THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2018-001362

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

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 REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Branch Banking & Trust Company ("BB&T"), Respondent/Appellant below, respectfully submits this Reply in support of its Petition for a Writ of Certiorari ("Petition") and in response to the Return to Petition for Writ of Certiorari ("Return") filed by Respondent Skywaves I Corporation ("Skywaves"), Appellant/Respondent below.

ARGUMENT

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

In the Court of Appeals, Skywaves staunchly and consistently maintained that in *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 1, 580 S.E.2d 440 (2000) ("*Olson II*"), this Court "definitively foreclosed the appealability of [a denial of] summary judgment." Pet. App. 221 (Appellant/Resp't's Corrected Final Resp't's Br., at 14). In opposing BB&T's Petition, however, Skywaves has taken a different tack. Skywaves now appears to concede that an appellate court has discretion to review a denial of summary judgment (or other unappealable order) under certain circumstances. *See* Return to Pet'n for Cert., at 6. According to Skywaves, review by this Court is unwarranted because there is no error of law; rather, the Court of Appeals made a factual determination "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." *Id.*

Skywaves' description of the Court of Appeals' holding is incorrect. The text of the decision makes clear that the Court of Appeals ruled, as a matter of law, that it had no discretion to consider BB&T's cross-appeal of the circuit court's denial of summary judgment. After reciting its holding in *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194,

216, 544 S.E.2d 38, 49 (Ct. App. 2001) ("*Olson I*"), the Court of Appeals continued:

> The supreme court granted certiorari to review the decision reached by this court in [*Olson I*]. The supreme court held "the denial of a motion for summary judgment is not appealable, even after final judgment," overruled *Garrett* and other cases cited by this court to the extent they were inconsistent with the supreme court's holding, and affirmed this court's refusal to consider the denial of summary judgment. [*Olson II*] at 168, n.8, 580 S.E.2d at 444, n.8. ...
>
> Based on the supreme court's decision in [*Olson II*] to affirm this court's refusal to consider a denial of summary judgment and to overrule *Garrett*, *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*. Thus, the circuit court's order denying BB&T summary judgment as to Skywaves' claims for breach of contract and breach of contract accompanied by fraudulent acts is not appealable. *See* [*Olson II*], 354 S.C. at 168, 580 S.E.2d at 444 ("[T]he denial of a motion for summary judgment is not appealable, even after final judgment."). Consequently, we dismiss BB&T's appeal.

Pet. App. 1565 (Slip Op. at 21 (citations omitted; emphasis added)).

As the above-quoted text makes clear, the Court of Appeals determined, *as a matter of law*, that it had no discretion to consider BB&T's cross-appeal of the denial of summary judgment. Consequently, Skywaves' primary argument in opposition to BB&T's Petition—that certiorari review is inappropriate because BB&T is merely challenging an erroneous finding of fact—must fail.

Alternatively, Skywaves contends that certiorari should be denied because this Court held in *Olson II* that a denial of summary judgment is never appealable. Return, at 6-9. Skywaves also contends that BB&T is attempting to "evade" the absolute rule established in *Olson II* by relying on *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985), a pre-*Olson II* decision. Return, at 10. In making this argument, Skywaves overlooks the fact that *Olson II* directly addressed *Davis* but did not overrule it, instead describing *Davis* as an "exception" to

the rule against appellate review of a denial of summary judgment.

This Court's treatment of *Davis* in *Olson II* demonstrates that the rule against appellate review of an interlocutory order is not as absolute as Skywaves would have it seem. The actual rule, as tacitly recognized in *Olson II*, is that while appellate review of a denial of summary judgment (or similar order) is never available as a matter of right, an appellate court in South Carolina nevertheless has discretion to review an otherwise unappealable order in conjunction with its review of an appealable order. Indeed, both this Court and the Court of Appeals have recognized and applied this Court have recognized this rule in numerous cases decided after *Olson II*. *See, e.g.*, *Se. Housing Found. v. Smith*, 380 S.C. 621, 635 n.14, 670 S.E.2d 680, 688 n.14 (2008); *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); *Walbeck v. The I'On Co.*, ___ S.E.2d ___, 2018 WL 3748668, at *12 (Ct. App. Aug. 8, 2018); *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.20 (Ct. App. 2006); *see also Kubic v. Merscorp Holdings, Inc.*, 416 S.C. 161, 165-66, 785 S.E.2d 595, 597 (2016) (granting certiorari to review denial of motion to dismiss, even though the denial was not accompanied by an appealable order).

Importantly, these post-*Olson II* decisions identify the parameters of an appellate court's discretion to consider an otherwise unauthorized appeal of an interlocutory order. *First*, the unappealable ruling must be accompanied by an appealable issue. *But cf. Kubic*, 416 S.C. at 165-66, 785 S.E.2d at 597. *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, this litigation has been ongoing for roughly 8½ years, since December 2009. It has already been the subject of one appeal, filed by Skywaves in 2011 and withdrawn in 2012. If the circuit court's denial of BB&T's motion for summary judgment stands, this case will go to a trial that will, in all probability, be followed by yet another appeal. The circumstances here are thus similar to those in *Edge*, a post-*Olson II* decision in which this Court exercised its discretion to review an unappealable order (a denial of a motion to dismiss) on the basis of judicial economy: "[A]n order in this case which is appealable is before the Court and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy) we will consider

State Farm's cross-appeal." *Edge*, 366 S.C. at 517, 623 S.E.2d at 390.

In this case, review of BB&T's cross-appeal may do more than narrow the issues for trial. It may make a trial (and subsequent appeal) unnecessary by fully resolving the litigation. Following the Court of Appeals' affirmance of the circuit court's rejection of Skywaves' tort and unfair trade practices claims, the only claims remaining are its claims for breach of contract and breach of contract accompanied by a fraudulent act. Both of these claims turn on whether Skywaves can prove that it was not in default under the terms of 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). This question was the subject of extensive briefing in the circuit court and the Court of Appeals, a fact that supports a discretionary grant of immediate review. *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 Skywaves' tort claims (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 SKYWAVES' CLAIMS FOR BREACH OF CONTRACT AND BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT.

Skywaves claims that BB&T's Petition "distorts reality," Return, at 2, to make it appear that BB&T was justified in declaring a default under the Factoring Agreement and, therefore, that BB&T did not breach the parties' contract.[1] Try as it might, however, Skywaves cannot avoid the simple truth that BB&T was entitled to declare a default under the plain terms of the Factoring Agreement.

Skywaves sets forth snippets of deposition testimony from several witnesses in an effort to make it appear that the site-plan financing, rather than Skywaves' rapidly deteriorating financial condition, was the basis for BB&T's declaration of default in January 2008. For example, Skywaves contends that Mike Hennessey, BB&T's problem loan administrator, testified that "he would have changed his position on default" if he had known BB&T had authorized funding on the basis of site plans. Return, at 3. However, Hennessey 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." Pet. App. 1313 (R. p. 1019, BB&T 30(b)(6) Dep. 64:14-18).

There can be no dispute that Skywaves' financial condition in January 2008 was nothing short of abysmal. Skywaves initially projected a net income of $1.4 million for 2007. Pet. App. 1586 (R. p. S-5, 2007 Projection). In September 2007, it adjusted its

[1] There is no dispute that if Skywaves' breach of contract claims fails, its claim for breach of contract accompanied by a fraudulent act also fails.

projections, estimating a net loss of ($120,532) for the year. Pet. App. 1599 (R. p. S-18, Revised 2007 Projection). Skywaves' financials for the third quarter of 2007 showed monthly losses greater than those predicted in the *revised* 2007 projections. Moreover, Skywaves' monthly losses were *increasing*, not decreasing.

Skywaves' year-end financials, provided to BB&T on January 17, 2008, 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. All told, the numbers revealed a $1.1 million chasm between Skywaves' revised 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 downward 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.

BB&T was also concerned that no money was coming in to reduce the amount owed under the Factoring Agreement. Pet. App. 1339 (R. p. 1045, Burke Dep. 60:19-25). Additionally, a field exam conducted in January 2008 revealed that Skywaves had received $340,000 from Verizon on factored invoices but had not turned that money over to BB&T. Pet. App. 1341 (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. Pet. App. 724-25 (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. As explained at length in BB&T's Reply Brief of Respondent-Appellant, each basis of default is fully supported by the evidence. Pet. App. 253-58 (Final Reply Br. of Resp't/Appellant, at 11-16).

Numbers do not lie, and the numbers in this case show that by January 2008, Skywaves was in dire financial straits despite BB&T's financing and efforts to assist the company, including its agreement to advance funds on the basis of site plans. Skywaves' precarious financial condition created an unacceptably high risk of nonpayment, leading BB&T to the conclusion that it had to declare a default under the terms of the Factoring Agreement. 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.

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

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)[.]

Pet. App. 686 (R. p. 416, Factoring Agreement ¶ 29 (emphasis added)).

South Carolina law recognizes that the right to a jury trial may be waived. *See Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 332-33, 755 S.E.2d 437 443 (2014); *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*, this 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.

The jury trial waiver in the Factoring Agreement is conspicuous. It 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.

The jury trial waiver is also unambiguous. Its language is simple and direct, stating in plain terms that both parties waive "trial by jury and the right to trial by jury on any issue in any way pertaining to this Agreement." Pet. App. 686 (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*.

Also, there can be no doubt that Ron 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, Pet. App. 598-99 (R. pp. 328-329, Konersmann Dep. 27:11-28:5), he also had substantial prior experience with factoring agreements, Pet. App. 604-05 (R. pp. 334-335, Konersmann Dep. 122:10–123:2).

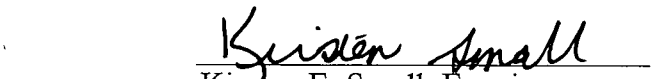
The Court should grant certiorari because the Court of Appeals should not have reversed the circuit court's order striking Skywaves' jury demand. The waiver is plainly valid under South Carolina law, and it is South Carolina law that should control the determination of this issue. Whether there is a right to a jury trial in a particular case, and how that right may be exercised, are inherently procedural questions. As such, they are governed by the law of the forum—South Carolina. *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).

Additionally, the Court of Appeals' ruling effectively allows Skywaves to pick and choose which provisions of the Factoring Agreement it wishes to be bound by. In suing for breach of the Factoring Agreement, Skywaves is seeking the benefit of its bargain. But, that bargain includes the jury trial waiver. In similar circumstances, a federal district court in Virginia refused to apply N.C. Gen. Stat. § 22B-10, reasoning that "[i]t would be inequitable to allow [the plaintiff] to retain the benefits of the Employment Agreement without having, at the same time, to live with its other provisions" *James River Mgmt. Co. v. Kehoe*, 2010 WL 431473, at *4 (E.D. Va. Feb. 5, 2010).

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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September 4, 2018

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PROOF OF SERVICE

I, Kirsten E. Small, Esquire, hereby certify that on the 4th day of September, 2018, I served a copy of the foregoing REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 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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