THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. SUPREME COURT

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

Roger M. Young, Circuit Court Judge

Appellate Case No. 2018-001362

Skywaves I Corporation.....Respondent,

v.

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

And
James Edahl .....Respondent.

RESPONDENT SKYWAVES I CORPORATION'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. **Did the Court of Appeals properly decline to review the denial of Petitioner's appeal from the denial of summary judgment, which is never appealable?**

Suggested Answer: *Yes.*

II. **Did the Court of Appeals properly reverse the trial court's denial of the right to a jury trial, where North Carolina law specifically prohibits contractual waivers of the right to a jury trial like the one that Petitioner relies upon?**

Suggested Answer: *Yes.*

COUNTERSTATEMENT OF THE CASE

Skywaves I Corporation ("Skywaves") filed this action 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") and James Edahl ("Edahl"). Skywaves has discussed the underlying facts and the parties' complex relationship in detail in its Briefs in the South Carolina Court of Appeals, which it incorporates herein by reference as if set forth at length.

BB&T's summary recitation of the facts distorts reality in an effort to make it appear that Judge Young's denial of its motion for summary judgment was so obviously mistaken that the Court of Appeals abused its discretion in declining to consider and reverse it. In reality, not only was there a genuine question of fact as to whether BB&T was justified in calling a default, but there was clear record evidence that BB&T itself breached the parties' agreement. In reality, Skywaves had developed a startling new and innovative technology and had a bright future. Indeed, in 2007, the year before the default, Skywaves' business plan so excited BB&T that it alerted its capital markets in New York of the possibility of an IPO, which would have meant bonuses for BB&T's officers dealing with Skywaves. In reality, the issues BB&T stridently complains about today were not material breaches sufficient to justify default at the time. Nothing Skywaves had done or failed to do would have triggered a default absent the false accusation of fraud.

Castlen Morris, the factors manager supervising the Skywaves account, knew of the history of Skywaves' payments, missed sales projections and the status of Skywaves' account. He testified that it was not unusual for a start up like Skywaves to have these issues and that, as long as there was no fraud, he would not consider them to be a default. In fact, he testified that the pattern of late payments that BB&T trumpets today as justifying the default, were so inconsequential at the time that he did he not consider them a default or even worthy of documentation in the file.

In reality, Jim Edahl's lie about his agreement with Skywaves to modify the factoring terms led BB&T to wrongfully accuse Skywaves of fraud. Both the agreement and the lie are undisputed; they are admitted in the pleadings and testimony. Judge Young's correctly concluded that evidence in the record supported that BB&T breached the contract with Skywaves and that a fraudulent act accompanied that breach.

Mike Hennessey was the problem account manager responsible for calling the default in 2008. He testified that, had he known Skywaves did not engage in fraud, he would have changed his position on default:

> 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.
>
> Q. What does that mean?
>
> A . . I would have had to change my whole stance.

Michael Burke was the auditor who first raised an issue regarding site plan funding. He testified that he would have dealt with the account "differently" had he known that Edahl approved site plan funding:

> 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.

On and after August 24, 2015 Skywaves filed a Notice of Appeal and Amended and Supplemental Notice of Appeal. BB&T then filed a notice of cross-appeal, purporting to appeal the partial denial of its Motion for Summary Judgment. BB&T argues that the trial judge erred in denying summary judgment as to Skywaves' contract claims. On May 2, 2018, the South Carolina Court of Appeals, affirmed in part and reversed in part the trial court's numerous decisions. Of relevance to the instant Petition, the court reversed the striking of Skywaves' jury trial demand and dismissed BB&T's cross-appeal. On or about July 23, 2018, BB&T filed the

instant Petition for a Writ of *Certiorari* ("Petition"), requesting that this Court review (and reverse) the Court of Appeals' decision only on those two issues. For the following reasons, this Court should deny BB&T's Petition and decline its invitation to review this matter.

ARGUMENT

BB&T's Petition for Writ of *Certiorari* is defective in that it has not shown "special and important reasons" making this case is appropriate for this Court to grant discretionary review. *Inter alia,* BB&T argues that this Court should grant *certiorari* over the Court of Appeals' determination that BB&T's cross-appeal of the denial of its Motion for Summary Judgment did not fall into any exception to the general rule that a denial of a Motion for Summary Judgment is not immediately appealable. This challenge of a finding of fact is not a proper matter for *certiorari* review.

The Appellate Court Rules set forth numerous guidelines for the granting of *certiorari*:

> A writ of *certiorari* is not a matter of right, but of sound judicial discretion, and will be granted **only where there are special and important reasons**. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> (1) Where there are novel questions of law.
>
> (2) Where there is a dissent in the decision of the Court of Appeals.
>
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> (4) Where substantial constitutional issues are directly involved.
>
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

See S.C.A.C.R., Rule 226(b) (emphasis added). BB&T has not argued or shown that any special and important reasons exist that would warrant discretionary review. BB&T does not argue that there are novel questions of law requiring this Court's clarification. There was no dissenting opinion in the Court of Appeals suggesting the existence of a legal question necessitating Supreme Court review. Furthermore, BB&T has not shown that the Court of Appeals' Opinion conflicts with a prior decision of the Court of Appeals or this Court. In addition, this case does not involve constitutional or federal issues. The Court of Appeals simply determined that BB&T's appeal of the denial of its motion for summary judgment did not fall into any exception

that would allow for the appeal of a matter that is not appealable. As discussed below, Skywaves submits that this Court should not grant review.

I. THIS COURT SHOULD NOT GRANT *CERTIORARI* WITH REGARD TO JURISDICTION OVER BB&T'S CROSS APPEAL FROM THE DENIAL OF ITS MOTION FOR SUMMARY JUDGMENT

A. The Dismissal of BB&T's Cross-Appeal Does Not Raise Issues Warranting This Court's Intervention

Initially, this Court should decline to review the question of whether the appellate courts possess jurisdiction over BB&T's cross-appeal, because it does not raise any substantial and important legal questions that necessitate this Court's review and resolution. The Court of Appeals' dismissal of the cross-appeal did not change any existing legal doctrines. It did not resolve any open legal questions. It did not concern any hotly-contest legal issues of substantial public importance. The Court of Appeals' decision here does not warrant this Court's clarification. To the contrary, the Court of Appeals' decision involved a determination that, under the record in this case, the facts did not warrant departure from the decades old prohibition of appellate review of the denial of summary judgment. At its heart, BB&T's argument is that the Court of Appeals incorrectly determined that the issues in BB&T's cross appeal were not sufficiently companion to (and did not have a sufficient nexus to) properly appealable questions to warrant immediate review. This is a factual disagreement, not a dispute over important governing legal questions. As a result, this case is not proper for review by *certiorari*.

B. The Court of Appeals Correctly Determined That BB&T Is Not Entitled to Appellate Review of the Denial of Its Motion for Summary Judgment, a Ruling That Is Never Proper for Appellate Review

Additionally, this Court should deny *certiorari* and refuse to review the dismissal of BB&T's cross-appeal because the Court of Appeals properly dismissed that appeal. As BB&T must concede, the *denial* of a motion for summary judgment is typically never subject to direct appeal. *See Silverman v. Campbell*, 326 S.C. 208, 211, 486 S.E.2d 1, 2 (1997). Nonetheless, BB&T suggests that — notwithstanding this well-settled rule — it was entitled to immediately

appeal the denial of its motion for summary judgment 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 Pet. for Writ of *Cert.*, at 5 (*quoting Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct. App. 2001) ("*Olson I*")). In other words, under BB&T's version of the law, because Skywaves could properly appeal various decisions, BB&T could then appeal the traditionally non-appealable denial of summary judgment.

However, this Court has rejected BB&T's contention; irrespective of whether there are issues properly on appeal before the Court, the denial of summary judgment is **never appealable**. As the Court of Appeals aptly observed:

> "A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). "The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict." *Id.* "[I]t is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment." *Id.* at 478 n.1, 443 S.E.2d at 380 n.1.

(*See* App. p. 1564). The Court of Appeals concluded that "we find the supreme court did not intend for the exception allowing orders that are not immediately appealable to be reviewed on appeal when accompanied by a related, immediately-appealable order to apply to orders denying motions for summary judgment." (*See* App. p. 1565). This well-settled rule is proper, and BB&T has not presented any compelling argument for a change in the law. Therefore, this Court should deny *certiorari.*

In fact, in a subsequent appeal following *Olson I*, the very case BB&T relies upon, this 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) ("*Olson II*").

Under this Court's holding in *Olson II*, BB&T is not entitled to appellate review of the denial of summary judgment, even if Skywaves properly appealed other issued. BB&T is not simply seeking to obtain an early appeal of an interlocutory order; rather, it is seeking appellate

review of a decision that is *never appealable*. *See Kinard v. Richardson*, 407 S.C. 247, 263, 754 S.E.2d 888, 897 (Ct. App. 2014) ("Judge Dickson's reference to this issue was made in an order denying Owner's summary judgment motion, which is never appealable.") (*citing Olson II*); *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 II*); *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 II*); *accord Lucas ex rel. Estate of Lucas v. Rawl Family Ltd. P'ship,* No. 2007-MO-058, 2007 WL 8434582, at *2 (S.C. Sept. 24, 2007) ("[A]n order denying a motion for summary judgment is never appealable because such an order is not a ruling on the merits of the action.") (per curiam) (*citing Olson II*). If BB&T seeks appellate review of the merits of Skywaves' contract claims, it must await a final judgment following trial. *Olson II* and a plethora of other cases support this conclusion.

Therefore, for the foregoing reasons, the Court should deny BB&T's Petition and should decline its invitation to review this matter.

C. Plaintiffs' Reliance on the Pre-*Olson* Opinions in *Brown v. County of Berkeley* and *Davis v. Lunceford* Is Misplaced

In its Petition, BB&T relies on *Brown v. County of Berkeley*, 366 S.C. 354, 622 S.E.2d 533 (2005), for the proposition "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." (*See* BB&T's Pet. for Writ of *Cert.*, at 5). This Court in *Brown* stated that:

> 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. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 512 (Ct. App. 2002) (*citing Morris v. Anderson County*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002)). In the instant case, however, the two issues argued on appeal (the denial of a preliminary injunction preventing a special audit and the denial of a motion to dismiss claims for defamation, defamation per se, and intentional infliction of emotional distress) lack a sufficient nexus or companionship to justify this Court's exercise of immediate appellate review.

See id., 366 S.C. at 362 n.5, 622 S.E.2d at 538 n.5. First, *Brown* does not recognize an actual legal basis for immediate review, but only refers to a "practice" of accepting appeals. Respectfully, the law is clear that there is no right to appeal from the denial of summary judgment, even if there are other appealable issues before the Court. Moreover, as in *Brown*, BB&T has not presented evidence showing that the breach of contract claims here have such a nexus to the appealable issues (the grant of summary judgment on certain tort claims) to warrant immediate review. BB&T has made no showing to support its suggestion that this Court should disregard clear jurisdictional law and consider the denial of summary judgment, which is *never* an appealable issue.

Additionally, in an effort to evade the application of this Court's clear ruling in *Olson II* and other binding precedent, BB&T relies upon this Court's pre-*Olson II* opinion in *Davis v. Lunceford* (which this Court mentioned in *Olson II*) to support its baseless claim of jurisdiction over its cross-appeal. Specifically, BB&T argues that *Olson II* did not undermine the precedential effect of *Davis v. Lunceford*:

> [T]his 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* BB&T's Pet. for Writ of *Cert.*, at 6). In other words, BB&T contends that — irrespective of the clear holding of *Olson II* that the denial of summary judgment is not immediately appealable, even when there are other properly appealed issues — *Davis v. Lunceford* creates a broad exception permitting appeals from the denial of summary judgment if immediate review would assist to resolve long-pending litigation. Respectfully, BB&T's argument is without merit.

Davis is a *per curiam* opinion that contains only a brief mention of the issue of appellate jurisdiction and contains no analysis of the issue. *See Davis*, 287 S.C. at 243, 335 S.E.2d at 799 ("Because of the need for final resolution in this case, we have allowed this direct appeal from the lower court's order denying appellant's motion for summary judgment. *Cf. Mitchell v.*

Mitchell, 276 S.C. 44, 275 S.E.2d 1 (1981)."). BB&T does not cite a single subsequent case relying on *Davis* to permit a party to appeal the denial of summary judgment. Most importantly, BB&T does not explain how *Davis* could survive this Court's clear ruling in *Olson II* that the denial of summary judgment is not appealable. *Davis'* dubious precedential value is limited because it was — as *Olson II* notes — decided before this Court's clear determination in *Ballenger v. Bowen* that the denial of summary judgment is not reviewable. Skywaves respectfully posits that this Court already fully foreclosed BB&T's arguments in *Olson II* and *Ballenger*. There is no contemporary law that supports BB&T's effort to obtain appellate jurisdiction in this matter.

Moreover, even if *Davis,* is the law, there is no evidence to dispute that the Court of Appeals properly refused to review the denial of summary judgment as to two complicated contract-based causes of action. BB&T has not shown that the immediate disposition of its appeal from the denial of summary judgment would benefit the interests of justice or judicial economy. The majority of disputed facts and inferences relevant to those claims therefrom and applicable law are completely separate from the tort claims that Skywaves properly appealed. If the Court grants review of the denial of summary judgment, it will interject further delay in this case of a year or more. A number of the witnesses were at their prime in 2007, but now are retirement age and older. The old adage "Justice delayed is justice denied "certainly seems applicable. If the Court grants immediate review of the denial of summary judgment, this will only serve to further delay trial by months or years.

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. THIS COURT SHOULD NOT GRANT *CERTIORARI* WITH REGARD TO THE COURT OF APPEALS' DETERMINATION THAT SKYWAVES DID NOT WAIVE ITS CONSTITUTIONAL RIGHT TO A JURY TRIAL

BB&T next seeks review of the Court of Appeals' reversal of the trial judge's striking of Skywaves' jury trial demand. For the reasons that follow, review is not proper in this case because the issue presented does not warrant Supreme Court consideration and because the Court of Appeals' decision is plainly correct.

Again, the jury trial waiver issue does not present an appropriate question for this Court's review. BB&T's argument is essentially that the Court of Appeals improperly applied the choice of law provision in the parties' agreement under the facts of this case. BB&T does not direct the Court to any important change in the law that the Court of Appeals made or to any important legal question that this Court should resolve. It simply disagrees with the result in this case.

In any event, the Court of Appeals correctly held that the trial court erred when it deprived Plaintiff of its constitutionally-protected right to a jury trial on the grounds that it had contractually waived that right under the March 22, 2005 Factoring and Security Agreement ("Factoring Agreement"). (*See* App. pp. 1191-1205). Specifically, the Court of Appeals held that:

> We find the circuit court erred by striking Skywaves' demand for a jury trial. Although the circuit court found the right to a jury trial is a procedural issue, the issue here is not the question of the right to a jury trial but rather, the enforceability of a contract provision. [Citation omitted.] Because this is a question of contract validity, and South Carolina courts generally uphold choice of law provisions, we find North Carolina law applies to determine the validity and enforceability of the contractual waiver of the right to a jury trial.

(*See* App. pp. 1555-56). BB&T disagrees and argues that Skywaves should not be permitted to exercise its constitutional right to a jury verdict because South Carolina law allows contractual waivers of that right:

> 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").

(*See* BB&T Pet. for Writ of *Cert.*, at 10). For the reasons that follow, Court of Appeals' determination was correct, and this Court should not review it.

The parties' Factoring Agreement contains two provisions relevant to the issue of whether Skywaves waived its right to a jury trial:

> 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* App. p. 1204). Additionally, there are three important, undisputed facts: (1) BB&T drafted the Factoring Agreement; (2) it is BB&T's standard document; and (3) BB&T expressly intended that North Carolina law would govern it. 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* App. p. 825 (*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 as long as they had a reasonable basis for their choice and the law chosen does not violate fundamental public policy of the state or other applicable law. *See King v. Bryant*, 225 N.C. App. 340, 737 S.E.2d 802 (2013). BB&T does not seriously dispute that North Carolina law governs the Factoring Agreement.

Under North Carolina law, contractual waivers of the right to a jury trial — such as that which BB&T relies upon — are not enforceable:

> 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.

See N.C. Gen. Stat. Ann. §22B-10. When a contract or clause is unconscionable, a court should not enforce that provision. *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). 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). It is beyond any dispute that North Carolina law would prohibit the enforcement of the alleged waiver of the right to a jury trial in the Factoring Agreement.

In an effort to evade the application of North Carolina law to this provision, BB&T incorrectly focuses its analysis on whether the right to jury trial is procedural or substantive. Specifically, it erroneously contends that, because the right to a jury trial is procedural, South Carolina procedural law must apply to determine whether the putative contractual waiver of the right to a jury trial is enforceable. While BB&T is correct that South Carolina's procedural law typically governs the issue of the right to a jury trial and grants such a right to most parties. However, the issue of the potential waiver of that right is a matter of contract, which (by BB&T's own contract) must be decided under North Carolina law. This is not a procedural question, but is a substantive matter of contract. North Carolina law does not allow contractual jury trial waivers in contracts. The question of the validity of a jury trial waiver in a contract is a substantive question, not procedural. The claimed jury trial waiver in the Factoring Agreement is void under North Carolina law. Therefore, pursuant to the Factoring Agreement, North Carolina law governs the question of this clause's validity.

In its Petition for Writ of *Certiorari*, BB&T relies heavily on language of Paragraph 29 of the Factoring Agreement: "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.'" (*See* BB&T's Pet. for Writ of *Cert.*, at 10). However, BB&T's argument selectively quotes only part of Paragraph 29 of the Factoring Agreement. That Paragraph begins with the important language that any waiver is only "[t]o the fullest extent permitted by applicable law." The applicable law — that of North Carolina — plainly does not permit contractual waivers of the right to a jury trial.

In its Petition, BB&T states that "[a]t least one court has refused to countenance such tactics." (*See* Pet. for Writ of *Cert.*, at 10 (*citing 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")). Skywaves respectfully urges that BB&T's reliance upon this case creates the absurd result that the statute could never be applied to secure a plaintiff's right to a jury trial. In any lawsuit where the statute could apply, the plaintiff must necessarily be suing under the authority of an agreement with a jury trial waiver. Under the approach that BB&T urges (and that is referenced in *James River*), the statute would be rendered a nullity. "'[W]here possible the language of a statute will be interpreted so as to avoid an absurd consequence.'" *See In re Expungement for Spencer*, 140 N.C. App. 776, 779, 538 S.E.2d 236, 238 (2000) (*quoting In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (1978)).

Additionally, BB&T's argument and reliance on *James River* disregards the Factoring Agreement's clear severability language:

> The provisions of this Agreement are independent of and separate from each other. If any provision hereof shall for any reason be held invalid or unenforceable, it is the intent of the parties that such invalidity or unenforceability shall not affect the validity or unenforceability of any other provision hereof and that this Agreement shall be construed as if such invalid or unenforceable provision had never been contained herein.

(*See* App. p. 686 ¶ 26). Under this provision, Skywaves is not forced into an all-or-nothing choice as to the enforceability of the terms of the Factoring Agreement. To the contrary, BB&T

has recognized that a single provision of that agreement might be unenforceable and that such unenforceability would not have any impact on the enforceability of *other provisions* of the Factoring Agreement. Skywaves is free to argue that the putative jury trial waiver is void or voidable, but that the remaining provisions of the Factoring Agreement are enforceable. Under North Carolina law, "'when a portion of a contract is void as against public policy, the remainder of that contract may still be enforceable to the extent it is severable from, and not dependent in its enforcement upon, the void portion.'" *See Maxwell Schuman & Co. v. Edwards*, 191 N.C. App. 356, 361, 663 S.E.2d 329, 333 (2008) (*citing Davis v. Taylor*, 81 N.C. App. 42, 46-47, 344 S.E.2d 19, 22 (1986)) ("Although we find the portion of the agreement in which legal fees were contingent upon a successful appeal voided, we do not void the entirety of the agreement."). Likewise, in this case, the voiding or voidability of one part of the Factoring Agreement does not foreclose enforcement of its other provisions.

CONCLUSION

For the foregoing reasons, Respondent Skywaves respectfully requests that this Honorable Court deny BB&T's Petition for Writ of *Certiorari* and decline to review the issues raised therein.

August 27, 2018

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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. 2018-001362

Skywaves I Corporation.....Respondent,

v.

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

And
James Edahl .....Respondent.

PROOF OF SERVICE

I certify that I served Respondent Skywaves I Corporation's Return to Petition for Writ of *Certiorari* on August 22, 2018 and Respondent Skywaves I Corporation's Return to Petition for Writ of *Certiori* with **corrected caption** on August 27, 2018, on the above-referenced Petitioner, by depositing a copy of them in the United States Mail, postage prepaid, addressed to their attorneys of record:

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