

**THE STATE SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM CHARLESTON COUNTY
The Honorable J.C. Nicholson, Circuit Court Judge

Case No. 2012-CP-10-2802

Discover Bank,

Appellant

v.

Jay Brown a/k/a John G. Brown, III,

Respondent.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS.....2

INTRODUCTION.....3

STANDARD OF REVIEW.....4

PRESERVATION OF ISSUES ON APPEAL.....5

ARGUMENT.....6

I THE FAILURE TO COMPLY WITH THE PLEADING
REQUIREMENTS OF THE SOUTH CAROLINA CONSUMER
PROTECTION CODE PROHIBITS THE USE OF THE COURTS
TO PURSUE A CONSUMER.....6

 A. Credit card accounts are consumer transactions that fall
 within the purview of the South Consumer Protection Code.....7

 B. Discover did not plead as required by SCCCPA and
 therefore could not maintain the action.....9

 C. Discover did not plead the particulars of the alleged
 debt as required by SCCPC.....11

 D. Contrary to Discover’s position facts cannot be plead
 in the alternative.....13

II DISCOVER DID NOT SUFFICIENTLY PLEAD A CAUSE OF
ACTION.....14

III THE AFFIDAVIT OF ACCOUNT LACKED EVIDENTIARY
SUFFICIENCY.....16

CONCLUSION.....20

CASES

<u>Armstrong v. Collins</u> , 366 S.C. 204, 621 S.E. 2d 368 (Ct. App. 2005)).....	13
<u>Auto Owners Ins. Co. v. Rollison</u> , 378 S.C. 600, 663 S.E.2d 484 (2008).....	10
<u>Baird v. Charleston County</u> , 333 S.C. 519, 511 S.E.2d 69 (1999).....	4
<u>Baughman v. American Telephone & Telegraph Co.</u> , 306 S.C. 101, 410 S.E. 2d 537 (1991).....	17
<u>Benya v. Gamble</u> , 282 S.C. 624, 321 S.E.2d 57 (Ct. App. 1984).....	15
<u>Bergstrom v. Palmetto Health Alliance</u> , 352 S.C. 221, 573 S.E.2d 805 (Ct. App. 2002).....	4
<u>Brewer v. Brewer</u> , 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963).....	10
<u>Brown v. Leverette</u> , 291 S.C. 364, 353 S.E.2d 697 (1987).....	5
<u>Bryant v. City of Charleston</u> , 295 S.C. 408, 368 S.E.2d 899 (1988).....	10
<u>Carolina Power & Light Co. v. City of Bennettsville</u> , 314 S.C. 137, 442 S.E.2d 177, (1994).....	9
<u>Davis v. Greenwood Sch. Dist. 50</u> , 365 S.C. 629, 620 S.E.2d 65 (2005).....	15
<u>Edens v. Laurel Hill. Inc.</u> , 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978).....	15
<u>Elam v. South Carolina Dep't of Transp.</u> , 361 S.C. 9, 602 S.E.2d 772 (2004).....	5
<u>Fuller v. Eastern Fire & Cas. Ins. Co.</u> , 240 S.C. 75, 124 S.E.2d 602 (1962).....	15
<u>Glarum v. LaSalle Bank Nat'l Ass'n, No.</u> , 83 So.3d 780 (Ct. App. Fla 2011).....	17, 18
<u>Gray v. State Farm Auto Ins. Co.</u> , 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997).....	5
<u>Hayne Federal Credit Union v. Bailey</u> , 327 S.C. 242, 489 S.E.2d 472 (1997).....	13, 14
<u>Hodges v. Rainey</u> , 341 S.C. 79, 533 S.E.2d 578 (2000).....	9
<u>Holy Loch Distributors, Inc. v. Hitchcock</u> , 340 S.C. 20, 531 S.E.2d 282 (2000).....	5, 19
<u>Inabinet v. Royal Exch. Assurance of London</u> , 165 S.C. 33, 162 S.E. 599 (1932).....	10
<u>I'On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000).....	6
<u>McClurg v. Deaton</u> , 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008).....	13
<u>Montgomery v. CSX Transport, Inc.</u> , 376 S.C. 37, 656, S.E.2d 20 (2008).....	17
<u>Player v. Chandler</u> , 299 S.C. 101, 382 S.E.2d 891 (1989).....	15
<u>Regions Bank v. Schmauch</u> , 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003).....	15
<u>Saro v. Ocean Holiday Partnership</u> , 314 S.C. 116, 441 S.E.2d 385 (Ct. App. 1994).....	17
<u>South Carolina Police Officers Retirement Sys. v. Spartanburg</u> , 301 S.C. 188, 391 S.E.2d 239 (1990).....	10
<u>South Carolina Dep't of Highways & Pub. Transp. v. Dickinson</u> , 288 S.C. 189, 341 S.E.2d 134 (1986).....	10

<u>State v. Blackmon</u> , 304 S.C. 270, 403 S.E.2d 660 (1991).....	10
<u>Stiles v. Onorato</u> , 318 S.C. 297, 457 S.E.2d 601 (1995).....	4
<u>Tatum v. Medical Univ. of South Carolina</u> , 346 S.C. 194, 552 S.E.2d 18 (2001).....	5
<u>Tidewater Supply Co. v. Industrial Elec. Co.</u> , 253 S.C. 483, 171 S.E.2d 607 (1969).....	15
<u>Toussaint v. Ham</u> , 292 S.C. 415, 357 S.E.2d 8 (1987).....	5
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 497 S.E.2d 731 (1998).....	13
<u>Williams v. Condon</u> , 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001).....	4, 5

STATUTES, RULES, & REGULATIONS

15. U.S.C. §1601.....	8
S.C. Code Ann. §37-1-10.....	7
S.C. Code Ann. §37-1-102.....	9
S.C. Code Ann. § 37-1-102(2)(d).....	6
S.C. Code Ann. § 37-2-301.....	8
S.C. Code Ann. § 37-3-404.....	2
S.C. Code Ann. § 37-5-110.....	2, 9, 11
S.C. Code Ann. § 37-5-111.....	2, 9, 10, 11
S.C. Code Ann. § 37-5-114.....	9, 10, 11
Fla. Statute § 90.803(6)(a)	17
Rule 8, SCRCP.....	13, 14
Rule 11(c), SCRCP.....	17
Rule 12(b)(6), SCRCP.....	4, 5
Rule 56(e), SCRCP.....	16
Rule 59(e), SCRCP.....	6
Rule 803(6), SCRE.....	18

SECONDARY AUTHORITY

Richard M. Hynes, <i>Broke But Not Bankrupt: Consumer Debt Collection in State Courts</i> , 60 Fla. L. Rev. 1 (Jan. 2008).....	3
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STATEMENT OF THE ISSUES

1. WHETHER THE TRIAL COURT CORRECTLY DETERMINED APPELLANT'S FAILURE TO COMPLY WITH THE CLEAR PLEADING REQUIREMENTS OF THE SOUTH CAROLINA CONSUMER PROTECTION CODE WARRANTED DISMISSAL.
2. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THE COMPLAINT FAILED TO SET FORTH A SUFFICIENT CASUE OF ACTION.
3. WHETHER THE TRIAL COURT CORRECTLY DETERMINED THE AFFIDAVIT OF ACCOUNT ATTACHED TO THE COMPLAINT LACKED APPROPRIATE EVIDENTIARY SUPPORT.

STATEMENT OF THE CASE

On April 26, 2012, Discover Bank (hereinafter "Discover") filed suit against Jay Brown a/k/a/ John G. Brown, III (hereinafter "Brown") by filing a complaint that consists of six paragraphs. (Complaint). The Complaint seeks to recover for amounts claimed owed under a consumer credit card. On July 12, 2012, Brown filed an Answer, Counterclaim and Motion to Dismiss. (Answer and Counterclaim). The gravamen of the Answer and Motion to Dismiss is Discover could not maintain the action due to deficiencies including its failure to adhere to consumer protection laws.

On November 28, 2012, Brown's Motion to Dismiss was heard before the Honorable J.C. Nicholson, Jr. An Order Granting the Motion to Dismiss was filed on January 14, 2012 (Order). Discover did not file a motion for reconsideration or other post trial relief. On January 4, 2013, Discover filed a Notice of Appeal which was followed by an Amended Notice of Appeal on January 28, 2013.

STATEMENT OF THE FACTS

This action was commenced with a Complaint that is composed of the following six paragraphs:

1. The Plaintiff is a state chartered financial institution conducting business in interstate commerce.
2. The Defendant resides in Charleston County and is neither an infant nor incompetent.
3. The Plaintiff provided credit to the Defendant pursuant to the agreement annexed hereto as Exhibit "A". Defendant has defaulted on the agreement by failing to remit the required payments as they come due. After giving credit for all payments received or credits applied, if any, as of February 29, 2012, the Defendant owes Plaintiff \$11,310.51, according to the Affidavit of Account annexed hereto as Exhibit "B" and statement of account annexed hereto as Exhibit "C" incorporated herein by reference.
4. That the business transaction described herein **may be a consumer credit transaction** as contemplated by the **South Carolina Consumer Protection Code**. Defendant is in default and Plaintiff is entitled to the amounts as referenced above. This amount is determined by assessing all due charges to Defendant's account.
5. On information and belief, the Notice of Consumer's Right to Cure, as contemplated under **S.C. Code of Laws Ann Section 37-5-110** and **37-5-111**, was sent to the Defendant or is not required.
6. The agreement further provides for the collection of reasonable attorney's fees, and the Defendant is hereby given notice by Plaintiff of its intention to collect reasonable attorney's fees pursuant to **S.C. Code of Laws Ann Section 37-3-404**.

At the bottom of single paged Complaint is the statement: "THIS COMMUNICATION IS FROM A DEBT COLLECTOR. THE PURPOSE OF THIS COMMUNICATION IS TO COLLECT A DEBT."

Exhibit "B" to the Complaint is an Affidavit of Account. (Complaint, Exhibit B). It is signed by a Legal Placement Account Manager for DB Servicing Corporation. DB Servicing Corporation is not a party to the action. It states Discover's claim is a suit on

account. Affiant blanketedly states to have access to records but does not aver to be the custodian of records. Nor does the affiant claim knowledge as to the policies or procedures for maintaining the subject records. Without setting forth how the number was derived, affiant asserts the sum of \$11,301.52 is owed. (Complaint, Exhibit B). Affiant further asserts that the agreement attached to the Complaint as Exhibit "A" is the agreement it allegedly provided credit to Defendant under. (Complaint, Exhibits A and B). On the face of Exhibit "A" it denotes Copyright in 2011 in favor of Discover (a time period after account creation). Additionally the document is unsigned and nowhere therein is Brown specifically identified or named. (Complaint, Exhibit A.).

Also attached to the Complaint is Exhibit "C." Exhibit "C" is represented to be a Statement of Account. It is not mentioned in the Affidavit of Account and no authentication whatsoever is offered. Interestingly, the Summary states: Previous Balance 411,310.51; Payments and Credits \$11,310.51; and **New Balance \$0.00**. (Complaint, Exhibit C). Neither Exhibit "B" or "C" to the Complaint set forth how the amount was determined, interest charge, interest accrued, when payments were made, and whether late charges or other charges were imposed to arrive at the total amount claimed owed.

INTRODUCTION

With the proliferation of the selling of junk debt consumer debt collection cases are overwhelming the courts throughout the country.¹ A common myth which is unfortunately generally subscribed to by the judiciary is that when a collector sues on a debt the consumer almost always owes the money. This underlying premise has been

¹ Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 Fla. L. Rev. 1 (Jan. 2008).

dramatically altered with the change in the market place by the selling of millions of dollars in consumer debt for pennies i.e. “junk debt.” Despite consumers general failure to protect their interests, they have defenses available to them against collectors and debt buyers wholesale litigation abuse. Collectors commonly bring actions against consumers when they have no real knowledge of whether the consumer owes the alleged debt; whether any amount claimed owed is outside the statute of limitations; where no contract exists to establish the debt; and when collector has little or no evidence to prove that the consumer owes the debt. Indeed collectors, as here, bring actions in complete defiance of the federal and state laws specifically enacted to protect consumers from abuse. Collectors should be prohibited from abusing the judicial system and should be required to adhere to the consumer protection laws enacted by Congress and the South Carolina Legislature as was determined by the trial court in this matter.

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRPC, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Bergstrom v. Palmetto Health Alliance, 352 S.C. 221, 573 S.E.2d 805 (Ct. App. 2002). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); Bergstrom, 352

S.C. at 233, 573 S.E.2d at 811; see also Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); Williams, 347 S.C. at 233, 553 S.E.2d at 499 (trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987). The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001); see also Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997) (motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

PRESERVATION OF ISSUES ON APPEAL

It is well settled that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved for appellate review. Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often **required** for issue preservation purposes. See Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). The Elam Court stated that a "party **must** file [a Rule 59(e), SCRC] motion when an

issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Id. at 24, 602 S.E.2d at 780. In I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), the policy underlying this rule was discussed:

If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party **must** file a motion to alter or amend the judgment in order to preserve the issue for appellate review. Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered **all** relevant facts, law, and arguments.

As noted, Rule 59(e) motions serve a vital purpose and are essential for proper issue preservation. Discover took no action in this case to preserve any issue for appellate review; therefore, certain issues have not been preserved for review.

ARGUMENT

I. THE FAILURE TO COMPLY WITH THE PLEADING REQUIREMENTS OF THE SOUTH CAROLINA CONSUMER PROTECTION CODE PROHIBITS THE USE OF THE COURTS TO PURSUE A CONSUMER.

The trial court correctly determined that Discover’s failure to comply with the provisions of the South Carolina Consumer Protection Code precluded it from maintaining the within collection action. Two pertinent expressed purposes of the South Carolina Consumer Protection Code (“SCCPC”) are: (1) to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit; and (2) to conform the regulation of consumer credit transactions to the policies of the Federal Consumer Credit Protection Act.” S.C. Code Ann. § 37-1-102(2)(d). The trial court correctly follow these mandates.

A. Credit card accounts are consumer transactions that fall within the purview of the South Consumer Protection Code.

In an effort to avoid the mandates of the SCCPC Discover suggestions it cannot determine whether a credit card account is a consumer credit transaction or consumer loan prior to commencing suite and that a credit card account may not be a consumer transaction. This position is incredulously, and if not frivolous, it clearly borders on the frivolous. Notwithstanding this position Discover admits “that the chances are very high” the transaction is a consumer transaction as contemplated by the SCCPC (App. Brief, p. 12 and Complaint) and in fact, repeatedly cites to the Act within its minimal Complaint.

A credit card to an individual, as in this case, is a consumer transaction. Throughout the various chapters of the SCCPC the term “credit card” is used no less than sixty-six (66) times. S.C. Code Ann. §37-1-10 et. seq. Within the first Chapter of the SCCPC, which contains a definitional section, the term is used sixteen (16) times. Indeed by employing the term repeatedly, the Legislature expressed its intent to regulate the relationship between creditors and credit card holders.

Additionally, as noted above the SCCPC was enacted with the stated purpose to conform the regulation of consumer credit transactions in this State with the policies of the Federal Consumer Credit Protection Act. S.C. Code Ann. §37-1-10. The Federal Consumer Credit Protection Act is an umbrella consumer protection law that was established in 1969 and includes the Equal Credit Opportunity Act, the Fair Credit Billing

Act, the Fair Credit Reporting Act and the Truth in Lending Act.² The Truth of Lending Act, which is commonly referred to as TILA, was created in 1968 to help protect the consumer as credit cards became more prevalent in the financial arena.³ Credit Card is a defined term within TILA. TILA requires that all the terms, costs and conditions of a credit agreement to be easily spelled out and relatively simple for the consumer to understand. TILA provides certain rights, such as the right to cancel any credit transactions that might result in a lien against a consumer's home; regulates credit card practices; and provides a blueprint for fair resolution in any dispute over credit card billing. Indeed, the laws the S.C. Legislature intend to follow by making specific reference to them were specifically created to protect consumer's rights with regard to credit cards. The SCCPC, specifically and by reference to federal laws applies to consumer credit transactions and credit card relationships.

Further persuasive argument that the collection of credit card accounts are subject to SCCPC is the citation to the statute by Discover in the subject simple Complaint. The Complaint only consists of six (6) paragraphs. However in three (3) of the paragraphs Discover actually makes specific reference to SCCPC. Moreover, paragraph 4 provides: "That the business transaction described herein **may be a consumer credit transaction** as contemplated by the **South Carolina Consumer Protection Code.**" (Complaint). It is absolutely duplicitous for Discover to attempt to argue the collection of a consumer credit card account is not subject to the SCCPC.

² S.C. Code Ann § 37-2-301 provides: A person upon whom the Federal Truth in Lending Act imposes duties or obligations shall make or give to the consumer the disclosures, information and notices required of him by that act and in all respects comply with that act.

³ In 2009 TILA was amended to include the Credit Card Accountability, Responsibility and Disclosure (CARD) Act of 2009. 15. U.S.C. §1601 et. Seq. The Credit Card Act of 2009 encompasses and defines credit card.

B. Discover did not plead as required by SCCPC and therefore could not maintain the action.

The trial court correctly determined that Discover had not complied with the specific provisions of the S.C. Code Ann. §§37-5-111 or 37-5-114 and Discover's position as to compliance was disingenuous.

South Carolina Code Ann §37-5-111 (Law Co. op. 1976) specifically requires "the creditor **shall** affirmatively plead and prove **either** that the notice to cure is not required or that the creditor has given the required noticed..." Likewise, South Carolina Code Ann §37-5-114 provides "In an action brought by a creditor against a consumer arising from a consumer credit transaction, the complaint **shall** allege the facts of the consumer's default, the amount to which the creditor is entitled, an indication of how that amount was determined, and **either** that the notice to cure required by §§37-5-110 and 37-5-111 has been given or is not required."

S.C. Code Ann. . §37-1-102, which sets forth the purposes of the South Carolina Consumer Protection Code, declares that it shall be liberally construed and applied to promote its underlying purposes and policies. S.C. Code Ann. §37-1-102(l). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [L]egislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Words must be given their plain and ordinary meaning without resort to subtle or

forced construction to limit or expand the statute's operation. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008); Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).

Two operative terms used in S.C. Code Ann §§37-5-111 or 37-5-114 are "shall" and "or." "Shall" is considered mandatory under principles of statutory interpretation. South Carolina Police Officers Retirement Sys. v. Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990); See also, South Carolina Dep't of Highways & Pub. Transp. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1986)("Ordinarily the use of the word 'shall' in a statute means that the action referred to is mandatory."). The use of the word "or" is typically a disjunctive usage. Brewer v. Brewer, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) (noting that the use of the word "or" in a statute "is a disjunctive particle"); see also Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008)(observing that "[a] statute remedial in nature should be liberally construed in order to accomplish the object[ive] sought" (quoting Inabinet v. Royal Exch. Assurance of London, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932))).

To interpret the statutory provisions as Discover urges would be inconsistent with the intent of the Legislature. The Legislature clearly stated that a complaint **shall** contain certain facts. Pleading these certain facts is mandatory. A collector bringing an action against a consumer must affirmatively state that the consumer was given the right to cure notice. If the Plaintiff does not make the statement that the notice was given, it must then state the basis for exempting the transaction from having to provide the notice. Relieving

the collector from having to make these assertions would be contrary to the statutory language and run counter to the manifest legislative intent. The term “or” was employed by the Legislature with a purpose. The term is used in the disjunctive directing that a collector must plead one or the other factual scenario i.e. notice was given or it was not required. Given the unambiguous language, requiring that the complaint contain one or the other statements is completely consistent with the logical construction of the provisions. To merely recite the language of the statute to include both assertions without providing clarity as to whether the right to cure was given or exempt, renders the language of the statute meaningless. The language is clear, the collector must provide a notice of right to cure and affirmatively state that it has done so in its pleadings if it elects to bring suit. To adopt the position of Discover would be to ignore the language specifically employed by the Legislature. The court correctly gave meaning to the language of the statute and required the pleading conform to the intent of the legislature. The decision of the lower court should be upheld.

C. Discover did not plead the particulars of the alleged debt as required by SCCPC.

In addition to having to plead that the notice of right to cure was given, the Legislature also requires that a collector shall plead certain facts about the debt. S.C. Code Ann §37-5-114 (“In an action brought by a creditor against a consumer arising from a consumer credit transaction, the complaint **shall** allege the **facts** of the consumer’s default, the amount to which the creditor is entitled, an indication of how that amount was determined, and **either** that the notice to cure required by §§37-5-110 and 37-5-111

has been given or is not required.”) The trial court correctly determined that Discover, the collector, not only failed to plead the notice of right to cure was given but also fail to abide by the statute and plead all the necessary particulars about the alleged debt.

The facts asserted by Discover to address default, the amount owed and how the amount was calculated are limited. The factual allegations regarding these issues are contained within Paragraph 3 of the Complaint which provides: “Defendant has defaulted on the agreement by failing to remit the required payments as they become due. After giving credit for all payments received or credits applied, if any, as of February 29, 2012, the Defendant owes Plaintiff \$11,310.51, according to the Affidavit of Account...” The trial court found the factual allegations deficit.

Specifically the trial court found that Discover failed to set forth sufficient facts as to how the amount was determined. Discover only addresses one side of the equation, credits. It does not address debits made against the account, interest charged against the account, late charges imposed or fees imposed to derive the amount. Again the South Carolina Legislature prescribed what a collector must plead in order to employ the South Carolina courts to pursue collection of a consumer debt. Clearly the Legislature is insisting that the collector give factual information not conclusory assertions. It must state how the amount is determined. Discover did not do this but rather made an unsupported conclusory statement.⁴ Thus, the trial court correctly determined Discover had not complied with the consumer protection statutes.

⁴ Interesting as noted in Exhibit “C” attached to the Complaint it says zero (0) is the new balance. Thus, taking the facts asserted as true in favor of Discover, there is no amount owed by Brown and the Complaint was file without an amount due and owing which is an essential element. The Court correctly dismissed the Complaint.

D. Contrary to Discover's position facts cannot be plead in the alternative.

To justify its failure to adhere to the requirements of the SCCPC and provide certain factual information in the complaint Discover argues that Rule 8, SCRPC should control the pleadings and it should be able to plead in alternative. This issue was not raised by Discover previously therefore it should not be considered now. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); McClurg v. Deaton, 380 S.C. 563, 579-80, 671 S.E.2d 87, 96 (Ct. App. 2008) (holding a party may not raise an issue for the first time in a motion to reconsider, alter or amend a judgment). This issue is not properly before this Court.

Notwithstanding the fact that the issue is not properly before the Court, Discover simply confuses and misunderstands Rule 8, SCRPC. Rule 8, SCRPC allows a party to plead alternative theories of recovery based upon the same set of facts. Armstrong v. Collins, 366 S.C. 204, 621 S.E. 2d 368 (Ct. App. 2005)(Rule 8 allows inconsistent causes of action.) It does not however allow for pleading of inconsistent or alternative facts.

Indeed the Supreme Court admonished the concept of pleading alternative facts when it adopted the doctrine of judicial estoppel, as it relates to matters of fact, in the case of Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997). The doctrine of judicial estoppels precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. *Id.* The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts. *Id.* The supreme court

explained,”In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly.” Id. at 251-52, 489 S.E.2d at 477.

Discover is not taking the truth seeking function seriously. Again the Legislature said, in essence, by adopting the SCCPC: collector if you are going to use our courts to pursue consumer debt you must tell us certain facts when you file the complaint or we will not let you use our court system. Discover attempts to skirt this requirement to assert necessary facts by regurgitating the statute with alternative factual conclusions. Neither Rule 8, SCRCF or SCCPC allow for this. Discover knew at the time it filed the action whether or not it had given the right to cure to the consumer. This fact existed at the time the complaint was filed. There is nothing to develop factually. Either Discover sent the notice prior to filing or it did not. If it did it so, it is required to state so. This is not an alternative theory. Discover by its own choice elected not to state this fact as required and the trial court correctly dismissed the action.

II. **DISCOVER DID NOT SUFFICIENTLY PLEAD A CAUSE OF ACTION.**

The trial court expressed its difficulty in determining what theory Discover was attempting to pursue; breach of contract, account, money had (Order). Discover now contends the sole cause of action is for breach of contract.

A binding, valid contract must exist for there to be a cause of action for breach of contract. See Tidewater Supply Co. v. Industrial Elec. Co., 253 S.C. 483, 171 S.E.2d 607 (1969); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003).

To recover for a breach of contract, the non-breaching party must prove:

- (1) a binding contract entered into by the parties;
- (2) a breach or unjustifiable failure to perform the contract; and
- (3) damage suffered by the plaintiff as a direct and proximate result of the breach.

Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962). In order for a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement. Davis v. Greenwood Sch. Dist. 50., 365 S.C. 629., 620 S.E.2d 65 (2005); Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989); see also Edens v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978) (It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms."). The "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. Player, 299 S.C. at 105, 382 S.E.2d at 894. A contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984).

Here Discover asserts “The Plaintiff provided credit to the Defendant pursuant to the agreement annexed hereto as Exhibit “A”. It does not specifically allege that Brown entered into the agreement or signed the alleged agreement. In fact the “agreement” attached is an unsigned document. Brown is not identified anywhere therein. Nothing shows nor is it asserted he assented to the alleged agreement. Moreover, Discover inconsistently asserts facts as to any alleged damage by incorporating within the Complaint a statement that shows credits made in the amount of the amount claimed owed along with a zero balance.

Finally, independent of the cause of action asserted, any possible cause of action including one for breach of contract must contain the necessary factual allegations as required by the SCCPC. It does not. These allegations are essential to a breach of contract claim. Thus, Discover failed to assert a claim for breach of contract as determined by the trial court.

III. THE AFFIDAVIT OF ACCOUNT LACKED EVIDENTIARY SUFFICIENCY.

Accompanying the proliferation of consumer collection matters is the proliferation of the use of insufficient, and in some instances, fraudulent affidavits in support of the claims. Here, although a collateral issue, the Court determined the Affidavit Discover attached to its Complaint was deficient.

In regard to affidavits it has been recognized in South Carolina that affidavits must be based upon personal knowledge, set forth the facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters

stated therein. See Rule 11(c), SCRPC; Rule 56(e), SCRPC; Montgomery v. CSX Transport, Inc., 376 S.C. 37, 656, S.E.2d 20 (2008) (applying the personal knowledge requirement of Rule 56(e)); and Saro v. Ocean Holiday Partnership, 314 S.C. 116, 441 S.E.2d 385 (Ct. App. 1994)(“facts stated in affidavits must be admissible evidence.”). Generally affidavits are to be made on personal knowledge setting forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated. See Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 410 S.E. 2d 537 (1991). More to the point, while not binding on this court, a Florida court found in a foreclosure action that an affidavit of indebtedness constitutes inadmissible hearsay when the affiant could only state that the data referenced in affidavit was accurate insofar as it replicated the numbers derived from the company’s computer system. Glarum v. LaSalle Bank Nat’l Ass’n, No. 83 So.3d 780 (Ct. App. Fla 2011). In Glarum, in an effort to establish the amount of indebtedness in their motion for summary judgment, LaSalle Bank filed an affidavit of a “specialist” at the loan servicer claiming that Appellant was in default in excess of \$340,000 on the note. Id. The Florida Court applied Fla. Statute § 90.803(6)(a),⁵ which mirrors our own Rule 803(6), SCRE,⁶ and found that the affidavit was inadmissible hearsay which did not

⁵ “We find that Orsini’s affidavit constituted inadmissible hearsay and, as such, could not support LaSalle’s motion for summary judgment. Pursuant to section 90.803(6)(a), Florida Statutes, documentary evidence may be admitted into evidence as business records if the proponent of the evidence demonstrates the following through a record’s custodian: (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.” Glarum, 4D10-1372, 2011 Fla. App. WL 3903161 at *1.

⁶ S.C. R. Evid. 803(6) provides: “**Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to

fit into the business records hearsay exception. *Id.* The court reasoned that “[d]espite [the affiant’s] intimate knowledge of how his company’s computer system works, he had no knowledge of how that data was produced, and he was not competent to authenticate that data.” *Id.*⁷

Discover did not seek reconsideration of nor challenge any issue relating to the Affidavit. Now for the first time Discover raises several issues and asserts additional facts not in the record. Discover now claims the affiant, an employee of an entity other than the named Plaintiff, is the custodian of records for Discover. (App. Brief, p. 7). This is incorrect. The affiant only avers that she has access to the records. Affiant does not aver she is the custodian of records. (Complaint Exhibit “B”). The Affiant does not lay a proper foundation to establish she is a qualified witness. Thus, the Affidavit does not comply with Rule 803(6), SCRE. Rule 803(6)(“all as shown by the testimony of the custodian or other qualified witness”).

Additionally, Discover asserts the affiant verifies that the attached agreement governs the debtor creditor relationship between the parties. (App. Brief, p. 7). As

make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however*, that subjective opinions and judgments found in business records are not admissible. The term “business” as used in this subsection includes Rule 803, SCRE business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.”

⁷ “Orsini did not know who, how, or when the data entries were made into Home Loan Services’s computer system. He could not state if the records were made in the regular course of business. He relied on data supplied by Litton Loan Servicing, with whose procedures he was even less familiar. Orsini could state that the data in the affidavit was accurate only insofar as it replicated the numbers derived from the company’s computer system. Despite Orsini’s intimate knowledge of how his company’s computer system works, he had no knowledge of how that data was produced, and he was not competent to authenticate that data. Accordingly, Orsini’s statements could not be admitted under section 90.803(6)(a), and the affidavit of indebtedness constituted inadmissible hearsay.” Glarum, 4D10-1372, 2011 Fla. App. WL 3903161 at *1.

discussed above the document referenced in the Affidavit is of consequence. Again affiant is not the custodian of records. Therefore she is not a qualified witness. She merely makes conclusions with no support. The document attached is generic, unsigned, undated, and does not identify Brown in any manner. It references copyright privileges by stating Copyright 2011, which shows Discover attempting to employ an agreement that does not relate to the alleged relationship base on its creation in 2011. That fact that Discover attempts to employ the document should be scrutinized under Rule 11, SCRPC.

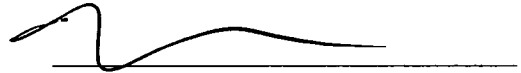
The last argument proffered by Discover as to the Affidavit relates to standing. Standing was neither raised before nor ruled upon by the trial court. Thus, it is not an issue properly before this Court. See Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). The trial court did not dismiss the action due to standing therefore the argument is not only not preserved but it did not have bearing on the trial court's determination.

CONCLUSION

The lower court committed no error of law. The facts clearly support the decisions made by the lower court. For the foregoing reasons Discover's appeal should be dismissed and the decision of the lower court affirmed.

Dated: May 23, 2013

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Mary Leigh Arnold', is written over a horizontal line.

Mary Leigh Arnold
749 Johnnie Dodds Blvd., Suite B
Mount Pleasant, 29464
843-971-6053

Attorney for Respondent

**THE STATE SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM CHARLESTON COUNTY
The Honorable J.C. Nicholson, Circuit Court Judge

Case No. 2012-CP-10-2802

Discover Bank,

Appellant

v.

Jay Brown a/k/a John G. Brown, III,

Respondent.

**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

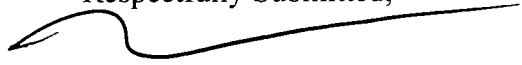
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MAY 24 2013

SC Court of Appeals

- 1) Complaint;
- 2) Answer, Counterclaim and Motion to Dismiss;
- 3) Order.

Respectfully Submitted,



Dated: May 23, 2013

Mary Leigh Arnold
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749 Johnnie Dodds Blvd., Suite B
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Attorney for Respondent

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AFFIDAVIT OF SERVICE

I, the undersigned do hereby certify that I have on this date, hand delivered, a true and correct copy of the Respondent's Brief and Designation of Matter to be Included in the Record to the following counsel of record:

Respectfully submitted,



Dated: May 23, 2013

Mary Leigh Arnold
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Attorney for Respondent

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