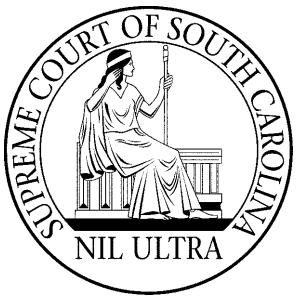

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18
May 2, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Re: Amendments to South Carolina Appellate Court Rules

Appellate Case No. 2016-002561

ORDER

On January 31, 2018, this Court submitted an order amending Rules 208, 215, 218, 221, 240, 245, 260, and 267 of the South Carolina Appellate Court Rules to the General Assembly pursuant to Article V, Section 4A of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, the amendments are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 1, 2018

The Supreme Court of South Carolina

Re: Amendments to South Carolina Appellate Court Rules

Appellate Case No. 2016-002561

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rules 208, 215, 218, 221, 240, 245, 260, and 267 of the South Carolina Appellate Court Rules are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 31, 2018

Rule 208(b), South Carolina Appellate Court Rules, is amended to provide:

(b) Content. The initial briefs under this Rule and the final briefs under Rule 211 shall contain:

(1) Brief of Appellant. The brief of appellant shall contain under appropriate headings and in the order here indicated:

(A) Table of Contents and Cases. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited.

(B) Statement of Issues on Appeal. A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.

(C) Statement of the Case. The statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and shall contain, as a minimum, the following information: the date of the commencement of the action or matter; the nature of the action or matter; the nature of the defense or of the response; the action of the court, jury, master, or administrative tribunal; the date(s) of trial or hearing; the mode of trial; the amount involved on appeal; the date and nature of the order, judgment or decision appealed from; the date of the service of the notice of appeal; the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal; and any changes made in the parties by death,

substitution, or otherwise. Any matters stated or alleged in appellant's statement shall be binding on appellant.

(D) Standard of Review. If all the issues are governed by the same standard of appellate review, the Brief shall contain a section with the heading "Standard of Review," which shall concisely set forth the applicable standard of review with citations to relevant case law establishing the standard. If the same standard of review is not applicable to all of the issues, a separate section with a heading of "Standard of Review" shall be included at the start of the argument on each issue with citations to relevant case law establishing this standard of review.

(E) Argument. The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority. A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions.

(F) Conclusion. A short conclusion stating the precise relief requested.

(2) Brief of Respondent. The brief of respondent shall conform to the requirements of Rule 208(b)(1)(A)-(F), except that a statement of the issues, of the case, or of the standard of review need not be made unless the respondent is dissatisfied with the statement of the issues, of the case, or of the standard of review by appellant. If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case. If a respondent does include his own statement of the case, he shall be bound by the matters stated or alleged in his statement of the case. Respondent's brief

may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).

Rule 215, South Carolina Appellate Court Rules, is amended to provide:

RULE 215
SUBMISSION WITHOUT ORAL ARGUMENT

The appellate court may decide any case without oral argument if it determines that oral argument would not aid the court in resolving the issues.

Rule 218(a), South Carolina Appellate Court Rules, is amended to provide:

(a) Conduct of Argument. The appellant shall open and close the argument. Unless otherwise permitted by the court, counsel will not be permitted to read from books, briefs, records or authorities cited, although brief references therefrom may be read to illustrate points and argument.

Rule 221(a), South Carolina Appellate Court Rules, is amended to provide:

(a) Rehearing. Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court. No return to a petition for rehearing may be filed unless requested by the appellate court. Ordinarily, however, rehearing will not be granted in the absence of such a request. No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari under Rule 242, SCACR.

Rule 240(e), South Carolina Appellate Court Rules is amended to provide:

> **(e) Return to Motion.** Any party opposing a motion or petition shall have ten (10) days from the date of service thereof to file an original and six (6) copies of his return with the clerk and serve on all parties a copy of the return; provided, however, that a return to a petition for rehearing may only be filed if permitted under Rule 221(a). The court may in its discretion enlarge or limit the time for filing the return. The provisions of Rule 240(c) shall apply to a return. Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition.

Rule 245(a), South Carolina Appellate Court Rules, is amended to provide:

> **(a) When Appropriate.** The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties. If the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the facts showing the reasons must be stated in the petition.

Rule 260(b), South Carolina Appellate Court Rules, is amended to provide:

> **(b) Agreed Dismissal.** If the parties to an appeal or other proceeding shall sign and file with the clerk of the appellate court an agreement that the proceeding be dismissed, the appellate court may enter an order of dismissal. The agreement may contain a provision altering the costs to be assessed under Rule 222 and/or other settlement terms subject to the provisions of Rule 261. An agreement that the proceeding be dismissed need not be in the form of a motion unless the parties request that the appellate court alter the costs assessed; approve a settlement agreement; modify the requirements of an Appellate Court Rule; or vacate a prior order, opinion, or judgment.

Rule 267(f), South Carolina Appellate Court Rules, is amended to provide as follows, and the current version of paragraph (f) is reordered as paragraph (g):

> **(f) Number of Copies.** The number of copies required to be filed are specified in the applicable Appellate Court Rule. However, the number of copies required to be filed may be reduced by order of the Supreme Court.

The Supreme Court of South Carolina

Re: Amendments to Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2017-002387

ORDER

On January 31, 2018, this Court submitted an order amending Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules to the General Assembly pursuant to Article V, Section 4A of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, the amendment is effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 1, 2018

The Supreme Court of South Carolina

Re: Amendments to Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2017-002387

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended as set forth in the attachment to this order. The amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 31, 2018

Rule 8 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended to provide:

Rule 8
Confidentiality

(a) Confidentiality. Any mediation communication disclosed during a mediation, including, but not limited to, oral, documentary, or electronic information, shall be confidential, and shall not be divulged by anyone in attendance at the mediation or participating in the mediation, except as permitted under this rule or by statute. Additionally, the parties, their attorneys and any other person present or participating in the mediation must execute an Agreement to Mediate that protects the confidentiality of the process. The parties and any other person present or participating shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation, which shall include, but not be limited to:

(1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;

(2) Admissions made in the course of the mediation proceeding by another party or any other person present;

(3) Proposals made or views expressed by the mediator;

(4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; and

(5) All records, reports or other documents created solely for use in the mediation or received by a mediator while serving as a mediator.

(b) Waiver of Confidentiality. Upon the signing by the parties of an agreement reached during mediation, confidentiality is waived as to the terms of the agreement, unless otherwise agreed to by the parties.

(c) Limited Exceptions to Confidentiality. There is no confidentiality attached to information that is disclosed during a mediation:

(1) for which the confidentiality against disclosure has been waived or stipulated to by all parties;

(2) that is used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;

(3) offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

(4) offered for the limited purpose in judicial proceedings of establishing, refuting, approving, voiding, or reforming a settlement agreement reached during a mediation;

(5) offered to report, prove, or disprove professional misconduct occurring during the mediation; or

(6) in a report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules.

(d) Limited disclosures. A mediation communication disclosed under subsections (c)(3), (c)(4), (c)(5), or (c)(6) remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this rule or by statute.

(e) Private Consultation/Confidentiality. The mediator may meet and consult individually with any party or parties or their counsel

during a mediation conference. The mediator without consent shall not divulge confidential information disclosed to a mediator in the course of a private consultation.

(f) No Waiver of Privilege. No communication by a party or attorney to the mediator in private session shall operate to waive any attorney-client privilege.

(g) Mediator Not to be Called as Witness. The mediator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum. All records, reports and other documents received by the mediator while serving in that capacity shall be confidential.

(h) Admissible information. Information that would be admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in a mediation.

The Supreme Court of South Carolina

Re: Amendments to Rules 207 and 607, South Carolina Appellate Court Rules

Appellate Case No. 2017-002059

ORDER

On January 31, 2018, this Court submitted an order amending Rules 207 and 607 of the South Carolina Appellate Court Rules to the General Assembly pursuant to Article V, Section 4A of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, the amendments are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 1, 2018

The Supreme Court of South Carolina

Re: Amendments to Rules 207 and 607, South Carolina Appellate Court Rules

Appellate Case No. 2017-002059

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rules 207 and 607 of the South Carolina Appellate Court Rules are amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 31, 2018

Rule 207(a), South Carolina Appellate Court Rules, is amended to provide:

RULE 207
TRANSCRIPT OF PROCEEDING

(a) Appeals From a Lower Court.

(1) Ordering the Transcript. Where a transcript of the proceeding must be prepared by the court reporter, appellant shall, within the time provided for ordering the transcript, make satisfactory arrangements (including agreement regarding payment for the transcript), in writing with the court reporter for furnishing the transcript. In appeals from the court of common pleas, masters-in-equity, special referees or the family court in domestic actions, the transcript must be ordered within ten (10) days after the date of service of the notice of appeal. In appeals from the court of general sessions or the family court in juvenile actions, the transcript must be ordered within thirty (30) days of the date of service of the notice of appeal. Appellant shall contemporaneously furnish all parties, the Office of Court Administration, and the clerk of the appellate court with copies of all correspondence with the court reporter. The court reporter must acknowledge receipt of the request by responding to the appellant within five business days. Where required by paragraph (a)(7) and by Order of the Supreme Court, copies of all correspondence must also be provided by electronic means. Unless the parties otherwise agree in writing, appellant must order a transcript of the entire proceedings below. If a party to the appeal unjustifiably refuses to agree to ordering less than the entire transcript, appellant may move to be awarded costs for having unnecessary portions transcribed; this motion must be made no later than the time the final briefs are due under Rule 211.

(2) Delivery of Transcript. The court reporter shall transcribe and deliver the transcript to appellant no later than sixty (60) days after the date of the request. Records shall be transcribed by the court reporter in the order in which the requests for transcripts are made.

(3) Extension for Court Reporter. If a court reporter anticipates continuous engagement in the performance of other official duties which make it impossible to prepare a transcript in compliance with this Rule, the reporter shall promptly notify the Office of Court Administration by submitting a

Court-approved Notice of Request for Extension form. The Office of Court Administration may grant up to three (3) extensions for a total of up to ninety (90) days. An extension in excess of ninety (90) days shall not be allowed except by order of the Chief Justice.

(4) Notice of Extension. Upon the granting of any extension of time for delivery of the transcript, the Office of Court Administration shall notify all parties and the clerk of the appellate court.

(5) Failure to Receive Transcript. If appellant has not received the transcript within the allotted time nor received notification of an extension within ten (10) days after the allotted time, appellant shall notify the Office of Court Administration, the clerk of the appellate court, and the court reporter in writing.

(6) Failure to Comply. The willful failure of a court reporter to comply with the provisions of this Rule shall constitute contempt of court enforceable by order of the Chief Justice.

(7) Electronic Notification. In addition to providing notice as set forth above in paragraphs (a)(1) and (a)(5), where an appellant is represented by counsel, counsel shall provide copies of all correspondence with a court reporter via electronic means as specified by Order of the Supreme Court. Court reporters shall also provide copies of all correspondence and extension requests via electronic means as specified by Order of the Supreme Court.

. . . .

Rule 607, South Carolina Appellate Court Rules, is amended to provide:

RULE 607
COURT REPORTER TRANSCRIPTS AND TAPES

(a) Applicability. This rule is applicable to court reporter transcripts and tapes relating to proceedings before the family and circuit court, to include proceedings before masters-in-equity. A court reporter for such a proceeding, regardless whether the court reporter is a Judicial Department employee or a private court reporter, shall comply with the requirements of this rule.

(b) Ordering Transcripts. Transcripts of proceedings which are needed for an appeal or appellate review of a post-conviction relief action before the Supreme Court or Court of Appeals shall be ordered as provided by Rules 207(a) or 243(b), SCACR. In all other cases, the request for the transcript shall be made, in writing, to the court reporter, and a copy of the request shall be served as provided by Rule 262(b), SCACR, on all parties to the proceeding which is to be transcribed and, if the transcript is requested for use in another case, on all parties in that case. A copy of the request shall also be provided to the Office of Court Administration. If the request is made by an attorney, the attorney shall provide copies of all correspondence via electronic means as specified in Rule 207(a)(7) and by Order of the Supreme Court. The names and addresses of all persons who are to be served with a copy shall be included on the request for the transcript. The court reporter must acknowledge receipt of the request by responding to the person making the request within five business days, and provide a copy to the Office of Court Administration as specified in Rule 207(a)(7) and by Order of the Supreme Court.

(c) Preparation of Transcript. The transcript shall be prepared in the manner prescribed by the Court Reporters Manual published by the Office of Court Administration.

(d) Delivery of Transcripts. A court reporter shall transcribe and deliver the transcript no later than sixty (60) days after the date of the request. Records shall be transcribed by the court reporter in the order in which the requests for transcripts are made; provided, however, that requests to transcribe post-conviction relief proceedings challenging a sentence of death shall be given priority as provided by S.C. Code Ann. § 17-27-160(E).

(e) Extension of Time to Deliver. If a court reporter anticipates continuous engagement in the performance of other official duties which make it impossible to prepare a transcript within the time specified in (d) above, the reporter shall promptly notify the Office of Court Administration by submitting a Court-approved Notice of Request for Extension form. The Office of Court Administration may grant up to three extensions for a total of up to ninety (90) days. Extensions in excess of ninety days (90) days shall not be allowed except by order of the Chief Justice.

(f) Notice of Extension. Upon the granting of any extension of time for delivery of the transcript, the Office of Court Administration shall notify the parties and, if the transcript has been requested for an appeal or other proceeding before the Supreme Court or the Court of Appeals, the Clerk of that Court.

(g) Failure to Receive Transcript. If the requesting party has not received the transcript within the allotted time nor received notification of an extension within ten (10) days after the allotted time, the requesting party shall notify, in writing, the Office of Court Administration, the court reporter and, if the transcript has been requested for an appeal or other proceeding before the Supreme Court or the Court of Appeals, the Clerk of that Court. If the request was made by an attorney, the attorney shall also provide notice via electronic means as provided in Rule 207(a)(7) and by Order of the Supreme Court.

. . . .

The Supreme Court of South Carolina

Re: Electronic Means Pursuant to Rules 207 and 607,
South Carolina Appellate Court Rules

Appellate Case No. 2017-002059

ORDER

Effective May 1, 2018, Rules 207 and 607 of the South Carolina Appellate Court Rules (SCACR) have been amended to require that attorneys and court reporters provide the Office of Court Administration with copies, via electronic means, of all correspondence related to the ordering of transcripts. The rules also require that court reporters provide Court Administration with copies, via electronic means, of requests for extensions to produce those transcripts. The amended rules state the Supreme Court will, by Order, provide the specific electronic means by which these copies will be provided.

Accordingly, IT IS ORDERED:

Whenever an attorney or court reporter is required to provide the Office of Court Administration with copies of correspondence relating to transcript requests via electronic means pursuant to Rule 207(a)(1), (a)(5), and (a)(7), SCACR, and/or Rule 607(b) and (g), SCACR, these copies shall be emailed to: transcripts@sccourts.org

Further, whenever a court reporter is required to provide a Notice of Request for Extension form to Court Administration via electronic means pursuant to Rule 207(a)(3) and (a)(7) and/or Rule 607(e), SCACR, that form shall be emailed to: extensionrequest@sccourts.org

When emailing copies of correspondence sent via U.S. Mail, the copies may be provided in .pdf or Microsoft Word format. Where correspondence between

attorneys and court reporters is by email, a carbon copy or forwarded copy of the email may be submitted to the appropriate email address.

Effective May 15, 2018, paper copies of Notice of Request for Extension forms submitted by court reporters, whether sent by mail or by facsimile, will no longer be accepted by Court Administration. Beginning May 15, court reporters must provide a Notice of Request for Extension form to Court Administration solely by electronic means as specified in the Court Reporter Manual to: extensionrequest@sccourts.org

Finally, all copies of correspondence and all forms sent via electronic means pursuant to this Order concerning transcripts, including emails sent by court reporters requesting extensions of time, must identify the case(s) to which the correspondence or extension request relates by providing the lower court case name and case number in the "SUBJECT LINE" of the email.

This order is effective May 1, 2018; however, communications and extension requests need not be submitted via electronic means until May 15, 2018. The terms of this Order remain in effect until revoked or superseded by Order of the Supreme Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 1, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Skywaves I Corporation, Appellant/Respondent,

v.

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

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

And

Of Whom James Edahl is the Respondent.

Appellate Case No. 2015-001809

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. Op. 5557
Heard March 5, 2018 – Filed May 2, 2018

AFFIRMED IN PART, REVERSED IN PART, AND DISMISSED IN PART

M. Dawes Cooke Jr. and John William Fletcher, both of Barnwell, Whaley, Patterson & Helms, LLC; John P. Linton Sr. and Brian C. Duffy, both of Duffy & Young, LLC; Andrew K. Epting Jr., of Andrew K. Epting Jr.,

LLC; and George J. Kefalos, of George J. Kefalos, PA, all of Charleston, for Appellant/Respondent.

Kirsten Elena Small, of Nexson Pruet, LLC, of Greenville; Julio E. Mendoza Jr., of Nexsen Pruet, LLC, of Columbia; and Molly Hughes Cherry, of Nexsen Pruet, LLC, of Charleston, all for Respondent/Appellant.

J.W. Nelson Chandler, of Chandler & Dudgeon LLC, of Charleston, for Respondent.

KONDUROS, J.: This cross-appeal arises out of a suit brought by Skywaves I Corporation (Skywaves) against Branch Banking and Trust Company (BB&T) and James Edahl. Skywaves brought suit against BB&T for breach of contract and breach of contract accompanied by fraudulent acts and against both BB&T and Edahl for negligent misrepresentation, negligence, and violation of the South Carolina Unfair Trade Practices Act (SCUTPA).[1] Skywaves appeals the circuit court's orders (1) granting BB&T's and Edahl's motions to strike its demand for a jury trial, (2) granting summary judgment to BB&T and Edahl as to its claims for negligence and negligent misrepresentation, (3) dismissing its SCUTPA claim, and (4) denying its motion to strike BB&T's and Edahl's answers. BB&T appeals the circuit court's order denying it summary judgment as to Skywaves' claims for breach of contract and breach of contract accompanied by fraudulent acts. We affirm in part, reverse in part, and dismiss in part.

FACTS/PROCEDURAL HISTORY

Skywaves is a South Carolina corporation that develops technology for the wireless telecommunications industry; specifically, Skywaves manufactures structures for sheltering equipment at the base of cell phone towers. Ronald Konersmann, a businessman who has been involved with manufacturing infrastructure for the telecommunications industry since 1982, is Skywaves' founder and Chief Executive Officer (CEO), and John Voytko, a licensed certified professional accountant, is Skywaves' Chief Financial Officer (CFO). BB&T is a banking institution with branches in several states including North and South

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[1] S.C. Code Ann. §§ 39-5-10 to -560 (1985 & Supp. 2017) ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.").

Carolina. Edahl is a resident of South Carolina and was an officer at BB&T at the time of the events leading to the action.

On March 22, 2005, Skywaves entered into a factoring agreement (the Agreement) with BB&T.[2] Under the Agreement, BB&T agreed to purchase Skywaves' accounts receivable for eighty percent of the face value of the invoice up to a maximum of $1.5 million. Once Skywaves sold a receivable to BB&T, BB&T became vested with all of Skywaves' rights in the account, including the right to payment. Every factored invoice was required to "state plainly on the face thereof that the [a]ccount . . . has been assigned and sold to, [and] is owned by and is payable to BB&T only." If a customer sent payment on a factored invoice to Skywaves, BB&T required Skywaves to hold the payment "as the property of BB&T, without commingling [the payment] with any funds or property of [Skywaves]," and immediately turn the payment over to BB&T. BB&T also required Skywaves to make several covenants and warranties regarding its financial status, including its ability to pay its debts as they matured in the ordinary course of business.

The Agreement was for a one-year term subject to renewal if not terminated by BB&T or Skywaves. BB&T could terminate the Agreement at any time with sixty days' written notice and could terminate the Agreement without notice "after the occurrence of any [e]vent of [d]efault." Events of default included violation of the financial covenants, such as Skywaves' inability to pay its debts as they accrued in the ordinary course of business; Skywaves' failure to comply with any portion of the Agreement or any other agreement it had with BB&T; and "for any other reason [BB&T] deem[ed] itself insecure." The Agreement also provided, "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." The Agreement stated in bold writing, immediately prior to the signature page, Skywaves waived its right to "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." Finally, the Agreement set forth "*the entire understanding between the parties . . . supersed[ing] all prior and*

[2] Skywaves and BB&T also entered into a 2005 loan agreement, a 2005 promissory note, a 2005 security agreement, a 2007 promissory note, and a 2007 security agreement. In each document, Skywaves waived its right to a jury trial on any claim related to the documents or "the conduct of the relationship between" BB&T and Skywaves. Moreover, all of these documents provided South Carolina law would govern any claims arising out of the documents.

contemporaneous agreements and understandings, inducements and conditions, whether express or implied, oral or written," and provided it "supersede[d] any course of performance and/or usage of the trade inconsistent with any of the terms hereof." (emphasis added).

From the outset, Skywaves contended some of its customers were unable or unwilling to make payments on factored invoices directly to BB&T, and it informed BB&T of this issue. Skywaves alleged it and BB&T orally agreed payments on factored invoices could flow through Skywaves and Skywaves could delay remittance of such payments to BB&T for up to sixty days. No writing reflects the alleged modifications to the Agreement, and on several occasions, BB&T told Skywaves to put the required notification on factored invoices and expressed concern regarding overdue payments on factored invoices. For example, on June 5, 2006, BB&T informed Skywaves "over $150,000 [of payments on factored invoices from Cingular and Nextel were thirty plus] days past due." On August 31, 2007, BB&T contacted Skywaves and asked why it had been holding payments from Verizon on factored invoices for six weeks and reminded Skywaves holding payments "could be viewed as a violation of the [Agreement]." A December 14, 2007 email from BB&T to Skywaves indicated $43,125 worth of accounts were over sixty days past due. Additionally, Skywaves' CFO Voytko admitted Skywaves intermingled the payments it received on the factored invoices, which belonged to BB&T, with Skywaves' funds and used the payments for operating purposes and cash flow.

From 2005 to 2006, Skywaves and BB&T occasionally amended the Agreement via written modifications in order for BB&T to fund Skywaves' working capital needs as those needs developed and expanded. Initially, on June 1, 2005, BB&T reduced the minimum monthly commission required under the Agreement because Skywaves did not begin factoring invoices until late 2005. Next, on May 11, 2006, BB&T and Skywaves executed a written amendment to the factoring agreement, increasing Skywaves' line of credit from $1.5 million to $1.75 million and reducing the minimum monthly commission. Additionally, early in 2006, BB&T began advancing money to Skywaves based on purchase orders it received from Nextel.

In early 2007, Skywaves won several lucrative government contracts, and as a result, its Board of Directors determined the company required more capital to meet the increased demand for its products than BB&T had provided at that time. Skywaves therefore solicited funding proposals from various entities, including Wachovia and Hunt Capital (Hunt). In particular, Hunt sent Skywaves a

preliminary, nonbinding term sheet, which was dated March 22, 2007, offering to purchase thirty percent of Skywaves' stock for $4 million.

Edahl, BB&T's relationship manager for Skywaves, assured Skywaves BB&T was familiar with Skywaves' financial needs and could provide for those needs without Skywaves diluting its stock by working with Hunt. Thus, Skywaves decided to obtain the needed funding from BB&T, and BB&T created a unique financing arrangement for Skywaves. On March 2, 2007, BB&T sent a letter to Skywaves, stating the Agreement had been renewed and it had increased Skywaves' line of credit to $3.5 million with a $2 million sublimit for purchase order financing. Under the renewal, BB&T would advance eighty-five percent of the value of an invoice to Skywaves and sixty percent of the value of a purchase order. On March 14, 2007, BB&T sent another letter to Skywaves, clarifying the purchase order advance rate was actually sixty-five percent. BB&T and Skywaves executed a written amendment, making the changes contemplated in the March 2 and March 14 letters. Under the amendment, BB&T would advance funds on the purchase order of any customer.

In the spring of 2007 and again in July 2007, Skywaves asked Edahl if BB&T would advance funds to it on the basis of site plans—potential sites where it anticipated placing shelters if ordered by customers. Konersmann stated Edahl agreed to factor site plans, and Edahl admitted he agreed to factor specific site plans—namely those related to Skywaves' contract with General Dynamics—at the same advance rate as purchase orders.[3] BB&T had never factored site plans before, an arrangement to factor site plans is not reflected in the Agreement or any written amendment to the Agreement, and Edahl's supervisor stated Edahl did not receive approval from him to factor site plans. BB&T advanced funds until January 2008 to Skywaves based on the General Dynamics site plans.

On January 17, 2008, Michael Burke, the new account executive for Skywaves' factoring line, went with Edahl to Skywaves' warehouse. During the visit, Skywaves provided BB&T its 2007 year-end financial statements, which showed Skywaves had not had a profitable month since January 2007 and had closed 2007 with a net loss of $1,388,349.43. Also during the visit, Burke asked Konersmann and Voytko about "a number of items that looked like purchase orders [BB&T] had advanced on that [it was] not getting invoices on." Konersmann and Voytko told Burke the items were not purchase orders, and Burke "was very shocked, very

[3] General Dynamics was one of Skywaves' customers and had a contract with the state of New York to deliver shelter units to New York's cell towers.

concerned" to learn BB&T was funding money to Skywaves without valid purchase orders. Edahl, out of fear of losing his job, denied knowledge of the site plan factoring and told his superiors at BB&T, in an email sent January 22, 2008, "As we discussed Friday, neither you or I had any idea that the [General Dynamics-New York State] purchase orders funded from July through October were not documented and funded exactly like the other purchase orders."

A January 2008 field audit by BB&T revealed Skywaves had received $320,000 to $340,000 from Verizon on factored invoices and had not turned this money over to BB&T. The audit also revealed that as of January 25, 2008, thirty-seven percent of Skywaves' payables were more than sixty days overdue. Skywaves stated its overdue debts were all to one creditor, StructuredTech, which was owned by a Skywaves' investor who agreed to give Skywaves an extension of time to pay. However, Skywaves admitted the amount owed to StructuredTech only accounted for twenty-five percent of Skywaves' payables.

On January 18, 2008, Edahl informed Skywaves its "over advance ha[d] put [it] in default of the commercial finance loan and that [it] w[ould] be getting written notice of the same shortly." On January 25, 2008, BB&T sent Skywaves written notice it had defaulted under the terms of the Agreement, BB&T refused to honor any further financial commitments, and BB&T was terminating the Agreement. In particular, BB&T asserted Skywaves defaulted because it had received payments for factored accounts and did not immediately turn the payments over to BB&T; Skywaves was not paying its debts in the ordinary course of business; and BB&T had the good faith belief Skywaves' ability to pay BB&T and perform the obligations of the Agreement were impaired.

In response, Skywaves hired an attorney, Earle Hewlette, who wrote to BB&T on Skywaves' behalf, asking BB&T to utilize a rescue plan to save the company and expressing Skywaves' "regret for the mistakes made in the past in dealing with [BB&T]." In its reply to Hewlette's email, BB&T did not agree to utilize the rescue plan. Additionally, BB&T listed eight instances of Skywaves holding payments owed to BB&T in violation of the Agreement, and two of these instances involved Skywaves holding payments for over sixty days. Due to the absence of funding, Skywaves filed for bankruptcy in April 2008.

On December 3, 2009, Skywaves filed this action against BB&T and Edahl for (1) breach of contract, (2) breach of contract accompanied by fraudulent acts, (3) negligent misrepresentation, (4) fraudulent inducement, and (5) lender liability. Skywaves subsequently filed an amended complaint, asserting claims against

BB&T for (1) breach of contract, (2) breach of contract accompanied by fraudulent acts, (3) promissory estoppel, and (4) breach of the covenant of good faith and fair dealing. It also asserted claims against both BB&T and Edahl for (1) negligent misrepresentation, (2) fraudulent misrepresentation, (3) negligence, and (4) violation of SCUTPA. In its amended complaint, Skywaves alleged, "The unfair acts and practices of [BB&T and Edahl] have an impact on the public interest, [and] have a potential for repetition."

In their answers to the amended complaint, BB&T and Edahl both admitted Edahl was an officer of BB&T and worked at the Charleston branch, but they denied that, "At all times relevant hereto, Defendant Edahl was the agent, servant, and employee of Defendant BB&T, and acted within the scope and course of his employment." In 2015, BB&T clarified it did "not deny that Mr. Edahl was its employee, and thus its agent, in the financing provided under the . . . Agreement." Additionally, in their answers, BB&T and Edahl denied Skywaves' allegations they agreed to modify the Agreement to provide for the advancement of capital based on site plans and that this modification was memorialized in numerous writings, including emails, letters, and other documents.

BB&T filed a partial motion to dismiss Skywaves' claims for negligent misrepresentation, fraudulent misrepresentation, negligence, violation of the SCUTPA, and breach of contract accompanied by fraudulent acts. Edahl filed a motion to dismiss all of Skywaves' claims against him. At the hearing on the motions to dismiss, BB&T and Edahl argued the lender liability statute of frauds, set forth in section 37-10-107 of the South Carolina Code (2015), barred Skywaves' claims.[4] Skywaves argued the case needed to proceed to trial to determine whether section 37-10-107 was applicable. Skywaves also argued BB&T's representations it could provide Skywaves with adequate financing was a present act that could constitute fraud. Additionally, Skywaves argued its relationship with BB&T exceeded the typical bank-customer relationship because BB&T, through Edahl, advised Skywaves and advised others to invest in Skywaves. Finally, Skywaves argued its allegation that BB&T's conduct had a potential for repetition was "sufficient to establish the impact on the public

[4] Section 37-10-107 provides, "No person may maintain an action for legal or equitable relief . . . based upon failure to perform an alleged . . . agreement . . . to lend or borrow money . . . unless the party seeking to maintain the action . . . has received a writing from the party to be charged . . . ."

interest," as required to have a claim under SCUTPA. After the hearing,[5] the circuit court dismissed all of Skywaves' claims against Edahl and also dismissed Skywaves' claims against BB&T for (1) breach of contract accompanied by fraudulent acts, (2) negligent misrepresentation, (3) fraudulent misrepresentation, (4) negligence, and (5) violation of SCUTPA. Skywaves filed a motion to reconsider the dismissal. Skywaves also filed a notice of intent to appeal the order. The circuit court granted Skywaves' motion to reconsider, modifying its order to allow Skywaves to proceed on its claims for breach of contract accompanied by fraudulent acts against BB&T and on its claims for negligence and negligent misrepresentation against BB&T and Edahl. Skywaves then filed a motion to withdraw its appeal as moot, and this court dismissed the appeal.

During Edahl's first deposition on September 19, 2013, he indicated he did not remember agreeing to site plan financing until he heard Konersmann's deposition testimony the week prior to his deposition. Edahl also testified no written modification to the Agreement was made reflecting his oral agreement with Skywaves to factor site plans. He stated that based on the oral agreement, he believed BB&T was obligated to finance site plans and in fact did finance some site plans.

On January 17, 2014, Skywaves filed a motion to strike both BB&T's and Edahl's answers on the ground they were sham pleadings because in their answers, BB&T and Edahl both denied the existence of an oral modification to the Agreement to include site plan factoring and had not amended their answers following Edahl's admission he agreed to site plan factoring. BB&T and Edahl filed motions to amend their answers to address Edahl's new testimony as to site plan factoring. After a hearing, the circuit court denied Skywaves' motion to strike and granted BB&T's and Edahl's motions to amend. At that point, BB&T and Edahl amended their answers to admit that as of March 2007, BB&T and Skywaves "memorialized certain written modifications to the . . . Agreement . . . to allow for factoring of invoices and purchase orders. [BB&T and Edahl] further admit[ted] an agreement to finance site plans, to a limited extent, with certain limitations on the amounts being factored." However, both Edahl and BB&T continued to deny the site plan funding modification was written.

On February 11, 2014, Edahl provided an affidavit, wherein he stated he "was aware in January 2008 that [he] had agreed to treat certain site plans of General

[5] The hearing involved BB&T's and Edahl's motions to dismiss Skywaves' claims, as well as the claims of Konersmann, Voytko, and three Skywaves investors.

Dynamics the same as purchase orders with respect to the funding under [the Agreement]." During his second deposition on November 21, 2014, Edahl testified he initially denied he had approved site plan factoring out of fear he would lose his job, and he admitted he had approved site plan financing. Furthermore, he stated Skywaves relied on his recommendation to fund its growth with purchase order and site plan financing. Based on Edahl's admission he agreed to site plan factoring, BB&T employee Michael Hennessey admitted in a deposition that Skywaves did not breach the site plan funding accommodation.

Several BB&T employees testified in depositions BB&T makes recommendations and gives advice to its customers; seeks to develop trust with its customers; has a duty to understand its customers' needs; and should treat its customers fairly and not mislead them. A BB&T employee also testified a bank customer is entitled to believe what their relationship manager tells them on behalf of BB&T. Moreover, in its philosophy, BB&T describes itself as a "high-quality financial advice business" and providing "professional sales and risk management direction."

BB&T and Edahl both filed motions for summary judgment and motions to strike Skywaves' demand for a jury trial. On January 12, 2015, the circuit court held a hearing on the motions to strike the demand for a jury trial. At the hearing, BB&T argued the right to a jury trial is a procedural issue and is accordingly governed by the law of the forum, in this case South Carolina. It contended the choice of law provision in the Agreement applied only to substantive issues, not procedural issues. BB&T stated South Carolina allows parties to waive the right to a jury trial in contracts, and therefore, Skywaves waived its right to a jury trial by signing the Agreement, which contained a jury trial waiver. BB&T also maintained its other agreements with Skywaves were governed by South Carolina law and contained jury trial waivers. Edahl agreed with BB&T's arguments and contended the waivers signed by Skywaves were also enforceable as to Skywaves' claims against him because he was BB&T's agent and employee. Skywaves argued the Agreement was governed by North Carolina law, which does not allow for jury trial waivers. Specifically, Skywaves asserted the issue at stake was substantive because it dealt with determining the validity of a contract provision, and thus, North Carolina law applied. Skywaves contended Edahl could not rely on the waiver provision because he was not a party to the Agreement.

After the hearing, the circuit court granted BB&T's and Edahl's motions to strike Skywaves' demand for a jury trial, finding the right to a jury trial was a procedural right, South Carolina law applied, and South Carolina law allows parties to contractually waive the right to jury trial. Skywaves filed a motion to reconsider

the order granting BB&T's and Edahl's motions to strike the demand for a jury trial. Skywaves then filed a motion to amend its amended complaint, alleging a claim for violation of the North Carolina Unfair Trade Practices Act. Skywaves also filed a second motion to strike BB&T's and Edahl's answers, arguing because BB&T and Edahl "knowingly took [] false positions, unsupported by the evidence, for years in this litigation," the court should apply the doctrines of unclean hands and judicial estoppel to strike BB&T's and Edahl's answers.

Following a hearing,[6] the circuit court filed an order (1) granting in part BB&T's motion for summary judgment; (2) granting Edahl's motion for summary judgment; (3) denying Skywaves' motion to amend its amended complaint; (4) denying Skywaves' motion to strike the answers of BB&T and Edahl; and (5) denying Skywaves' motion to reconsider the order striking its demand for a jury trial. In particular, the circuit court denied BB&T summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by fraudulent acts. However, the court granted summary judgment to BB&T on Skywaves' claims for promissory estoppel and breach of the covenant of good faith and fair dealing. The court also granted BB&T and Edahl summary judgment as to Skywaves' claims for negligence and negligent misrepresentation because (1) the economic loss doctrine barred the claims, (2) Skywaves could not establish the elements of negligence and negligent misrepresentation, and (3) the lender liability statute of frauds barred the claims. The court denied Skywaves' motion to strike because it found no evidence was presented that BB&T's or Edahl's answers were "manifestly false or made in bad faith." This appeal followed.

LAW/ANALYSIS

I. Skywaves' Appeal

A. Strike of Demand for a Jury Trial

Skywaves argues the circuit court erred by holding it waived its constitutional right to a jury trial by signing the Agreement, which contained a jury trial waiver. It maintains the jury trial waiver was unconscionable and void under North Carolina law, which was the governing law of the Agreement. Skywaves contends the question of the validity of a jury trial waiver in a contract is a substantive legal issue and the issue should therefore be governed by North Carolina law. We agree the circuit court erred by striking Skywaves' demand for a jury trial.

[6] The transcript of this hearing was not included in the record on appeal.

"Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law." *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 728 (D.S.C. 2007); *see also Team IA, Inc. v. Lucas*, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011) ("Choice of law clauses are generally honored in South Carolina."); *Livingston v. Atl. Coast Line R. Co.*, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935) ("[C]ontracts are to be governed as to their nature, validity[,] and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view."). "However, a choice-of-law clause in a contract will not be enforced if application of foreign law results in a violation of South Carolina public policy." *Nucor Corp.*, 482 F. Supp. 2d at 728; *see also Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 33, 644 S.E.2d 663, 673 (2007) ("This [c]ourt will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution."). "[T]he fact that the law of two states may differ does not necessarily imply that the law of one state violates the public policy of the other." *Nash v. Tindall Corp.*, 375 S.C. 36, 41, 650 S.E.2d 81, 84 (Ct. App. 2007) (alteration in original) (quoting *Boone v. Boone*, 345 S.C. 8, 13-14, 546 S.E.2d 191, 191 (2001)).

Under North Carolina law, "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." N.C. Gen. Stat. § 22B-10 (2017). Conversely in South Carolina, "[a] party may waive the right to a jury trial by contract." *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014) (quoting *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 63, 566 S.E.2d 863, 866 (Ct. App. 2002)). "[T]he right to a trial by jury is a substantial right, and we 'strictly construe' such waivers." *Id*. (quoting *Twillman*, 351 S.C. at 64, 566 S.E.2d at 866). However, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." *Id*. at 332-33, 755 S.E.2d at 443 (alteration in original) (quoting *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003)).

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. *See Green v. U.S. Auto. Ass'n Auto & Prop. Ins. Co.*, 407 S.C. 520, 523-25, 756 S.E.2d 897, 899-900 (2014) (finding the issue in the case was not parental immunity, which had been abolished in South Carolina, but the enforceability of a contract provision and holding the "family member exclusion

[policy] contained in the Florida automobile [insurance] policy at issue . . . [was] not void as against [South Carolina] public policy"). 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.[7] *See Nucor Corp.*, 482 F. Supp. 2d at 728 ("Generally, under South Carolina choice of law principles, if the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law."). Thus, the contractual waiver of the right to a jury trial is void and unenforceable. N.C. Gen. Stat. § 22B-10 ("Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable.").

Furthermore, North Carolina's policy of finding contractual jury trial waivers unenforceable is not void as against South Carolina public policy. *See Nash*, 375 S.C. at 41, 650 S.E.2d at 84 ("[T]he fact that the law of two states may differ does not necessarily imply that the law of one state violates the public policy of the other." (alteration in original) (quoting *Boone*, 345 S.C. at 13-14, 546 S.E.2d at 191). South Carolina's public policy regarding contracts focuses on holding parties to their contract provisions and the effect of those provisions. *See Blackburn*, 407 S.C. at 332-33, 755 S.E.2d at 443 ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it." (alteration in original) (quoting *Regions Bank*, 354 S.C. at 663, 582 S.E.2d at 440)). Therefore, South Carolina public policy would support holding BB&T and Edahl to their choice of law provision, which has the effect of voiding the jury trial waiver. Thus, we find the jury trial waiver is unenforceable, and the circuit court erred in striking Skywaves' demand for a jury trial.[8] Accordingly, we reverse the circuit court's decision on this issue.

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[7] Furthermore, we note that under North Carolina choice of law principles, the result would be the same. *See Tanglewood Land Co. v. Byrd*, 261 S.E.2d 655, 656 (N.C. 1980) ("[T]he interpretation of a contract is governed by the law of the place where the contract was made."); *id*. ("[However], whe[n] 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.").

[8] We recognize Skywaves waived its right to a jury trial in several other agreements with BB&T, which stated they were governed by South Carolina law. However, the Agreement provided it "supersed[ed] all prior or contemporaneous agreements" of the parties and "any course of performance and/or usage of the trade inconsistent with the terms [of the Agreement]." Thus, because the issues in

B. Grant of Summary Judgment as to Negligence and Negligent Misrepresentation

Skywaves argues the circuit court erred by granting summary judgment as to its tort claims because it presented evidence (1) Edahl and BB&T owed a duty to Skywaves; (2) Edahl and BB&T breached that duty; (3) Skywaves justifiably relied on BB&T and Edahl; and (4) Skywaves' reliance on Edahl and BB&T proximately caused Skywaves damages. In its reply brief, Skywaves contends the two-issue rule does not apply here because the economic loss doctrine and the lender liability statute of frauds in section 37-10-107 were not implicated in its appeal. We disagree.

"Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). "It should be noted that although cases generally have discussed the 'two[-]issue' rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of [circuit] courts." *Id*. at 346, 692 S.E.2d at 904 (quoting *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 332 S.C. 417, 420 n.1, 472 S.E.2d 253, 255 n.1 (1996)). "[A]n unappealed ruling, right or wrong, is the law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

We affirm the grant of summary judgment to BB&T and Edahl on Skywaves' claims for negligence and negligent misrepresentation based on the two-issue rule. The circuit court granted summary judgment on Skywaves' claims for negligence and negligent misrepresentation on the grounds that (1) the economic loss doctrine barred the claims, (2) the lender liability statute of frauds barred the claims, and (3) Skywaves could not prove the elements of the claims. However, Skywaves only appealed the ground that it could not prove the elements of negligence and negligent misrepresentation. Because Skywaves did not appeal the grounds of the economic loss doctrine or the lender liability statue, these grounds became the law of the case. *See Jones*, 387 S.C. at 346, 692 S.E.2d at 903 ("Under the two[-]issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will

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this case pertain to the Agreement, the choice of law provisions in the other documents are irrelevant.

become the law of the case."); *see also Lewis*, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."). Accordingly, we affirm the grant of summary judgment on Skywaves' claims for negligence and negligent misrepresentation.

C. Dismissal of SCUTPA Claim

Skywaves argues the circuit court erred by dismissing its SCUTPA claim for failing to make any allegations BB&T and Edahl's conduct affected the public interest. Skywaves maintains it presented evidence BB&T and Edahl's conduct created a potential for repetition because their conduct—undertaking to provide advice—was part of BB&T's institutional procedures. We disagree.

> When a court is considering a motion to dismiss and matters outside the pleadings are presented to and not excluded by the court, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, [SCRCP,] and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Martin v. Companion Healthcare Corp., 357 S.C. 570, 574, 593 S.E.2d 624, 627 (Ct. App. 2004) (quoting Rule 12(b), SCRCP). "An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court." *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998).

> A [circuit] court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Id. (quoting Rule 56(c), SCRCP). "Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ." *NationsBank v. Scott Farm*, 320 S.C. 299, 302-03, 465 S.E.2d 98, 100 (Ct. App. 1995). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id*. at 303, 465 S.E.2d

at 100. "In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." *Id*. "Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings." *Id.*

Under SCUTPA, "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). In order to be actionable under SCUTPA, the unfair or deceptive act or practice must have an impact on the public interest. *See Novack Enters., Inc. v. Cty. Corner Interiors Inc.*, 290 S.C. 475, 477-78, 351 S.E.2d 347, 349 (Ct. App. 1986). "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace." *Id*. at 479, 351 S.E.2d at 349-50.

> An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.

Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004).

We find the circuit court did not err by granting the motion to dismiss Skywaves' SCUTPA claims. Initially, in *Kerr v. Branch Banking & Trust Co.*, the supreme court found despite filing motions to dismiss, the plaintiffs—which included Skywaves—provided materials outside of the pleadings and the trial court relied on those materials, converting the motions to dismiss into motions for summary judgment. 408 S.C. 328, 329 n.1, 759 S.E.2d 724, 725 n.1 (2014). Similarly, we must evaluate this issue under the applicable standard for summary judgment, rather than the standard for a motion to dismiss. *See Martin*, 357 S.C. at 574, 593 S.E.2d at 627 ("When a court is considering a motion to dismiss and matters outside the pleadings are presented to and not excluded by the court, 'the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, [SCRCP,] and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.'" (quoting Rule 12(b),

SCRCP)); *Wells*, 331 S.C. at 301, 501 S.E.2d at 749 ("An appellate court reviews the granting of summary judgment under the same standard applied by the [circuit] court.").

Viewing the evidence in the light most favorable to Skywaves, we find no genuine issue of material fact exists as to whether Edahl and BB&T's conduct affected the public interest. *See Wells*, 331 S.C. at 301, 501 S.E.2d at 749 ("A [circuit] court should grant a motion for summary judgment when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting Rule 56(c), SCRCP)); *NationsBank*, 320 S.C. at 303, 465 S.E.2d at 100 ("In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party."); *Novack Enters., Inc.*, 290 S.C. at 477-78, 351 S.E.2d at 349 (providing in order to be actionable under SCUTPA, the unfair or deceptive act or practice must have an impact on the public interest); *see also Singleton*, 358 S.C. at 379, 595 S.E.2d at 466 ("An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.").

Here, Skywaves provided no evidence to the circuit court BB&T had engaged in violations in the past. Moreover, Skywaves provided no evidence to the circuit court BB&T's institutional procedures—giving advice to customers—created a potential for repetition of unfair and deceptive acts. Instead, on this point, Skywaves relied on its pleadings, which stated "unfair acts and practices of [BB&T and Edahl] have an impact on the public interest, have potential for repetition." Because Skywaves relied solely on the mere allegations in its complaint and did not provide further evidentiary support, BB&T and Edahl were entitled to summary judgment on the SCUTPA claim. *See NationsBank*, 320 S.C. at 303, 465 S.E.2d at 100 ("Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.").

Additionally, the majority of Skywaves' argument to the circuit court detailed how BB&T and Edahl treated Skywaves differently than a normal bank customer by

giving it advice and asking others to invest in Skywaves, causing BB&T and Edahl to have a fiduciary duty to Skywaves that is not normally owed by a bank to a customer. By arguing BB&T treated Skywaves differently from any other customer, Skywaves admitted BB&T and Edahl's treatment of it was not a standard company procedure with the potential for repetition. Accordingly, the circuit court did not err in dismissing Skywaves' SCUTPA claim, and we affirm the circuit court's dismissal of the claim.[9]

D. Motion to Strike BB&T's and Edahl's Answers

Skywaves argues the circuit court erred by not granting its motion to strike BB&T's and Edahl's answers and entering default against them as a sanction for their deceitful conduct. In particular, Skywaves asserts BB&T and Edahl lied in their answers about Edahl's position as an agent of BB&T and the nature of the relationship between BB&T and Skywaves. Skywaves asserts BB&T and Edahl continued to perpetuate this fraud on the court by denying the existence of the site plan financing modification even after Edahl admitted he agreed to site plan financing. Additionally, Skywaves asks this court to strike BB&T's and Edahl's answers through the doctrines of unclean hands or judicial estoppel. We disagree. "A motion to strike is addressed to the sound discretion of the [circuit court] and will not be disturbed in the absence of a clear showing of prejudicial error." *S.C. Dep't of Health & Envtl. Control v. Fed-Serv Indus., Inc.*, 294 S.C. 33, 39, 362 S.E.2d 311, 314-15 (Ct. App. 1987). "The imposition of sanctions is generally entrusted to the sound discretion of the [c]ircuit [c]ourt." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (quoting

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[9] Even if Skywaves' motion to dismiss had not been converted to a motion for summary judgment, the circuit court did not err in dismissing Skywaves' SCUTPA claim because Skywaves merely stated BB&T and Edahl's conduct satisfied the public interest requirement of SCUTPA without alleging any particularized facts. *See Grimsley v. S.C. Law Enf't Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) ("On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the [circuit] court." (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009))); *id*. ("If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper."); *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (providing that even under the liberal standard applicable on a motion to dismiss, a mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient).

Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987)). "A [circuit] court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the [c]ourt of [a]ppeals only if an abuse of discretion has occurred." *Id*. "The burden is upon the party appealing from the order to demonstrate the [circuit] court abused its discretion." *Id*. "An abuse of discretion may be found whe[n] the appellant shows that the conclusion reached by the [circuit] court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Id*.

"In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *McNair v. Fairfield County.*, 379 S.C. 462, 467, 665 S.E.2d 830, 832-33 (Ct. App. 2008) (quoting *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999)). "Therefore, the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Griffin Grading & Clearing, Inc.*, 334 S.C. at 198, 511 S.E.2d at 719. "Whe[n] the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience[,] or gross indifference to its rights to justify the sanction." *Id*. at 198-99, 511 S.E.2d at 719.

We find the circuit court did not abuse its discretion by denying Skywaves' motion to strike BB&T's and Edahl's answers. In its motion to strike, Skywaves asserted BB&T and Edahl consistently lied and engaged in deceitful conduct by refusing to admit Edahl was an agent of BB&T and by denying the existence of the site plan factoring agreement. However, BB&T and Edahl both admitted Edahl was an employee of BB&T, and BB&T's and Edahl's refusal to admit that, "At all times relevant hereto, Defendant Edahl was the agent, servant, and employee of Defendant BB&T, and acted within the scope and course of his employment," does not constitute deceitful conduct. If BB&T and Edahl had admitted this statement instead of refusing it, they would have conceded all of Edahl's actions involving Skywaves were within the scope of his employment, including the authorization of site plan financing without the approval of his supervisors at BB&T. Moreover, in its amended complaint Skywaves alleged the parties modified the Agreement to include site plan factoring and these modifications were memorialized in writing. In their original answers, BB&T and Edahl denied these allegations outright, but after Edahl admitted he agreed to site plan factoring, both BB&T and Edhal amended their answers to reflect the Agreement was orally modified to include

limited site plan factoring. The record on appeal contains no writing memorializing the agreement to factor site plans, and Edahl testified this modification was not memorialized in writing. Thus, we find Edahl and BB&T were not acting in bad faith or perpetuating fraud on the court by denying Skywaves' allegation they made a written modification to the Agreement to include factoring site plans. Therefore, we find the circuit court did not abuse its discretion in denying Skywaves' motion to strike BB&T's and Edahl's answers. *See Griffin Grading & Clearing, Inc.*, 334 S.C. at 198-99, 511 S.E.2d at 719 ("Whe[n] the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience[,] or gross indifference to its rights to justify the sanction.").

Additionally, Skywaves cites to several cases in support of its argument South Carolina courts have been more open to striking the answer of a defendant in recent years. *See Barnette v. Adams Bros. Logging*, 355 S.C. 588, 595, 586 S.E.2d 572, 576 (2003) (holding the circuit court did not abuse its discretion by dismissing one of the plaintiff's actions "[g]iven [plaintiff's] persistent refusal to comply with the trial court's orders"); *McNair*, 379 S.C. at 464-67, 665 S.E.2d at 831-33 (holding the circuit court did not abuse its discretion by striking the defendant's answer because the defendant failed to (1) produce documents requested during discovery, (2) coherently organize the documents it did produce, and (3) provide complete responses to interrogatories, and the court told defendant to correct the discovery issues several times and warned the defendant "it was inclined to strike [defendant's] answer"); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257-58, 594 S.E.2d 541, 548 (Ct. App. 2004) (holding the circuit court did not abuse its discretion by striking appellant's answer in response to appellant's intentional defiance of the trial court's temporary restraining order and his willful destruction of evidence); *Griffin Grading & Clearing, Inc.*, 334 S.C. at 199-200, 511 S.E.2d at 719 (affirming the circuit court's order striking defendant's answer when defendant "admitted at oral argument that the failure to comply with certain discovery in this case was 'indefensible'" and had failed to comply with four prior orders from the court); *Halverson v. Yawn*, 328 S.C. 618, 620-21, 493 S.E.2d 883, 884-85 (Ct. App. 1997) (affirming the circuit court's order striking appellant's complaint because plaintiff failed to comply with the court's order to comply with discovery and presented no evidence showing she complied with the order). However, unlike the defendants in the cited cases, BB&T and Edahl never violated a court order. Thus, the cases cited by Skywaves are factually and legally distinguishable from this case. Accordingly, the circuit court did not err in denying Skywaves' motion to strike, and we affirm as to this issue.

II. BB&T's Appeal

BB&T argues the circuit court erred in denying its motion for summary judgment on Skywaves' claims for breach of contract and breach of contract accompanied by fraudulent acts. BB&T maintains this court has jurisdiction over the denial of its motion for summary judgment because this case, which has been pending since 2009, needs resolution and because the denial of summary judgment is closely related to the issues raised in Skywaves' appeal. We disagree.

"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.

In *Olson v. Faculty House of Carolina, Inc.*, this court stated denials of motions for summary judgment are generally not immediately appealable but acknowledged the exception that "courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily appealable when these appeals are companion to issues that are reviewable." 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct. App. 2001), *aff'd*, 354 S.C. 161, 580 S.E.2d 440 (2003). In particular, this court noted *Garrett v. Snedigar*, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), which stated the appeal of a denial of a motion for summary judgment was properly before the court because the issue of whether the circuit court erred in granting summary judgment was properly before the court. *Olson*, 344 S.C. at 216-17, 544 S.E.2d at 50. However, this court also noted "the continued viability of *Garrett* is debatable given the recent decisions of *Silverman v. Campbell*, 326 S.C. 208, 486 S.E.2d 1 (1997)[,[10]] and *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994).[[11]]" *Olson*, 344 S.C. at 218, 544 S.E.2d at 51. This court then declined to address the denial of summary judgment "[b]ecause of the dissonance in the precedent in

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[10] In *Silverman*, the supreme court refused to consider the denial of a motion for summary judgment but did consider another issue raised by the appellants. 326 S.C. at 211, 486 S.E.2d at 2.

[11] In *Ballenger*, the supreme court found appeals of the denial of summary judgment are not appealable, even after final judgment. 313 S.C. at 476-77, 443 S.E.2d at 380.

regard to the appealability of the denial of a motion for summary judgment." *Id*. at 219, 544 S.E.2d at 51.

The supreme court granted certiorari to review the decision reached by this court in *Olson*. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 163, 580 S.E.2d 440, 441 (2003). 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. *Id*. at 168, n.8, 580 S.E.2d at 444, n.8. *But see Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 371, 628 S.E.2d 902, 918 (Ct. App. 2006) (dismissing an appeal from the denial of summary judgment but recognizing an appellate court "may entertain appeals from interlocutory orders not ordinarily appealable when they are companion to reviewable issues").

Based on the supreme court's decision in *Olson* 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*, 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.

CONCLUSION

We affirm the circuit court's orders (1) granting summary judgment to BB&T and Edahl on Skywaves' claims of negligence and negligent misrepresentation; (2) dismissing Skywaves' SCUTPA claim; and (3) denying Skywaves' motion to strike BB&T's and Edahl's answers. Additionally, we dismiss BB&T's appeal of the circuit court order denying summary judgment to BB&T on Skywaves' claims for breach of contract and breach of contract accompanied by fraudulent acts. Further, we reverse the circuit court's order granting BB&T's and Edahl's motions to strike Skywaves' demand for a jury trial on Skywaves' claims against BB&T for breach of contract and breach of contract accompanied by fraudulent acts. Accordingly, the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND DISMISSED IN PART.

LOCKEMY, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tyrus J. Clark, Respondent,

v.

Amika T. Clark, Appellant.

Appellate Case No. 2015-002326

Appeal From Greenville County
David Earl Phillips, Family Court Judge

Opinion No. 5558
Heard November 6, 2017 – Filed May 2, 2018

AFFIRMED

Jessica Ann Salvini and Liza Marie Deever, both of Salvini & Bennett, LLC, of Greenville, for Appellant.

Gwendolynn Wamble Barrett, of Barret Mackenzie, LLC, of Greenville, for Respondent.

KONDUROS, J.: In this divorce action, Amika T. Clark (Wife) appeals the family court's awarding joint custody to her and Tyrus J. Clark (Husband) of their daughter (Child). She contends the court erred in finding exceptional circumstances supported such an award. She also maintains the family court erred in granting Husband's motion to reconsider the parties' settlement agreement in regards to the equitable division of property. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Wife married in 2006 and Child was born in December of 2009. Husband has another daughter, who was born in 2002, as a result of a previous relationship, who lives with her mother in Arizona.

In 2012, Husband initiated divorce proceedings against Wife but the matter was later administratively dismissed. He filed another action against Wife on October 28, 2013, but did not serve Wife. The parties continued to reside together. On March 16, 2014, the parties had a physical altercation at their home. Both parties called the police and alleged physical abuse by the other party.[1] Wife was arrested for criminal domestic violence.

On March 24, 2014, Wife filed an action against Husband seeking a divorce and sole custody of Child, alleging physical and verbal abuse. She also sought an order of protection against Husband. The family court held a hearing and denied Wife's request for the order of protection, consolidated Husband's and Wife's actions, and issued a joint restraining order. Husband amended his pleadings to allege Wife physically abused him and sought a restraining order. He also requested primary custody of Child and served Wife with the pleadings. Shortly thereafter, the family court held an expedited temporary hearing and as result, issued a temporary order providing the parties would have joint custody of Child and share parenting time on a week-to-week basis.

A final hearing was held May 19 through 21, 2015.[2] At the beginning of the hearing, the family court sent the parties out of the courtroom to give them more time to reach an agreement in the case. When the parties returned to the courtroom about an hour later, they advised the court they had reached a partial settlement agreement resolving the equitable division of property. The parties agreed they would each keep the personal property they had in their possession. Husband would reimburse Wife $3,000 for the difference in the value of property they had

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[1] Police were called to the parties' home eleven times between 2012 and 2014.

[2] At the time of the final hearing, the domestic violence charge against Wife was still pending. Wife testified she chose not to participate in a pretrial intervention program because she believed it would require her to admit to guilt. As a result, a no contact order, which prevented the parties from communicating, remained in effect at the time of the final hearing.

in their possession. The parties provided they agreed to a 50/50 split and gave the family court a list of assets and debts. Some of the balances of accounts were missing but were to be filled in by the parties with the balances at the time of filing. Also, alimony was waived. Both parties were questioned as to whether they wanted the family court to approve their settlement agreement and if they knew the agreement would not be reviewable and would be final in nature. Both parties agreed. The family court approved the agreement, and the hearing proceeded on the remaining contested matters.

At the hearing, both parties as well as two of Child's teachers testified Child was doing well and was happy. Wife visited Child each day at preschool for thirty minutes during the weeks Husband had custody of Child. Husband did the same but less often than Wife. Husband called Linda Hutton to testify, who the parties stipulated was an expert in the field of psychotherapy for adolescents and children. Hutton testified Child was doing well with the week-to-week custody arrangement and at the current time did not need therapy. Hutton indicated she did not know how a change in custody might affect Child.

The guardian ad litem (GAL) testified she did not have any concerns with Child's health and well-being with either party. However, the GAL noted the parties have a difficult time making joint decisions. She also indicated Child first began seeing Hutton because the GAL believed Child was "drawing back a little bit." Yet, according to the GAL, Hutton found Child was in the normal range and did not observe the behavior the GAL had noticed. Still, the GAL continued to notice the drawing back but acknowledged Hutton was an expert in the field, whereas she was not. The GAL believed Child would, like anyone, experience some stress from changing the custody situation but that she was resilient. She stated Child had "done remarkably well so far." The GAL determined Child enjoyed and appreciated the time she spent with Husband. The GAL provided some of her concerns could be alleviated by parents' decision-making responsibilities being divided with one parent making the final decision in certain areas and the other parent making the final decision in other areas, instead of them trying to make decisions together. The GAL described Child as being a joy to work with and very polite, articulate, kind, smart, empathetic, and perceptive. The GAL stated her "biggest concern here is that ability to get to a final conclusion that they could move forward on" because "it's very difficult for these parties to move forward."

Husband testified he currently works out of his home for a computer science business. He provided he travels some for work but only when Child was not in his custody. He indicated his negotiations for employment with his current employer included his getting to pick and choose when he travels in order to accommodate the custody schedule. He stated his previous job with IBM involved a lot of mandatory travel. Husband also testified that when Child was in his custody he encouraged Child to call Wife and tell her she loves her frequently. Husband believed a change in the custody schedule would hurt Child because it would break the routine to which she has become accustomed and cause her anxiety. He thought it took Child a long time to overcome Wife's arrest and she had "finally stabilized and . . . taken off."

Wife testified she typically works Monday through Friday from 8:00 a.m. to 5:00 p.m. On Fridays when Child is scheduled to go to Husband's for the week, Wife works from 11:00 a.m. to 7:00 p.m. to spend more time with Child that morning. She provided her employer is flexible with her schedule. She indicated she travels sometimes for her job and Child stays with her parents at those times. Wife asserted that during the marriage, she had been Child's primary caregiver because Husband was often out of town for work or busy working even when he was home. Wife was not in favor of the current week-to-week custody schedule because she believed Child was accustomed to her being the primary caregiver. Wife thought Child needed a "home base" to do her homework assignments timely, which Wife did not believe Husband would ensure. Wife indicated she believed Husband was a good father.

The family court issued a final order and divorce decree awarding the parties joint custody of Child, alternating placement from week to week,[3] with Wife being the final decision maker. The court noted it had concerns about the parties' inability to communicate with one another. Based on the totality of the record, the court determined exceptional circumstances existed warranting joint physical custody to continue and that it was in Child's best interest. The court found because Child had thrived for the fourteen months prior to the final hearing under the current placement schedule, it was best to continue it. The family court was concerned about the effect of adding a change in custody when Child was soon to begin a new school program.

[3] During summer, the rotation would be month-to-month.

The family court later filed a supplemental order, which included the distribution of assets. Wife filed a motion for reconsideration, arguing the family court should have awarded her sole custody and Husband visitation only. The family court denied her motion. Husband filed a motion to reconsider and alter or amend judgment pursuant to Rules 52, 59(e), and 60, SCRCP, arguing a twelve-foot trailer included in the marital estate was accounted for twice in the supplemental order. The family court amended the supplemental order to include the trailer only once. This appeal followed.

STANDARD OF REVIEW

The appellate court reviews decisions of the family court de novo. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). The appellate court generally defers to the findings of the family court regarding credibility because the family court is in a better position to observe the witness and his or her demeanor. *Id.* at 385, 391, 709 S.E.2d at 651-52, 655. The party contesting the family court's decision bears the burden of demonstrating the family court's factual findings are not supported by the preponderance of the evidence. *Id.* at 388-89, 709 S.E.2d at 653-54.

Our supreme court recently reiterated its holding from *Lewis*, stating:

> In *Lewis*, this [c]ourt extensively analyzed the applicable standard of review in family court matters and reaffirmed that it is de novo. We noted that, while the term "abuse of discretion" has often been used in this context, it is a "misnomer" in light of the fact that de novo review is prescribed by article V, § 5 of the South Carolina Constitution.
>
> We observed that de novo review allows an appellate court to make its own findings of fact; however, this standard does not abrogate two long-standing principles still recognized by our courts during the de novo review process: (1) a trial judge is in a superior position to assess witness credibility[] and (2) an appellant has the burden of showing the appellate court that the preponderance of the evidence is against the finding of the trial judge.

Stoney v. Stoney, Op. No. 27758 (S.C. Sup. Ct. refiled April 18, 2018) (Shearouse Adv. Sh. No. 16 at 9, 10-11) (per curiam) (footnote and citation omitted).

LAW/ANALYSIS

I. Custody

Wife contends the family court erred in finding exceptional circumstances warranted Husband and Wife having joint custody of Child. We disagree.

"The paramount and controlling factor in every custody dispute is the best interests of the children." *Brown v. Brown*, 362 S.C. 85, 90, 606 S.E.2d 785, 788 (Ct. App. 2004); *see also Davis v. Davis*, 356 S.C. 132, 135, 588 S.E.2d 102, 103-04 (2003) (finding in a child custody case, the welfare of the child and the child's best interests are the primary, paramount, and controlling considerations of the court). "[T]he appellate court should be reluctant to substitute its own evaluation of the evidence on child custody for that of the [family] court." *Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). "This is especially true in cases involving the welfare and best interests of children." *Dixon v. Dixon*, 336 S.C. 260, 263, 519 S.E.2d 357, 359 (Ct. App. 1999) (quoting *Aiken Cty. Dep't of Soc. Servs. v. Wilcox*, 304 S.C. 90, 93, 403 S.E.2d 142, 144 (Ct. App. 1991)). "[A] determination of the best interest[s] of the children is an inherently case-specific and fact-specific inquiry." *Rice v. Rice*, 335 S.C. 449, 458, 517 S.E.2d 220, 225 (Ct. App. 1999).

> (A) The court shall make the final custody determination in the best interest of the child based upon the evidence presented.
> (B) The court may award joint custody to both parents or sole custody to either parent.
> (C) If custody is contested or if either parent seeks an award of joint custody, the court shall consider all custody options, including, but not limited to, joint custody, and, in its final order, the court shall state its determination as to custody and shall state its reasoning for that decision.

> (D) Notwithstanding the custody determination, the court may allocate parenting time in the best interest of the child.

S.C. Code Ann. § 63-15-230 (Supp. 2017).

> The family court considers several factors in determining the best interest of the child, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including [the guardian ad litem], expert witnesses, and the children); and the age, health, and sex of the children.

Patel v. Patel (*Patel I*), 347 S.C. 281, 285, 555 S.E.2d 386, 388 (2001), *superseded by statute on other grounds by* S.C. Code Ann. §§ 20-7-1545 to -1557. "The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child. In addition, psychological, physical, environmental, spiritual, educational, medical, family, emotional[,] and recreational aspects of the child's life should be considered." *Woodall*, 322 S.C. at 11, 471 S.E.2d at 157 (citation omitted). "While numerous prior decisions set forth criteria that are helpful in such a determination, there exist no hard and fast rules and the totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." *Davenport v. Davenport*, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975). "Thus, when determining to whom custody shall be awarded, all the conflicting rules and presumptions should be weighed together with all of the circumstances of the particular case, and all relevant factors must be taken into consideration." *Woodall*, 322 S.C. at 11, 471 S.E.2d at 157. Although a parent's morality "is a proper factor for consideration," it is only relevant if it directly or indirectly affects the welfare of the child. *Davenport*, 265 S.C. at 527, 220 S.E.2d at 230. "Custody of a child is not granted a party as a reward or withheld as a punishment." *Id.*

> In South Carolina, in custody matters, the father and mother are in parity as to entitlement to the custody of a child. When analyzing the right to custody as between a father and mother, equanimity is mandated. We place our approbation upon the rule that in South Carolina, there is no preference given to the father or mother in

> regard to the custody of the child. The parents stand in perfect equipoise as the custody analysis begins.

Brown, 362 S.C. at 91, 606 S.E.2d at 788 (quoting *Kisling v. Allison*, 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct. App. 2001)).

The family court has jurisdiction to order joint custody when it finds it is in the child's best interests. S.C. Code Ann. § 63-3-530(A)(42) (2010). However, "[a]lthough the legislature gives family court judges the authority to order joint or divided custody whe[n] the court finds it is in the best interests of the child, . . . joint or divided custody should only be awarded whe[n] there are exceptional circumstances." *Lewis v. Lewis*, 400 S.C. 354, 365, 734 S.E.2d 322, 327 (Ct. App. 2012) (omission by court) (quoting *Patel v. Patel* (*Patel II*), 359 S.C. 515, 528, 599 S.E.2d 114, 121 (2004)). "Absent exceptional circumstances, the law regards joint custody as typically harmful to the children and not in their best interests." *Spreeuw v. Barker*, 385 S.C. 45, 61, 682 S.E.2d 843, 851 (Ct. App. 2009); *see Patel II*, 359 S.C. at 528, 599 S.E.2d at 121) (noting joint custody should be ordered only under exceptional circumstances); *Courie v. Courie*, 288 S.C. 163, 168, 341 S.E.2d 646, 649 (Ct. App. 1986) ("Divided custody is avoided if at all possible[] and will be approved only under exceptional circumstances.").

> In determining joint custody is usually considered harmful to and not conducive to the best interest and welfare of a child, our courts have explained the disfavor as follows:
>
> > The courts generally endeavor to avoid dividing the custody of a child between contending parties, and are particularly reluctant to award the custody of a child in brief alternating periods between estranged and quarrelsome persons. Under the facts and circumstances of particular cases, it has been held improper to apportion the custody of a child between its parents, or between one of its parents and a third party, for ordinarily it is not conducive to the best interests and welfare of a child for it to be

> shifted and shuttled back and forth in alternate brief periods between contending parties, particularly during the school term. Furthermore, such an arrangement is likely to cause confusion, interfere with the proper training and discipline of the child, make the child the basis of many quarrels between its custodians, render its life unhappy and discontented, and prevent it from living a normal life.

Lewis, 400 S.C at 365, 734 S.E.2d at 327-28 (quoting *Scott v. Scott*, 354 S.C. 118, 125-26, 579 S.E.2d 620, 624 (2003)).

In *Spreeuw*, this court found:

> [T]he exceptional nature of this case demands that we affirm the family court's award of joint physical custody. In this case, a seven[-]year delay occurred between the issuance of the family court's final order . . . and oral argument before this panel . . . . The reasons for the delay in this case range from the acceptable—Father's bankruptcy proceeding—to the unacceptable—the rash of motions filed by both parties. Since the family court's final order, the children have grown from the ages of five and twelve to the ages of twelve and nineteen. Undoubtedly, many things have changed in the children's lives since 2002. However, the custodial arrangement has remained constant. At this point, we are reluctant to order a change in the custody arrangement based on a record which most certainly has become cold. Accordingly, we affirm the family court's decision to award both parties joint physical custody of the children.

385 S.C. at 61-62, 682 S.E.2d at 851.

Likewise, we affirm the family court's custody award in the present case. Wife argues the record contains no evidence she engaged in conduct to alienate Child

from Husband. However, Husband testified that during the marriage, due to Wife's influence, Child could not tell him she loved him and told him she could only give him one hug. He provided he "stopped [the] marriage because [he] wanted [Child] to be able to freely love who she wanted to love." Husband testified Child was acclimated to the current custody arrangement and knew when it was time for the exchange between Wife and Husband. He believed Child needed both her parents in order to become a well-adjusted child and adult and neither parent had a greater position in her life than the other. Wife testified she wanted Husband and Child to have a strong bond. She also provided Husband loves Child and is a good father.

While joint custody is generally disfavored, this arrangement worked well for Child for the fourteen months before the final hearing.[4] This custody arrangement has now continued from the time of the hearing (May 2015) until present, which is an additional twenty-nine months, amounting to a total of forty-three months or about three and a half years—close to half of Child's life. The teachers, parents, GAL, and therapist all testified about how well Child was doing. Many witnesses commented on how happy and well-adjusted she was at the time of the final hearing. We find the passage of time and the good reports on Child's welfare and mental adjustment to the situation comprise exceptional circumstances warranting joint custody. While disfavored, no evidence has been presented to allow the family court or this court to rule differently. Accordingly, we affirm the family court's joint custody award.

II. Settlement Agreement

Wife maintains the family court erred when it issued an order granting Husband's motion to reconsider the parties' settlement agreement equitably allocating the marital estate. We disagree.

"[P]arties may enter into contracts resolving issues of alimony and equitable distribution and . . . the family court has jurisdiction over those contracts." *Swentor v. Swentor*, 336 S.C. 472, 479, 520 S.E.2d 330, 334 (Ct. App. 1999). "The family court has exclusive jurisdiction: . . . (25) to modify or vacate any order issued by the court." S.C. Code Ann. § 63-3-530(A) (2010). "However, 'the law in South

[4] Child was about four and a half years old when her parents starting living apart and began sharing custody, was about five and a half years old at the time of the final hearing, and is now over eight years old.

Carolina is exceedingly clear that the family court does not have the authority to modify court ordered property divisions.'" *Simpson v. Simpson*, 404 S.C. 563, 571, 746 S.E.2d 54, 58-59 (Ct. App. 2013) (quoting *Green v. Green*, 327 S.C. 577, 581, 491 S.E.2d 260, 262 (Ct. App. 1997)); *see* S.C. Code Ann. § 20-3-620(C) (2014) ("The court's order as it affects distribution of marital property shall be a final order not subject to modification except by appeal or remand following proper appeal."); *Swentor*, 336 S.C. at 480 n.2, 520 S.E.2d at 334 n.2 ("[A]n agreement regarding equitable apportionment claims is final and may not be modified by the parties or the court . . . .").

In *Green*, during a divorce proceeding, the parties reached a property settlement agreement, which was approved by the family court. 327 S.C. at 578, 491 S.E.2d at 261. Later, the wife moved to adjust the agreement to decrease the value of an office building allocated to her in the settlement, contending "the husband and his expert 'fraudulently concealed and withheld evidence of the true condition of the building and the fact that there was structural as well as other damage to the building which would have a cost of approximately $36,500 to repair.'" *Id.* at 578-79, 491 S.E.2d at 261. "The wife conceded that neither she nor the husband really knew the extent of the damage to the building at the time they entered into the agreement." *Id.* at 579, 491 S.E.2d at 261. The family court concluded "it was within the 'equitable powers' of the court to reopen and modify the parties' agreement." *Id.* at 581, 491 S.E.2d at 262. However, this court found "the law in South Carolina is exceedingly clear that the family court does not have the authority to modify court ordered property divisions." *Id.*

Rule 60(a), SCRCP, permits trial courts to correct clerical errors at any time: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." Nevertheless,

> The family court's correction of clerical errors may not extend to "chang[ing] the scope of the judgment." *Michel v. Michel*, 289 S.C. 187, 190, 345 S.E.2d 730, 732 (Ct. App. 1986). "Except for those matters over which a court retains continuing jurisdiction, terms of a final property settlement agreement, once approved, are binding on the parties and the court." *Price v. Price*, 325

> S.C. 379, 382, 480 S.E.2d 92, 93 (Ct. App. 1996); *accord Doran v. Doran*, 288 S.C. 477, 478, 343 S.E.2d 618, 619 (1986) ("A trial judge loses jurisdiction to modify an order after the term at which it is issued, except for the correction of clerical [errors]. Once the term ends, the order is no longer subject to any amendment or modification which involves the exercise of judgment or discretion on the merits of the action.").

Brown v. Brown, 392 S.C. 615, 622, 709 S.E.2d 679, 683 (Ct. App. 2011) (alterations by court).

The situation here is unlike that in *Green*. Wife does not allege she and Husband owned more than one trailer. The order included the trailer in two different places, thus accounting for it twice. Changing the order to only include the trailer once was not a change in the scope of judgment but was merely a correction of a clerical error. Accordingly, the family court was allowed to correct this. The fact that the parties reached the settlement on the division of marital property after being sent out in the hall for an hour to negotiate at the beginning of the final hearing likely contributed to the parties submitting forms that had been hastily prepared or had not been double checked. Therefore, the family court did not err in correcting the order to only account for the twelve-foot trailer one time instead of two.

CONCLUSION

The family court did not err in awarding joint custody as this case presented exceptional circumstances. Further, the family court did not err in granting Husband's motion to modify the marital division due to the erroneous inclusion of the trailer twice. Accordingly, the family court's decision is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.