THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-205647

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-07515, 2009-CP-10-07517,
2009-CP-10-07518 and 2010-CP-10-09959

2009-CP-10-07515
James J. Kerr, Crayton Walters, and J.T. Main, LLC, ... Appellants,

v.

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

2009-CP-10-07517
Ron Konersmann, ... Appellant,

v.

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

2009-CP-10-07518
John Voytko, ... Appellant,

v.

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

2010-CP-10-09959
Patricia Konersmann, ... Appellant,

v.

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

APPELLANTS' CONSOLIDATED FINAL REPLY BRIEF

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I. Defendants Miscast the Nature of These Cases

In their primary Brief, Plaintiffs argued that S.C. Code § 37-10-107 does not apply in the instant case, in part, because Plaintiffs are simply asserting claims under basic tort law and are not asserting causes of action based on any agreement with Defendants. In their response, Defendants argue that Plaintiffs' claims still run afoul of S.C. Code § 37-10-107 and that no duty of care existed to support a negligence claim. In doing so, Defendants focus on the presence or absence of a documented banking relationship between Plaintiffs and Defendants. This is essentially what the trial court did as well.

For example, Defendants argue that Section 37-10-107 applies because Plaintiffs' claims are tied to BB&T's contractual promises to Skywaves. Moreover, in their argument about "duty," Defendants focus on the existence of a bank-customer relationship with Plaintiffs. (*See* Respondents' Init. Br., at p.17 (*citing Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003))). At their core, Plaintiffs' arguments turn on the incorrect premise that the basis of Plaintiffs' claims is an effort to become part of the banker-customer relationship or to enforce the bank's contracts. This reflects a fundamental misunderstanding of what Plaintiffs are seeking to do here. Defendants conflate these investor claims with Skywaves' separate lawsuit, which is not before the Court. Therefore, Plaintiffs will endeavor to clarify how their claims are independent of the BB&T-Skywaves agreement and arise out of BB&T's breach of independent, extracontractual duties owed to them and thus fall outside of the statute of frauds.

These cases have been filed on behalf of potential investors in or lenders to Skywaves, not Skywaves itself. Plaintiffs do not seek to enforce Defendants' contractual duties to Skywaves. They do not seek to vindicate Skywaves' rights; there is already a

pending lawsuit seeking to do that. They do not claim that they were fraudulently induced to enter into a direct contractual relationship with BB&T, as they admittedly never entered into such an agreement. Rather, Plaintiffs seek to vindicate **their** rights, which (although they are, in a sense, related to it) are not directly based on the BB&T-Skywaves agreement. These claims are based on separate, false representations made to induce Plaintiffs to invest in Skywaves. While theses representations concerned BB&T's commitment to Skywaves, they do not require enforcement of the actual obligation (and, in fact, could succeed even if there never was a binding agreement).

Skywaves developed an innovative product for the wireless telecommunications industry, with a lucrative customer base. Back in 2005, Skywaves and BB&T entered into a written factoring agreement, under which BB&T purchased certain Skywaves receivables and agreed to collect them on Skywaves' behalf. For two years, the parties operated under this arrangement for BB&T to fund Skywaves' working capital needs.

In early 2007, Skywaves' Board of Directors determined that it needed expanded financial commitments to provide capital infusion beyond what BB&T provided to service its increasing business.[1] So, Skywaves solicited proposals from various entities to assist in obtaining additional working capital — including a proposal to expand the existing arrangement with BB&T. Ultimately, BB&T persuaded Skywaves to use it to raise additional working capital. Thus, BB&T — in a series of communications — expanded its existing arrangement with Skywaves. BB&T promised, among other things, to liberalize its funding by providing capital infusions based, not only on invoices and accounts receivable, but on purchase orders, contracts and even site plans. This was a commitment to provide funding much earlier in the course of Skywaves' dealings with a potential customer. Such liberalized funding would help Skywaves grow and cultivate its

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[1] The factual allegations discussed in this Section are contained in Ron Konersmann Am. Compl. ¶¶ 10-28, 41, 44-48; Kerr Am. Compl. ¶¶ 9-27, 37-45; Voytko Am. Compl. ¶¶ 10-29, 41-48; and Patricia Konersmann Compl. ¶¶ 5-23, 33-40.

business.

However, BB&T wanted more investors to provide additional sources of capital to Skywaves, which would benefit BB&T by spreading its risk. Consequently, in approximately July 2007, Defendant Edahl traveled to McBee, South Carolina on behalf of BB&T in an effort to induce a number of potential lenders and investors – including Plaintiffs – to infuse more capital into Skywaves. During his presentation, Defendant Edahl made numerous representations to those potential lenders and investors, which are referenced in the Plaintiffs' Complaints. For example, Defendant Edahl stated that BB&T had committed to funding Skywaves' growth through the factoring arrangement, based not only on invoices, but purchase orders, contracts, **and** site plans. As a result, shortly thereafter, in reliance on these representations, Plaintiffs made significant equity investments in Skywaves and/or loaned money to Skywaves.

On January 25, 2008 — only a few months after the McBee meeting — BB&T unilaterally and without cause refused to fund purchase orders, contracts and site plans and wrongfully claimed that Skywaves was in default of the factoring agreement. Contrary to the representations made to Plaintiffs, BB&T abruptly repudiated Defendants' representations and ended its relationship with Skywaves. This unexpected termination of the parties' relationship forced Skywaves to submit to bankruptcy liquidation proceedings, without the ability to reorganize and continue as an active business entity. Obviously, this caused great financial harm to the Plaintiffs, who had only months earlier been convinced to invest in Skywaves with false promises about what BB&T had agreed to do. Moreover, it would have been particularly surprising to Plaintiffs, since it had been preceded by several years of ongoing business between Skywaves and BB&T, wherein BB&T honored its word.

In essence, the crux of Plaintiffs' claims here is **not** simply that BB&T breached its contract with Skywaves, but that BB&T made misrepresentations to them that induced them to invest in Skywaves. They were induced not to enter into any contract with

BB&T or Edahl, but to invest in Skywaves. In this lawsuit, the Plaintiffs seek to recover the damages that they suffered because of their reliance upon BB&T's false representations to them, not the damages that Skywaves suffered because of BB&T's breach of its agreement.

The focus of Plaintiffs' claims is not on the BB&T-Skywaves agreement but on Defendants' tortious conduct directed to Plaintiffs. BB&T represented that it would provide unique funding for the Skywaves' growth, with the specific purpose of inducing the plaintiffs to invest in Skywaves. These plaintiffs made substantial investment in a new company based on BB&T's representation regarding the nature of its funding. These plaintiffs did not expect BB&T would guarantee the success of the company, only that BB&T would continue the unique funding so long as Skywaves was not in default. These torts do not require or necessitate that Plaintiffs be customers of BB&T. They do not require a creditor-debtor relationship. They are not based on any contractual relationship between Plaintiffs and BB&T. They are duties imposed in the law that can exist between parties who are not in contractual privity.

As the supreme court succinctly stated in *Edward's of Byrnes Downs v. Charleston Sheet Metal Co.*, 253 S.C. 537, 542, 172 S.E.2d 120, 122 (1970): "The fact that plaintiff was not a party to the contract under which defendant was acting is not determinative of plaintiff's right to sue. The liability of defendant to plaintiff exists independently of contract and rests upon the common law duty to exercise due care to avoid injury or damage to others." There are various circumstances where duties can exist without a contractual relationship. For example, the Restatement (Second) of Torts permits an action against a party who provides information for the guidance of others (irrespective of any contractual relationship):

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable

> reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

See Restatement (Second) of Torts § 552(1).

In addition, there are numerous South Carolina cases recognizing that duties can exist to parties who are not in contractual privity with each other (especially where claims are premised on misrepresentations). For example, the South Carolina Supreme Court has held that a marketing consultant, hired by the **Georgia** Ports Authority to compare the merits of the Savannah and Charleston ports, could owe a duty of care to the **South Carolina** Ports Authority to report accurate information:

> Consultants such as BAH may be found liable in negligence to non-contracting parties who have reasonably relied on their reports in taking some action. [Citations omitted.] We hold a duty to use due care, running from a consultant to the commercial competitor who is being critiqued, arises when the consultant undertakes to objectively analyze and compare the attributes of commercial competitors for the purpose of giving one a market advantage over the other.
>
> Under this analysis, BAH owed a duty to the S.C. State Ports Authority to exercise due care to accurately report objective factual data concerning the Charleston port, if it knew or should have known the report was intended to be used by GPA as a marketing device. Conversely, however, we can see no duty from BAH to individuals who, in whole or in part, rely upon the shipping traffic in the Charleston port for commercial profit. The relationship, if any, flowing between a consultant and someone distantly affected by his work is far too attenuated to rise to the level of a duty flowing between them.

See South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 376-77, 346 S.E.2d 324, 326 (1986). There the Court recognized that a duty could exist to a party that not only was not a party to the defendant's agreement, but was, in fact, the party that the defendant and its privy intended to disadvantage.

In *Lawlor v. Scheper*, 232 S.C. 94, 101 S.E.2d 269 (1957), the Court held that a purchaser of land could sue the agent of the vendor – with whom he had no contract – for making false representations regarding mortgages on the property. The Court began by noting that the claims against the agent did not stem from the contract of sale, but from

tort: "[t]he complaint clearly discloses that this action is not on the contract of sale but one in tort for the recovery of damages for an alleged false and fraudulent representation." *See id.*, 232 S.C. at 98, 101 S.E.2d at 271. The Court then concluded that, if the agents undertook to advise the purchaser regarding the mortgages or professed to have knowledge about the same, they could be held liable in tort. *See id.*, 232 S.C. at 99-100, 101 S.E.2d at 271.

In *Murray v. Bank of America, N.A.*, 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003), cited in Plaintiffs' opening brief, this Court held that a bank could owe a duty of care to a non-customer in whose name an account had been fraudulently opened, premised solely on the interactions between the bank and the plaintiff:

> 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 id., 354 S.C. at 343, 580 S.E.2d at 197; *accord Roundtree Villas Assoc., Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984) (holding, under Restatement (Second) of Torts § 323[2], that construction lender and its advisor could be held liable to purchaser

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[2] The Restatement (Second) of Torts § 323 provides as follows:

for negligently undertaking repairs even in absence of contractual relationship).

South Carolina has long recognized that a duty of care in a case like this does not depend upon the existence of a contract between the parties. Here, Plaintiffs' claims do not depend upon the existence or enforceability of a particular agreement between BB&T and Skywaves. Rather, these claims arise solely in the arena of tort. They are based entirely on Defendants' efforts to induce investments in Skywaves. Plaintiffs are not seeking to enforce any agreement to lend money; they are seeking recompense for being misled about whether an agreement existed. Plaintiffs' claims are not "based on" an agreement to lend; they are "based on" misrepresentations made to them to induce them to enter into a relationship with a party **other than the bank.** It is a matter of utter indifference to the Plaintiffs whether Skywaves can enforce BB&T's promise to loan it money; Plaintiffs' grievance is that BB&T induced them to invest in Skywaves. It defies logic to suggest that a lender liability statute would act to preclude tort claims by strangers to any agreement with the bank. Such a result would permit banks to mislead third parties with impunity about any matter arguably related to an agreement to lend money.

Defendants' argument and interpretation of the statute creates an inequitable situation in cases such as this. Under the allegations of the Complaints, it is clear that there was an agreement between BB&T and Skywaves that would pass muster under the statute. However, Defendants argue that, to the extent the Complaints include allegations that they made misrepresentations to third parties that were somehow related to that

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> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

enforceable agreement, the claims are barred by the same statute of frauds that is satisfied as to Skywaves. This is not a case where a plaintiff seeks to compel a bank to honor an undocumented oral agreement to lend it money. This is a case where third parties were misled to invest in an entity on the grounds that the entity had a binding agreement with the bank. Plaintiffs are not utilizing their tort claims to "get around" the statute and enforce an otherwise unenforceable agreement.

The statute's plain language demonstrates that it only applies to situations where a claim is truly "based upon" an agreement to lend money that is not properly documented. In other words, the statute governs where a party seeks to enforce an oral agreement to loan money. This is reflected by the fact that the statute requires the agreement to be signed by "the party to be charged." *See* S.C. Code § 37-10-107(1)(c). In other words, the statute applies where a party seeks to charge another party with performance of the agreement, *i.e.,* to compel performance.[3] This is consistent with the Defendants' stated

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[3] In their Brief, Defendants cite *Schoen v. Morris*, 15 P.3d 1094 (Colo. 2000) for the proposition that the statute bars an action even where there was no direct borrower-lender relationship. However, *Schoen* is distinguishable in several respects. In that case, the court held that a claim by a bridge lender claiming that a bank had committed to provide permanent financing to its borrower was barred by a Colorado statute. However, unlike the South Carolina statute (which applies to claims "based upon" promises to lend money), the Colorado statute applied to claims "related to" "credit agreements," terms that Colorado had previously construed very broadly:

> Although we have not previously considered whether assurances between lenders to the same borrower constitute "credit agreements" under the credit agreement statute of frauds, Colorado cases applying the statute have adopted a broad definition of the term "credit agreements." In *Univex Int'l., Inc. v. Orix Credit Alliance, Inc.*, we noted that the statute "does not apply only to claims involving transactions which are characterized exclusively as credit agreements, but also ... to claims which merely relate to credit agreements." 914 P.2d 1355, 1358 (Colo. 1996). We then concluded that the statutory definition of a "credit agreement" was sufficiently broad to include a sales agreement containing financing terms for the proposed sale. *Id.* Similarly, in *Pima Fin. Serv. Corp. v. Selby*, the court of appeals held that a settlement agreement resolving a deficiency dispute constituted a "credit agreement" under the statute because it waived the terms of the original credit agreement based on which the deficiency claim was made 820 P.2d 1124, 1127 (Colo. Ct. App. 1991); see § 38-10-124(1)(a)(II) (including in the definition of credit agreement "[a]ny amendment of, cancellation of, waiver

purpose of the statute, "to limit the increase in lender liability litigation." (*See* Respondents' Init. Br., at p.15).

For these reasons, this Court should reverse the trial court's dismissal of Plaintiffs' claims.

II. Defendants' Assertion That Plaintiffs Failed to Allege Conduct Sufficient to Support a Negligent Misrepresentation or Fraud Claim Is Without Merit

As an alleged alternative sustaining ground, Defendants argue that Plaintiffs have failed to sufficiently plead claims of negligent/fraudulent misrepresentation or fraud in the inducement. Specifically, Defendants posit that: (a) Plaintiffs have not pled a false statement of fact; and (b) Plaintiffs have not pled facts sufficient to support reasonable reliance by Plaintiffs. For the reasons that follow, Defendants' arguments are without merit.

First, Plaintiffs' negligent misrepresentation counts sufficiently plead actionable misrepresentations. The general rule is that misrepresentations must relate to a presently existing fact, but this 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."); *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). Construing Plaintiffs' Amended Complaints in the light most favorable to them, they pass muster under Rule 12(b)(6).

The crux of Plaintiffs' Amended Complaints is that they were misled into investing in Skywaves. As discussed previously, Defendants' alleged misrepresentations

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> of, or substitution for any or all of the terms or provisions of any ... credit [agreement].").

See id., 15 P.3d at 1097. South Carolina's statute is worded differently from Colorado's. There is nothing in the language of the South Carolina statute that would require the same result. Nothing in *Schoen* would insulate these Defendants from tortiously misleading Plaintiffs into making investments in Skywaves.

primarily concerned BB&T's existing commitment to provide capital to Skywaves. Plaintiffs allege that, in July 2007, Defendants represented, among other things, that BB&T was committed and bound to provide financing to Skywaves at such early stages as site planning. This would result in the provision of capital earlier in the process of performing work for a potential client and would enable Skywaves to expand its business. This was a statement about a present fact: that BB&T had the present intention and commitment to provide ongoing financing on this basis. Although this representation was forward-looking in a sense, it emanated from a present and existing fact. Rather than being bound to a long-term commitment to Skywaves on this basis, BB&T repudiated its promise only months after the Plaintiffs were duped into investing in Skywaves.

Under such circumstances, even where the misrepresentations involve future commitments, they are actionable because they relate to a presently existing condition:

> Torts based on misrepresentation "must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." *Tom Hughes Marine, Inc. v. Am. Honda Motor Co.*, 219 F.3d 321, 324–25 (4th Cir.2000).
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> Paragraph 47 of the Complaint alleges as a false representation by First Century that NAG had the authority to conduct the absolute auction. This was not a forward-looking representation; First Century had allegedly already given NAG the authorization to conduct the absolute auction at the time the representation was made. The Amended Complaint sufficiently alleges the elements of this claim. Therefore, the Court denies the motion to dismiss Plaintiffs' negligent misrepresentation claim against First Century.

See Pulliam v. Clark, 2012 WL 1835717, at *5 (D.S.C. May 21, 2012). At pleading stage of the case, it is premature to determine as a matter of law that Plaintiffs' misrepresentation claims cannot succeed.

Defendants next argue that Plaintiffs' negligent misrepresentation claims fail because Plaintiffs could not reasonably rely on Defendants' misrepresentations. (*See* Respondents' Init. Br., at pp.18-19 ("When there is no fiduciary relationship between the parties and the situation involves an arm's length transaction between mature, educated

parties, as is the case here, there is no right to rely."). For the reasons that follow, Defendants' arguments lack merit.

Plaintiffs rely on two[4] cases for their position that there must be a fiduciary relationship for there to be reasonable reliance. These cases are inapposite and do not support the requirement of a fiduciary relationship. In *Florentine Corp. v. PEDA I, Inc.*, 287 S.C. 382, 339 S.E.2d 112 (1985), individuals formed a corporation to obtain a shoe franchise. These individuals negotiated with a leasing agent for a mall, who promised that they would have no competition and that a competitor would not be allowed in the mall. The individuals and franchisee signed a lease for space in the mall, **even though it did not contain a promise of exclusivity.** Ultimately, the mall leased a space to one of the franchisee's competitors, which put it out of business. The Supreme Court held that, under those circumstances, the individuals and franchisee could not assert a valid claim for fraud. Specifically, the Court held that there could not be reasonable reliance for the following reasons:

> There was no confidential or fiduciary relationship between the respondents and the leasing agents of the mall. The lease was negotiated as an arm's length business transaction. Respondents read the lease prior to signing it and recognized that the owners of the mall had not agreed to refrain from leasing premises to the "Athletic Attic". An attorney reviewed the document on behalf of the respondents before it was signed.

See id., 287 S.C. at 386, 339 S.E.2d at 114.

The instant case is distinguishable from *Florentine* in several key respects. First, this case does not involve an arm's length transaction between Plaintiffs and Defendants (or Defendants' principal). They were not adversarial parties on the opposite sides of a business deal. Rather, Plaintiffs were considering investing in Skywaves, BB&T's

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[4] Plaintiffs also cite *GSM Dealer Servs., Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994), for the general principal that the Plaintiffs must have a right to rely on the alleged misrepresentations. However, *GSM Dealer Services* was not decided on the basis of the reasonableness of reliance. In that case, the court held that there was no evidence of a misrepresentation.

customer. *Florentine* is focused upon cases where the opposing contractual parties mislead each other into a contract. Moreover, *Florentine* involved a contract with the defendant's principal that the plaintiffs knew did not guarantee exclusivity. As such, they could not reasonably believe that they would be ensured exclusivity, irrespective of what the agent might have said. Where the agreement does not include that key term, the plaintiff could not rely on a representation. Here, there is no contract between the Plaintiffs and Defendants that could supersede oral representations in that fashion. As a result, this case is distinguishable from *Florentine*.

Defendants' other cited case, *First Savings Bank, FSB v. Capital Investors, Inc.*, 316 S.C. 360, 365, 450 S.E.2d 83, 86 (Ct. App. 1994), *rev'd in part on other grds.*, 459 S.E.2d 307 (1995), is also easily distinguishable. There, contrary to Defendants' suggestion, the Court did not create a rule that "sophisticated" parties could not rely on misrepresentations in the absence of a fiduciary duty. In *First Savings Bank*, this Court held **only** that "sophisticated plaintiffs could not have reasonably relied on alleged oral representations **that directly conflict with the specific written terms of the guaranty agreements they each signed**." *See id.*, 316 S.C. at 365, 450 S.E.2d at 86 (emphasis added). The Complaints here do not disclose that the Plaintiffs signed documents containing information contrary to Defendants' misrepresentations. This case is plainly not within *First Savings Bank.*

In addition, Defendants' argument fails because it is too early in this case to determine the reasonableness of reliance. This Court held in *Starkey v. Bell*, 281 S.C. 308, 313, 315 S.E.2d 153, 156 (Ct. App. 1984) that "[i]ssues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are **preeminently factual issues for the triers of the facts**." (Emphasis added). As the Supreme Court stated in *Florentine Corporation, Inc. v. PEDA I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985), one of the cases cited by Defendants:

> The right to rely must be determined in light of the representee's duty to use reasonable prudence and diligence under the circumstances. The determination of what constitutes reasonable diligence and prudence must be made **on a case by case basis**. Various circumstances which will be considered include the form and materiality of the representation; the respective age, experience, intelligence and mental and physical conditions of the parties; and the relations and respective knowledge and means of knowledge of the parties.

(Emphasis added). "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005).

Here, Plaintiffs allege facts that could support a finding of a fiduciary relationship under the circumstances. First, Plaintiffs expressly allege that a fiduciary relationship — a relationship of special trust — existed between Defendants and Plaintiffs. (*See* R. at pp.79-80 ¶¶ 58-63, 66 (emphasis added); *see also* R. at pp.67-68 ¶¶ 48-55; R. at pp.91-92 ¶¶ 58-63, 66; R. at pp.115-16 ¶ 42-49). This should suffice, in and of itself, to pass Rule 12(b)(6) muster. Moreover, Plaintiffs allege that, at the July 2007 meeting in McBee, Defendants undertook to provide information and representations for use by Plaintiffs in deciding whether to invest in Skywaves. These representations primarily concerned the nature of BB&T's commitment to the infusion of capital into Skywaves. Defendants were in the best position to know the truth of those representations and had a pecuniary interest in inducing investment in Skywaves, to increase BB&T's security. Plaintiffs relied on Defendants to provide truthful information. It is certainly conceivable that, under those circumstances, Plaintiffs could prove the existence of a fiduciary relationship, if necessary. It would be premature to decide, as a matter of law without any discovery or investigation, that Plaintiffs could not possibly prove such a relationship.

For these reasons, this Court should reverse the trial court's dismissal of Plaintiffs' claims.

III. Plaintiffs Properly Preserved Their Partial Performance Argument

Defendants argue that Plaintiffs failed to preserve their argument that their claims are insulated from the statute of frauds because of part performance. Specifically, Defendants argue that, while Plaintiffs did make this argument in opposition to the Motions to Dismiss, the trial court did not expressly rule on it. Defendants contend that Plaintiffs should have asked for a specific ruling on this issue in a Rule 59 Motion. Plaintiffs respectfully posit that this argument is without merit.

Defendants base their argument on *West v. Newberry Elec. Co-op.*, 357 S.C. 537, 543, 593 S.E.2d 500, 503 (Ct. App. 2004). However, in *West*, unlike the instant case, the appellee obtained declaratory relief apparently after a trial with findings by the judge. Under such circumstances, the trial court is directed by the Rules to make specific findings of fact and conclusions of law. *See* S.C.A.C.R., Rule 52(a). It is understandable that, where the trial judge fails to address an issue after a trial on the merits by making findings and conclusions, that issue is not properly preserved for appeal unless the losing party seeks a ruling. This is reflected in one of the cases cited in *West*:

> Under South Carolina Rule of Civil Procedure 52(a), "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." This Court has previously determined this requirement to be directory and that noncompliance would not form the basis for invalidating a judgment. [Citations omitted.] Rather, where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding. [Citations omitted.]
>
> The record reflects the circuit court did not explicitly rule on Penn National's argument that Noisette failed to prove Ismail was a permissive user. Penn National has failed to show it made a Rule 59(e), SCRCP motion to amend or alter judgment on this ground. We hold the issue was thus not properly before the Court of Appeals and should not have been addressed.

See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 123-24 (1991).

This case does not involve a trial before Judge Young. It does not involve a final

decision on the merits after presentation of evidence. This matter was presented to Judge Young on a Rule 12(b)(6) motion to dismiss based, in part, on S.C. Code § 37-10-107. In opposition, Plaintiffs suggested a number of reasons why that statute should not govern, any one of which (standing alone) would have mandated denial of the motion. Judge Young granted the motion, thereby rejecting all of Plaintiffs' arguments against the application of the statute (whether he stated his reasons why or not). Judge Young's ruling meant that he necessarily rejected any and all arguments Plaintiffs made against application of the statute. The mere fact that he did not expressly explain why he rejected one of the bases argued by Plaintiffs should not preclude appellate review of that basis. The cases requiring ruling on each specific issue for preservation should not apply in the instant matter.

For these reasons, this Court should reverse the trial court's dismissal of Plaintiffs' claims.

CONCLUSION

For all of the reasons set forth herein, this Court should reverse the trial court's grant of Defendants' Motions to Dismiss Plaintiffs' Complaints in these matters.

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March 26, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-205647

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

Roger M. Young, Circuit Court Judge

Cases 2009-CP-10-07515, 2009-CP-10-07517,
2009-CP-10-07518 and 2010-CP-10-09959

2009-CP-10-07515
James J. Kerr, Crayton Walters, and J.T. Main, LLC, ... Appellants,

v.

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

2009-CP-10-07517
Ron Konersmann, ... Appellant,

v.

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

2009-CP-10-07518
John Voytko, ... Appellant,

v.

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

2010-CP-10-09959
Patricia Konersmann, ... Appellant,

v.

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

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Appellants' Consolidated Final Reply Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that on the 26th day of March, 2013, I served three (3) bound copies of the Appellants' Consolidated Final Reply Brief on counsel for Respondents by hand delivery, addressed as follows:

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