THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

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,

PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and was finally ruled on by the Court of Appeals on June 21, 2018.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in refusing to review the denial of BB&T's motion for summary judgment, where review is authorized by this Court's decisions in *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985), *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003) ("*Olson II*"), and *Brown v. County of Berkeley*, 366 S.C. 354, 622 S.E.2d 533 (2005)?

2. Did the Court of Appeals err in failing to apply the law of the forum state, South Carolina, when assessing the viability of a waiver of the procedural right to a jury trial?

INTRODUCTION

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

STATEMENT OF THE CASE

The Court of Appeals' Opinion accurately stated the undisputed facts, which are as follows. In March 2005, Skywaves entered into a factoring agreement (the "Factoring Agreement") with BB&T, pursuant to which BB&T agreed to purchase, at 80 percent of face value, invoices for telecommunications structures built by Skywaves and shipped to customers. BB&T was entitled to terminate the Factoring Agreement upon the occurrence of an "Event of Default" such as violation of Skywaves' financial covenants, including its inability to pay its debts as they came due in the ordinary course of business; Skywaves' failure to comply with its obligations under the Factoring Agreement; and BB&T "for any other reason deem[ing] itself insecure or the Collateral impaired." (Pet. App. 682, Factoring Agreement ¶ 12).

Skywaves never fully met its obligation to have its customers make payments directly

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

to BB&T, asserting that some customers were unable or unwilling to do so. At the same time, Skywaves claimed that BB&T had authorized it to retain misdirected payments for up to 30 days. This claim was not supported by any documentary evidence and, in fact, was affirmatively contradicted by BB&T's repeated admonitions and warnings that Skywaves' chronic failure to promptly remit payments could be treated as a violation of the Factoring Agreement.

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

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

On January 25, 2008, BB&T notified Skywaves that it was in default of the Factoring

Agreement. (Pet. App. 724-25, Default Letter). The default letter identified three events of default, all based on the January field audit and each an independently sufficient basis for a default under the terms of the Factoring Agreement:

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

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

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

ARGUMENT

I. THE COURT OF APPEALS SHOULD HAVE EXERCISED ITS DISCRETION TO REVIEW THE DENIAL OF BB&T'S MOTION FOR SUMMARY JUDGMENT.

After Skywaves appealed the orders striking the jury demand and granting summary judgment to BB&T on the tort claims, BB&T cross-appealed the denial of summary judgment on the contract claims. The Court of Appeals dismissed BB&T's cross-appeal, reasoning that in *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003) ("*Olson II*"), this Court had abolished the exception permitting review of otherwise-unappealable orders in conjunction with review of closely related, appealable orders. (Pet. App. 1565). This Court should grant certiorari because the Court of Appeals' decision is in conflict with this Court's decision in *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985),

which was distinguished, but not overruled, in *Olson II.* The Court of Appeals' ruling is also in conflict with *Brown v. County of Berkeley*, 366 S.C. 354, 622 S.E.2d 533 (2005), a post-*Olson II* decision in which this Court recognized that an appellate court has discretion to review an otherwise-unappealable order when it is closely related to an appealable order that is before the court.

In *Olson II*, this Court granted certiorari to review the Court of Appeals' decision in *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001) ("*Olson I*"). The opinion in *Olson I* recognized "that generally, the denial of a motion for summary judgment is not immediately appealable," but also noted that "the courts have made a practice of accepting appeals of denials of interlocutory orders ... when these appeals are companion to issues that are reviewable." *Id.* at 216, 544 S.E.2d at 49. The Court of Appeals cited several cases as examples of this practice. *See id.* at 216-18, 544 S.E.2d at 49-50 (citing *Garrett v. Snedigar*, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992), and *Tanner v. Florence City–County Bldg. Comm'n*, 333 S.C. 549, 553, 511 S.E.2d 369, 371 (Ct. App. 1999)). The Court of Appeals noted, however, decisions by this Court seemed to cast doubt on the continuing viability of this practice. *See Olson I*, 344 S.C. at 218-19, 544 S.E.2d at 51 (citing *Silverman v. Campbell*, 326 S.C. 208, 486 S.E.2d 1 (1997), and *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994)). The Court of Appeals also noted that in *Davis*, this Court "held reviewing the denial of summary judgment was proper to resolve protracted litigation," even though the denial of summary judgment "was the only one on appeal." *Olson I*, 344 S.C. at 218, 544 S.E.2d at 51). Ultimately, the Court of Appeals in *Olson I* declined to review the denial of summary judgment. *See id.* at 219, 544 S.E.2d at 51.

In *Olson II*, this Court affirmed the Court of Appeal's refusal to review the denial of summary judgment and specifically overruled *Garrett*, *Anthony*, and *Tanner*. *See Olson II*, 354 S.C. at 168 & n.8, 580 S.E.2d at 444 & n.8. However, the Court distinguished, *but did not overrule*, its decision in *Davis*. *See Olson II*, 354 S.C. at 167-68, 580 S.E.2d at 444 (describing *Davis* as "[t]he only recent exception to this rule," where the Court "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 13 years"); *see also Morris v. Anderson Cty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) ("[T]his Court may, as a matter of discretion, consider an unappealable order along with an appealable issue *where such a ruling will avoid unnecessary litigation*." (emphasis added)).

In this case, the Court of Appeals erred by failing to recognize the import of this Court's treatment of *Davis* in *Olson II*. The central holding of *Olson II* is that a denial of summary judgment is not reviewable *solely* because it is accompanied on appeal by a reviewable order. That was the rule espoused in *Garrett*, *Anthony*, and *Tanner*, all of which the Court overruled. But if a denial of summary judgment were *never* reviewable on appeal, this Court would also have overruled *Davis*, in which the denial of summary judgment was the *only* issue on appeal. Moreover, this Court in *Olson II* did not simply ignore or overlook *Davis*, but instead cited *Davis* as a "recent exception" to the general rule against appellate review of summary judgment denials. The ultimate lesson of *Olson II*, therefore, is that an appellate court has discretion to review a denial of summary judgment, at least when immediate review will advance the resolution of long-pending litigation. *See Davis*, 287 S.C. at 243, 335 S.E.2d at 799 (accepting appeal of denial of summary judgment "[b]ecause of the need for final resolution" in a long-pending medical malpractice action).

The exercise of such discretionary review is warranted in this case to bring finality to the parties' dispute. The events giving rise to this litigation occurred more than a decade ago, in 2007 and early 2008, and the case has been pending since December 2009. *Cf. Davis*, 287 S.C. at 243, 335 S.E.2d at 799 (reviewing the denial of summary judgment in litigation that arose from a medical procedure performed more than a decade earlier). The circuit court has dismissed or granted summary judgment on all of the numerous tort claims asserted by Skywaves, and the Court of Appeals has affirmed those rulings. Thus, only Skywaves' contract claims remain, and as explained in BB&T's briefs, these claims clearly fail as a matter of law. Therefore, review of the denial of summary judgment will fully—and finally—bring an end to 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. *Cf. Brown v. Cty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (recognizing discretion to accept appeal of an interlocutory order "when these appeals are companion to issues that are reviewable" but declining to exercise this discretion because "the two issues argued on appeal ... lack a sufficient nexus or companionship to justify this Court's exercise of immediate appellate review").[2] As this Court recognized in a related case, this litigation "at its core ... revolves around the contractual relationship between BB&T and its customer, Skywaves." *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 726 (2014). And, as the circuit court recognized in its summary judgment order, all of Skywaves' claims allege a single wrong committed by BB&T: a failure "to honor its obligations to

[2] Notably, this Court's recognition, in *Brown*, of its discretion to accept review of an otherwise unappealable order occurred two years *after* the Court issued its decision in *Olson II*.

capitalize [Skywaves'] needs"—obligations that are set forth in the parties' contract, the Factoring Agreement. (Pet. App. 328). In particular, 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 any alleged misrepresentations by BB&T. These same alleged statements are central to Skywaves' contract claims.

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

BB&T asks the Court to grant certiorari because the Court of Appeals, in conflict with this Court's decisions in *Davis*, *Olson II*, and *Brown*, failed to recognize its discretion to review the denial of BB&T's motion for summary judgment, the exercise of which is justified by the protracted nature of this litigation, the need to avoid further litigation, and the close nexus with the issues raised in Skywaves' appeal.

II. THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE ORDER STRIKING SKYWAVES' DEMAND FOR A JURY TRIAL.

BB&T also seeks a writ of certiorari as to the Court of Appeals' reversal of the order striking Skywaves' demand for a jury trial.[3] Review by this Court is warranted because the Court of Appeals misapprehended the binding force of the jury-waiver provision, under which Skywaves *and* BB&T "knowingly, intelligently and expressly waive[d] ... trial by jury and the right to trial by jury," and the Factoring Agreement's choice-of-law provision, specifying North Carolina law. (Pet. App.686, Factoring Agreement ¶ 25 (choice of law), ¶ 29 (jury waiver)). Skywaves contended, and the Court agreed, that the jury-waiver

[3] 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.

provision is unenforceable under N.C. Gen. Stat. § 22B-10, which provides that contractual jury waivers are "unconscionable as a matter of law."

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

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

governed by South Carolina law. By the same token, an agreement to waive trial by jury in a South Carolina forum is an agreement for the waiver of a South Carolina procedural right.

Certiorari is warranted even if one accepts the Court of Appeals' view that the issue here is more about the enforceability of a contract than it is about the procedural right to a jury trial. Skywaves is unfairly attempting to use the Factoring Agreement as both a sword and a shield. It is seeking damages for BB&T's alleged breach of the Factoring Agreement while simultaneously repudiating the jury waiver provision. At least one court has refused to countenance such tactics. *See James River Mgmt. Co. v. Kehoe*, 2010 WL 431473, at *4 (E.D. Va. Feb. 5, 2010) (refusing to apply N.C. Gen. Stat. § 22B-10 because "[i]t would be inequitable to allow James River to retain the benefits of the Employment Agreement without having, at the same time, to live with its other provisions").

The jury waiver provision is clear and conspicuous. It appears in the Factoring Agreement as the last separately numbered paragraph on the page immediately preceding the signature page. The signature page does not include any additional paragraphs, and only includes a signature block for both Skywaves and BB&T. Moreover, the jury waiver is unambiguous and bilateral. In simple and direct terms, the provision states that Skywaves and BB&T waive "trial by jury and the right to trial by jury on any issue in any way pertaining to this agreement." (Pet. App. 686, Factoring Agreement ¶ 29).

As BB&T explained in its Final Respondent's Brief of Respondent/Appellant, there can be no doubt that Ronald Konersmann, who executed the Factoring Agreement as Skywaves' founder and CEO, was fully capable of understanding the waiver. Konersmann not only holds an MBA from the University of Notre Dame (Pet. App. 598-99, Konersmann Dep. 27:11-28:5), he also had substantial prior experience with factoring agreements. (Pet.

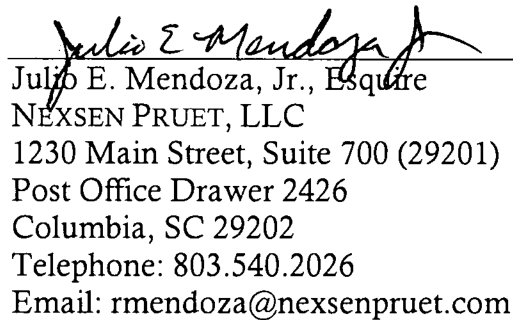
App. 604-05, Konersmann Dep. 122:10–123:2).

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

CONCLUSION

For the reasons set forth above, BB&T respectfully asks the Court to grant certiorari and exercise its discretion to review the circuit court's denial of BB&T's motion for summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by a fraudulent act. Further, the Court should reverse the circuit court and remand with instructions for the circuit court to enter summary judgment in BB&T's favor on those claims, finally resolving nearly a decade of litigation. Alternatively, the Court should grant certiorari on the jury-waiver issue, and should affirm the circuit court's order striking Skywaves' demand for a jury trial.

Respectfully submitted,



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Columbia, South Carolina
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PROOF OF SERVICE

I, Julio E. Mendoza, Jr., Esquire, hereby certify that on the 23rd day of July, 2018, I served a copy of the PETITIONER'S PETITION FOR A WRIT OF CERTIORARI and PETITIONER'S INDEX, submitted by Petitioner 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 Respondent Skywaves I Corporation and on counsel for Respondent James Edahl via United States Mail, postage prepaid, and addressed as follows:

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