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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

James E. Chellis, Master-In-Equity

Appellate Case No. 2020-001127

1st Franklin Financial Corporation, Respondent,

v.

Estate of Roby A. Adams, Appellant.

PETITION FOR REHEARING OR REHEARING EN BANC

Appellant, Estate of Roby A. Adams, hereby moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law and rules, for an order granting rehearing or rehearing *en banc* in this case. Appellant believes that an important issue of first impression is presented in this appeal regarding whether our legislature intended to impose strict liability for a violation of S.C. Code Ann. § 37-5-108(2), which issue merits *en banc* review. Appellant incorporates by reference the Record filed in this appeal and both of Appellant's final briefs, including the issues and arguments raised therein. In addition, Appellant respectfully submits that the court may have overlooked or misapprehended certain material facts or arguments raised in this case, in the following sections of its Order affirming as modified the trial court's decision:

1. LEGISLATIVE INTENT TO IMPOSE STRICT LIABILITY

The court's Order, in paragraph 1, holds that "the master did not err by determining the South Carolina legislature did not intend to impose strict liability for a violation of section 37-5-108." The court's Order then properly focuses on legislative intent but does not address Appellant's arguments citing specific sections of the South Carolina Consumer Protection Code ("SCCPC") where the legislature states its intent regarding this statute. See App.Final Brief, pp. 6-9, and Final Reply Brief, pp. 3-7. Although the legislature made several statements regarding the purposes of this law in the General Provisions and Definitions section of the SCCPC, found at S.C. Code Ann. § 37-1-102, this court's Order doesn't even cite to that purpose section of the law. Reference to that section, as Appellant has previously argued, shows that the legislature intended (1) that the SCCPC should be liberally construed and applied to promote its underlying purposes and policies [37-1-102(1)], which policies include (2) that consumer borrowers should be protected against unfair practices [37-1-102(2)(d), (3) that the SCCPC should conform to the policies of the Federal Consumer Credit Protection Act [37-1-102(2)(f), which Act includes the Fair Debt Collection Practices Act ("FDCPA") as Title VIII of that Act, and (4) that the law in this state on the subject matter of this law should be uniform [37-1-102(2)(g)]. Of these purpose statements, the most important is that the SCCPC should conform to the policies of the FDCPA, since it is widely agreed that the FDCPA is a strict liability statute (see App. Final Brief, p. 8), and Respondent has even admitted this fact (see Resp. Final Brief, p. 10 FN 6). This court's failure to interpret the SCCPC as a strict liability statute also means that the law in this state under the SCCPC will not be uniform, since each trial court will be using a subjective standard for liability under the law instead of the objective standard that a strict liability approach would bring to the interpretation of the law. See App. Final Reply

Brief, pp.5-6. The court's Order also fails to address the effect of the South Carolina Supreme Court case cited by Appellant (see App. Final Brief, pp. 7-8 and Final Reply Brief, p.4-5) which held that both the FDCPA and S.C. Code Ann. § 37-5-108 "prohibit" the type of debt collection conduct listed as "factors" that the court should consider under § 37-5-108(5) to determine whether the law has been violated. *In the Matter of Sean Bannon Zenner*, 348 S.C. 499, 560 S.E. 2d 406 at FN 3 (S.C. 2002). Under the subjective standard approved by both this court and the lower court, a creditor could admit to sending a debtor a debt collection postcard, which action clearly violates § 37-5-108(5)(b)(ix), but not be liable for a violation of § 37-5-108(2) unless the trial court in its subjective discretion finds that to be a violation. As previously argued, such an interpretation is contrary to the way that the FDCPA is interpreted, contrary to the same way our Supreme Court interpreted both the FDCPA and the SCCPC in the *Zenner* case, and effectively guts the statute, since consumer attorneys will not take these cases on a contingency basis if they don't know that their clients are at least going to recover statutory damages and that they are going to recover their reasonable attorney fees for bringing the action to enforce the law. This result is also contrary to the legislative intent as expressed in § 37-1-102(1) to construe this law liberally in a way to promote its purposes and policies. Although the court has discretion to determine that other debt collection conduct not listed in the statute is unconscionable and therefore violates the statute ["following factors, among others, as applicable" § 37-5-108(5)(c)], the trial court should not be allowed to find that any admitted violations of the statute, such as the admitted $9.08 false representation overcharge in this case, are not violations of the statute.

2. THE MASTER ERRED BY GRANTING PARTIAL SUMMARY JUDGMENT

In paragraph 2 of this court's order, the court held that the master did not err by granting

Respondent partial summary judgment on Appellant's counterclaim alleging that Respondent acted unconscionably bv falsely representing the amount of the debt that Appellant owed by $9.08. Appellant has argued that determining whether unconscionable debt collection occurred in this case is a simple matter of following the definition of that term in the statute itself. See App. Final Brief, p. 12 and App. Final Reply Brief, pp. 4-5. First, this court has ruled in its Order that Respondent falsely represented the amount of the debt by $9.08, which is correct. Under § 37-5-108(5)(c)(i), a false representation about the amount of a consumer debt is a "fraudulent, deceptive or misleading representation in connection with the collection of a consumer credit transaction." Under § 37-5-108(5) and the *Zenner* case referenced above, a violation of any of the "factors" listed under this heading is "prohibited" debt collection conduct, which makes it sanctionable unconscionable debt collection under § 37-5-108(2). To hold otherwise would bring this court into conflict with the holding of our Supreme Court in the *Zenner* case, which case this court appears to have overlooked in issuing its Order, since that case was not addressed by this court in its Order.

Even if this court does not reconsider its decision that the legislature did not intend to impose strict liability for a violation of § 37-5-108(2), this court should still find that the master erred when granting partial summary judgment on Appellant's counterclaim. As Appellant pointed out on pages 14-15 of App. Final Brief, the master himself orally ruled, before issuing his written opinion, that if the determination of unconscionability was subjective, as he believed, then he could not grant summary judgment on Appellant's counterclaim until the evidence was presented at trial, since the subjective nature of the determination made it a question of fact that couldn't be determined on summary judgment. This court does not address that statement by the master in its Order, but instead finds both

that the master had subjective discretion to determine unconscionability and that the master did not err in granting summary judgment before trial, which is contrary to the master's reasoning on this issue. These rulings by this court appear to be in conflict with each other, as the master himself stated based on his reasoning at the oral ruling stage of this case. This court should therefore reverse the master's grant of summary judgment on Appellant's counterclaims, since it has held that the master has subjective discretion to determine unconscionability, which also means that determining unconscionability is a question of fact based on evidence presented at trial, and not a question of law. Of course, if this court were to determine that the legislature did intend for a creditor to be strictly liable for a violation of § 37-5-108, then the trial court could determine "as a matter of law" that unconscionable debt collection conduct had occurred, even at the summary judgment stage, which seems to Appellant to give much greater significance to the phrase "as a matter of law" in both § 37-5-108(1) and (2).

Appellant appreciates the fact that this court limited the master's order in the last sentence of paragraph 2 of the Order by stating that Appellant can present additional evidence in future proceedings, except regarding "the specific claim on which the master granted summary judgment." However, Appellant requests that this court clarify the meaning of that phrase more specifically, in order to avoid a misunderstanding or a dispute between the parties as to its meaning. It seems to Appellant that this language means only that Appellant may not claim that the extra $9.08 alleged due in the first complaint filed against Appellant by Respondent is a violation of § 37-5-108(2), but not that any other allegation about the extra $9.08 alleged due in any statement by Respondent or document written by Respondent other than the first complaint can't be presented to the court as evidence of a violation of that Code section. Appellant has argued that since the master

ruled on page 7 of his order (see Record, p.9 and email from court on p. 101) that the reason the $9.08 overcharge in the first complaint was not a violation of § 37-5-108 was because pleadings are privileged as a matter of law, which ruling was based on the *Pond Place Partners* case referenced in the master's order on that same page of the order. Appellant disputed the reasoning of that holding on pages 9-10 of his Final Reply Brief. Neither Respondent nor this court addressed Appellant's argument that the *Pond Place Partners* case cited by the master in support of his litigation privilege does not apply to the facts of this case, and does not stand for the proposition that false debt collection representations in pleadings are protected by the litigation privilege doctrine from violating § 37-5-108. Appellant therefore respectfully requests that this court determine if the master's reliance on that case was misplaced and whether false debt collection statements in pleadings are indeed privileged and cannot violate the SCCPC. If this court disagrees with the master on that legal ruling, then Appellant respectfully requests that this court reverse its ruling that the master did not err when granting partial summary judgment on Appellant's counterclaim. However, even if this court does choose to affirm the master's ruling on that legal issue, Appellant respectfully requests that this court clarify its Order to state that Appellant is only barred from presenting evidence of any alleged violations of the SCCPC that appear solely in pleadings in any future proceeding in this case, and that Appellant may present evidence of any alleged violations that appear in Respondent's documents or statements other than pleadings.

3. THE MASTER ERRED BY DENYING APPELLANT'S RULE 59(E) MOTION

In paragraph 3 of the court's Order, the court held that the master did not err when denying Appellant's Rule 59(e) motion. Appellant agrees that this court's review of the master's order is controlled by an abuse of discretion standard. However, it is an abuse of

discretion for a trial judge to issue an order lacking a discernible reason for the issuance of that order. See *Johnson v. Johnson*, 296 S.C. 289, 304, 372 S.E.2d 107, 115 (Ct. App. 1988) and other cases cited on pages 15-16 of Appellant's Final Brief including *Lollis v. Dutton*, 421 S.C. 467, 487, 807 S.E.2d 723 (Ct. App. 2017), in which case these case cites were found, and which case this court did not address in its Order. See also Appellant's arguments on this issue on pages 11-12 of his Final Reply Brief. Note that the *Lollis* case also cites Rule 52(a), SCRCP, as this court did in its Order, but still finds it an abuse of discretion to issue an order lacking a discernible reason. The whole text of the master's Rule 59(e) order in this case reads as follows: "Defendant's Motion to Reconsider under SCRCP 59 is denied." (R. p. 93). It is not possible to imagine that a more succinct Rule 59(e) order could be entered by any court. If this Rule 59(e) order does not violate the abuse of discretion standard enunciated by this court in the *Lollis* case referenced above, then Appellant does not see how it is possible that any Rule 59(e) order could violate that standard. It appears to Appellant that the court's ruling in this case is in conflict with its ruling in the *Lollis* case cited above. Appellant therefore requests that this court find that the master abused his discretion when issuing the Rule 59(e) order and take such action as may be appropriate regarding that order, including vacating it, if appropriate.

WHEREFORE, Appellant requests that this court issue an order granting rehearing or rehearing *en banc* in this case and make the following findings, as may be appropriate:

1. That the master erred when ruling that the legislature did not intend to impose strict liability for a violation of § 37-5-108(2).
2. That the master erred when granting partial summary judgment on Appellant's counterclaim alleging that Respondent acted unconscionably by falsely

representing that Appellant owed an extra $9.08 to Respondent.

3. That the master erred when ruling that pleadings are protected by litigation privilege and that any false debt collection allegations in pleadings cannot violate § 37-5-108(2) of the S.C. Code due to that litigation privilege.

4. In the alternative, if the master did not err when granting partial summary judgment on Appellant's counterclaim, that the language of the last sentence of paragraph 2 of this court's Order be clarified to state that Appellant is only barred from presenting, in any future proceeding in this case, evidence of any alleged violation of the SCCPC that appears solely in the pleadings, and that Appellant may present evidence of any alleged violations that appear in Respondent's documents or statements other than those that appear solely in any pleadings.

5. That the master abused his discretion when denying the Rule 59(e) order, and that the Rule 59(e) order be vacated, and that this court take such other action regarding the vacated Rule 59(e) order as may be appropriate.

Dated February 9, 2023.

Respectfully submitted,

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PROOF OF SERVICE

All counsel of record have been served with this Petition For Rehearing Or Rehearing *En Banc* by simultaneous email service to their email address of record indicated below on this February 9, 2023.

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/s/ John R. Cantrell, Jr.

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February 9, 2023

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: 1st Franklin Financial Corporation v. Estate of Roby A. Adams
Case No. 2020-001127

Dear Miss Kitchings:

Enclosed please find the filing fee of $50.00 for Appellant's Petition for Rehearing Or Rehearing En Banc, which motion is being filed with the court via email, with copies via email to the parties indicated below.

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