

(See R. pp. 1008-11). Years later, BB&T has been forced do an about-face and admit that Skywaves was *not* in violation of the of the site plan funding agreement (although BB&T characterizes it as an accommodation):

Q. Okay. 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.

Q. So SkyWaves, in 2007 to 2008, was in full compliance with the site plan accommodation, but based on what you believe was other information, the bank charged fraud.

A. Yes.

(See R. p. 1017).<sup>6</sup>

Skywaves was unable to meet BB&T's demands. Without a line of credit, it was unable to continue operations or find a buyer. Consequently, it was forced to declare bankruptcy, and this suit followed. Plaintiff Skywaves has asserted three main overall theories of recovery (in multiple causes of action): one in contract, one in tort, and one under the South Carolina Unfair Trade Practices Act.

The contract cause is simple. BB&T agreed to loan \$2 million on account of site plans. This money was not to be repaid until the site plans were fully developed and an invoice paid. BB&T breached this contract — not Skywaves — by wrongfully demanding security for the money it loaned. The Bank's admission that Skywaves was not in breach constitutes an admission of the wrongful conduct. (See R. p. 1017).

The breach of contract was accompanied by fraudulent acts characterized by dishonesty in fact and unfair dealing. BB&T made material misrepresentations in order to induce Skywaves into continuing its relationship with BB&T rather than working with Hunt Capital, Wachovia, and other lenders, by offering to modify the factoring agreement to fund based on Skywaves' invoices and purchase orders and site plans. After Skywaves turned down proposals for working capital investments from other lenders, BB&T sought to change the terms of the modified factoring agreement back to the terms of the original agreement. When Skywaves refused, BB&T called a default citing pretextual reasons and immediately stopped funding in order to harm Skywaves.

The tort claims arise out of misrepresentations Defendants made for the purpose of inducing Skywaves to enter (and remain) in a relationship with BB&T. Edahl knew that the misrepresentations were likely to cause Skywaves to enter into a contract with BB&T, and that such a contract was predicated on the notion that Skywaves could rely on

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<sup>6</sup> Ironically, Mike Hennessey, the man who called the default, has testified he "would have had to do a 360 (sic)" and "change [his] whole stance" had he known the truth at the time. (See R. p. 1081).

BB&T to fulfill the representations that Edahl made. Beyond that, Edahl purposefully induced Skywaves to pass up alternative funding and rely on BB&T to provide funding by representing that he had designed a financing program that was suitable for Skywaves' needs (*see* R. p. 947) when even BB&T admits it was not a suitable financing program. (*See* R. p. 929 (noting that purchase order financing was not an “appropriate financing mechanism for Skywaves”)). Defendants further induced Skywaves by misrepresenting that BB&T was willing to capitalize Skywaves' future growth based on site plans, when BB&T would have never approved of such a plan, had the appropriate management known about it. (*See* R. p. 923 (“Q: Did you approve the loan—loaning money on site plans? A. No.”); *accord* R. p. 1042 (“I was shocked, very concerned and had an empty feeling in my stomach”)). The SCUTPA cause arises because Defendant's deception induced a relationship for its profit and because Defendants' conduct directly affects the public interest and is capable of repetition.

In its baffling Order granting (in part) Defendants' motions for summary judgment, the lower court found evidence sufficient to sustain an action for breach of contract and breach of contract accompanied by a fraudulent act, but held that the same evidence that made out a fraudulent act did not make out a case for misrepresentation/tort or a violation of SCUTPA.

**B.     The Trial Court Erred in Granting Summary Judgment as to Skywaves' Tort Claims**

For the reasons that follow, this Court should reverse the trial court's entry of summary judgment as to Skywaves' tort claims. The lower court granted summary judgment on Skywaves' tort causes because it mistakenly concluded there exists no duty that could support tort recovery.

Initially, the trial judge's conclusion conflicts with the law of this case. The trial court previously concluded that the facts alleged in the Amended Complaint — which the evidence in the record has bolstered — were sufficient to raise a duty. In 2012,

Defendants moved to dismiss Skywaves' Amended Complaint, arguing that it owed no duty to Skywaves, due to the nature of the bank/customer relationship. The court denied those motions, ruling that Skywaves' Amended Complaint alleged a *prima facie* case of duty:

Skywaves' Amended Complaint includes numerous allegations of a relationship beyond mere creditor/debtor, including that BB&T and Edahl undertook to advise Skywaves, that BB&T went outside of its standard contracts and created funding agreements, including the "special" factoring agreement, specifically for Skywaves, that BB&T tailored the services it was offering specifically to Skywaves, and that BB&T and Edahl knew Skywaves placed special trust in them and was relying on their expertise.

(See R. p. 46). As discussed in the preceding section, the facts are consistent with those allegations.

The lower court's error is even more surprising because the Supreme Court, in related lawsuits that Skywaves' investors filed, has determined that there was enough evidence to show that BB&T may have undertaken a duty to Skywaves. In *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014), the Supreme Court contrasted the bank's duty to investors, who did not have a contract, with the duty Defendants owed Skywaves: "[W]e conclude that while Skywaves may be able to show that, as a BB&T customer, the bank owed the corporation a duty, Appellants are not BB&T's customers and therefore are not owed a similar duty." See *Kerr*, 408 S.C. at 333, 759 S.E.2d at 724.

Even if the existence of a duty was not already the law of the case, Skywaves adduced sufficient evidence supporting its allegations to create a question of fact as to the existence of a duty. In a typical banking relationship, the bank does not owe a customer a tort duty, *unless* the bank undertakes to provide advice as part of its services. It is well-established that banks owe a limited duty of care to their customers; a bank-customer relationship is merely a lender-borrower relationship and is not fiduciary in nature unless

the bank undertakes to advise its customers as part of the services that the bank offers. *See Kerr*, 408 S.C. at 333, 759 S.E.2d at 726.

The evidence shows that the Skywaves/BB&T relationship was not a typical bank-customer relationship. BB&T undertook to provide financial advice and design a unique capitalization vehicle for Skywaves as part of the services it provided. For example, Edahl testified that “[w]e designed that program.” (*See R.* p. 947). Moreover, another BB&T witness testified that the Skywaves’ account was “sort of a unique situation in that it didn’t fit the -- the mold for factoring that was the normal protocol.” (*See R.* p. 1072). In fact, BB&T witness have testified that “this financing program was **tailor-made for Skywaves.**” (*See R.* p. 1055).

In a typical banking relationship, the customer might decide, for example, that it wishes to expand operations to meet future business. When this situation arises it will analyze the market for its product and anticipated costs, and calculate financing and capital necessary to meet that need. The customer will then explain its plans to the bank and request a specific type of financing, on specific terms designed to finance that particular development. In a garden-variety banking relationship, the bank will then review the submission and decide whether to take the risk of lending the money. If the business fails, the customer cannot blame the bank, since the bank provided no advice. The relationship in this hypothetical is purely lender-borrower in nature.

Skywaves’ situation was very different from that hypothetical “typical” relationship. BB&T and Edahl undertook to provide specific financial and business advice to Skywaves to guide the operation of its business. Moreover, BB&T actually promoted the fact that it was more than a bank and that it provides (through employees such as Edahl) business advice and that it expects its customers to rely on that business advice. The BB&T philosophy, published by John A. Allison the chairman and CEO explains: “*We are in the high-quality financial advice business.*” (*See R.* pp. 1218-49). He describes his “*clients as long term partners.*” **Id.** BB&T’s mission statement

expressly states it provides business management advice and direction, including "providing professional sales and risk management direction and support." (See R. pp. 927-28). BB&T represented that it would become a "**trusted -- and not easily replaced** -- source of **advice and insight**." (See R. pp. 916-17 (emphasis added)).

Tol Broome, BB&T's President of Commercial Finance, testified that the mission statement means BB&T gives advice to clients:

Q. I notice in here it refers to the fact that you're providing professional sales and risk management direction to your customers.

A. Yes.

Q. Is that equivalent to saying that you're giving advice to your customers?

A. Yes.

(See R. p. 1071)

BB&T's business model was based on the notion that it would induce its customers to trust and rely on its advice. Frank Bullard, BB&T's South Carolina market president and Edahl's supervisor, testified that, as a relationship manager, Edahl's job was to develop the confidence and trust of the customer so as to render valuable advice:

Q. Is one of the goals of a relationship manager to develop confidence and trust in your customers?

A. Yes.

Q. And to be able to render value advice to the customer?

A. Yes.

(See R. pp. 912-15).

Against this backdrop, BB&T undertook to not merely fund Skywaves, but to advise it as to *how* to capitalize its future business expansion. The advice BB&T provided Skywaves included designing a plan that was *unique* to Skywaves and was intended to meet its capitalization needs. Mr. Broome testified that the capitalization

plan BB&T and Edahl created for Skywaves was a “unique situation in that it didn't fit the -- the mold for factoring that was the normal protocol.” (See R. p. 929).

Castlen Morris, the account executive in charge of the Factoring Agreement that BB&T created specifically for Skywaves, testified that the “approved structure that Jim Edahl got is definitely *out of the box from what I'm used to.*” (See R. p. 1054). He further testified that “this financing program was **tailor-made for Skywaves.**” (See R. p. 1055 (emphasis added)). He additionally expressed that “this is typically not part of BB&T’s standard contract (it is something out of the ordinary for Skywaves exclusively.” (See R. pp. 1008-11). Finally, he noted that “[this] is a **great departure from what we would do for a 'typical' client.**” (See R. pp. 1005-07 (emphasis added)).

Though based on a factoring platform, the funding scheme that BB&T and Edahl devised was to be the equivalent of a working capital investment that Hunt Capital had offered to Skywaves to fund its growth. (See R. p. 972).

The lower Court’s finding that “Skywaves cannot establish justifiable reliance” (see R. p. 58-71 Order Granting BB&T Motion for Summary Judgment in part, at 10) is astonishing since BB&T actually conceded that it knew Skywaves relied on its advice:

Q. Do you think SkyWaves relied upon your recommendation to fund this growth for purchase order financing?

A. Yes.

Q. Okay. The same thing with site plans?

A. Yes.

(See R. p. 947). Moreover, BB&T has acknowledged its duty to understand its customers' needs:

Q. Do you think that a relationship manager should know his customer's business needs?

A. Yes.

(See R. p. 921). Another BB&T witness testified that:

Q. Okay. As part of being a professional do you deem that you have a duty to know your customer and your customer's needs?

A. Sure.

(See R. p. 1079).

BB&T's understanding its customers' needs is important because BB&T makes recommendations that are supposed to be in its customer's best interest:

Q. We've covered earlier that one of the roles of a relationship manager is to build trust and confidence in the client relationship; is that right?

A. Right.

Q. And, part of the way you do that is have an ongoing relationship with the client knowing the client's business; is that right?

A. Right.

Q. And, making recommendations on what you think is in the client's best interest?

A. That's correct.

(See R. p. 915).

Of course BB&T has a duty to be honest and to never mislead its customer with regard to the advice it provides:

Q. And would you agree that a banker should treat his customer fairly and reasonably?

A. Correct.

Q. And would you agree that a banker should never mislead his customer?

A. Correct.

(See R. p. 1056)

BB&T admits the bank's customer is justified in believing the truth of what the relationship manager says on behalf of the bank:

Q. And do you believe that the customer should be entitled to believe that what the relationship manager says on behalf of the bank is true?

A. Yes.

(See R. p. 921).

Having undertaken a duty to advise Skywaves in a professional capacity and on which it was reasonable for Skywaves to rely, BB&T owed Skywaves a standard of care that it failed to meet. Edahl's representation that his financing plan included a promise to loan money on the basis of site plans was patently false when made. His supervisor never approved the scheme:

Q. Did you approve the loan—loaning money on site plans?

A. No.

(See R. p. 923).

Edahl's scheme for financing Skywaves' growth on a factoring platform was not suitable for Skywaves needs as BB&T now admits. BB&T now concedes that it was not an "appropriate financing mechanism for Skywaves." (See R. p. 929). In fact, BB&T witness Tol Broome likened the plan to "venture capital" lending, something it would never have considered for Skywaves. (See R. pp. 1072-73; *accord* R. p. 1043).

In summary, contrary to the trial court's conclusions, there is ample evidence that "the BB&T relationship manager had developed a relationship upon which they [Skywaves] were entitled to rely." BB&T led Skywaves to believe it understood Skywaves financing needs. It undertook to give Skywaves unique advice, catered to Skywaves, regarding how to finance its growth. It induced Skywaves to trust and believe its recommendations for financing. BB&T expected Skywaves to justifiably rely on BB&T's advice for financing (and even acknowledges its duty). BB&T and Edahl then lied about what BB&T was prepared to do. Defendants also made recommendations for financing that were known to be wholly inappropriate for Skywaves needs.

In light of this undisputed evidence, it is clear that the trial court erred in granting summary judgment to Defendants as to Skywaves' claims.

**III. THE TRIAL COURT ERRED IN DISMISSING SKYWAVES' SCUTPA CLAIM, BECAUSE BB&T'S MISCONDUCT AFFECTED THE PUBLIC INTEREST AND WAS CAPABLE OF REPETITION**

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The standards governing the analysis of a Motion to Dismiss in South Carolina are well-settled:

“On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.” *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). “That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Id.* If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

*Grimsley v. South Carolina Law Enforcement Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (reversing grant of motion to dismiss). “The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action.” *See Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 568, 703 S.E.2d 197, 199 (2010).

The lower court dismissed Skywaves' action for violation of the South Carolina Unfair Trade Practices Act, mistakenly concluding that the Amended Complaint lacked any allegations “that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.” To the contrary, Skywaves presented evidence that Defendants' conduct created a potential for repetition, stemming from the fact that this conduct was part of BB&T's institutional procedures.

Under SCUTPA, "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce<sup>7</sup> are hereby declared unlawful." See S.C. Code § 39-5-20(a). "In order to bring an action under the UTPA, the plaintiff must demonstrate (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest." See *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 291 (4th Cir. 1998) (applying SCUTPA):

An impact on the public interest may be shown if the acts or practices have the potential for repetition. *Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998) (citation omitted). The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts. *Id.* at 388, 496 S.E.2d at 23. (citation omitted).

*Accord Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461 (2004). SCUTPA should be given a liberal construction, *McTeer v. Provident Life and Acc. Ins.*, 712 F. Supp. 512 (D.S.C. 1989), and should not be construed to increase a plaintiff's burden of proving liability, since its purpose is to give additional protection to victims of unfair practices, not to make a case more difficult than under common law. See *Debondt v. Carlton Motorcars*, 342 S.C. 254, 269, 536 S.E.2d 399 (Ct. App. 2000).

As Skywaves has detailed in the preceding sections, its First Amended Complaint and the undisputed evidence contains numerous details of Defendants' fraudulent and wrongful conduct. This behavior (undertaking to provide advice) is not an isolated incident. Rather, Defendants' actions were taken as part of BB&T's philosophy and

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<sup>7</sup> S.C. Code § 39-5-10 defines "trade and commerce" as: "Trade" and "commerce" shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible, real, personal, or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

mission. Similarly, BB&T's efforts to keep customers away from other banks by misrepresenting the details of the relationship are not necessarily limited to Skywaves. To the contrary, this is the precise type of unfair practice that is capable of repetition. As a result, Judge Young erred in dismissing Plaintiff Skywaves' SCUTPA claim.

**IV. THE TRIAL COURT SHOULD HAVE GRANTED PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' ANSWERS AND ENTERED DEFAULT AS A SANCTION FOR DEFENDANTS' PATTERN OF DECEITFUL CONDUCT**

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**A. Applicable Legal Standards**

Either exercising its inherent powers or under the doctrines of unclean hands or judicial estoppel, the trial judge should have sanctioned Defendants for their dishonest conduct, by entering a default judgment against them. Defendants' admitted pattern of misconduct in violation of Rules of Civil Procedure 11 and 37, including making knowingly false pleadings, interrogatory answers, affidavits and perjured deposition testimony, requires the sternest of action to protect the integrity of the judicial process.

"A trial court has the inherent power to protect itself from indignities and to enable it effectively to administer its judicial functions." *See State v. Brantley*, 279 S.C. 215, 217, 305 S.E.2d 234, 235 (1983) (citations and internal quotation marks omitted). In *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d (2003), the Supreme Court noted that fraud on the court "requires a showing that one has acted with bad faith or and intent to deceive or defraud the court." "The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings . . . and consequently to the due administration of justice." *State v. Goff*, 228 S.C. 17, 22, 88 S.E.2d 788, 790-91 (1955).

Similarly, judicial estoppel is intended to ensure the integrity of the judicial process. *See Hawkins v. Bruno Yacht Sales*, 342 S.C. 352, 536 S.E.2d 698 (Ct. App. 2000); *accord Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E. 2d 629, 631 (2004) (*citing Hawkins v. Bruno Yacht Sales*, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003) ("The

purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary.”). The elements of judicial estoppel are well-settled:

(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

*See Cothran*, 357 S.C. at 215-16, 592 S.E.2d at 632.

While "unclean hands" is normally asserted for the protection of a party's own rights, it is closely related to judicial estoppel and courts have treated it as such. For example, in *Wachovia Bank, NA. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), as a sanction for "unclean hands," the Court of Appeals prohibited a bank from pursuing equitable foreclosure and legal causes of action. In *Matrix Fin. Serv. Corp. v. Frazer*, 394 S.C. 714 S.E. 2d 532 (2011), the Supreme Court applied unclean hands to bar a lender from legal or equitable remedies.

**B. Defendants Have Engaged in Dishonest Conduct in Their Relationship With Skywaves and in This Litigation**

Defendants' history with Skywaves has, unfortunately, been replete with the Defendants' dishonesty and misrepresentations, all to Skywaves' detriment. However, Defendants' untruthful actions have not been limited to the facts giving rise to this lawsuit. In addition to the underlying fraud Defendants inflicted on Skywaves, Defendants have also made numerous untrue factual claims in this litigation, which have harmed not only Skywaves, but also the dignity of the South Carolina court system. For the reasons that follow, the trial court should have sanctioned Defendants for their misconduct by striking their answers.

For example, for four years Defendants refused to admit that Edahl acted as its agent within the course and scope of his employment. That was simply untrue. In reality, the testimony shows that BB&T actually granted Edahl incentive pay (bonus) for the work he performed as Skywaves' exclusive relationship officer in 2007. (*See* R. p. 707). When BB&T subsequently felt it would be advantageous to admit that Edahl was its agent — in an effort to deprive Skywaves of its constitutional right to a jury trial four years later — it did so. (*See* R. pp. 709-13). For example, in a January 15, 2015 letter brief to the trial court, in an effort to evade any possible jury trial, BB&T argued that Defendant Edahl should obtain the benefit of the claimed jury trial waiver and "confirm[ed] that BB&T admits that Mr. Edahl was its employee when the financing at issue was provided under the Factoring Agreement." (*See* R. pp. 629-31). Defendants' refusal to admit the obvious fact that Edahl was BB&T's agent is one illustration of Defendants' dishonest conduct.

More to the heart of this case, Defendants also defrauded the trial court with regard to the nature of the relationship between the parties. Specifically, Defendant Edahl lied about the undisputed modification of the parties' Factoring Agreement. Defendants did their best to conceal this misrepresentation, and only admitted the truth when they had no choice. Even then, Defendants did what they could to minimize and qualify their admission.

In its First Amended Complaint, Skywaves made numerous allegations to the effect that it had an agreement (orally and confirmed in writing) with BB&T to modify the original Factoring Agreement to provide for the advancement of capital based, *inter alia*, on site plans (as opposed to having to await invoices):

12. In early 2007, Skywaves' Board of Directors determined that it would need an expanded financial commitments to provide capital infusion beyond those being currently provided by BB&T to meet the increasing number of Requests for Quotations it was receiving as a result of winning two General Dynamics contracts, one for \$12 million with the Navy/Coast Guard and the other a \$20 million multi-year homeland security initiative with the New York state SWN Police. . . .

18. Between March and December of 2007, Skywaves and BB&T exchanged a series of emails, letters and documents, which memorialized the

relevant and material terms of a new and expanded factoring agreement (or a modification of the prior agreement).

19. Under this modified factoring agreement, BB&T agreed, among other things, to provide capital infusions based on invoices, purchase orders, contracts and site plans.

20. Skywaves received numerous writings from BB&T containing the material terms and conditions of this promise, undertaking, accepted offer, commitment, or agreement. BB&T, or its duly authorized agent, signed those writings to the extent required by the law.

21. For example, BB&T sent numerous email messages confirming the relevant terms of the modifications to the existing factoring agreement. . . .

57. Defendant BB&T, acting primarily through Defendant Edahl, represented in writing that if Skywaves would continue its banking relationship with BB&T, BB&T would devise a funding program tailored exclusively for Skywaves, not in keeping with their ordinary contract and course of business with other customers.

(*See* R. pp. 86-99 ¶¶ 12, 18-21, & 57). In its original Answer, originally filed in 2010 in federal court while the case was on removal, BB&T flatly denied these allegations. (*See* R. pp. 100-07 ¶¶ 12, 18-21 & 28). In his original Answer (filed on July 6, 2012), Defendant Edahl — the BB&T agent actually making the modification — also completely denied those allegations. (*See* R. pp. 161-170 ¶¶ 12, 18-21 & 28).

In making these denials, Defendants knowingly perpetrated a fraud on the court in that they denied the existence of the modified agreement with unclean hands, without any good faith basis for doing so. In fact, Defendants knew that BB&T had, through Defendant Edahl, authorized and agreed to such a modification of the Factoring Agreement. For years in this lawsuit, Defendants continued to vehemently deny that BB&T had modified the Factoring Agreement, despite Skywaves' testimony and pleadings to the contrary.

During his deposition in 2013, Defendant Edahl finally admitted, for the first time, that what Plaintiff had been saying was true all along: Edahl (on behalf of BB&T) had in fact modified the Factoring Agreement to permit capitalization based on site plans:

Q: And in fact, after you considered it did you approve that?

A: Talked to Walt Denning about that concept, and Walt's response was he was okay with it if we could structure it like we had the purchase orders and if we could track them. And -- and we talked to Castlen and he felt that we could monitor that okay, and -- and so we agreed to factor the site plans at that time.

(*See* R. p. 188). Defendant Edahl confirmed there was never a formal written modification of the original Factoring Agreement to reflect these new terms. (*See id.*). Edahl testified that BB&T was obligated to fund Plaintiff's site plans in accordance with this modification:

Q: Did you feel that after you made the agreement with Skywaves to finance site plans, as you have testified to, that the bank was then obligated to finance these plans?

A: Yes.

Q: And in fact, did the bank finance those plans?

A: Some sites, yes.

(*See* R. pp. 188-89). After Edahl's testimony, BB&T conducted a second fraud investigation. It examined Edahl's conduct and terminated him because he "admitted to false statements." (*See* Sealed R. p. S-37). Edahl was subsequently redeposed and admitted that he perjured himself in his 2013 deposition.

Despite Edahl's admission that he had approved advances based upon site plan funding, Defendants did not initially move to amend their answers to reflect the truth, despite Plaintiff's pleas for them to promptly do so. (*See* R. pp. 714-16). Because of this testimony (and Defendants' refusal to rectify it), on January 17, 2014, Skywaves filed a Motion to Strike Defendants' Answers as being based on false information. Shortly thereafter, apparently realizing that they could no longer deny reality, Defendants' filed Motions to Amend their Answers. (*See* R. pp. 193-223). However, even then, in their proposed amended answers Defendants refused to unqualifiedly admit what was obvious and indisputable.

13. Responding to paragraph 18, Defendant admits only that in March of 2007, BB&T and Skywaves memorialized certain written modifications to the March 22, 2005 Factoring Agreement. Defendant denies the remaining allegations of paragraph 18.

14. Responding to paragraph 19, Defendant admits only that the March 22, 2005 Factoring Agreement was amended to allow for factoring of invoices and purchase orders. Defendant further admits an agreement to finance site plans, to a limited extent, with certain limitations on the amounts being factored. Defendant denies the remaining allegations of paragraph 19.
15. Responding to paragraphs 20 and 21, Defendant admits only that the March 2007 amendment to the March 22, 2005 Factoring Agreement was in writing, signed on behalf of BB&T and provided to Plaintiff.

(See R. p. 200 ¶¶ 13-15). In their proposed Amended Answers, Defendants also continued to deny agreeing to modify the Factoring Agreement to permit advances based upon General Dynamics' proposed purchase orders. In other words, even though the clear evidence demonstrates that Defendants' position is demonstrably false, they have not fully and unequivocally admitted what they cannot deny.

Defendants knowingly perpetrated a fraud on the trial court and denied the existence of the modified agreement with unclean hands. As a sanction, the Court should strike Defendants' Answers and permit Plaintiff to prove damages. For years, in both state and federal court, Defendants have contended that S.C. Code § 37-10-107 barred some of Plaintiffs' claims and have denied that BB&T ever modified the Factoring Agreement to provide funding based on General Dynamics' proposed purchase orders (*i.e.*, site plans). For seven years, BB&T denied agreeing to advance funds based on site plans. For over four years, Defendants' fraudulent denial was memorialized in pleadings and an affidavit submitted in federal court.

Long before the Skywaves asked the Court to sanction Defendants, Defendant Edahl's testimony confirmed that BB&T modified the Factoring Agreement to provide for funding based on site plans. In response, months after Edahl's testimony, Defendants amended their Answers to finally — but only half-heartedly — admit their misstatement, conceding only that they agreed to lend "to a limited extent, with certain limitations on the amount being factored."

BB&T's Rule 30 (b)(6) designee, Michael Hennessy — the same person who accused Skywaves of fraud and claimed Skywaves' principals would go to jail for bank fraud — admitted that Skywaves was "in full compliance" with the parties' modified agreement when it obtained the \$1.2 million advance. Edahl has come clean and admitted that: (a) he had testified dishonestly and (b) BB&T had made the modified agreement. Despite these concessions (made only after years of protracted litigation), Defendants only amended their answers in a self-serving way that fails to acknowledge the complete truth and continues to assert the statute of frauds as a sham defense.

Further, even years after Defendants amended their Answers (and only weeks before Skywaves' Second Motion to Strike), BB&T dishonestly answered an interrogatory; when asked the date it first claimed Skywaves was in default, BB&T answered January 25, 2008, the day that BB&T sent a letter setting forth a pretextual basis for default. In reality, Edahl's memorandum of January 18, 2008 documented that BB&T declared Skywaves in default — not for the contrived reasons stated in its January 25, 2008 letter — but because Skywaves had secured \$1.2 million in advances under the site plan program. (*See Sealed R. p. S-35*). Yet, it persisted with its disdain for the truth in its answers to supplemental interrogatories, served as late as March 23, 2015.

Defendants perpetrated an artifice on the Court by denying (in pleadings and elsewhere) that BB&T modified the line of credit to permit advances based upon the proposed contract with General Dynamics. Defendants removed the case to United States District Court on the baseless premise that Defendant Edahl (who made numerous misrepresentations to Plaintiff) was fraudulently joined to destroy diversity. The District Court rejected Defendants' arguments and remanded the case back to this Court, granting Plaintiff a substantial award of attorneys' fees. In the proceedings in federal court, BB&T filed a false affidavit from Edahl, which claimed that all funding commitments were written and in accordance with customary practice. Edahl subsequently admitted in his

second deposition that paragraph 10 of his Affidavit filed in United States District Court was "false," and he knew it was false when he signed it. (*See R. pp. 717-20*).

In 2014, Defendants *finally* amended their Answers, but failed to acknowledge that Skywaves had complied with the parties' modified agreement. Defendants qualified their admission by stating that BB&T agreed to "finance site plans, to a limited extent, with certain limitations on the amount being factored." (*See R. pp. 234-44, 265-73*).

This lie is consistent with how BB&T treated Skywaves throughout the relationship. For example, as discussed in detail above, BB&T and its agents not only held Skywaves in default of the Factoring Agreement, but they also accused them of engaging in illegal conduct. However, the reality is that Skywaves was acting, at all times, in full conformity with the agreement that Defendants led it to believe governed. Michael Hennessy testified on behalf of BB&T that Skywaves was in full compliance with the modified agreement (General Dynamics site plan funding):

Q. Okay. 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.

Q. So Skywaves, in 2007 to 2008, was in full compliance with the site plan accommodation, but based on what you believe was other information, the bank charged fraud.

A. Yes.

(*See R. pp. 696*).

Certainly, in order to protect its integrity, the trial court could have elected to refer this matter to the Solicitor or United States attorney; however, that Court was not powerless to sanction Defendants. The Court's inherent power and the doctrines of judicial estoppel and unclean hands justify sanctions for Defendants' misrepresentations to the Court. Defendants' fraud on the Court was pervasive, duping even their own esteemed and completely honorable counsel who relied on information from their clients

to state earlier that "from BB&T's perspective, is, in fact, that the officers of Skywaves acknowledged that there had been wrongful conduct and acknowledged a right to call a default under the agreement." (See R. p. 1131). Over time, BB&T has been forced to concede that Edahl approved site plan funding and that it wrongfully accused Skywaves of fraud. Yet, Defendants have not apologized to Skywaves for their accusations and denial and their pattern of misbehaviors remains unchecked.

Defendants knowingly took false positions for years in this lawsuit that were unsupported by any evidence — and were, in fact, demonstrably incorrect. They have received substantial benefit in this litigation and other related litigation from taking these positions. Finally, Defendants have been caught in their lies. Their misconduct began with a wrongful removal to the United States District Court supported by a false affidavit of Defendant Edahl. The District Judge remanded and entered sanctions against the Defendants.

It is insignificant whether the Court views Defendants' conduct through the prism of unclean hands, judicial estoppel, or any other doctrine intended to protect the integrity of the justice system. Defendants' pattern of conduct was willful, wanton, and reckless, exhibiting a disdain for the truth. Defendants acted with disrespect to the other parties and contempt for the Court. While the striking of an answer is an extreme sanction, it is available for a reason. As a remedy, it serves to discipline the improper conduct of parties such as Defendants and to give fair notice to others that the Court will not condone dishonest obstructionism. South Carolina courts have exercised this sanction judiciously, but firmly; if the reported appellate decisions are any examples, courts have imposed the sanction with greater frequency in recent years. See, e.g., *McNair v. Fairfield City*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 548 (Ct. App. 2004); *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 596 S.E.2d 572, 575 (2003); *Griffin Grading & Clearing v. Tire Serv. Equip. Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999); *Halverson v. Yawn*,

328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997); *Horry County v. Aquafina Partners of S.C., LLC*, 2014 WL 2589852 (Ct. App. April 2, 2014) (unpublished).

To paraphrase Justice Douglas, dishonest testimony and false pleadings taint the judicial process "as an open sewer may ruin a river." *See Berman v. Parker*, 348 U.S. 26, 33 (1954). Sanctions are the only disinfectant available to the Court. Although Defendant BB&T is a successful business enterprise, its actions toward the trial court have polluted judicial waters intentionally, consistently, and contemptuously. BB&T should have been sanctioned for its open and obvious misconduct. Plaintiff asks that the Court maintain the quality of the judicial river by reversing the trial court's refusal to strike Defendants' answers as a sanction for their improper conduct.

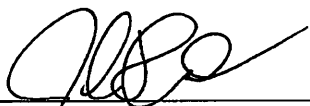
### CONCLUSION

For the foregoing reasons, Plaintiff Skywaves respectfully requests this Honorable Court to reverse the trial court's orders in the following respects:

- (a) Reverse the trial court's granting of Defendants' motions to strike Plaintiff's constitutionally-protected request for a jury trial;
- (b) Reverse the trial court's granting of summary judgment as to Plaintiff's tort claims;
- (c) Reverse the trial court's dismissal of Plaintiff's SCUTPA claim; and
- (d) Reverse the trial court's refusal to strike Defendants' Amended Answers as a sanction for their dishonest conduct in this litigation.

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THE STATE OF SOUTH CAROLINA  
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In the Court of Common Pleas for the Ninth Circuit

Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-001809

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Of which Branch Banking & Trust Company, successor in merger  
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AND

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

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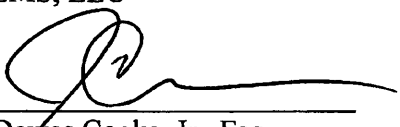
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**RULE 211 CERTIFICATE OF COMPLIANCE**

The undersigned certifies that Respondent/Appellant's Final Appellant's Brief, Final Appellant's Reply Brief, and Corrected Final Respondent's Brief comply with Rule 211(b), SCACR.

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I certify that I have served the Appellant/Respondent's Final Appellant's Brief on  
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Of whom James Edahl is the .....Respondent

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## **STATEMENT OF THE CASE**

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

## SUMMARY OF ARGUMENT

Skywaves' entire case is premised upon the idea that BB&T called a default under the Factoring and Security Agreement (the "Factoring Agreement") for what it deems a "pretextual" reason, even though there has never been any doubt that Skywaves actually was in default for all the reasons identified by BB&T in its January 2008 Default Letter. (R. pp 454-455, Default Letter). Specifically, Skywaves was keeping for itself payments on factored invoices, money that rightfully belonged to BB&T; it was not paying its bills as they came due; and its prospects of paying BB&T the amount owed under the Factoring Agreement—approximately \$3.5 million—were effectively nonexistent. By January 2008, BB&T knew that Skywaves was losing huge sums of money month after month, had not had a profitable month since January 2007, and had failed to meet its projected income in every single month of 2007, despite having revised its projections mid-year. BB&T also knew that while Skywaves had predicted a net profit of \$1.4 million for 2007, it actually ended 2007 with a total net *loss* of \$1.4 million—a difference of *\$2.8 million*. In light of these circumstances, there can be no doubt that BB&T was entitled to declare a default under the terms of the Factoring Agreement, as it did on January 25, 2008.

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

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

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

## ARGUMENT

### I. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO BB&T ON SKYWAVES' TORT CLAIMS.<sup>1</sup>

The circuit court granted BB&T's motion for summary judgment on Skywaves' tort claims for negligence and negligent misrepresentation.<sup>2</sup> (R. pp. 58-71, Order). In its appeal, Skywaves challenges only the grant of summary judgment as to the tort claims for negligence and negligent misrepresentation. This Court should affirm the circuit court, for two independent reasons. First, Skywaves failed to appeal all bases for the circuit court's ruling, and therefore affirmance is required by the two-issue rule. Second, the circuit court correctly ruled that Skywaves' tort claims fail on their merits.<sup>3</sup>

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

<sup>2</sup> The lower court also granted summary judgment on Skywaves' claim for breach of the covenant of good faith and fair dealing, reasoning—correctly—that this claim was subsumed by Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act. (R. p. 65, Order); see *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (“[T]he implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract.”). Skywaves does not challenge this ruling in its Appellant's Brief, presumably because the circuit court denied summary judgment on Skywaves' contract claims. BB&T, however, has cross-appealed the circuit court's denial of summary judgment on the contract claims. For the reasons explained in BB&T's Appellants' Brief of Respondent/Appellant, BB&T is entitled to summary judgment on all aspects of Skywaves' contract claims.

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

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

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

**A. Skywaves’ tort claims are governed by South Carolina law.**

The Factoring Agreement provides that “[a]ll acts, transactions, rights and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina.” (R. p. 416, Factoring Agreement ¶ 25). Choice of law clauses are generally honored in South

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

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

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

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

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

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

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

(R. pp. 58-71, Order).

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

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

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

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

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

Skywaves' claims for promissory estoppel, negligence and negligent misrepresentation appear to be based upon an alleged oral promise to "provide capital financing to Skywaves" or to "provide ... funding [for] all of its financial needs." (R. pp. 90, 92, Am. Comp. ¶¶ 41, 56). To the extent these claims are for alleged oral promises outside the confines of the Factoring Agreement, they are barred by S.C. Code Ann. § 37-10-107, which is "essentially a statute of frauds" for lender liability claims. *Sea Cove Dev., LLC v. Harbourside Comm. Bank*, 387 S.C. 95, 105, 691 S.E.2d 158, 163 (2010).<sup>4</sup> Section 37-10-107 prohibits any claim against a lender, whether in contract or in tort, that is not based on a written agreement signed by the parties. *Id.* Specifically, § 37-10-107 provides, in relevant part:

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

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<sup>4</sup> As the *Sea Cove Development* Court explained,

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

*Id.*

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

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

- (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
- (b) promissory or equitable estoppel;
- (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
- (d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

Skywaves' claims are all based upon alleged *oral* statements, promises, or representations made by BB&T, *e.g.*, that BB&T "was fully committed to providing the present and future banking needs of Skywaves." (R. pp. 91-92, Am. Compl. ¶ 53). But Skywaves has not provided, and cannot provide, anything in writing from BB&T to evidence the material terms and conditions of the alleged promises or representations made to it by Edahl or anyone on behalf of BB&T. Skywaves' claims for negligence and negligent misrepresentation are therefore barred by § 37-10-107.

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

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

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

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

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

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

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

The circuit court correctly ruled that "Skywaves' claim for negligence, which it presents as a claim for breach of 'fiduciary duty,' fails for want of any duty." (R. p. 66, Order). "[T]he normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature." *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003). "In limited circumstances," however, "a fiduciary relationship may be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers." *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986). Proving a fiduciary

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

The relationship between Skywaves and BB&T was clearly stated in the Factoring Agreement. Skywaves alleges that BB&T’s agreement to provide financing based on purchase orders and site plans “gave rise to a special relationship between the parties” (R. p. 96), but there are no facts in the record indicating that the modifications of the Factoring Agreement altered the basic debtor-creditor relationship between Skywaves and BB&T. Skywaves’ principals, Ron Konersmann and John Voytko, are experienced businessmen, and Voytko is a licensed CPA. Nothing in the record suggests that either of them lacked the sophistication needed to understand the terms of the Factoring Agreement and the modifications they asked BB&T to make.

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

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

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

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

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

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

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

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

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

Skywaves does not contend, and could not prove, that BB&T promised never to cease providing funds or never to declare a default under the Factoring Agreement, no matter how dire Skywaves' financial condition became. The terms of the relationship between Skywaves and BB&T were clearly spelled out in the Factoring Agreement, and under those terms, BB&T was entitled to protect its interests by declaring the loan in default. Indeed, Skywaves admitted that the terms of the Factoring Agreement "protect[ed] the bank, which is fine, you know, it's their money and we're borrowing it so if anything happens, they should be the person to try to, you know, get all of their money back." (R. pp. 346-347, Konersmann Dep. 169:24-170:4).

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

Second, Skywaves' negligent misrepresentation claim fails because Skywaves cannot prove it had a right to rely on any representation inconsistent with the written terms of the Factoring Agreement. "Where there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely, and the party has not stated a claim for negligent misrepresentation or fraudulent inducement." *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014).<sup>5</sup> The Factoring Agreement expressly provided that it "constitute[d] and expresse[d] the entire understanding between the parties hereto ... and supersede[d] all prior and contemporaneous agreements and

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<sup>5</sup> The law of North Carolina is the same. See *Jordan v. Earthgrains Cos.*, 155 N.C. App. 762, 767, 576 S.E.2d 336, 340 (2003).

understandings ... and supersede[d] any course of performance.” (R. p. 416, Factoring Agreement ¶ 24). In light of this clear language, Skywaves could not *reasonably* have relied on any representation not consistent with the express terms of the Factoring Agreement. *See DeHart v. Dodge City of Spartanburg, Inc.*, 311 S.C. 135, 139-40, 427 S.E.2d 720, 722 (Ct. App. 1993) (holding plaintiff who failed to read contract “as a matter of law ... did not have the right to rely on statements” inconsistent with contract’s terms); *see also Citizens & S. Nat’l Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (Ct. App. 1994) (“The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document.”). Accordingly, the circuit court was correct in its ruling that Skywaves’ negligent misrepresentation claim failed as a matter of law for lack of justifiable reliance.

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

Skywaves' First Amended Complaint included a claim for violation of the South Carolina Unfair Trade Practices Act, 39 S.C. Code Ann. §§ 39-5-10 to -180 (1976 & Supp. 2015). (R. pp. 97-98, Am. Compl. ¶¶ 91-100). The circuit court dismissed this claim, with prejudice, because Skywaves "merely offer[ed] a conclusion of law" that BB&T's alleged conduct affected the public interest, failing to allege "any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition." (R. p. 42, Order). Skywaves' appeal of this ruling is without merit.<sup>6</sup>

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

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<sup>6</sup> BB&T notes that after Skywaves moved for reconsideration of the November 8 order, the circuit reinstated several of the claims it had dismissed, but it did not reinstate the SCUTPA claim. (R. p.69, Order). Subsequently, Skywaves moved to amend its First Amended Complaint to "clarify" that the claim should have been made under the *North Carolina* Unfair Trade Practices Act. (R. p. 664, Mem. in Support of Mot. to Amend). The circuit court denied the Motion to Amend. (R. pp. 68-70, Order). Rather than appeal that denial, Skywaves has reversed course, and now argues that it properly pleaded a claim under the *South Carolina* act.

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

In this case, the circuit court dismissed Skywaves’ SCUTPA claim on the basis that Skywaves failed to allege “any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition.” (R. p. 42, Order). In reviewing this ruling, this Court must apply the same standard as the circuit court. *See Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426. Accordingly, the question for this Court is whether the facts alleged, and reasonable inferences from those facts, “constitute a cause of action.” *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014). “A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint.” *Disaboto v. S.C. Ass’n of Sch. Admins.*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013). The circuit court correctly concluded that Skywaves failed to adequately allege a claim for violation of SCUTPA.

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

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

(R. p. 98, Am. Compl. ¶ 97). Even under the liberal standard applicable on a motion to dismiss, a mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient. *See Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986).

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

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

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

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

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

(R. p. 416, Factoring Agreement ¶ 29 (emphasis added)). Based on this provision, BB&T and Edahl moved to strike Skywaves' jury demand, and the circuit court granted this motion. (R. pp. 53-57, Order). This Court should affirm that ruling.<sup>7</sup>

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

In addition to the jury trial waiver, the Factoring Agreement contains a choice of law provision, which states that “[a]ll acts, transactions, rights, and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina.” (R. p. 416, Factoring Agreement ¶ 25). Based on this provision, Skywaves contends that the validity of the jury trial waiver is governed by North Carolina law, which prohibits such waivers. Br. at 5-7; *see* N.C. Gen. Stat. § 22B-10 (“Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable.”). Skywaves is wrong, however, because availability of a jury trial is a procedural issue. As such, it is governed by the law of the forum, South Carolina, under which contractual jury trial

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<sup>7</sup> 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.

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

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

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

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

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

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

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

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

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

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

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

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

usages and terminology as generally understood in the particular trade or business.” *Williams v. GEICO*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (Ct. App. 2014) (internal quotation marks omitted). Based on this standard, it is clear that the jury trial waiver is unambiguous. Its language is simple and direct, stating in plain terms that Skywaves waives “trial by jury and the right to trial by jury on any issue in any way pertaining to this Agreement.” (R. p. 416, Factoring Agreement ¶ 29). In fact, the language of the Factoring Agreement is nearly identical to the language approved by the Supreme Court in *Blackburn*. Further, there can be no doubt that Konersmann, who executed the Factoring Agreement on behalf of Skywaves, was fully capable of understanding the waiver. Konersmann not only holds an MBA from the University of Notre Dame (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)

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

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

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

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

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

Skywaves actually filed two motions to strike Respondents' answers, both of which were denied by the circuit court. In its first motion to strike, filed in January 2014, Skywaves asserted that BB&T's Answer was as a "sham." (R. p. 181, 1st Motion to Strike). The motion arose out of Respondent Jim Edahl's deposition testimony that in the spring of 2007 he had agreed for BB&T to provide financing based on site plans from a particular Skywaves customer as though they were

purchase orders. (R. pp. 231-232, Edahl Dep. (9/19/2013) 46:15-50:22). Edahl further testified that when the issue of site-plan financing arose in January 2008, he did not recall having made this agreement. (R. pp. 937-938, Edahl Dep. (9/19/2013) 80:21-81:11).

Several months later, Skywaves filed the first Motion to Strike. Although nothing in the law or the rules of procedure requires a party to amend a pleading every time new information comes to light during discovery, Skywaves complained that BB&T had failed to amend its Answer in light of Edahl's deposition testimony. BB&T therefore moved to amend its Answer. Subsequently, the circuit court denied Skywaves' Motion to Strike and granted BB&T's Motion to Amend its Answer. (R. pp. 53-57, Order).

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

The circuit court denied Skywaves' second Motion to Strike on July 23, 2015. (R. p. 70, Order).

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

Skywaves' appellate brief, like its second Motion to Strike, is inappropriate and inflammatory. It appears to be an effort to gain an advantage in this appeal by

smearing mud on Respondents and their counsel. To that end, Skywaves presents a misleading and unfounded statement of relevant events. Skywaves' revisionist history ignores the evidence.

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

18. Between March and December of 2007, Skywaves and BB&T exchanged a series of emails, letters and documents, which memorialized the relevant and material terms of a new and expanded factoring agreement (or a modification of the prior agreement).

19. Under this modified factoring agreement, BB&T agreed, among other things, to provide capital infusions based on invoices, purchase orders, contracts and site plans.

(R. p. 88, Am. Compl. ¶¶ 18, 19). BB&T's original Answer, filed in February 2010, denied these allegations. (R. p. 101, Answer ¶ 12 ("Defendant denies the allegations of paragraphs 16, 17, 18, 19, 20, 21 and 22.")). BB&T's response was consistent with Rule 8(b), SCRCP, which requires only that a defendant's answer "shall admit or deny the averments upon which the adverse party relies." The response also served the fundamental purpose of an answer to a complaint: to "apprise the opponent of those allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable the plaintiff to prevail." 5 Charles Alan Wright, et al., *Federal Practice & Procedure* § 1261 (3d ed.).

Moreover, the evidence shows that BB&T had a good faith belief, at the time of its original Answer, that Skywaves had submitted site plans as purchase orders on

behalf of General Dynamics. In January 2008, BB&T declared a default under the terms of the Factoring Agreement based on Skywaves' ever-deteriorating financial condition, its inability to pay its debts as they came due, and its continuing noncompliance with its contractual obligation to remit to BB&T any funds received on factored invoices. (R. p. 454, Default Letter). At that time, the only information BB&T had regarding site plan financing was that there should have been, but were not, purchase orders supporting advances based on Skywaves' expected sales to General Dynamics. At that time, BB&T's problem loan administrator, Mike Hennessy, was unaware that site-plan financing had been approved. It is undisputed that Edahl did not say that he had approved the site-plan financing.

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

- When a third-party examiner inquired about the “purchase order line” during a routine field exam on January 22, 2008, Skywaves CFO John Voytko told her that Skywaves “currently does not have purchase orders to support \$1,971,355 of the amounts listed under General Dynamics (GD). Per John Voytko, the controller, *the company is working with GD to obtain a purchase order to support these.*” (R. p. 861, Field Examiner's Report (italics added; bold & underlining original)).
- After Konersmann and Voytko told Hennessy about the site plan financing, Skywaves' consultant, Earl Hewlette, approached BB&T with proposals to repay BB&T for the “non-conforming” advances. (R. p. 457, Email from Hewlette to Hennessy). Hewlette assured BB&T that Skywaves' management had “a sincere appreciation and regret for the mistakes made in the past in dealing with the bank.” (*Id.*)
- On February 11, 2008, counsel for BB&T wrote to Konersmann, rejecting Hewlette's proposals and identifying several issues that had to be resolved before the bank could consider not enforcing its rights under the Factoring Agreement. (R. pp. 468-471, Letter from Licata to Konersmann). One of the issues was “funding by BB&T on what it understood to be purchase orders” but which the field exam had revealed to be only “contractual obligations of General Dynamics ... a stage of the process at which BB&T had never agreed to provide funding.” (R. p. 470, Letter from Licata to

Konersmann). Notably, Skywaves made no attempt to correct this misunderstanding.

This was the information BB&T had when Skywaves filed its complaint in December 2009, alleging that BB&T had agreed “to provide capital infusions based on invoices, purchase orders, contracts and site plans” (R. p. 18, Am. Compl. ¶ 19), and when BB&T filed its Answer in February 2010, denying that allegation.

When he was deposed in September 2013, Konersmann testified that he had asked, and Edahl had agreed, for BB&T to advance funds on General Dynamics’ site plans as a “gap filler” for the latter half of 2007. (R. p. 360, Konersmann Dep. 304:13-22). During his own deposition the following week, Edahl testified that Konersmann’s testimony had reminded him (Edahl) that he had agreed to provide funds based on the General Dynamics site plans. (R. pp. 937-938, Edahl Dep. 80:24-81:21). At that time, Edahl testified that in 2008, he had not remembered agreeing to site plan financing. (R. p. 937, Edahl Dep. 78:20-79:15). Several months later, Edahl swore an affidavit admitting that he “was aware in January 2008 that [he] had agreed to treat certain site plans of General Dynamics the same as purchase orders with respect to funding under BB&T’s factoring agreement with Skywaves, but did not reveal this information to BB&T or anyone out of fear and panic of the situation.” (R. p. 192, Edahl Aff. ¶ 4).

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

Responding to Paragraph 19, Defendant admits only that the March 22, 2005 Factoring Agreement was amended to allow for factoring of invoices and purchase orders. Defendant further admits that it agreed

to finance site plans, to a limited extent, with certain limitations on the amounts being factored. Defendant denies the remaining allegations of Paragraph 19.

(R. p. 267, Am. Answer ¶ 14).

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

Skywaves also complains, Br. at 28, about BB&T's denial of Skywaves' broadly stated allegation that "[a]t *all time* [sic] relevant hereto, Defendant Edahl was the agent, servant and employee of Defendant BB&T, and acted within the scope and course of his employment." (R. p. 91, Am. Compl. ¶ 52 (emphasis added); *see* R. p. 268, Am. Answer ¶ 30 (denying, *inter alia*, the allegations of ¶ 52)). Skywaves ignores, however, that BB&T's Answer and Amended Answer both admitted Skywaves' allegation that "James Edahl is an officer of BB&T who does business in Charleston County and is a citizen and resident of South Carolina." (R. p. 86, Am. Compl. ¶ 4; *see* R. p. 101, Answer ¶ 5 ("Defendant admits the allegations of ¶ 4."); R. p. 266, Am. Answer ¶ 5 (same)). This admission necessarily establishes that Edahl was BB&T's agent when acting within the course and scope of his employment—a point which BB&T has never disputed. Further, there is nothing underhanded or improper about BB&T's denial of Paragraph 52, which essentially alleges that

*everything* Edahl did with respect to Skywaves was *always* within the course and scope of his employment.

Finally, Skywaves incorrectly and misleadingly contends that BB&T “dishonestly answered an interrogatory” by stating that it declared Skywaves in default on January 25, 2008.<sup>8</sup> Br. at 32. According to Skywaves, the “reality” is that BB&T declared Skywaves in default on January 18, when Edahl spoke with Konersmann and Voytko by telephone and told them an overadvance “had put [Skywaves] in default ... and that they would be getting written notice of the same.” (R. p. 741, Opp. to Mot. for Summ. J.). However, Edahl did not have the authority to declare a default, and Skywaves knows it. In its Supplemental Interrogatory Number 4, Skywaves asked BB&T to “[i]dentify ... the person(s) who had the authority to declare the Skywaves account in default in January, 2008.” (R. p. 872, BB&T’s Answers to Supp. Interrogatories). In response, BB&T identified Mike Hennessy, Walt Denning, and Mike Burke—but not Jim Edahl. (*Id.*) More importantly, Skywaves ignores the plain terms of the Factoring Agreement, which require a declaration of default to be in writing. (R. pp. 414-415, Factoring Agreement ¶ 20 (“All notices, requests and demands to or upon a party hereto shall be in writing.”)). Skywaves’ complaint regarding the interrogatory answer is entirely unfounded.

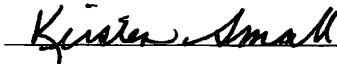
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<sup>8</sup> Specifically, Skywaves’ Supplemental Interrogatory Number 5 asked, “Did BB&T declare the Skywaves account in default prior to the letter of January 25, 2008? If so, what was the claimed default?” BB&T responded, “No.” (R. p. 872, BB&T’s Answers to Supp. Interrogatories).

## CONCLUSION

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

Respectfully submitted,



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Greenville, South Carolina  
September 6, 2016

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

**RECEIVED**

SEP 08 2016  
SC Court of Appeals

Skywaves I Corporation, ..... Appellant/Respondent,

v.

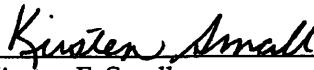
Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T, ..... Respondent/Appellant,

And

James Edahl, ..... Respondent,

CERTIFICATION OF COMPLIANCE

Undersigned counsel hereby certifies that the foregoing FINAL RESPONDENT'S  
BRIEF OF RESPONDENT/APPELLANT complies with Rule 211(b), SCACR.

  
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**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.<sup>1</sup>

## **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).

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<sup>1</sup> 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.<sup>2</sup> (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

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<sup>2</sup> In other words, rather than purchasing an invoice reflecting money actually owed for a shelter built by Skywaves, BB&T agreed to advance 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.<sup>3</sup>

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<sup>3</sup> 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.<sup>4</sup>

#### 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

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<sup>4</sup> 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).<sup>5</sup>

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

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<sup>5</sup> 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.<sup>6</sup>

**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

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<sup>6</sup> 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.<sup>7</sup>

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<sup>7</sup> 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.

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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.<sup>8</sup>

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

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<sup>8</sup> 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.<sup>9</sup> 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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<sup>9</sup> 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.<sup>10</sup> 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.

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<sup>10</sup> 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.<sup>11</sup> 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

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<sup>11</sup> 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.<sup>12</sup>

**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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<sup>12</sup> 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 (3<sup>rd</sup> 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.<sup>13</sup> *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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<sup>13</sup> 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.<sup>14</sup> (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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<sup>14</sup> 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."

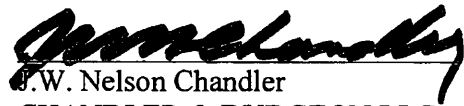
While Skywaves seeks to distract from the merits with this issue, it does not change the result or somehow illegitimatize Edahl's dispositive defenses. The striking of an answer is a drastic remedy, which should only be considered, much less imposed, in the most extreme circumstances. *See Germofert 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.

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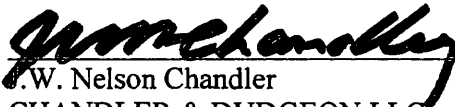
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In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Commons Pleas

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-07516

**RECEIVED**  
SEP 02 2016  
SC Court of Appeals

Skywaves I Corporation .....  
Appellant/Respondent,

v.

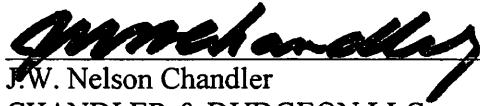
Branch Banking and Trust Company,  
Successor in merger to Branch Banking  
and Trust Company of SC, a/k/a BB&T..... Respondent/  
Appellant,

and James Edahl, .....  
Respondent.

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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

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SC Court of Appeals

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  
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AND

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

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
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## INTRODUCTION

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

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

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

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

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

## **ARGUMENTS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**a. Defendants Admit That an Agreement Existed**

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

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

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

The written admission must contain all the essential elements of the contract, and the terms and conditions must be stated with reasonable certainty, that is, all material parts must be contained in the memorandum, and it is insufficient where it omits an essential term. [Citation omitted.] It is obvious that the terms stated or admitted must be those mutually agreed to by the parties. Otherwise there is no complete agreement.

*Walker v. Preacher*, 199 S.E. at 677; 72 Am. Jur. 2d Statute of Frauds § 339 at 862 (1974).

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

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

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

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

All acts, transactions, rights, and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The South Carolina statute states that a failure to properly memorialize a contract within the statute precludes claims under the following legal or equitable theories:

- (a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;
- (b) promissory or equitable estoppel;
- (c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or
- (d) negligent misrepresentation.

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

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

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

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

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

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

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

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

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

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

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

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

In order to establish a claim for negligence the plaintiff must prove the following elements: 1) a duty of care owed by the defendant to the plaintiff; 2) a breach of that duty by the defendant's negligent act or omission; 3) the plaintiff was damaged; and 4) the damages proximately resulted from the breach of the duty. *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The issue of whether the law recognizes a particular duty is an issue of law to be decided by the court. *Ellis by Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996).

Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." *Shipes v. Piggly Wiggly St. Andrews*, 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977). Ordinarily, the common law imposes no duty on a person to act. *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997). An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance. *Id.*

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

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

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

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

On June 2, Murray went to the Bank and spoke with Thomas Wright, a former vice-president and banking center manager with the Bank. She testified that she requested the Bank close the fraudulent account and notify the merchants who submitted checks written on the account that the account was fraudulent. When she left, she felt assured that the Bank would handle the matter. Wright testified he notified the Bank's headquarters in Charlotte on May 21, 1997 that the account was overdrawn and requested its closure. The Bank did not close the account until June 30, 1997, which was almost a month after Murray requested it close the account and notify the merchants. Wright stated the Bank failed to follow its own procedures.

We find a relationship between the Bank and Murray arose sufficient to impose upon the Bank a duty of care when Murray went to the Bank seeking closure of the account. The Bank failed to follow its own procedures, did not timely close the account, and did not notify any merchants that the account was fraudulent. We find sufficient evidence in the record from which the jury could determine the Bank breached its duty to Murray after this duty arose. Accordingly, we find the trial court did not err in denying the Bank's motion for a directed verdict.

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

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

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

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

**2. There Is At Least a Scintilla of Evidence of Damages**

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

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

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

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

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

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

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

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

To prove a claim for the common law tort of negligent misrepresentation, Quail Hill was required to establish the following elements:

- (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

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

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

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

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

- There is evidence that Defendants represented to Skywaves that BB&T had the present intention to fulfill Skywaves financing needs when, in fact, BB&T did not have such an intention.
- There is evidence that Defendants represented to Skywaves that it did not need to seek alternative sources of capitalization.
- There is evidence that BB&T represented that it would not treat the alleged defaults that it now relies upon in this case as a ground for termination of the agreement.
- There is evidence that Defendants represented to Skywaves that BB&T's present intention was to treat the Factoring Agreement as terminable only upon reasonable cause when, in fact, BB&T did not have such an intention.

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

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

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

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

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

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

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

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

Under Connecticut law, contractual jury trial waivers are presumptively valid. *L & R Realty v. Connecticut Nat'l Bank*, 715 A.2d 748, 755 (Conn.1998)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### CONCLUSION

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

August 31, 2016

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

RECEIVED

Hon. Roger M. Young, Circuit Court Judge SFP 08 2016

SC Court of Appeals

Appellate Case No. 2015-001809

Skywaves I Corporation, .....Appellant/Respondent,

v.

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

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

AND

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

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## **STATEMENT OF ISSUE ON APPEAL**

**Did the Circuit Court err in denying BB&T's motion for summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act?**

## STATEMENT OF THE CASE

### I. INTRODUCTION

Numbers do not lie, and in this case, the numbers showed a startup company in dire financial straits, despite BB&T's financing and efforts to assist the company, including numerous accommodations and forbearance. Ultimately, however, Skywaves' precarious financial condition created an unacceptably high risk of non-payment, leading BB&T to the conclusion that it could not continue its relationship with Skywaves. In doing so, BB&T acted prudently and appropriately. Most importantly, it acted within its rights under the agreement between it and Skywaves, the terms of which are clear and undisputed.

### II. FACTS

BB&T is a banking institution with branches in North and South Carolina. Skywaves was a startup company that manufactured structures for sheltering equipment at the base of cell phone towers. (R. p. 330, Konersmann Dep. 51:9-14). Ronald Konersmann, an experienced businessman who has been involved in manufacturing infrastructure for the telecommunications industry since 1982, was Skywaves' founder and CEO. (R. p. 483, Konersmann CV; R. pp. 952-956, Konersmann Dep. 27:17-44:2). John Voytko, a licensed CPA, was the company's CFO. (R. pp. 372-373, Voytko Dep. 36:23-37:4).

Like many startup companies, Skywaves needed cash to fund its operations and to purchase construction materials for the shelters. (R. p. 386, Voytko Dep. 151:5-12). To provide working capital, in March 2005 Skywaves entered into a number of written agreements with BB&T, including the Factoring Agreement at issue in this litigation. (R. pp. 404-417, Factoring Agreement).

**A. 2005: BB&T Agrees to Factor Invoices for Skywaves.**

“Generally speaking, factoring is a form of commercial finance whereby a business sells its accounts receivable to a financing company in exchange for immediate payment of some portion of those receivables.” *PAF Invs., LLC v. General Dynamics Land Sys., Inc.*, 2011 WL 2669742, at \*1 (D.S.C. July 7, 2011). The Factoring Agreement between Skywaves and BB&T, as initially executed in March 2005, provided that BB&T would purchase Skywaves’ accounts receivable for 80 percent of the face value of the invoice, up to a maximum of \$1.5 million. (R. pp. 404-406, Factoring Agreement ¶ 1(a) (“Advance Percentage”; “Maximum Credit Amount”)). By executing the Factoring Agreement, Skywaves acknowledged that the Agreement set forth “the entire understanding between the parties ... supersed[ing] all prior and contemporaneous agreements and understandings, inducements and conditions, whether express or implied, oral or written.” (R. p. 416, Factoring Agreement ¶ 24). Skywaves further recognized that the written Agreement “control[led] and supersede[d] any course of performance and/or usage of the trade inconsistent with any of the terms hereof.” (*Id.*).

Once Skywaves sold a receivable to BB&T under the Factoring Agreement, BB&T became vested with all of Skywaves’ rights in the account, including the right of payment. (R. p. 408, Factoring Agreement ¶ 2). Accordingly, every factored invoice was required to “state plainly on the face thereof that the Account ... has been assigned and sold to, and is owned by and is payable to BB&T only.” (R. p. 411, Factoring Agreement ¶ 10). In the event that a customer mistakenly sent payment on a factored invoice to Skywaves instead of to BB&T, Skywaves was

required to hold the funds “as the property of BB&T, without commingling [them] with any funds or property of [Skywaves],” and immediately turn the funds over to BB&T. (R. p. 410, Factoring Agreement ¶ 8).

Although Skywaves made arrangements for some of its customers to pay factored invoices directly to BB&T, it contends that some of its customers were unable or unwilling to accommodate a second address in their systems for remitting payments on factored invoices to BB&T. (R. p. 376, Voytko Dep. 63:19-66:15; R. pp. 349-350, Konersmann Dep. 191:13-192:18). Skywaves contends that it informed BB&T of this difficulty from the outset and that BB&T accepted—not in writing, but in a “verbal conversation”—that payments on such invoices would flow through Skywaves. (R. p. 377, Voytko Dep. 64:15-20). Skywaves further contends that it could delay remittance of such payments to BB&T for up to 60 days, despite the written requirement that they be immediately forwarded to BB&T, because immediate remittance would not “work” for Skywaves. (R. p. 342, Konersmann Dep. 152:16-18; *see* R. p. 381, Voytko Dep. 69:17-23). However, there is nothing in writing reflecting these alleged modifications to the Factoring Agreement. In fact, BB&T repeatedly admonished Skywaves to put the required notification on factored invoices and expressed concern regarding overdue payments on factored invoices. (R. p. 430, Email from Castlen Morris to John Voytko (Feb. 15, 2006); R. p. 431, email from Castlen Morris to John Voytko (June 5, 2006); R. p. 432, email from Castlen Morris to John Voytko (Feb. 14, 2007)).<sup>1</sup>

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<sup>1</sup> In the June 5, 2006 email, BB&T noted that “over \$150,000 is 30+ days past due” on factored invoices to Cingular and Nextel and emphasized how important it was for BB&T to be able to contact Skywaves’ customers directly regarding overdue

Skywaves never segregated misdirected payments on factored invoices, although the Factoring Agreement required it to do so. (R. p. 384, Voytko Dep. 86:3-6). Rather, as CFO Voytko readily admitted, Skywaves used BB&T's funds for operating purposes and to manage cash flow. (R. pp. 991-992, Voytko Dep. 81:10-82:1). Effectively, Skywaves used misdirected payments on factored invoices as short-term, interest-free loans.

To mitigate the risk inherent in providing financing to a startup company like Skywaves, BB&T required Skywaves to make certain covenants and warranties regarding its financial status, including its ability to its debts as they matured in the ordinary course of business, the accuracy of financial statements provided to BB&T, and the non-occurrence of any material adverse change in Skywaves' financial status since the most recent financial statement. (R. pp. 409-410, Factoring Agreement ¶ 7). The Agreement made clear that these covenants and warranties were continuing in nature. (*Id.*) To enable BB&T to monitor Skywaves' financial condition, the Agreement required submission of monthly financial statements, prepared in accordance with Generally Accepted Accounting Principles (GAAP), within 30 days of month-end. (R. p. 415, Factoring Agreement ¶ 21(b)). Skywaves frequently missed this deadline, but it does not contend that the reporting requirement was ever amended. (R. p. 374, Voytko Dep. 55:7-17).

BB&T's obligation to factor invoices for Skywaves was not perpetual. The Factoring Agreement was for a one-year term, subject to automatic renewal if not terminated by BB&T or Skywaves. (R. p. 414, Factoring Agreement ¶ 19). Further,

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factored invoices, and warned that its inability to do so could make the factoring arrangement untenable.

BB&T was entitled to terminate the Agreement at any time upon 60 days' written notice, and could terminate the Agreement "forthwith and without notice upon or after the occurrence of any Event of Default." (*Id.*) As relevant to this litigation, the Agreement defined "Event of Default" to include violation of the financial covenants, including Skywaves' 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).

Although it entered into the Factoring Agreement in March 2005, Skywaves did not begin factoring invoices until late that year. (R. p. 375, Voytko Dep. 59:11-16). In light of this delay, BB&T voluntarily reduced the minimum monthly commission owed under the Factoring Agreement in June 2005. (R. p. 419, Letter from Castlen Morris to Ronald Konersmann and John Voytko (June 1, 2005)).

**B. 2006: The Factoring Agreement is Renewed and Modified; BB&T Accommodates Skywaves by Agreeing to Advance Funds for Purchase Orders.**

In March 2006, the Factoring Agreement was automatically renewed for a second year. (R. p. 414, Factoring Agreement ¶ 19). In May of that year, the parties executed a written modification of the Agreement, increasing Skywaves' maximum credit by \$250,000, to \$1.75 million, and cutting the minimum monthly commission in half—both changes favoring Skywaves. (R. p. 421, Amendment, May 11, 2006).

Skywaves was not profitable in 2006 (R. p. 351, Konersmann Dep. 221:5-7), and it continued to be short on cash. At some point in early 2006, BB&T began advancing money to Skywaves based on purchase orders received from Nextel, one

of Skywaves' customers. (R. pp. 435-436, Email from Castlen Morris to John Voytko (Mar. 25, 2006)). In other words, rather than purchasing an invoice reflecting money actually owed for a shelter that had already been built, BB&T agreed to advanced funds to Skywaves on the basis of a customer's order for a shelter yet to be built. Skywaves received a lower percentage of the face value of purchase orders sold to BB&T—initially 60 percent, later increased to 65 percent. (R. p. 997, Voytko Dep. 118:2-14; R. p. 425, Letter from Edahl to Voytko (Mar. 14, 2007)). If and 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 (60 or 65 percent) and the rate for invoices (80 or 85 percent).<sup>2</sup> (R. p. 996, Voytko Dep. 115:14-25).

**C. 2007: BB&T Continues its Commitment to Skywaves;  
Skywaves' Finances Deteriorate.**

**1. Renewal of the Factoring Agreement.**

The Factoring Agreement was renewed again in March 2007. (R. p. 423, Letter from Edahl to Voytko (Mar. 2, 2007)). At that time, the Agreement was again modified in ways favorable to Skywaves:

- The maximum credit amount was increased to \$3.5 million with a sublimit of \$2 million for purchase orders;
- The advance rate was set at 85 percent for invoices and 65 percent for purchase orders;
- BB&T's commission rate was reduced to .45 percent of each invoice, with a monthly cap of \$3,000; and

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<sup>2</sup> For example, if Skywaves submitted a purchase order for a \$100,000 shelter in March 2006, BB&T would have advanced 60 percent of the purchase price, or \$60,000. Upon completion of the shelter, Skywaves would assign the invoice to BB&T, and BB&T would pay Skywaves the difference between the amount previously advanced and the amount owed for the invoice under the Factoring Agreement—at that time, 80 percent of face value, or \$20,000.

- Skywaves was permitted to make interest-only payments on its outstanding balance, with the principal due in April 2008, the end of the one-year term.

(R. pp. 423 and 425, Letters from Edahl to Voytko (Mar. 2 and 14, 2007)). BB&T also agreed to advance funds on purchase orders from any Skywaves customer. (R. p. 423, Letter from Edahl to Voytko (Mar. 2, 2007)).

The March 2, 2007 renewal letter closed by stating that BB&T “look[ed] forward to continuing to assist” Skywaves in growing its business, and noting that the bank would consider additional modifications of the Agreement “[a]ssuming Skywaves 2007 budget previously submitted to BB&T is achieved.” (*Id.* (emphasis added)). As it turned out, however, Skywaves came nowhere close to meeting its 2007 projection of total net income of \$1.4 million. (R. p. S-5, 2007 Projected Financials). Instead, Skywaves finished 2007 with a *loss* of \$1.4 million. (R. p. 447, 2007 year-end financial statement). Thus, by the end of 2007 Skywaves was deeply unprofitable, and the company’s management had missed its projections by wide margins.

## **2. Skywaves’ Unrealized Projections and Financial Losses.**

Skywaves’ 2007 projected financials, provided to BB&T in October 2006, predicted modest but steady profits throughout the year, ranging from a minimum net profit of \$98,835 in each month of the first quarter, to a maximum of \$139,835 in July. (R. p.S-5, 2007 Projected Financials). The reality was much different: With the exception of January (during which Skywaves showed a net income of profit of \$46,658, less than half of what it had predicted), Skywaves *lost* money in every single month of 2007. (R. p. 447, 2007 year-end financials).

Skywaves provided its first-quarter financials to BB&T on May 8, 2007—

more than a week after they were due. (R. p. 443, Email from Voytko to Morris (May 8, 2007); R. pp. S-10-14). The numbers showed that Skywaves had fallen far short of its first-quarter projections. In January, for example, Skywaves showed a net income of \$46,658<sup>3</sup>—far less than its projected net income of \$98,835. Skywaves predicted a net income of 98,835 for February, but in fact showed a net *loss* of (\$31,227). The trend continued in March: instead of a net income of \$98,835, Skywaves showed a net *loss* of (\$35,250). Skywaves explained these numbers as the result of a delay in a large project in New York. (R. p. 443, Email from Voytko to Morris (May 8, 2007)). Skywaves assured BB&T that the project would be back on track by July and that “the 2007 production forecast will be completed in the 3<sup>rd</sup> and 4<sup>th</sup> quarters of 2007.” (*Id.*)

In mid-September, Skywaves provided BB&T with revised projections for the remainder of 2007. (R. p. S-18-19, Revised 2007 Projections). The revised projections abandoned Skywaves’ previous goal of \$1.4 million in net income in 2007, instead predicting a net *loss* of (\$120,532). Skywaves also predicted that it would have net losses of (\$117,900), (114,600), and (\$79,970) in July, August, and September, respectively. Skywaves attributed these dismal projections to additional delays in the General Dynamics project (forecasted revenue decreased by \$800,000), as well as delays in projects for AT&T (forecasted revenue decreased by \$700,000), Sprint/Nextel (forecasted revenue decreased by \$1.5 million), and Verizon (forecasted revenue decreased by \$400,000). Skywaves also noted that “government

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<sup>3</sup> This figure was calculated as \$47,629.47 in the quarterly financials produced to BB&T on May 8, 2007, but was adjusted to \$46,658 in the 2007 year-end financials. Whenever there is a difference between the 2007 quarterly reports and the 2007 year-end report, the number from the year-end report is used.

related business ... has been slow to develop" (forecasted revenue decreased by \$400,000) but that Skywaves had submitted proposals for business worth \$1.5 million and was "waiting to get results of the bid process." (R. p. S-19, Revised 2007 Projections).

The revised forecast included actual financials for the second quarter of 2007, and the results were far from encouraging. In April, Skywaves did not achieve its projected net income of \$116,835, but instead suffered a net *loss* of (\$94,919). The losses continued in May (net *loss* of (\$117,245), compared to projected net income of \$116,835) and June (net *loss* of (\$121,200), compared to projected net income of \$134,835). In sum, while Skywaves had predicted total net income of \$665,010 for the first half of 2007, it ended that period with a net *loss* of (\$355,749)—more than \$1 million *less* than predicted.

Despite this disheartening reality, Skywaves predicted dramatic increases in net income during the remainder of 2007. According to the revised 2007 projections, losses would continue in the third quarter but would be countered by swiftly rising profits during the fourth quarter, resulting in total net income of \$235,220 in the second half of 2007.<sup>4</sup>

Even the lowered expectations of the revised 2007 projections proved impossible for Skywaves to meet. When Skywaves sent its third-quarter financials to BB&T on November 5, 2007, not only did they show losses greater than those

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<sup>4</sup> Interestingly, Skywaves' original predictions for 2007 showed a slight decrease in net income from November to December (a time when poor weather and the holiday season would likely dampen construction of cell phone towers), but its revised 2007 projections showed a substantial *increase* in net income for November and December.

predicted in the revised 2007 projections, the monthly losses were *increasing*, not decreasing. Specifically, the actual net loss for July 2007 was (\$147,973) (compared to a predicted net loss of (\$117,900)); the actual net loss for August was (\$146,508) (compared to a predicted net loss of (\$114,600)); and the actual net loss for September was (\$149,942) (compared to a predicted net loss of (\$79,970)). Altogether, during the third quarter of 2007 Skywaves showed a total net loss (\$444,423), substantially more than the predicted net loss of (\$312,470).

### **3. Advancement of Funds on Site Plans.**

Skywaves' financial projections for 2007 were based, in part, on expected revenues from a large project involving General Dynamics, which had a contract with the State of New York for a multi-year homeland security initiative. (R. p. 87, Am. Compl. ¶ 12). Skywaves had entered into a master contract with General Dynamics regarding the specifications for the shelters, but as of mid-2007, General Dynamics had not actually submitted any purchase orders to Skywaves. (R. pp. 359-360, Konersmann Dep. 303:9-304:2). In need of additional funding from BB&T, Skywaves went to General Dynamics and asked for purchase orders. (R. p. 361, Konersmann Dep. 310:1-23). Unable to provide purchase orders because of Homeland Security regulations, General Dynamics instead gave Skywaves site plans showing where it anticipated locating shelters when (and if) it eventually ordered them. (*Id.*) In July 2007, Skywaves asked BB&T to advance funds on the basis of the site plans. Unlike BB&T's written agreement to provide financing on the basis of purchase orders, nothing in writing reflects any formal agreement by BB&T to provide financing on the basis of site plans. Nevertheless, BB&T indulged Skywaves'

request and, during the second half of 2007, advanced funds to Skywaves on the basis of the General Dynamics site plans, under the same terms applicable to purchase orders.

**D. 2008: Skywaves' Default under the Factoring Agreement.**

Michael Burke replaced Castlen Morris as the account executive for Skywaves' factoring line in late November 2007. (R. pp. 1039-1040, Burke Dep. 21:22-25). On January 17, 2008, Edahl and Burke visited Skywaves' warehouse, where Skywaves gave a presentation to familiarize Burke with its business. (R. pp. 391-392, Voytko Dep. 169:15-170:1; R. p. 362, Konersmann Dep. 337:1-16). During that visit, Skywaves provided BB&T its year-end actual financial statements for 2007. (R. p. 393, Voytko Dep. 173:10-17).

The year-end financial statements showed that Skywaves' downward spiral had continued—in fact, had worsened—during the fourth quarter of 2007. Instead of rapidly rising income, as predicted in the revised 2007 financials, Skywaves showed huge losses in every month of the fourth quarter. In October, the net loss was (\$143,295) (compared to predicted net income of \$66,780); in November, the net loss was (\$251,889) (compared to predicted net income of \$217,180); in December, the net loss was (\$197,238) (compared to predicted net income of \$263,730). All told, the numbers revealed a vast, \$1.1 million chasm between Skywaves' projection for the fourth quarter (net income of \$547,690) and its actual results (net loss of (\$592,422)).

Thus, in January 2008, BB&T knew that Skywaves was losing large amounts of money month after month, had not had a profitable month since January 2007, and had failed to meet its projected income in every single month in 2007, despite

having revised its projections mid-year. BB&T also knew that Skywaves had closed 2007 with a total net *loss* of \$1.4 million—a disastrous mirror-image of its original forecast of total net *income* of \$1.4 million.

Also during the January 17 meeting, Burke inquired about “a number of items that looked like purchase orders we had advanced on that we were not getting invoices on.” (R. p. 1042, Burke Dep. 32:25-33:3).

It was a large block that ... had been financed between July and I want to say October. ... I saw other purchase orders previous to these being paid, other purchase orders after being paid. This one block never seemed to go away. That was my concern that I brought up in the meeting on January 17th[.]

(R. p. 1044, Burke Dep. 50:22-51:9). After repeated questions from Burke, Konersmann and Voytko eventually admitted that the items were not purchase orders, although at that time Burke did not understand that BB&T had advanced funds against site plans. (R. p. 1042, Burke Dep. 33:3-6).

This was not Burke’s only concern going into the January 17 meeting, however. He was also concerned that no money was coming in to reduce the amount owed under the Factoring Agreement. (R. p. 1045, Burke Dep. 60:19-25). Additionally, a field exam conducted in January revealed that Skywaves had received \$340,000 from Verizon on factored invoices but had not turned that money over to BB&T. (R. p. 1047, Burke Dep. 66:17-24).

Faced with Skywaves’ ever-deteriorating financial condition, BB&T concluded that it had to take action. 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 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.*). BB&T further informed Skywaves that:

At this time, as a result of the default and/or in exercise of rights granted to it in the Agreement (regardless of the existence of a default), BB&T will make no further Advances (as defined in the Agreement). Additionally, BB&T is hereby demanding payment of the Obligations due under the Agreement (including any Advances outstanding).

You are further advised that, at the present time, BB&T is exercising its right to terminate its further performance under the Agreement. This action, together with BB&T's election to provide [sic] further Advances, for the present time, terminates any obligation that BB&T might have to provide any additional funding to Skywaves.

(*Id.*). BB&T did not declare Skywaves in default on the basis of the site-plan financing, which it had agreed to and actually provided.

Skywaves acknowledged, ultimately, that the Factoring Agreement "is protecting the bank, which is fine, you know, it's their money and we are borrowing it." (R. pp. 346-347, Konersmann Dep. 169:24-170:2). Skywaves further admitted that the Factoring Agreement set forth the actions BB&T was entitled to take in the event of a default. (R. p. 347, Konersmann Dep. 170:14-22).

**E. Skywaves' Bankruptcy and This Lawsuit.**

Instead of refuting or attempting to cure the defaults identified by BB&T in the January 25 letter, 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, Email from Hewlette to Edahl (Feb. 8, 2008)). Hewlette's "rescue plan" was for BB&T to extend \$2.1 million of *additional* credit to Skywaves, to be accomplished by "recategorization" of the \$1.6 million in site-plan advances "together with a new advance of \$500k[,] as a separate commercial loan outside of the line of credit" under the Factoring Agreement. (*Id.*). In other words, Hewlette's plan was to give Skywaves \$2.1 million in borrowing ability under the Factoring Agreement by moving that amount into an unsecured loan.

BB&T was not willing to agree to these terms, nor could the parties reach any other agreement. Ultimately, Skywaves declared bankruptcy. Blaming its bankruptcy on BB&T, Skywaves filed this action against BB&T in late 2009. Skywaves' First Amended Complaint asserted claims against BB&T for (1) breach of contract; (2) breach of contract accompanied by fraudulent acts; (3) promissory estoppel; (4) breach of covenant of good faith and fair dealing; (5) negligent misrepresentation; and (6) negligence.<sup>5</sup>

On July 27, 2015, the circuit court granted in part and denied in part BB&T's motion for summary judgment. (R. pp. 58-71). The court granted summary judgment

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<sup>5</sup> Skywaves also asserted claims for fraudulent misrepresentation and violation of the South Carolina Unfair Trade Practices Act. These claims were dismissed by the circuit court under Rule 12(b)(6), SCRCP. (R. pp. 35-43, Order (Nov. 8, 2011); R. pp. 44-49, Order (June 15, 2012)).

to BB&T on Skywaves' claims for promissory estoppel, breach of the covenant of good faith and fair dealing, negligent misrepresentation, and negligence. However, the circuit court denied summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act.

Skywaves timely appealed the portion of the circuit court's order granting summary judgment to BB&T. BB&T then timely cross-appealed the portion of the circuit court's order denying BB&T's motion for summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION OVER BB&T'S CROSS-APPEAL.

BB&T's cross-appeal asks the Court to reverse the denial of summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act, and to remand with instructions to enter summary judgment in BB&T's favor on those claims. Ordinarily, a denial of summary judgment is not directly appealable. *See Silverman v. Campbell*, 326 S.C. 208, 211, 486 S.E.2d 1, 2 (1997). "The appellate courts have discretion, however, to consider an unappealable order if an appealable issue is before the court and a ruling on appeal will avoid unnecessary litigation." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 495 n.2, 450 S.E.2d 616, 618 n.2 (Ct. App. 1994); *see Morris v. Anderson County*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (same). "Specifically, the courts have made a practice of accepting appeals of denials of interlocutory orders ... when these appeals are companion to issues that are reviewable." *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct. App. 2001).

This is an appropriate case for the Court to exercise its discretion and accept BB&T's appeal. First, reviewing the denial of summary judgment is proper when doing so may speed the resolution of protracted litigation. *See Davis v. Luncesford*, 287 S.C. 242, 243, 335 S.E.2d 798, 799 (1985) (accepting appeal of denial of summary judgment "[b]ecause of the need for final resolution" in a medical malpractice action that was on appeal for the third time). The events giving rise to this litigation occurred in 2007 and early 2008, and the case has been pending for six years, since December 2009. The circuit court granted summary judgment to Defendants on all

claims except those for breach of contract and breach of contract accompanied by a fraudulent act. As explained herein, 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, “at its core, this case 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 merits of the denial of summary judgment will be fully briefed by the parties. In filing this brief, BB&T will present its arguments in support of summary judgment, and Skywaves will have a full and fair opportunity to oppose these arguments in its response brief. The parties’ submission of briefs on the merits of the denial of summary judgment supports review. *See Pitts*, 352 S.C. at 339, 574 S.E.2d at 512.

## **II. BB&T IS ENTITLED TO SUMMARY JUDGMENT ON SKYWAVES' BREACH OF CONTRACT CLAIM.**

Skywaves' breach of contract claim alleges that the contract between it and BB&T was a "modified factoring agreement," in which BB&T agreed "to provide capital infusions based on invoices, purchase orders, contracts and site plans." (R. p. 89, Am. Compl. ¶ 28). Skywaves claims BB&T breached this agreement by "failing to perform its obligations ... and by terminating the parties' agreement without cause." (*Id.* ¶ 31) BB&T is entitled to summary judgment on this claim. First, BB&T performed its obligations under the agreement: BB&T agreed to advance funds on the basis of purchase orders and site plans, and there is no dispute that it did, in fact, advance those funds. Second, BB&T properly exercised its right to declare a default under the clear written terms of the Factoring Agreement.

### **A. Standard of Review and Applicable Law**

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRPC." *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). Under Rule 56(c), summary judgment is appropriate if "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Rule 56(c), SCRPC. "In determining whether any triable issue of fact exists, the evidence and all inferences which can *reasonably* be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Grimsley v. SC Law Enf. Div.*, \_\_\_ S.E.2d \_\_\_, 2015 WL 9315569, at \*3 (S.C. Dec. 23, 2015) (internal quotation marks omitted; emphasis in original). "Even though courts are required to view the facts in the light most

favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" *Id.* (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)).

Skywaves' breach of contract claim is governed by North Carolina law. The Factoring Agreement provides that "[a]ll acts, transactions, rights and liabilities under this Agreement shall be governed in all respects by, and construed in accordance with, the internal laws of the State of North Carolina." (R. p. 416, Factoring Agreement ¶ 25). Choice-of-law clauses are honored in South Carolina unless application of the designated state's law would result in a violation of South Carolina public policy. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 249, 717 S.E.2d 103, 108-09 (Ct. App. 2001).

The elements for a breach of contract claim under North Carolina law are: (1) the existence of a valid contract, and (2) breach of the contract's terms. *See Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003). In North Carolina, the construction of a contract with clear and unambiguous language is a matter of law for the court. *See Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 207, 652 S.E.2d 701, 709 (2007). "Thus, '[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.'" *Id.* (quoting *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946)).

**B. BB&T performed its obligations under the Factoring Agreement.**

As noted above, Skywaves' breach of contract claim rests in part on its allegation that BB&T failed to live up to its obligation to provide funding under the Factoring Agreement and in particular, the agreement to provide financing on the basis of site plans. But, the undisputed facts are that BB&T *did* provide funding on the basis of site plans, to the tune of \$1.6 million.

**C. BB&T had ample grounds for declaring a default under the plain terms of the Factoring Agreement.**

Paragraph 12 of the Factoring Agreement provided, "An Event of Default shall be deemed to have occurred under this Agreement, and BB&T shall be entitled to take such action as is elsewhere provided herein, if any one or more" of several listed events should occur. (R. p. 412, Factoring Agreement ¶ 12). As is relevant to this litigation, the listed events included the following:

- "[A]ny breach, violation or default in the performance of any covenant, warranty or undertaking in this Agreement";
- "BB&T shall for any ... reason deem itself insecure or the Collateral impaired."

(*Id.*) The Factoring Agreement further provided:

Upon and after the occurrence of any Event of Default, (a) BB&T may, at its option *and without notice or demand of any kind (all of which are hereby expressly waived by Client)*, declare all of the Obligations to be ... immediately due and payable ... [and] (b) BB&T shall be authorized to terminate further performance by it under this Agreement[.]

(*Id.* ¶ 13 (emphasis added)).

In the January 25, 2008 default letter, BB&T identified three events of default "[i]n particular, but not by way of limitation." (R. pp. 454-455, Default Letter). First, in violation of ¶ 8, Skywaves had repeatedly failed to immediately turn over to

BB&T all payments on factored invoices. Second, in violation of the representations, covenants, and warranties set forth in ¶ 7, Skywaves was not paying its debts as they came due. (R. pp. 409-410, Factoring Agreement ¶ 7 (warranting that Skywaves “is able to pay, does pay and will continue to pay its debts as they mature in the Ordinary Course of Business”)). Third, BB&T stated that “[b]ased upon the most recent audit, BB&T currently has a good faith belief that the prospects of payment to it or the performance of the Obligations (as defined in the Agreement) is impaired.” (R. p. 454, Default Letter).

**1. Skywaves failed to remit payments to BB&T.**

The Factoring Agreement clearly stated that if any payments on factored invoices were sent to Skywaves, Skywaves was required to keep those funds separate from its operating accounts and remit them “immediately” to BB&T. (R. p. 410, Factoring Agreement ¶ 8). This requirement is not surprising, given that money paid on factored invoices *belonged to BB&T* as the owner of those invoices. Nevertheless, Skywaves never attempted to keep payments on factored invoices (BB&T’s money) separate from Skywaves’ money, but instead commingled all money that came in. (R. p. 384, Voytko Dep. 86:3-9).

The evidence also shows—and Skywaves has never denied—that it did not remit these funds to BB&T immediately, or anything close to it. Skywaves simply asserts, without a shred of documentary evidence, that it had 60 days from the time it received payment on a factored invoice to turn the money over to BB&T. (R. pp. 380-381, Voytko Dep. 68:20-69:23; R. pp. 336-337, Konersmann Dep. 124:20-125:10). Nothing, beyond the say-so of Skywaves’ officers, supports this claim. *See*

*Crockett v. First Fed. Sav. & Loan Ass'n of Charlotte*, 289 N.C. 620, 631, 224 S.E.2d 580, 588 (1976) (“Where the terms of the contract are not ambiguous, the express language of the contract controls in determining its meaning and *not what either party thought the agreement to be.*” (emphasis added)).

Skywaves does admit, however, that holding payments on factored invoices for more than 60 days would violate the Factoring Agreement. (R. p. 338, Konersmann Dep. 138:1-10). Notably, in August 2007, BB&T contacted Skywaves to find out why it had been holding payments on factored invoices to Verizon for *six weeks*. (R. p. 385, Voytko Dep. 150:21-151:24; R. p. 449, Sept. 2007 Notes). In response to Skywaves’ explanation that it had retained the payments because money was a little tighter than usual, BB&T reminded the company that holding the payments “was a violation of the Factoring Agreement.” (R. p. 449, Sept. 2007 Notes). In a subsequent conversation, BB&T “reiterated that the payments received cannot be held and it could result in a cancellation of the contract.” (*Id.*)

In addition to the six-week delay in August 2007, as of February 11, 2008, BB&T had identified at least eight payments on factored invoices that had been received by Skywaves but not immediately remitted to BB&T. (R. pp. 469-470, Feb. 11, 2008 letter). Skywaves had been holding two of these payments for more than 60 days.

**2. Skywaves could not pay its debts as they came due in the ordinary course of business.**

In ¶ 7 of the Factoring Agreement, Skywaves represented, covenanted, and warranted that it was “able to pay, does pay, and will continue to pay” its debts as they came due in the ordinary course of business. (R. pp. 409-410, Factoring

Agreement ¶ 7). Skywaves does not contend that this provision of the Factoring Agreement was ever modified. Furthermore, Skywaves does not dispute that as of January 25, 2008, 37 percent of its payables were more than 60 days past due and thus had not been paid in the ordinary course of Skywaves' business. (R. pp. 454-455, Default Letter).

Instead, Skywaves contends that its inability to pay its debts was not a default because most of the overdue payables were owed to a single creditor, StructurTech, owned by Franz Meier, who was also an investor in Skywaves. Skywaves admits that its payables to StructurTech were "technically late," but that this did not constitute a default because Meier had agreed to give Skywaves an extension of time to pay. (R. pp. 399-400, Voytko Dep. 194:15-195:2; R. pp. 363-364, Konersmann Dep. 342:16-343:21). A corporate insider's alleged willingness to forbear on collecting Skywaves' debts is irrelevant, because such forbearance is not in the ordinary course of business. Indeed, the fact that Skywaves needed Meier to extend its credit is itself proof that Skywaves was unable to pay, and was not paying, its debts as they came due.

Moreover, the amounts owed to StructurTech accounted for only 25 percent of Skywaves' payables. Skywaves *admits* that 12 percent of its payables were overdue and were owed to other creditors. This is hardly a *de minimis* amount. On this basis alone, BB&T was entitled to declare Skywaves in default.

**3. BB&T had a good faith belief that it was insecure.**

In addition to the specific Events of Default listed in ¶ 12, the Factoring Agreement also entitled BB&T to declare a default if it "for any other reason

deem[ed] itself insecure.” (R. p. 412, Factoring Agreement ¶ 12). North Carolina imposes a statutory requirement that when a lender invokes a clause entitling it to deem itself insecure, it “has the power to do so only if [the lender] in good faith believes that the prospect of payment or performance is impaired.” N.C. Gen. Stat. Ann. § 25-1-309; *see* S.C. Code Ann. § 36-1-309 (same). “‘Good faith’ ... means honesty in fact and the observance of commercially reasonable standards of dealing.” N.C. Gen. Stat. Ann. § 25-1-201(b)(20). BB&T invoked this ground for default in the January 25, 2008 letter, stating, “Based on the most recent audit, BB&T currently has a good faith belief that the prospects of payment to it or performance of the Obligations ... is impaired.” (R. pp. 454-455, Default Letter).

BB&T unquestionably had a good faith basis for deeming itself insecure. As of January 25, 2008, the following conditions existed:

- Skywaves had reached the \$3.5 million maximum factoring allowed under the Factoring Agreement, which included a sublimit of \$2 million for purchase orders, such that no further advances could be made, or, if some availability existed, the amount would be limited and insufficient to fund Skywaves’ operations;
- Instead of achieving net income of \$1.4 million in 2007 as it originally projected, Skywaves lost approximately \$1.4 million in 2007;
- The revised 2007 forecast given by Skywaves to BB&T in September 2007, which projected a year-end loss of (\$120,532), proved to be alarmingly wrong, in that it underestimated the year-end loss by nearly \$1.2 million;
- Skywaves’ payments due to its vendors, including StucturTech, were not current;
- Skywaves was not immediately remitting payments it received on factored invoices to BB&T, or even segregating such payments, but instead was comingling such payments with other funds; and
- The Factoring Agreement was set to expire in less than 90 days, on April 5, 2008, at which time all indebtedness due to BB&T under the Factoring Agreement would mature and become due for

payment.

In light of these facts, there cannot possibly be a genuine issue of fact as to whether BB&T could have a good faith belief that it was insecure. *See S.C. Nat'l Bank v. S. Polymers, Inc.*, 313 S.C. 246, 249, 437 S.E.2d 148, 149 (Ct. App. 1993) (holding bank entitled to summary judgment on borrower's breach of contract claim "[u]nless the evidence was susceptible to the inference that the Bank was without reasonable grounds for insecurity or that it did not make an honest judgment with respect to the facts known to it").

Skywaves seems to suggest that BB&T should not have felt insecure because "at that time [we were bringing in] two or three million dollars of work, our purchase orders were going up and that would allow the cash flow to catch up on some of this." (R. p. 365, Konersmann Dep. 345:4-8). Skywaves cannot explain, however, how the incoming work would allow it to meet a looming repayment obligation of at least \$3.5 million by early April—a mere nine weeks away. Moreover, Skywaves admitted that it had no idea how long it would take to improve its cash flow, and even then Skywaves would need to establish a payment plan with BB&T. (R. p. 365, Konersmann Dep. 345:15-25). In view of Skywaves' indisputably dire financial condition, BB&T's duty to act in good faith did not require it to blindly accept Skywaves' predictions that success was just around the corner. *See First State Bank of Or. v. Hoehnke Nursery Co.*, 667 P.2d 1022, 1025 (Or. Ct. App. 1983) (holding that borrower's assurances that its financial condition would improve in the near future did not preclude lender from declaring default under the terms of the parties' agreement).

**III. BB&T IS ENTITLED TO SUMMARY JUDGMENT ON SKYWAVES' CLAIM FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT.**

The circuit court also erred in denying BB&T's motion for summary judgment on Skywaves' claim for breach of contract accompanied by a fraudulent act. This claim is governed by South Carolina law. *See Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 143, 494 S.E.2d 449, 454 (Ct. App. 1997). Accordingly, to succeed on this claim Skywaves must prove (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *See Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).

As an initial matter, and as discussed above, Skywaves cannot prevail on its claim for breach of contract. Necessarily, then, Skywaves cannot prove the first element of a claim for breach of contract accompanied by a fraudulent act. This, alone, is a sufficient basis for granting summary judgment in BB&T's favor. *See Baughman v. AT&T Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991) ("[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." (internal quotation marks omitted)).

In addition to its inability to prove a breach of the Factoring Agreement, Skywaves cannot point to evidence creating a genuine issue of material fact on the elements of fraudulent intent and a fraudulent act. *See Floyd v. County Squire Mobile Homes, Inc.*, 287 S.C. 51, 53, 336 S.E.2d 502, 503 (Ct. App. 1985) ("[M]ere breach of a contract, even if willful or with fraudulent purpose, is not sufficient to entitle a plaintiff to go to the jury on the issue of punitive damages.").

In its First Amended Complaint, Skywaves contended that “[t]he justification advanced by BB&T” for declaring a default “was pretextual, if not outright false,” and that the declaration of default was truly motivated by BB&T’s desire to “renegotiate” the terms of the Factoring Agreement. (R. pp. 89-90, Am. Compl. ¶ 35). Skywaves further articulated its allegations in its Opposition to BB&T’s Motion for Summary Judgment, where it claimed that BB&T “formally” declared a default during the meeting on January 17, 2008, and then, on January 25, “attempted to amend its declaration of default” by identifying three different events of default. (R. pp. 728-729, Skywaves Opp. to Mot. for Summ. J.).

While there is no doubt that BB&T was concerned about the site plan financing, nothing in the record supports Skywaves’ claim that BB&T declared a default, formally or otherwise, on January 17. But even if it had done so, the fact that the January 25 default letter identified different events of default does not support a claim for breach of contract accompanied by a fraudulent act. *See D.R. Horton, Inc. v. Wescott Land. Co.*, 398 S.C. 528, 556, 730 S.E.2d 340, 354-55 (Ct. App. 2012) (holding that the counterclaim defendant’s “shifting reasons for refusing to close” a real estate transaction might demonstrate fraudulent intent but “they are not evidence of an independent fraudulent act which accompanied the breach”). Because the unambiguous terms of the Factoring Agreement entitled BB&T to declare a default for each of the reasons identified in the January 25 letter, its declaration of default necessarily was not a fraudulent act. *Cf. Martin v. Hamilton State Bank*, 723 S.E.2d 726, 727 (Ga. Ct. App. 2012) (holding that there is no bad faith “where a party to a contract has done what the provisions of the contract expressly give him

the right to do” (internal quotation marks omitted)).

Skywaves makes much of the fact that Jim Edahl denied knowledge of the site plan financing when the issue arose during the meeting at Skywaves on January 17, 2008, and that he admitted during the course of these proceedings that he had, in fact, approved advances on the basis of site plans. This information, however, does not help Skywaves prove its claim for breach of contract accompanied by a fraudulent act. Edahl told Skywaves that BB&T would provide financing on the basis of site plans, and BB&T, in fact, provided site-plan financing from July 2007 until the end of the year.<sup>6</sup> Skywaves does not explain (because it cannot) how making a promise and fulfilling it constitutes either fraudulent intent or a fraudulent act. *See McNair v. Rainsford*, 330 S.C. 332, 358-59, 499 S.E.2d 488, 502 (Ct. App. 1998) (affirming summary judgment where plaintiff did not allege fraud with particularity and failed to offer evidence of any fraudulent act); *Minter v. GOCT, Inc.*, 322 S.C. 525, 529-30, 473 S.E.2d 67, 70-71 (Ct. App. 1996) (affirming directed verdict in the defendant’s favor because evidence of fraudulent intent “is not evidence of an independent fraudulent act which accompanied the breach” of contract).

More importantly, BB&T did not declare a default on the basis of site-plan financing but rather on the three grounds identified in the default letter, each of which was a wholly separate, independently adequate basis for declaring default. *See Capitol Radiology, LLC v. Sandy Spring Bank*, 439 Fed. Appx. 222, 226-27 (4th Cir. 2011) (holding that dispute regarding validity of one ground of default did not

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<sup>6</sup> At that point, Skywaves was effectively maxed out on the credit available to it under the Factoring Agreement. Thus, even if BB&T had not declared a default for other reasons, Skywaves could not have obtained additional site-plan financing.

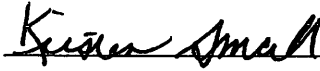
preclude summary judgment because the default also rested on another, “wholly separate” ground).

In summary, the evidence is insufficient to establish a genuine issue of fact for trial as to Skywaves’ claim for breach of contract accompanied by a fraudulent act. The circuit court therefore erred in denying BB&T’s motion for summary judgment.

### **CONCLUSION**

For the reasons set forth herein, BB&T respectfully asks the Court 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.

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Greenville, South Carolina  
September 6, 2016

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

**RECEIVED**  
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SC Court of Appeals

Skywaves I Corporation, ..... Appellant/ Respondent,

v.

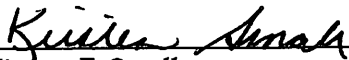
Branch Banking and Trust Company,  
Successor in Merger to Branch Banking and Trust  
Company of SC, a/k/a BB&T, ..... Respondent/ Appellant,

And

James Edahl, ..... Respondent,

CERTIFICATION OF COMPLIANCE

Undersigned counsel hereby certifies that the foregoing FINAL APPELLANT'S  
BRIEF OF RESPONDENT/ APPELLANT complies with Rule 211(b), SCACR.

  
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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

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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, Kirsten E. Small, Esquire, hereby certify that on the 6th day of September, 2016,  
I served a copy of the FINAL APPELLANT'S BRIEF OF RESPONDENT/APPELLANT,  
submitted by Respondent/Appellant Branch Banking and Trust Company, Successor in  
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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

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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 appealable?**

**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 issue 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<sup>1</sup>, 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

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<sup>1</sup> 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<sup>2</sup> 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*).<sup>3</sup>

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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<sup>2</sup> 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*).

<sup>3</sup> 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**

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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<sup>4</sup>:

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.

---

<sup>4</sup> 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 *assuming 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. Springstead*, 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?

7

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. Hennessey 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.

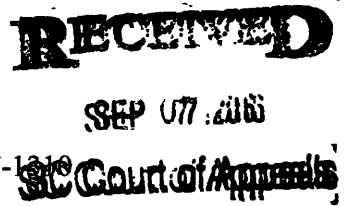
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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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

Roger M. Young, Circuit Court Judge

Appellate Case No. 2015-001809

**RECEIVED**

SFP 07 2016

SC Court of Appeals

Skywaves I Corporation.....Appellant/Respondent

v.

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

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

AND

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

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(continued on next page)

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

**RECEIVED**

SEP 08 2016

SC Court of Appeals

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v.

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

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

AND

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

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## ARGUMENT

### I. THIS COURT HAS DISCRETION TO CONSIDER BB&T'S CROSS-APPEAL.

Skywaves argues that in *Olson v. Faculty House of S.C.*, 354 S.C. 1, 580 S.E.2d 440 (2003), the Supreme Court “definitively foreclosed the appealability of summary judgment,” Resp.’s Br. of Appellant/Resp. at 15. Therefore, Skywaves contends, this Court has no discretion to consider BB&T’s cross-appeal of the denial of summary judgment on Skywaves’ claims for breach of contract and breach of contract accompanied by a fraudulent act. Skywaves is incorrect. In *Olson*, the Supreme Court distinguished, but did not overrule, *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985), in which the Court allowed an appeal from the denial of summary judgment in the interest of finally resolving a long-running case. *See id.* at 242-43, 335 S.E.2d at 799.

The *Olson* Court’s treatment of *Davis* indicates that the rule against appellate review of an interlocutory order is not as absolute as Skywaves would have it seem. The actual rule, as articulated in BB&T’s opening brief, is that an appellate court in South Carolina has discretion to review an otherwise unappealable order in conjunction with its review of an appealable order. Indeed, both the Supreme Court and this Court have recognized this rule in numerous cases decided after *Olson*. *See, e.g., Se. Housing Found. v. Smith*, 380 S.C. 621, 635 n.14, 670 S.E.2d 680, 688 n.14 (2008); *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 371 & n.20, 628 S.E.2d 902, 918 & n.10 (Ct. App. 2006); *Edge v. State Farm Mut. Ins. Co.*, 366 S.C. 511, 516-17, 623 S.E.2d 387, 390 (2005); *Brown v. Cty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005).

These decisions identify the parameters of the Court's discretion to consider an otherwise unauthorized appeal of an interlocutory order. *First*, the Court must already have before it an appealable issue. In all of the cases cited in the preceding paragraph, the question was whether the Court should review an otherwise unappealable order in addition to its review of an order subject to immediate appeal. *Second*, immediate review must be supported by principles of judicial economy. *See, e.g., Se. Housing Found.*, 380 S.C. at 635 n.14, 670 S.E.2d at 688 n.14 ("Because the trial court's grant of summary judgment ... is a final determination that is properly before this Court, we believe judicial economy argues for the resolution of Smith's arguments on the 60(b) motion at this time."); *Edge*, 366 S.C. at 516-17, 623 S.E.2d at 390 (exercising jurisdiction over cross-appeal of order denying motion to dismiss "because of judicial economy"). *Third*, there must be a nexus between the appealable order and the non-appealable order. *See Brown*, 366 S.C. at 362 n.5, 622 S.E.2d at 538 n.5 (declining to exercise jurisdiction when the unappealable issue "lack[ed] a sufficient nexus or companionship to justify this Court's exercise of immediate appellate review"); *accord Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338-39, 574 S.E.2d 502, 511-12 (Ct. App. 2002) (exercising jurisdiction over denial of summary judgment that was "closely connected to" appealable issues). BB&T's cross-appeal meets all of these criteria.

*Appealable Issue.* There is no dispute that Skywaves' appeal of the circuit court's grant of summary judgment on several of its claims is properly before the Court. Accordingly, this requirement is satisfied.

*Judicial Economy.* Judicial economy supports the exercise of jurisdiction here. As of the filing of this Reply Brief, this litigation has been ongoing for roughly 6½ years, since December 2009. It has already been the subject of one appeal, filed by Skywaves in 2011 and withdrawn in 2012. Consideration of BB&T's cross-appeal may "avoid another appeal in the future and potentially narrow the issues for trial," *Edge*, 366 S.C. at 517, 623 S.E.2d at 390—indeed, the case may be resolved in its entirety. Further, both parties have fully briefed the merits of BB&T's cross-appeal. *See Pitts*, 352 S.C. at 339, 574 S.E.2d at 512 (holding that exercise of discretion was supported by the fact that the parties had briefed the merits); *cf. State v. Hewins*, 409 S.C. 93, 113, 760 S.E.2d 814, 824 (2014) ("In the interest of judicial economy, we have decided to address the merits of this issue as the parties did in their briefs and at oral argument.").

*Nexus.* The issues raised in BB&T's cross-appeal are closely intertwined with the issues raised in Skywaves' appeal. The circuit court's summary judgment order addressed all of Skywaves' surviving claims, granting summary judgment to BB&T on the claims for promissory estoppel, breach of the covenant of good faith and fair dealing, negligent misrepresentation, and negligence, and denying summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act. All of these claims arise out of the same facts, and all rest, ultimately, on Skywaves' claim that BB&T improperly declared Skywaves to be in default of the Factoring Agreement in January 2008.

In view of the foregoing, BB&T respectfully asks the Court to exercise its discretion to review the denial of summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act.

**II. BB&T IS ENTITLED TO SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIM.**

Skywaves' breach of contract claim, as stated in its First Amended Complaint, alleges that BB&T breached the "modified factoring agreement" by "failing to perform its obligations thereunder and terminating the parties' agreement without cause." (R. p. 89, Am. Compl. ¶¶ 28, 31). Knowing it cannot succeed on this theory, Skywaves asserts a new theory on appeal: that BB&T breached the Factoring Agreement by "demand[ing] immediate repayment of all advances that BB&T had made to Skywaves," even though "Skywaves was not obligated to repay any of the money advanced on site plans until the line of credit expired in April 2008." Resp.'s Br. of Appellant/Resp., at 15. "It is well settled that one cannot present and try his case on one theory and then change his theory on appeal." *Gurganious v. City of Beaufort*, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995).

Regardless of the theory, however, Skywaves cannot point to evidence creating a genuine issue of material fact on its breach of contract claim. Therefore, BB&T is entitled to summary judgment.

**A. Skywaves misstates the standard of review.**

Throughout its brief, Skywaves repeatedly asserts that the circuit court's denial of summary judgment should be affirmed because BB&T has not shown that Skywaves was in default under the Factoring Agreement. *See, e.g.*, Resp.'s Br. of

Appellant/Resp., at 18 (arguing that BB&T “has not shown that Skywaves breached this provision of the Factoring Agreement”). Skywaves ignores that it is the plaintiff in this litigation, not BB&T. The burden is on Skywaves to prove the elements of its claim that BB&T breached the Factoring Agreement by declaring a default. *See Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 506 (Ct. App. 2012) (“To recover for a breach of contract, *the plaintiff must prove*: (1) a binding contract; (2) a breach of contract; and (3) damages proximately resulting from the breach.” (emphasis added)). Therefore, to avoid summary judgment Skywaves must point to evidence that would permit a reasonable factfinder to conclude that it was *not* in default under the Factoring Agreement. *See S.C. Nat’l Bank v. S. Polymers, Inc.*, 313 S.C. 246, 249, 437 S.E.2d 148, 149 (Ct. App. 1993) (holding that to avoid summary judgment on claim that lender breached contract by declaring default under “deems insecure” clause, plaintiff must demonstrate that “the evidence was susceptible of the inference that the [defendant bank] was *without reasonable grounds* for insecurity” (emphasis added)).

**B. Skywaves mischaracterizes the documentary and testimonial evidence.**

Skywaves contends that BB&T cannot be entitled to summary judgment unless it first “overcome[s] the genuine issues of material fact regarding the actual terms of the” Factoring Agreement. Resp.’s Br. of Appellant/Resp., at 5. In reality, however, there is very little dispute about the terms of Factoring Agreement, either as it was executed in 2005 or as modified over time. In particular, there is no dispute that BB&T agreed to advance funds on the basis of site plans submitted by General Dynamics, nor is there any dispute that such funding was provided, exactly as

promised.<sup>1</sup> The only factual dispute regarding modifications to the Factoring Agreement is over Skywaves' claim that it was allowed to keep payments on factored invoices for up to 60 days, rather than remitting them immediately to BB&T. But, as discussed *infra*, even if Skywaves' allegation is accepted as true, BB&T is still entitled to summary judgment.

Skywaves' recitation of "Underlying Facts," Resp.'s Br. of Appellant/Resp., at 5-12, is replete with errors and half-truths. This becomes clear when the statements in Skywaves' brief are compared to the actual documents and testimony.

**1. Skywaves misstates the terms of the Factoring Agreement.**

Skywaves' description of the terms of the Factoring Agreement is almost entirely incorrect. According to Skywaves,

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. Through this Factoring Agreement, Skywaves could obtain prompt partial payment of invoices and repay the advance once the customer paid the invoice in full.

Resp.'s Br. of Appellant/Resp., at 6 (citation omitted). The first part of the statement is correct: under the Factoring Agreement, BB&T purchased Skywaves' invoices for 80 percent of their face value.<sup>2</sup> (R. p. 404, Factoring Agreement ¶ 1(a) (defining

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<sup>1</sup> Skywaves makes much of Jim Edahl's deposition testimony and subsequent affidavit correcting his testimony, concerning the agreement to provide funds on the basis of site plans submitted by General Dynamics. (These events are discussed in BB&T's Respondent's Brief of Respondent/Appellant, at 24-28.) There is no dispute, however, that the agreement was made and that BB&T provided funds on the basis of site plans, exactly as it had agreed to do. Moreover, as discussed *infra*, the site plan funding was not the reason BB&T declared Skywaves in default of the Factoring Agreement.

<sup>2</sup> The Factoring Agreement was subsequently modified to increase the Advance Percentage to 85 percent on invoices. The advance percentage for purchase orders

“Advance Percentage”)). The remainder of the statement, however, reflects a fundamental misunderstanding of both how factoring works generally, and of the specific terms of terms the Factoring Agreement between Skywaves and BB&T. In general terms, factoring is a form of financing in which “[a] factor purchases the accounts receivable without recourse but at a discount, and then collects the accounts.” *Ivey v. First Citizens Bank & Trust Co.*, 539 B.R. 77, 79 (M.D.N.C. 2015). At that point, the factor owns the receivable, and payment is due from the customer to the factor, not to the company. The benefit to the company is improved cash flow; the benefit to the factor is the margin between the purchase price and the amount collected on the account, plus any fees the factor may charge.

Consistent with this definition of factoring, the Factoring Agreement between Skywaves and BB&T clearly provided that BB&T *purchased* invoices from Skywaves. (R. p. 408, Factoring Agreement ¶ 2 (providing that BB&T became the “absolute owner” of factored invoices)). Because BB&T owned the factored invoices, the Factoring Agreement required Skywaves to include language on factored invoices “stat[ing] plainly on the face thereof that the Account represented by such invoice has been assigned and sold to, is owned by and is payable to BB&T.” (R. p. 411, Factoring Agreement ¶ 10). Payments on factored invoices were supposed to be made by the customer directly to BB&T. In the event a Skywaves customer mistakenly sent payment on a factored invoice to Skywaves, the Factoring Agreement required Skywaves to hold the payment “as the property of BB&T,” to keep it separate from

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(and, eventually, for site plans) was 65 percent. (R. p. 423, Letter from Edahl to Voytko (Mar. 2, 2007)).

Skywaves' funds, and to remit the payment to BB&T without delay. (R. p. 410, Factoring Agreement ¶ 8).

In view of the foregoing, Skywaves' statements that "[u]nder the Factoring Agreement ... Skywaves was required to repay the sums [for factored invoices] when it received payment from the customer," and that "Skywaves could obtain prompt partial payment of invoices and repay the advance once the customer paid in full," Resp.'s Br. of Appellant/Resp., at 6, are obviously wrong.<sup>3</sup> These statements assume, contrary to the terms of the Factoring Agreement, that payments on factored invoices could go directly to Skywaves and, worse, that payments on factored invoices belonged to Skywaves, not to BB&T. Throughout the existence of the factoring relationship, however, Skywaves persistently failed to notify its customers that payment on factored invoices was due directly to BB&T, and it persistently held onto payments on factored invoices rather than remitting them immediately to BB&T. Although BB&T elected not to place Skywaves in default each time this happened, it nevertheless repeatedly reminded Skywaves of its obligations under the Factoring Agreement. (R. p. 1059, Morris Dep. 65:1-21).

**2. BB&T was not fully cognizant of Skywaves' financial condition in December 2007 and early January 2008.**

Attempting to suggest that BB&T somehow did something underhanded by declaring a default of the Factoring Agreement on January 25, 2008, Skywaves claims that BB&T was "[f]ully cognizant of Skywaves' financial condition" in

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<sup>3</sup> Skywaves' statement that "BB&T maintained a security interest in the [factored] invoice," Resp.'s Br. of Appellant/Resp., at 8, is also wrong, because BB&T *owned* the factored invoices.

December 2007 and early January 2008, and yet took no action. Resp.'s Br. of Appellant/Resp., at 10. However, the testimony of Skywaves' CFO, John Voytko, contradicts Skywaves' claim.

Skywaves initially projected a net income of \$1.4 million for 2007.<sup>4</sup> (R. p. S-5, 2007 Projection). In September, it adjusted its projections, estimating a net loss of (\$120,532). (R. p. S-18, Revised 2007 Projection). However, the revised projection also estimated positive net income for the months of October, November, and December 2007. (*Id.*). Although Skywaves was supposed to provide BB&T with monthly financial statements, information for the fourth quarter of 2007 was not provided until January 17, 2008—at which point it became clear to BB&T that Skywaves had incurred massive losses (rather than the predicted profits) during October, November, and December. At that point, BB&T brought in Mike Hennessy, a problem loan administrator.

BB&T was certainly concerned about Skywaves' financial condition prior to mid-January 2008. Internal memos, confirmed by deposition testimony, reflect the bank's growing concern about Skywaves' finances. (R. p. S-39, Email from Denning to Edahl (Sept. 7, 2007);<sup>5</sup> R. p. S-46, Memo from Edahl to Denning (Sept. 20, 2007); R. p. S-49, Memo from Edahl to Denning (Nov. 12, 2007)). Skywaves seems to believe that BB&T should have declared a default as soon as the first cloud appeared

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<sup>4</sup> The facts summarized here are set forth in more detail in BB&T's opening brief. See Appellant's Br. of Resp./Appellant, at 8-12.

<sup>5</sup> The September 7, 2007 email from Walter Denning to Jim Edahl summarized the discussion of Skywaves during a meeting of the Business Loan Subcommittee. Denning noted, "I do want to stress, our position is not to increase our exposure ... The company must understand that any additional needs should be funded through additional equity investment or other sources."

on Skywaves' horizon. This is a rather ironic stance, given that the premise of every one of Skywaves' claims is that success was just around the corner if BB&T had just kept funding it a little longer. Moreover, Skywaves ignores that it entered into the Factoring Agreement because it was a startup company, and short on cash—a fact of which BB&T was perfectly aware.

**3. The site-plan funding was not the reason BB&T declared Skywaves in default.**

When Mike Hennessey became involved in mid-January 2008, he initially thought that Skywaves had represented the site plans as being purchase orders, because that is what Ron Konersmann and John Voytko told him. (R. p. 1080, Hennessey Dep. 23:3-8). Skywaves notes that Hennessey testified that if he had known, in January 2008, that BB&T had authorized funding based on site plans, he “would not have considered Skywaves [to be] in default on the site plan funding program.” (R. p. 1020, BB&T 30(b)(6) Dep. 65:8-16). However, Hennessey also made clear that this knowledge “wouldn’t have made any difference because the default [was] not based upon” the funding of site plans; “[t]he default [was] based upon the financial condition of Skywaves.” (R. p. 1019, BB&T 30(b)(6) Dep. 64:14-18). Additionally, a memo written by Mike Burke makes clear that BB&T was very concerned about Skywaves' failure to remit payments on factored invoices, and that this concern was clearly communicated to Skywaves. (R. p. S-52-53, Memo from Burke to Allard (Jan. 24, 2008)).

**C. Skywaves cannot show a genuine issue of material fact regarding BB&T's right to declare Skywaves in default.**

**1. Skywaves failed to remit payments on factored invoices.**

The Factoring Agreement provided that customer payments on factored invoices were to be made directly to BB&T. (R. p. 411, Factoring Agreement ¶ 10). The Agreement also provided that if a Skywaves customer mistakenly sent payment on a factored invoice to Skywaves, rather than to BB&T, Skywaves, "as trustee of an express trust created for BB&T's benefit ... shall immediately turn over to BB&T the identical checks ... or other forms of payment received." (R. p. 410, Factoring Agreement ¶ 8). Skywaves' failure to comply with this provision was the first ground of default identified in the January 25, 2008 Default Letter. Additionally, on January 22, 2008 Mike Burke spoke with Konersmann and Voytko regarding \$342,000 in payments on factored invoices that had not been sent to the bank; Burke "advised both that this was a serious issue and that we expected to be repaid this money at once." (R. p. S-52, Memo from Burke to Allard (Jan. 28, 2008)).

Skywaves contends that the parties agreed to a modification of the Factoring Agreement, under which it was allowed to keep misdirected payments on factored invoices for up to 60 days (effectively giving itself interest-free short-term loans amounting to hundreds of thousands of dollars).<sup>6</sup> Although the Factoring Agreement

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<sup>6</sup> Skywaves confuses the issue by contending that it had no obligation to "repay" advances on site plans or purchase orders until it issued an invoice to a customer. Resp.'s Br. of Appellant/Resp., at 8. This is a correct statement, in that the customer would have no obligation to send payment to BB&T until the structure had been built and an invoice issued. However, it has nothing to do with the first ground of default, which concerned what happened *after* Skywaves issued an invoice to a customer. Skywaves was in default because when a customer sent payment to Skywaves rather than to BB&T, Skywaves kept the money rather than remitting it immediately to BB&T.

required any modification of its terms to be made through a signed writing (R. p. 416, Factoring Agreement ¶ 24), there is no written modification of the Factoring Agreement incorporating this change. There is, however, substantial documentary evidence indicating that no such modification was ever made. Among other things, the record includes at least three separate emails from Castlen Morris to John Voytko reminding him of Skywaves' obligation to promptly remit to BB&T all payments on factored invoices. (R. p. 430, Email from Morris to Voytko (Feb. 15, 2006); R. p. 431, email from Morris to Voytko (June 5, 2006); R. p. 432, email from Morris to Voytko (Feb. 14, 2007)). For example, Morris emailed Voytko in June 2006 about \$150,000 Skywaves had held for "30+ days." If there really were a 60-day grace period, one would expect that such an email would not have been sent, or that Voytko would have responded by reminding BB&T of the terms of their deal. But, such emails were sent—repeatedly, in fact—and there is no evidence that Voytko, or anyone else at Skywaves, ever told Morris that Skywaves was allowed to keep payments for up to 60 days.

Undeterred, Skywaves contends that the modification was made orally, citing *Son-Shine Grading Co. v. ADC Constr. Co.*, 68 N.C. App. 417, 315 S.E.2d 346 (1984), for the proposition that a written contract may be orally modified even when it prohibits oral modifications.<sup>7</sup> Resp.'s Br. of Appellant/Resp., at 17. However, while North Carolina courts have "recognize[d] the validity of an oral modification to a written contract despite the contract's inclusion of a 'no oral modifications' clause, [they]

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<sup>7</sup> To the extent Skywaves believes a modification occurred because BB&T did not immediately declare a default when Skywaves held onto a misdirected payment, it is incorrect. The Factoring Agreement clearly provides that any leeway granted by BB&T did not operate as a waiver. (R. pp. 415-416, Factoring Agreement ¶ 23).

have not done so where, as here, the original contract was subject to the statute of frauds.” *Nixon Assocs., LLC v. Brown*, 768 S.E.2d 201, 2014 WL 7466753, at \*3 (N.C. Ct. App. 2014) (distinguishing *Son-Shine Grading*). When the statute of frauds requires that a contract be in writing, any oral modification of that contract “will be ineffectual unless there is some memorandum of it.” *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984).

Even if Skywaves’ claimed oral modification were accepted as true, Skywaves still cannot show that it was not in default. Skywaves acknowledged that holding a misdirected payment on a factored invoice for more than 60 days would violate the Factoring Agreement as (allegedly) modified. (R. pp. 336-337, Konersmann Dep. 124:20-125:10). The evidence in the record demonstrates that more than once, Skywaves held such payments longer than 60 days:

- In November 2006, BB&T notified Skywaves that nearly \$80,000 paid to Skywaves by Cingular was “60+ days past due.” (R. p. 994, Voytko Dep. 98:5-100:5).
- In August 2007, BB&T questioned Skywaves regarding a payment from Verizon that Skywaves held for *three months*—far longer than the supposed 60-day grace period. (R. p. 1057, Morris Dep. 57:10-58:12).
- On September 18, 2007, Skywaves notified BB&T that it was finally remitting a payment made by Verizon on 70 days earlier. (R. p. 1059, Morris Dep. 66:1-67:9).

Moreover, BB&T warned Skywaves, over and over, that it was not permitted to hold payments on factored invoices. (R. p. 449, Sept. 2007 notes; R. p. 1059, Morris Dep. 65:5-8).

## **2. Skywaves was not paying its debts as they came due.**

The second ground of default was that Skywaves was not paying its debts as they came due in the ordinary course of business. (R. pp. 454-455, Default Letter).

Skywaves devotes only 17 lines of its brief to this issue, and it points to no evidence at all to show that it was in compliance with this term of the Factoring Agreement. Nor can it do so, given that both Ron Konersmann and John Voytko admitted that Skywaves was substantially overdue on payments to a number of vendors. (R. pp. 399-400, Voytko Dep. 194:15-195:2; R. pp. 363-364, Konersmann Dep. 342:16-343:21). In addition, a field auditor examined Skywaves' financial records through December 31, 2007, and determined that Skywaves had total accounts payable of \$977,843, and of that amount, \$362,207 was over 60 days old. (R. p. 860, Audit Report).<sup>8</sup> Skywaves was also delinquent on its payroll taxes. (*Id.*) In light of the testimony and the documentary evidence, no reasonable factfinder could conclude that Skywaves was paying its debts as they came due.

**3. BB&T had a good-faith basis for deeming itself insecure.**

In its opening brief, BB&T explained why the undisputed facts establish that it had a good faith basis for deeming itself insecure, an event of default under the Factoring Agreement. Appellant's Br. of Resp./Appellant, at 24-26. Skywaves does not attempt to challenge the facts, but instead expresses outrage that BB&T supported its argument with citations to the North Carolina Uniform Commercial Code (NC-UCC), N.C. Gen. Stat. §§ 25-1-101, *et seq.*<sup>9</sup> According to Skywaves, there

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<sup>8</sup> Skywaves contends that most of this amount was owed to Franz Meier, who was an investor in Skywaves and who had agreed to give Skywaves more time to pay. But, Skywaves does not attempt to refute BB&T's argument that forbearance by a corporate insider is not "the ordinary course of business." Further, Skywaves does not dispute that a portion of its overdue accounts payable were owed to creditors who were not insiders of the company.

<sup>9</sup> BB&T cited N.C. Gen. Stat. § 25-1-309 (providing that a "deems insecure" contract term may be invoked "only if that party in good faith believes that the

is no “legal or factual basis” for applying the NC-UCC to the Factoring Agreement. Resp.’s Br. of Appellant/Resp., at 20. Skywaves is wrong, both legally and factually. As a legal matter, the Factoring Agreement is “[a] sale of accounts, chattel paper, payment intangibles, or promissory notes” and thus is covered by NC-UCC Article 9, Secured Transactions. N.C. Gen. Stat. § 25-9-109(a)(3); see *Rentenbach Constructors, Inc. v. CM P’ship*, 181 N.C. App. 268, 271, 639 S.E.2d 16, 18 (2007). As a factual matter, the Factoring Agreement defines “UCC” as referring to the NC-UCC (R. p. 407, Factoring Agreement ¶ 1(a)); incorporates the NC-UCC’s definition of several terms (R. p. 407, Factoring Agreement ¶ 1(b)); and elsewhere incorporates portions of the NC-UCC. (R. pp. 412-414, Factoring Agreement ¶¶ 13, 14, 17).

As a fallback, Skywaves contends that even if the NC-UCC applies, § 25-1-309 “does not permit a party to *terminate an agreement* because they feel insecure, reasonably or otherwise.” Resp.’s Br. of Appellant/Resp., at 20 (emphasis added).<sup>10</sup> But, of course, BB&T did not “terminate” the Factoring Agreement; it declared Skywaves in default, with the goal of working through the issues with Skywaves. (R.

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prospect of payment or performance is impaired”) and N.C. Gen. Stat. § 25-1-201(b)(20) (defining “good faith” as “honesty in fact and the observance of commercially reasonable standards of dealing”). Based on these definitions, BB&T identified the specific, undisputed facts supporting its invocation of the “deems insecure” clause as a ground of default. Appellant’s Br. of Resp./Appellant, at 24-25.

<sup>10</sup> Skywaves describes the “deems insecure” clause as “unenforceable, baseless, [and] self-serving.” Resp.’s Br. of Appellant/Resp., at 20. Skywaves’ claim that the “deems insecure” clause is unenforceable was not raised below, and in any event is without merit. See *Crockett v. First Fed. Sav. & Loan Ass’n of Charlotte*, 289 N.C. App. 620, 631, 224 S.E.2d 580, 588 (1976). The claim that the clause is “baseless” is non-sensical. As for “self-serving,” Konersmann himself agreed, under oath, that the Factoring Agreement “is protecting the bank, *which is fine*, you know, *it’s their money* and we are borrowing it.” (R. pp. 346-347, Konersmann Dep. 169:24-170:2 (emphasis added)).

p. 1022, BB&T 30(b)(6) Dep. 110:1-5 (“If a default exists, almost every single problem loan administrator calls that default, and then we work through the issues if we can. But you don’t ever waive a default until you call it.”); R. p. 1021, BB&T 30(b)(6) Dep. 108:5-6 (testifying that the declaration of default “started the conversation”)). Critically, **BB&T continued to fund Skywaves even after declaring the default.** (R. p. 1021, BB&T 30(b)(6) Dep. 107:14-18). Specifically, BB&T funded payroll and advanced funds to enable Skywaves to build shelters ordered by Verizon. (R. p. 1043, BB&T 30(b)(6) Dep. 144:12-24).

**D. Because BB&T was entitled to declare a default under the plain terms of the Factoring Agreement, Skywaves’ other arguments are irrelevant.**

**1. The materiality of Skywaves’ defaults is irrelevant because BB&T was entitled to declare a default under the plain terms of the Factoring Agreement.**

Skywaves argues at length that BB&T failed to establish that Skywaves’ defaults under the Factoring Agreement were material, such that BB&T’s declaration of default was not justified. Resp.’s Br. of Appellant/Resp., at 21-27. As an initial matter, Skywaves, not BB&T, has the burden of proof. Regardless, however, the cases on which Skywaves relies do not support its argument.

Skywaves cites numerous cases in support of its purported rule that only a *material* violation of contract terms justifies a declaration of default. The cited cases, however, involved claims for equitable relief, where the presence or absence of a material breach was a necessary prerequisite to obtaining the relief sought. *See, e.g., Ebert v. Ebert*, 735 S.E.2d 451 (Table), 2012 WL 5857386, at \*2-\*3 (N.C. Ct. App. 2012) (holding that a party who is in material breach of a contract is not entitled to

specific performance); *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 705, 682 S.E.2d 726, 738-39 (2009) (holding equitable remedy of rescission is available only if other party's breach goes to the heart of the parties' bargain); *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 243 (1964) ("The right to rescind does not exist where the breach ... does not go to the heart of an agreement.").

The problem with Skywaves' reliance on these cases is twofold. First, Skywaves is seeking damages, not an equitable remedy. Therefore, cases discussing the standard for obtaining equitable relief are entirely irrelevant. Second, and more fundamentally, Skywaves again ignores that it bears the burden of proof. If the materiality of its default were an issue, it would be up to Skywaves to prove that its default was *not* material.

Materiality is not an issue in this case, because the plain terms of the Factoring Agreement entitled BB&T to declare a default. North Carolina law is clear that when "contract language is plain and unambiguous on its face," it "will be enforced as written as a matter of law." *Fairview Developers, Inc. v. Miller*, 187 N.C. App. 168, 172, 652 S.E.2d 365, 368 (2007); see *Kenley Family P'ship v. Yu*, 635 S.E.2d 537, 2006 WL 2947148, at \*2 (N.C. Ct. App. 2006) (unpublished) (holding that default clause must be enforced as written); accord, e.g., *Bank of Am., N.A. v. JB Hana, LLC*, 766 F.3d 841, 856 (8th Cir. 2014) (holding lender was entitled, under the plain terms of the contract, to declare a default); *J.E. Robert Co. v. Signature Props., LLC*, 71 A.3d 492, 508-09 (Conn. 2013) (same); *First State Bank of Or. v. Hoehnke Nursery Co.*, 667 P.2d 1022, 1025 (Or. Ct. App. 1983) (same).

**2. BB&T did not waive its right to declare a default.**

Skywaves additionally contends that BB&T waived its right to call a default by not doing so the very first time Skywaves held onto a misdirected payment on a factored invoice. Resp.'s Br. of Appellant/Resp., at 23-24. Skywaves once again ignores the plain language of the Factoring Agreement, which made clear that leniency on BB&T's part would not constitute a waiver. (R. p. 415, Factoring Agreement ¶ 23 ("Neither the failure nor any delay on the part of BB&T to exercise any right, remedy, power or privilege hereunder shall operate as a waiver thereof ..."))).

The cases Skywaves cites in support of this argument involved contracts for the sale of real property. Therefore, they are not controlling in this case, which is concerned with a lending contract. *See Speer v. Great W. Bank*, 2016 WL 791203, at \*4 (N.C. Ct. App. Mar. 1, 2016) (making this distinction). In the context of lending agreements, North Carolina law is clear that "no waiver results from isolated instances of acceptance of late payments." *Barker v. Agee*, 93 N.C. App. 537, 541, 378 S.E.2d 566, 569 (1989). Waiver occurs only upon "a consistent course of accepting past-due installments." *Id.* Even then, "such waiver certainly [does] not render the Note unenforceable for all time." *Speer*, 2016 WL 791203, at \*4. If the lender notifies the borrower "that prompt payment is again required," a subsequent late payment will entitle the lender to hold the borrower in default. *Driftwood Manor Invs. v. City Fed. Sav. & Loan Ass'n*, 63 N.C. App. 459, 464, 305 S.E.2d 204, 207 (1983).

Skywaves' waiver argument also fails because settled North Carolina law holds that a waiver does not occur when a lender, although not calling a default, "makes clear to the debtor its intent to hold the debtor to the terms of the agree-

ment.” *NationsBank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 270, 447 S.E.2d 812, 816 (1994). In this case, BB&T repeatedly reminded Skywaves that payments on factored invoices were to be made directly to the bank, and routinely warned Skywaves that failure to promptly remit misdirected payments was a violation of the Factoring Agreement. Such reminders and warnings were given throughout the existence of the Factoring Agreement, including on February 15, 2006 (R. p. 430, Email from Morris to Voytko); June 5, 2006 (R. p. 431, Email from Morris to Voytko regarding payments on factored invoices held for “30+ days”); February 14, 2007 (R. p. 432, Email from Morris to Voytko); and in August and September of 2007 (R. p. 449, Sept. 2007 notes). Under these circumstances, Skywaves could not reasonably believe that BB&T was intentionally abandoning its right to prompt remittance of misdirected payments on factored invoices.

This point is reinforced by Paragraph 29 of the Factoring Agreement, which provides that Skywaves “knowingly, intelligently and expressly waives demand, protest, notice of protest, notice of default or dishonor, notice of payment or nonpayment, and notice of default.” (R. p. 416, Factoring Agreement ¶ 29). North Carolina courts will recognize and enforce such provisions according to their terms. *See, e.g., Harty v. Underhill*, 211 N.C. App. 546, 553-54, 710 S.E.2d 327, 333 (2011). In light of this provision, and regardless of any warnings or reminders given to Skywaves, no waiver was created by BB&T’s decision not to place Skywaves in default every time it violated the plain terms of the Factoring Agreement. However, as has already been noted, BB&T repeatedly reminded Skywaves of its obligation to immediately remit payments on factored invoices to BB&T and, on multiple

occasions, warned Skywaves that its failure to comply with the factoring agreement would jeopardize its relationship with the bank. *See Nixon Assocs.*, 2014 WL 7466753, at \*5 (holding that acceptance of partial rent payments did not establish waiver of right to collect unpaid rent under the terms of the lease agreement).

**III. BB&T IS ENTITLED TO SUMMARY JUDGMENT ON SKYWAVES' CLAIM FOR BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT.**

Skywaves does not respond to BB&T's argument that this claim sounds in tort, and thus is governed by South Carolina law. Appellant's Br. of Resp./Appellant, at 26-27. Under South Carolina law, to survive summary judgment on a claim of breach of contract accompanied by a fraudulent act, the plaintiff must create a genuine issue of material fact as to each of three elements: (1) a breach of contract; (2) fraudulent intent relating to the breach (and not merely to the making of the contract); 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).

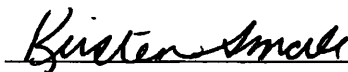
Skywaves cannot create an issue of fact on any of these elements. First, as discussed at length in Part II of this brief, Skywaves cannot point to evidence that would allow a reasonable factfinder to conclude that BB&T breached the Factoring Agreement by calling a default. Second, Skywaves cannot show fraudulent intent. Although Skywaves asserts that there is evidence that "BB&T misrepresented its motive" for declaring the default, Resp.'s Br. of Appellant/Resp., at 28, it does not identify any such evidence. Moreover, even if BB&T had some undisclosed motive for declaring a default, the simple reality is that the plain terms of the Factoring Agreement entitled it to do so. *See Martin v. Hamilton State Bank*, 723 S.E.2d 726, 728-29 (Ga. Ct. App. 2012) (holding that a bank's possible motivation was immaterial

because the terms of the agreement entitled it to declare a default). Third, there is no evidence at all of any fraudulent act committed by BB&T. The only “act” identified by Skywaves is the declaration of default, *i.e.*, the act that constitutes the alleged breach of contract. Skywaves does not identify any other fraudulent act committed by BB&T. Therefore, BB&T is entitled to summary judgment on Skywaves’ claim for breach of contract accompanied by a fraudulent act.

## CONCLUSION

For the foregoing reasons, BB&T respectfully asks the Court to exercise its discretion to consider the merits of BB&T's cross appeal and to reverse the denial of summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act.

Respectfully submitted,



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Greenville, South Carolina  
September 6, 2016

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

**RECEIVED**  
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SC Court of Appeals

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,

CERTIFICATION OF COMPLIANCE

Undersigned counsel hereby certifies that the foregoing FINAL REPLY BRIEF OF  
RESPONDENT/ APPELLANT complies with Rule 211(b), SCACR.



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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,

**PROOF OF SERVICE**

I, Kirsten E. Small, Esquire, hereby certify that on the 6th day of September, 2016,  
I served a copy of the FINAL REPLY BRIEF OF RESPONDENT/APPELLANT,  
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  
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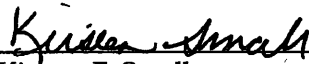
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