THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Kristi Lee Harrington, Circuit Court Judge

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SC Court of Appeals

Case No. 2011-CP-10-3794
Court of Appeals Tracking No. 2013-000226

Lauren Lee Mattox, Respondent,

v.

PHH Mortgage Corporation a/k/a PHH Mortgage Services d/b/a Instamortgage.com, Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in affirming the entire jury award and denying the Appellant's post-trial motion for election of remedies when the Respondent's Complaint and the evidence at trial clearly demonstrated that the Respondent's damages for each cause of action flowed from an identical set of facts and when affirming the entire award would result in the Respondent receiving a double recovery?

2. Did the trial court err in trebling the jury's award of damages under the South Carolina Unfair Trade Practices Act ("SCUTPA") when the Respondent failed to make a timely post-trial motion to treble damages and failed to put forth any evidence of a willful violation of SCUTPA by the Appellant?

3. Did the trial court err in awarding the Respondent, pursuant to the South Carolina Unfair Trade Practices Act ("SCUTPA"), nearly One Hundred Fifty Thousand Dollars ($150,000.00) in attorneys' fees and expenses incurred in prosecuting all of her claims, including her claims other than a violation of SCUTPA, when the Respondent failed to make a timely post-trial motion for said attorneys' fees and when the jury's SCUTPA award represented only Twenty-Five Thousand Dollars ($25,000.00) of the total award?

4. Did the trial court err in denying the Appellant's motion for directed verdict and judgment notwithstanding the verdict on the grounds that the Fair Credit Reporting Act preempted the Respondent's state law claims?

5. Did the trial court err in denying the Appellant's Motion to Set Aside Entry of Default even though the Appellant demonstrated good cause for relief from the entry of default?

STATEMENT OF THE CASE

The Respondent filed the instant action on May 27, 2011, against the Appellant, PHH Mortgage Corporation a/k/a PHH Mortgage Services d/b/a Instamortgage.com (hereinafter referred to as "PHH Mortgage"). (Pl. Compl. filed May 27, 2011). The Respondent's Complaint alleged five causes of action: (1) breach of contract; (2) negligence; (3) violation of the South Carolina Unfair Trade Practices Act (hereinafter referred to as "SCUTPA"); (4) defamation; and (5) intentional interference with contract. (Pl. Compl. filed May 27, 2011).

The Respondent alleged that she refinanced the mortgage on her property at 814 Mikell Drive (hereinafter referred to as "The Property") with PHH Mortgage in October 2007. (Pl. Compl., ¶ 4 filed May 27, 2011). After an increase in her monthly mortgage payment, the Respondent "requested a loan modification package from" PHH Mortgage, and she allegedly received the loan modification package from PHH Mortgage five months after requesting it. (Pl. Compl., ¶¶ 6-8 filed May 27, 2011). The Respondent completed the loan modification and returned it to PHM Mortgage on or about December 15, 2009. (Pl. Compl., ¶ 9 filed May 27, 2011). After PHH Mortgage allegedly lost the Respondent's first loan modification application, she completed a second loan modification package and sent it to PHH Mortgage. (Pl. Compl., ¶¶ 10-11 filed May 27, 2011). On or about April 8, 2010, PHH Mortgage informed the Respondent that she had been "approved to make trial payments under a new loan modification." (Pl. Compl., ¶ 12 filed May 27, 2011). After the Respondent received the approval letter, she received a notice of intent to foreclose from PHH Mortgage. (Pl. Compl., ¶ 13 filed May 27, 2011). The Respondent alleged that she timely made three trial payments, and in July 2010, she executed and entered into a loan modification contract with PHH Mortgage. (Pl. Compl., ¶¶ 14-15 filed May 27, 2011).

According to the Respondent, she made timely payments each month under the new loan modification agreement. (Pl. Compl., ¶ 16 filed May 27, 2011). In March 2011, the Respondent received a loan payment booklet from PHH Mortgage reflecting a "new monthly loan payment amount of $1,509.39, which reflected an increase in the amount of $29.39." (Pl. Compl., ¶ 17 filed May 27, 2011). According to the Respondent, PHH Mortgage stated that she was in arrears for the months of January, February, and March 2011, and PHH Mortgage reported to the credit reporting bureaus that the Respondent failed to make timely payments on the modification loan. (Pl. Compl., ¶ 18 filed May 27, 2011). The Respondent alleged that PHH Mortgage refused to properly apply payments made by the Respondent to her account and instead reported to the credit bureaus that the Respondent failed to make several payments under the loan modification. (Pl. Compl., ¶¶ 19-20 filed May 27, 2011). As a result of this alleged "inaccurate reporting," the Respondent claims her credit score plummeted, resulting in cancellation of existing credit cards, denial of credit card applications, and damage to her reputation and credit. (Pl. Compl., ¶ 21 filed May 27, 2011).

The Respondent alleged that she made repeated phone calls to PHH Mortgage in an effort to correct the inaccurate reporting, but PHH Mortgage did not investigate the inaccurate reporting, provide reason for the inaccurate reporting, or correct the inaccurate reporting. Pl. (Pl. Compl., ¶¶ 22-25 filed May 27, 2011). According to the Respondent, PHH Mortgage has a "practice of falsely reporting to the credit reporting bureaus that consumers of its loan products are delinquent when in fact they are not in arrears, and it fails to properly investigate, verify, and correct such false reports when requested to do so." (Pl. Compl., ¶ 26 filed May 27, 2011).

PHH Mortgage was served with the Summons and Complaint on June 2, 2011. (Affidavit of Personal Service filed June 9, 2011). On or about July 5, 2011, the Respondent

moved for default. (Affidavit of Default filed July 5, 2011). The clerk of court entered default the same day. (Notice of Entry of Default filed July 5, 2011). Shortly thereafter, PHH Mortgage moved to set aside the entry of default by motion filed on August 9, 2011. (PHH Mortgage's Motion to Set Aside Entry of Default filed August 9, 2011). The trial court received memoranda and heard oral arguments from the parties on the issue of setting aside the entry of default, and by Order dated October 7, 2011, The Honorable Kristi Lee Harrington denied PHH Mortgage's motion to set aside the entry of default. (Order Denying Motion to Set Aside Entry of Default filed October 10, 2011).

On November 15, 2012, and November 16, 2012, the trial court held a default damages hearing. After considering the testimony and evidence presented by the Respondent, the jury awarded damages to the Respondent in the following amounts:

Breach of Contract	\$25,000.00
Negligence	\$75,000.00
Defamation	\$100,000.00
Unfair Trade Practices	\$25,000.00
Intentional Interference with Contract	\$25,000.00
Punitive Damages	\$0

(Transcript of Hearing, November 16, 2012, p. 206, line 6 – p. 208, line 1).

After the trial court read the jury's verdict, it asked whether or not the parties had any post-trial motions. (Transcript of Hearing, November 16, 2012, p. 209, lines 1 – 6). On several occasions throughout the proceedings, the trial court informed the parties that it would require them to make post-trial motions immediately following the verdict and would not allow the parties ten (10) days to file post-trial motions. Respondent's counsel stated he did not have any post-trial motions. (Transcript of Hearing, November 16, 2012, p. 209, lines 5 – 6). Counsel for PHH Mortgage raised two post-trial motions: (1) post-trial motion for judgment notwithstanding the verdict and (2) post-trial motion for election of remedies by the Respondent. (Transcript of

Hearing, November 16, 2012, p. 209, line 7 – p. 210, line 5). The trial court took the post-trial motion for judgment notwithstanding the verdict under advisement, but it specifically asked the parties to submit briefs in support of their positions on the issue of election of remedies.

On or about December 3, 2012, the Respondent filed a Post-Trial Motion to Confirm Jury's Award of Damages and Request for Attorneys' Fees and Treble Damages under SCUTPA and a supporting memorandum and affidavit. (Plaintiff's Notice of Motion and Post-Trial Motion to Confirm Jury's Award of Damages and Request for Attorneys' Fees and Treble Damages under SCUTPA filed December 3, 2012); (Plaintiff's Memorandum in Support of Post-Trial Motion to Confirm Jury's Award of Damages and Request for Attorneys' Fees and Treble Damages under SCUTPA filed December 3, 2012). Pursuant to the trial court's instruction, PHH Mortgage filed a memorandum in support of its post-trial motion for election of remedies. (Reply Memorandum in Support of Post-Trial Motion for Election of Remedies filed December 11, 2012). PHH Mortgage also filed a memorandum in opposition to the Respondent's belated post-trial motion. (Memorandum in Opposition to Post-Trial Motion for Treble Damages and Attorneys' Fees filed December 11, 2012). The trial court heard arguments from the parties on or about December 12, 2012, and by order filed December 17, 2012, the trial court affirmed the entire jury award of $250,000, trebled the $25,000 SCUTPA award to $75,000, and awarded the Respondent attorney's fees and costs in the amount of $149,761.03. (Order filed December 17, 2012).

STANDARD OF REVIEW

The determination of damages by a jury is entitled to substantial deference. Stevens v. Allen, 336 S.C. 439, 446-47, 520 S.E.2d 625, 629 (Ct. App. 1999). The fact finder is vested with considerable discretion over the amount of a damages award, and the appellate review of the amount of damages "is limited to the correction of errors of law." Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (2008); Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310-311, 594 S.E.2d 867, 873 (Ct. App. 2004). In reviewing a damages award, the appellate court does not weigh the evidence but instead determines if any evidence supports the award. Vortex, 378 S.C. at 208, 662 S.E.2d at 450; Austin, 358 S.C. at 311, 594 S.E.2d at 873.

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 606, 681 S.E.2d 884, 888 (2009); Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." Sundown, 383 S.C. at 606-07, 681 S.E.2d at 888; Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162–63, 375 S.E.2d 321, 322–23 (Ct. App. 1988). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Sundown, 383 S.C. at 606-07, 681 S.E.2d at 888; In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

ARGUMENTS

I. THE TRIAL COURT ERRED IN AFFIRMING THE ENTIRE JURY AWARD AND DENYING THE APPELLANT'S POST-TRIAL MOTION FOR ELECTION OF REMEDIES WHEN THE RESPONDENT'S DAMAGES FOR EACH CAUSE OF ACTION FLOWED FROM AN IDENTICAL SET OF FACTS AND AFFIRMING THE ENTIRE AWARD RESULTED IN THE RESPONDENT RECEIVING A DOUBLE RECOVERY.

Because the Respondent's damages for each cause of action flowed from an identical set of facts and because awarding the Respondent the full jury award would result in a double recovery, the trial court erred in not requiring the Respondent to elect among her remedies. "Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action." Taylor v. Medenica, 324 S.C. 200, 218, 479 S.E.2d 35, 44 (1996). "It is the act of choosing between inconsistent remedies allowed by law on the same set of facts." Id. at 218, 479 S.E.2d at 44-45; Thompson v. Watts, 281 S.C. 504, 507, 316 S.E.2d 393, 395 (1984). The basic purpose of election of remedies is to prevent double recovery for a single wrong. Save Charleston Found. v. Murray, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985). "Election of remedies is not applicable where there are two separate causes of action, each based on different facts." Taylor, 324 S.C. at 218, 479 S.E.2d at 45; Jones v. Winn-Dixie Greenville, 318 S.C. 171, 175, 456 S.E.2d 429, 431-32 (Ct. App. 1995). When a plaintiff seeks only one remedy, there is nothing to elect. Keeter v. Alpine Towers International, Inc., 399 S.C. 179, 198, 730 S.E.2d 890, 900 (Ct. App. 2012); see also Adams v. Grant, 292 S.C. 581, 586, 358 S.E.2d 142, 144 (Ct. App. 1986) ("Where a plaintiff presents two causes of action because he is uncertain of which he will be able to prove, but seeks a single recovery, he will not be required to elect.").

"As its name states, the doctrine applies to the election of 'remedies' not the election of 'verdicts.'" Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 57, 691 S.E.2d 135, 153

(2010) (defining a "'remedy' as '[t]he means by which . . . the violation of a right is . . . compensated.'" (quoting Black's Law Dictionary 1163 (5th ed. 1979))). Nevertheless, the trial court must ensure that the plaintiff does not receive a double recovery. Keeter, 399 S.C. at 198, 730 S.E.2d at 900; see also Collins Music Co. v. Smith, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) ("It is well settled in this state that there can be no double recovery for a single wrong and a plaintiff may recover his actual damages only once." (internal quotation marks omitted)). "When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both." Save Charleston, 286 S.C. at 175, 333 S.E.2d at 64.

"The determination of whether a verdict grants a double recovery begins with the trial court's responsibility to interpret the verdict in order to ascertain the jury's intent." Keeter, 399 S.C. at 198, 730 S.E.2d at 900. "To determine the jury's intent in an ambiguous verdict, the court should consider the entire proceedings, focusing on the events and circumstances that reasonably indicate what the jury intended." Id. at 199, 730 S.E.2d at 900-01; see also Durst v. S. Ry. Co., 161 S.C. 498, 506, 159 S.E. 844, 848 (1931) (stating "the construction of a verdict should, and can, depend upon, not only the language used by the jury, but other things occurring in the trial may be, and should be, properly regarded in determining what a jury intended to find"); Howard v. Kirton, 144 S.C. 89, 101, 142 S.E. 39, 43 (1928) (stating it is "the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it was his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the course of the trial"); see also 75B Am.Jur.2d *Trial* § 1545 (2007) ("In the interpretation of an ambiguous verdict, the court may make use of anything in the proceedings that serves to show with certainty what the jury intended, and, for this purpose, reference may be

had, for example, to the pleadings, the evidence, the admissions of the parties, the instructions, or the forms of verdict submitted."). Because a cumulative verdict would result in double recovery and the Respondent's causes of actions are based upon the same set of facts, the trial court erred in denying PHH Mortgage's post-trial motion for election of remedies, and this Honorable Court must remand this matter to the trial court with instructions requiring the Respondent to elect among her remedies.

A. THE TRIAL COURT ERRED IN NOT FINDING THAT THE RESPONDENT'S DAMAGES FOR EACH CAUSE OF ACTION FLOWED FROM AN IDENTICAL SET OF FACTS.

Because the Respondent alleged same set of facts for each cause of action resulted in the same damage, the trial court should have required the Respondent to elect among her remedies. In particular, the Respondent alleged that PHH Mortgage failed to timely respond to her requests for information, failed to accurately apply her mortgage payments, and inaccurately reported to the credit bureaus that she was late or failed to make the mortgage payments, resulting in damage to her credit score, reduction in her credit, cancellation of her credit, and denial of additional credit. However, the Respondent uses these same allegations for all five (5) of her causes of action, and as a result, she should have been required to elect among her remedies to prevent duplicative recoveries of the same injury based upon the same alleged misconduct.

First, a simple review of the Respondent's Complaint demonstrates that the Respondent alleged a core set of facts to support every cause of action she pleaded. (Pl. Compl., ¶¶ 1-26 filed May 27, 2011). Under Rule 54(c), SCRCP, "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." The Respondent's core set of facts hinges upon PHH Mortgage's delays in responding to her requests and refusal to properly apply payments made by the Respondent to her account and instead reporting to the credit bureaus that the Respondent failed to make several payments under the

loan modification. (Pl. Compl., ¶¶ 19-20 filed May 27, 2011). It is this "inaccurate reporting" that the Respondent alleges caused her credit score to plummet and resulted in cancellation of existing credit cards, denial of credit card applications, and damage to her reputation and credit. (Pl. Compl., ¶ 21 filed May 27, 2011). According to the Respondent, PHH Mortgage has a "practice of falsely reporting to the credit reporting bureaus that consumers of its loan products are delinquent when in fact they are not in arrears, and it fails to properly investigate, verify, and correct such false reports when requested to do so." (Pl. Compl., ¶ 26 filed May 27, 2011). If the Respondent intended to prove a different set of facts to support each cause of action, she would not have alleged a core set of facts in her Complaint but instead would have pleaded separate facts for each cause of action. None of the Respondent's causes of action plead different facts, and in fact, each cause of action refers to the same facts to support the alleged misconduct by PHH Mortgage.

Second, each of the Respondent's causes of action refers back to the core set of facts alleged in the opening of her Complaint. For breach of contract, the Respondent specifically alleged that PHH Mortgage breached its agreement with the Respondent by "failing to apply the Respondent's monthly payments to the Respondent's account." (Pl. Compl., ¶ 31 filed May 27, 2011). However, she also pleaded this fact in support of her negligence claim, stating that PHH Mortgage breached its duty to the Respondent by "failing to apply and credit all payments made by the Respondent to her account." (Pl. Compl., ¶ 35a filed May 27, 2011). Similarly, the Respondent alleged that the "above described violations of the S.C. Unfair Trade Practices Act were the proximate cause of damages incurred by the Respondent," but there are no separate facts alleged in the SCUTPA cause of action. (Pl. Compl., ¶ 41 filed May 27, 2011). Instead,

the Respondent simply refers to same set of facts and allegations used to support her other causes of action.

The Respondent also uses the "inaccurate reporting" by PHH Mortgage as the basis for several causes of action. In the negligence cause of action, the Respondent alleged that PHH Mortgage breached its duty to the Respondent by "falsifying and or inaccurately reporting payments by the Respondent as late when they were made in a timely manner" and "misrepresenting the status of Respondent's account to credit bureaus and third-parties." (Pl. Compl., ¶¶ 35b, 35i filed May 27, 2011). The Respondent's defamation claim relies also exclusively upon this alleged "inaccurate reporting." In her defamation cause of action, the Respondent alleged that PHH Mortgage "has repeatedly and continues to make inaccurate statements to the credit bureaus about the Respondent's mortgage payments and financial condition" and that these "inaccurate and negative statements made by [PHH Mortgage] have damaged and continue to damage the previous excellent reputation of the Respondent." (Pl. Compl., ¶¶ 46, 48 filed May 27, 2011). The Respondent also claims that these "false and inaccurate reports of the Respondent's payment history to the credit bureaus resulted in a negative credit report, a poor credit score, and the cancellation of her credit card," which is the basis of her intentional interference with contract claim. (Pl. Compl., ¶ 58 filed May 27, 2011). Again, the Respondent also alleged that the "above described violations of the S.C. Unfair Trade Practices Act were the proximate cause of damages incurred by the Respondent," but there are no separate facts alleged in the SCUTPA cause of action. (Pl. Compl., ¶ 41 filed May 27, 2011). Ultimately, the alleged failure to properly apply the Respondent's mortgage payments served as the factual basis for at least three of the Respondent's causes of action, and the alleged

"inaccurate reporting" served as the factual basis for at least four of the Respondent's causes of action.

Third, based upon the jury's verdict, it is clear that the jury found that either PHH Mortgage's conduct supporting the Respondent's breach of contract claim and/or intentional interference claim also supported her SCUTPA claim. The jury awarded $25,000 for each of these three claims, and these were the three claims that awarded damages solely for pecuniary loss. It stands to reason that the jury based the damages on all three of these causes of action on the same conduct.

Further, the evidence put forth at trial aligns with the allegations of the Complaint. The Respondent testified about delays in receiving documentation from PHH Mortgage (Transcript of Hearing, November 15, 2012, p. 12, line 11 – p. 18, line 19), incorrectly applied payments (Transcript of Hearing, November 15, 2012, p. 22, line 14 – p. 24, line 7), and inaccurate statements to the credit bureaus (Transcript of Hearing, November 15, 2012, p. 36, line 10 – p. 37, line 20). Throughout the trial, it was the same set of facts that served as the basis for each of the Respondent's causes of action. Because the misconduct alleged by the Respondent against PHH Mortgage for all of her causes of action was the same, the trial court erred in not requiring the Respondent to elect among her remedies to prevent her from recovering multiples of her pecuniary damages.

B. THE TRIAL COURT ERRED IN NOT FINDING THAT THE AFFIRMATION OF THE ENTIRE JURY AWARD ALLOWED THE RESPONDENT TO RECEIVE A DOUBLE RECOVERY.

Because the cumulative verdict results in the Respondent receiving more than double recovery for the same damages, the trial court erred in not requiring the Respondent to elect among her remedies. In particular, the defamation damages alleged by the Respondent includes

all of the damages alleged by the Respondent in her other common law causes of action, and the pecuniary damages in the Respondent's SCUTPA claim duplicate the pecuniary damages alleged in her common law claims. Therefore, the Respondent should have to elect among her remedies.

1. The Respondent's defamation damages represent the sum of her common law damages.

There are two types of damages in defamation actions: general and special. If a defamatory statement is actionable per se, the law presumes that certain "general damages" are the natural and proximate result of the defamation; such presumed damages include injury to reputation, mental suffering, hurt feelings, and "similar injuries, incapable of definite money valuation." Whitaker v. Sherbrook Distributing Co., 189 S.C. 243, 246, 200 S. E. 848, 849 (1939); see also Capps v. Watts, 271 S.C. 276, 281, 246 S. E. 2d 606, 609 (1978); Lily v. Belk's Dep't Store, 178 S.C. 278, ___, 182 S. E. 889, 891 (1935). If the defamatory statement is not actionable per se, the plaintiff must plead and prove "special damages." Capps, 271 S.C. at 281, 246 S.E.2d at 608. "Special damage must consist of some provable material loss to the plaintiff as a result of the injury to his reputation." Wardlaw v. Peck, 282 S.C. 199, 205, 318 S. E. 2d 270, 275 (Ct. App. 1984). Special damages include a loss of money or some provable material injury to the property, business, profession, or occupation of the plaintiff that is capable of being assessed a monetary value. Smith v. Phoenix Furniture Co., 339 F. Supp. 969, 971 (D.S.C. 1972). Special damages do not include hurt feelings, embarrassment, humiliation, or emotional distress. Wardlaw, 282 S.C. 205, 318 S.E.2d at 275. Special damages also must result from some injury to reputation, and to the plaintiff's reputation specifically, which was caused by the defamatory statement. Capps, 271 S.C. at 281, 246 S.E.2d at 608.

Because the Respondent's allegations did not support defamation actionable per se, she had to prove and recover special damages before she could recover general damages for

defamation. In fact, the Respondent did plead special damages. These special damages included all pecuniary or economic losses suffered by the Respondent, including damage to her credit score, reduction in her credit, cancellation of her credit, and denial of additional credit, that resulted from the alleged "inaccurate" credit reporting by PHH Mortgage. The Respondent alleged these pecuniary damages for her breach of contract and intentional interference with contract causes of action, and she recovered these pecuniary damages for these causes of action. (Pl. Compl., ¶¶ 27-33, ¶¶ 55-61 16 filed May 27, 2011). In the Respondent's Complaint, she alleged damages for the intentional interference with contract cause of action including "a negative credit report, a poor credit score, and the cancellation of her credit card" and her inability "to obtain credit cards from at least six other credit card companies." (Pl. Compl., ¶¶ 58-59 filed May 27, 2011). These two causes of action seek pecuniary damages to compensate the Respondent for her damaged credit.

Similarly, the Respondent alleged those same pecuniary damages as part of her defamation claim. (Pl. Compl., ¶ 53 filed May 27, 2011). In her Complaint as part of her defamation claim, the Respondent alleged that she had "suffered injury to her reputation, health, mental suffering, her credit rating, her ability to obtain credit and her ability to gain employment as a direct and proximate result of the Defendant's misconduct and maliciously false representations." (Pl. Compl., ¶ 53 filed May 27, 2011). The pecuniary losses were a significant part of the Respondent's defamation claim, and as a result, the trial court erred in failing to consider the duplicative nature of awarding those pecuniary losses for multiple causes of action. The jury's verdict for defamation is coextensive with the $25,000 award for breach of contract[1]

[1] Damages recoverable for breach of contract are pecuniary losses that either flow as a natural consequence of the breach or must have been reasonably within the parties' contemplation at the time of the contract. Parker v. Shecut, 340 S.C. 460, 490, 531 S.E.2d 546, 562 (Ct. App. 2000); Bensch v. Davidson, 354 S.C. 173, 178, 580 S.E.2d 128,

and the $25,000 award for intentional interference with contract[2] that constitute the Respondent's pecuniary damages.[3] Because the Respondent's defamation damages include these pecuniary losses as well, a cumulative verdict would award the Respondent with a double recovery. As a result, she must elect between her defamation claim and her breach of contract and intentional interference with contract claims.

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130 (2003). A plaintiff cannot recover damages for mental anguish in a breach of contract claim. Whitten v. American Mut. Liability Ins. Co., 468 F.Supp. 470, 473 (D.S.C. 1977), aff'd, 594 F. 2d 860 (4th Cir. 1979).

[2] The damages for intentional interference with contract include any resulting damages from the defendant's intentional procurement of the contract's breach. Collins Music Co. Inc. v. Smith, 332 S.C. 145, 147-48, 503 S.E.2d 481, 482 (Ct. App. 1998).

[3] It is also likely that the Respondent's awards for breach of contract and intentional interference with contract constitute duplicative awards. In Collins Music, the Court of Appeals reviewed the shared damages connection between these two causes of action. In that case, the Court cited a Missouri case as follows:

> While the causes of action [of breach and tortious interference] involve separate and distinct wrongful acts committed by different parties, there are important commonalities which affect the damages question. The nexus between the two causes of action is the breach of the contract, for ... breach of the contract is an element of both causes of action. This is the element from which the injured party's actual damages flow on both the contract and tort claims. This does not mean, however, that the measure of actual damages on both causes of action are [sic] coextensive.
>
> Under the contract claim the injured party can recover actual damages for the direct and natural consequences of the breach, or for damages that were within the contemplation of the contracting parties. The damages recoverable for intentional interference are not measured by contract rules. The injured party can recover from the tortfeasor: the pecuniary loss of the benefits of the contract; consequential losses for which the interference is the legal cause; and, emotional distress or actual harm to reputation if they are reasonably to be expected to result from the interference. Thus, the actual damages under the contract claim and tort claim will be coextensive only with respect to the lost benefits of the contract which were a direct and natural consequence of the breach, or within the contemplation of the contracting parties....
>
> [The plaintiff] cannot collect double recovery (once from each defendant) for actual damages which are coextensive under the contract and tort claims.

Collins Music, 332 S.C at 147-48, 503 S.E.2d at 482 (citing Ross v. Holton, 640 S.W.2d 166, 173 (Mo.Ct.App.1982) (citations omitted); see also Charles River Constr. Co. v. Kirksey, 480 N.E.2d 315 (1985) (holding damages suffered by builder for tortious interference with developers by second builder and real estate broker were subsumed in contract damage award in absence of evidence of an out-of-pocket loss to justify additional recovery); TSC Indus., Inc. v. Tomlin, 743 S.W.2d 169, 172 (Tenn.Ct.App.1987) ("[T]he damages recoverable for the pecuniary loss of the contract are common to both the action for breach and the action for inducement[;] [t]herefore, ... any payments made by the one who breaches the contract must be credited in favor of the one who induced the breach.").

In Collins Music, the Court reduced the two $10,000 verdicts for breach of contract and intentional interference with contract to one verdict of $10,000 on these grounds.

Similarly, the defamation damages awarded by the jury would include the $75,000 negligence award. Actual damages for negligence include personal or bodily injury, death, damage to tangible property, including lost wages and economic loss, pain and suffering, mental anguish, and loss of enjoyment of living. Because damages for negligence include both economic and non-economic components, it makes reasonable sense that the jury's award for negligence would include the $50,000 in pecuniary losses awarded for the breach of contract and intentional interference with contract causes of action. In fact, the Respondent alleged pecuniary damages as part of her negligence claim. The Respondent alleged that she suffered "damage to her financial condition, credit, mental condition, anxiety, and her health." (Pl. Compl., ¶ 36 filed May 27, 2011). Therefore, the jury would have awarded the remaining $25,000 on the Respondent's negligence claim to compensate her for mental anguish, anxiety, and health concerns.

Finally, that leaves the remaining $25,000 on the defamation verdict for injury to the Respondent's reputation. When the Court considers that the Respondent's defamation claim contains four elements[4], the jury's verdict makes complete sense. It is clear the jury intended the award for defamation to include the same damages it awarded the Respondent for her breach of contract, intentional interference with contract, and negligence causes of action. Because the jury's award for defamation would include the pecuniary awards for breach of contract and intentional interference with contract and the remaining mental anguish award for negligence, the trial court erred in not requiring the Respondent to elect among her remedies for (1) defamation, (2) negligence, and (3) breach of contract and intentional interference with contract.

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[4] The Respondent alleged four elements of damages for her defamation claim: (1) damages resulting from harm to her credit rating; (2) damages resulting from her inability to obtain credit; (3) damages for her mental anguish; and (4) damages for the injury to her reputation. (Pl. Compl., ¶ 53 filed May 27, 2011). On the other hand, her negligence claim included only the first three elements from her defamation damages. (Pl. Compl., ¶ 36 filed May 27, 2011).

2. The Respondent's SCUTPA damages are identical to the damages she has claimed in her contract causes of action.

Because the Respondent does not allege a different pecuniary loss under her SCUTPA claim than for her breach of contract or intentional interference with contract claims which are also a part of her defamation and negligence claims, she must elect among her claims for (1) defamation, (2) negligence, (3) breach of contract and intentional interference with contract, and (4) SCUTPA. Under the South Carolina Unfair Trade Practices Act ("SCUTPA"), "[a]ny person who suffers any ascertainable loss of money or property ... as a result of the use or employment by another person of an unfair or deceptive method, act or practice ... may recover actual damages." S.C. Code Ann. § 39-5-140 (1976). SCUTPA allows for the recovery of actual damages. See Global Prot. Corp. v. Halbersberg, 332 S.C. 149, 159, 503 S.E.2d 483, 488 (Ct.App.1998) (citing S.C.Code Ann. § 39-5-140(a) (1976)). "Actual damages under the UTPA include special or consequential damages that are a natural and proximate result of deceptive conduct." Id. (citing Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996)).

The jury's verdict awarded the Respondent with $25,000 for breach of contract and $25,000 for intentional interference with contract, and only these two common law causes of action required the Respondent to prove pecuniary losses. While a SCUTPA claim requires proof of pecuniary losses, the Respondent did not prove or introduce evidence of a separate pecuniary loss for the SCUTPA claim. Instead, the Respondent relied upon the same pecuniary losses, including damage to her credit score, reduction in her credit, cancellation of her credit, and denial of additional credit, that resulted from the defamatory credit reports for all of her causes of action. In the Complaint, the Respondent alleged that the "above described violations of the S.C. Unfair Trade Practices Act were the proximate cause of damages incurred by the Respondent," but there are no separate facts alleged in the SCUTPA cause of action or separate

damages claimed by the Respondent. (Pl. Compl., ¶ 41 filed May 27, 2011). To award the Respondent with a cumulative verdict would result in the Respondent recovering her pecuniary losses multiple times. The trial court erred in not requiring the Respondent to elect among her remedies because for the Respondent's causes of action that required proof of pecuniary damages, such as SCUTPA and defamation, she relied upon the same pecuniary damages and, therefore, awarding her the cumulative verdict resulted in a double recovery.

II. THE TRIAL COURT ERRED IN TREBLING THE JURY'S AWARD OF DAMAGES UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT ("SCUTPA") BECAUSE THE RESPONDENT FAILED TO MAKE A TIMELY POST-TRIAL MOTION TO TREBLE DAMAGES AND FAILED TO PUT FORTH ANY EVIDENCE OF A WILLFUL VIOLATION OF SCUTPA BY THE APPELLANT.

Because the Respondent failed to timely move for treble damages and further failed to put forth any evidence of a willful or knowing violation of SCUTPA by PHH Mortgage, the trial court erred in trebling the jury's award of SCUTPA damages. SCUTPA provides that "[i]f the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper." S.C. Code Ann. § 39-5-140(a) (1976).

In jury trials, post-trial motions are made promptly at the end of the trial, or upon motion, the court may grant an additional ten days to the parties for filing of post-trial motions. Rule 59, SCRCP, Notes to 1986 Amendments. Throughout the trial of this case, the trial court specifically informed the parties that it would require them to make post-trial motions immediately following the reading of the jury's verdict and would not grant an additional ten days for filing post-trial motions. Again, at the close of trial, the trial court asked counsel for both parties if they had any post-trial motions to be made, and Respondent's counsel stated he

did not have any post-trial motions. (Transcript of Hearing, November 16, 2012, p. 209, lines 1 – 6). The trial court further stated that while it wanted the parties to brief the issue of election of remedies, it did not want the parties to file any additional motions or expand the scope of the issues before the court. (Transcript of Hearing, November 16, 2012, p. 210, line 13 – p. 211, line 15 and p. 215, lines 20 -25).

Approximately seventeen (17) days after the final day of trial, the Respondent filed a "Post-Trial Motion to Confirm the Jury's Award of Damages and Request for Attorneys' Fees and Treble Damages under SCUTPA". At the end of trial, PHH Mortgage raised two post-trial motions: (1) for judgment notwithstanding the verdict and (2) for election of remedies. The trial court requested that the parties submit briefs on the second post-trial motion, but it did not grant additional time for the parties to file additional post-trial motions. In fact, the trial court specifically stated that it did not want any additional grounds for post-trial motions raised beyond the issue of election of remedies. The trial court reiterated at the close of trial that all post-trial motions had to be made immediately. The trial court could not have been more adamant about this requirement. Because in its discretion the trial court required the parties to make post-trial motions immediately at the end of trial, the Respondent's post-trial motion to treble damages was untimely, and therefore, the trial court erred in granting the Respondent's motion to treble SCUTPA damages.

Even if the Respondent's post-trial motion to treble damages was timely, the trial court erred in finding the Respondent demonstrated that PHH Mortgage's actions in violating the SCUTPA were willful or wanton. Besides actual damages, when a person or entity willfully or knowingly violates the SCUTPA by reason of an unfair or deceptive method, act or practice, the court awards three times the actual damages sustained. S.C. Code Ann. § 39-5-140 (1976).

Specifically, the statute provides that "[i]f the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20," the Respondent recovers three times actual damages. S.C. Code Ann. § 39-5-140 (1976) (emphasis added). The term "willful" as used in the SCUTPA creates a statutory standard of willfulness different from the common law standard and, for purposes of the SCUTPA, conduct is willful if the defendant should have known it violates § 39-5-20. S.C. Code Ann. § 39-5-110(c) (1976); State ex rel. Medlock v. Nest Egg Soc. Today, Inc., 290 S.C. 124, 128, 348 S.E.2d 381, 384 (Ct. App. 1986). The standard is not one of actual knowledge, but of constructive knowledge, so if, in the ordinary exercise of due diligence, a person of ordinary prudence engaged in trade or commerce could have ascertained that his conduct violates the Unfair Trade Practices Act, then such conduct is "willful" within the meaning of the statute. Id. In determining willfulness, courts consider only the actions at the time of the transaction in question. Ward v. Dick Dyer and Associates, Inc., 304 S.C. 152, 403 S.E.2d 310 (1991). Because there is no evidence to support a willful violation of the SCUTPA by PHH Mortgage, the trial court erred in granting the Respondent's motion to treble damages.

First, SCUTPA charges the court with the duty of finding whether or not the plaintiff proved that the defendant willfully violated the SCUTPA. Because the statute specifically requires the trial court to make that determination, it is an action undertaken by the trial court upon a timely post-trial by the plaintiff. Further, it cannot be admitted by reason of a defendant's default. Ultimately, the determination of trebling damages under the SCUTPA is an issue of damages made by the trial court upon motion at the close of trial based upon the evidence presented at trial.

Second, the Respondent offered absolutely no evidence to support a willful violation of the SCUTPA by PHH Mortgage. There is no evidence to support the requirement that in the ordinary exercise of due diligence, PHH Mortgage could have ascertained that its conduct violated the SCUTPA. PHH Mortgage's misconduct alleged by the Respondent does not fall into any of the enumerated actions of the SCUTPA specifically declared violations of the SCUTPA. See S.C. Code Ann. §§ 39-5-30 through -50 (1976). Instead, to find that PHH Mortgage willfully violated the SCUTPA, the trial court had find that a mortgage servicer negligently failing to properly apply payments to a customer's account or negligently reporting "inaccurate" payment status to credit bureaus willfully violates the SCUTPA. As PHH Mortgage argued at trial, its conduct was not based upon an intent to violate the law or harm the Respondent but instead resulted from overwhelming customer demand in the face of an economic crisis.

Further, based upon the jury's award of $0 in punitive damages, the trial court should have considered the jury's lack of finding willful conduct by PHH Mortgage. Although SCUTPA creates a statutory standard of willfulness different from the common law standard, the trial court should have considered the jury's finding of $0 punitive damages in evaluating the alleged misconduct by PHH Mortgage. It is clear from the jury's verdict that it did not find that PHH Mortgage acted willfully, maliciously, wantonly, or with any intent to harm the Respondent. Instead, the jury's verdict clearly demonstrates that it believed the arguments presented by PHH Mortgage that it became overwhelmed with mortgage refinances and modifications at a time of economic crisis and acted negligently in misapplying the Respondent's payments and "inaccurately" reporting her payments to the credit bureaus. For these reasons, if the Respondent's post-trial motion is considered timely, the trial court still erred in trebling

damages under SCUTPA because the Respondent failed to prove PHH Mortgage willfully violated SCUTPA.

III. THE TRIAL COURT ERRED IN AWARDING THE RESPONDENT, PURSUANT TO THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT ("SCUTPA"), THE TOTAL ATTORNEYS' FEES AND EXPENSES INCURRED IN PROSECUTING ALL OF HER CLAIMS, INCLUDING HER CLAIMS OTHER THAN A VIOLATION OF SCUTPA, WHEN THE RESPONDENT FAILED TO MAKE A TIMELY POST-TRIAL MOTION FOR SAID ATTORNEYS' FEES AND WHEN THE JURY'S SCUTPA AWARD REPRESENTED ONLY A FRACTION OF THE TOTAL AWARD.

Because the Respondent failed to timely move for an award of attorneys' fees and because the award of attorneys' fees grossly exceeds the jury's SCUTPA award in relation to the total award, the trial court erred in awarding the Respondent $149,761.03 in attorneys' fees and costs. SCUTPA provides that the court will award attorneys' fees and costs to any party that proves a violation of the statute. S.C. Code Ann. § 39-5-140(a) (1976). The plaintiff can recover only reasonable attorneys' fees and costs associated with the SCUTPA claim. GTR Rental, LLC v. DalCanton, 547 F.Supp.2d 510, 523 (D.S.C. 2008). It is the court's duty to determine whether the attorneys' fees sought by the plaintiff are reasonable. Id. When determining the reasonableness of an attorneys' fees request under the SCUTPA, the trial court must consider the following six factors: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Williamson v. Middleton, 374 S.C. 419, 649 S.E.2d 57, 68 (Ct. App. 2007) (citing cases). The court must give consideration to all six factors, with none of the six factors controlling. Id.

As an initial matter as argued in the previous section, the Respondent failed to timely move post-trial for an award of attorneys' fees under SCUTPA. Throughout the trial of this case, the trial court specifically informed the parties that it would require them to make post-trial

motions immediately following the reading of the jury's verdict and would not grant an additional ten days for filing post-trial motions. Again, at the close of trial, the trial court asked counsel for both parties if they had any post-trial motions to be made, and Respondent's counsel stated he did not have any post-trial motions. (Transcript of Hearing, November 16, 2012, p. 209, lines 1 – 6). The trial court further stated that while it wanted the parties to brief the issue of election of remedies, it did not want the parties to file any additional motions or expand the scope of the issues before the court. (Transcript of Hearing, November 16, 2012, p. 210, line 13 – p. 211, line 15 and p. 215, lines 20 -25).

Approximately seventeen (17) days after the final day of trial, the Respondent filed a "Post-Trial Motion to Confirm the Jury's Award of Damages and Request for Attorneys' Fees and Treble Damages under SCUTPA". Because in its discretion the trial court required the parties to make post-trial motions immediately at the end of trial, the Respondent's post-trial motion to award attorneys' fees under SCUTPA was untimely, and therefore, the trial court erred in granting the Respondent's motion to award attorneys' fees.

Further, in the present case, under the factors outlined above, the trial court erred in concluding the attorneys' fees sought by the Respondent were reasonable and necessary to prosecute the Respondent's SCUTPA claim. First, the nature, extent, and difficulty of the case are drastically less novel and complex by reason of the default rendered against PHH Mortgage. As a result, the Respondent merely had to prove damages, not liability. Second, because the Respondent needed only to devote time to damages, the time necessary to prepare and try this case was substantially reduced. Similarly, PHH Mortgage noticed only the deposition of the Respondent, and the Respondent only noticed the depositions of Caine Henry and Georg Finder. The discovery performed by the Respondent in this case was limited. Third, given the

outstanding reputation of Pratt-Thomas Walker, P.A., and specifically Jon Austen, Esquire, and Ian Freeman, Esquire, the third and sixth factors weigh toward the reasonableness of the attorneys' fees sought. Fourth, the affidavit of Respondent's counsel does not specifically address whether or not he undertook representation of the Respondent in this matter on a contingency fee or hourly fee agreement. See GTR Rental, 547 F.Supp.2d at 524 (holding that because counsel did not work on a contingency fee agreement that the fourth factor had no bearing on the court's consideration of the reasonableness of the attorneys' fees sought). Fifth, the Respondent's recovery on the SCUTPA claim, $25,000, represents only a percentage of her total recovery. As a result, the trial court should have apportioned the attorneys' fees sought and award only an amount of attorneys' fees equal to the SCUTPA's portion of the total award in order to make the attorneys' fees award reasonable in light of the jury's award. See GTR Rental, 547 F.Supp.2d at 524 (finding that the SCUTPA damages awarded represented 27.6% of the total award, and therefore, adjusting the hours to represent a reasonable number of hours expended on the SCUTPA claim and reducing the attorneys' fees award). For these reasons, the trial court erred in awarding the Respondent's entire demand for attorneys' fees and not reducing said demand to a reasonable number of hours and costs expended on the SCUTPA claim.

IV. THE TRIAL COURT ERRED IN HOLDING THE FAIR CREDIT REPORTING ACT DID NOT PREEMPT THE RESPONDENT'S STATE LAW CLAIMS.

Because the Fair Credit Reporting Act preempts state law claims related to inaccurate credit reporting by creditors, the trial court erred in denying PHH Mortgage's motion for directed verdict. "The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is 'without effect.'" Priester v. Cromer, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (2012) (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608 (1992)). "'[T]he purpose of Congress is the

ultimate touchstone' of pre-emption analysis." Cipollone, 505 U.S. at 516 (quoting Malone v. White Motor Co., 435 U.S. 497, 504, 98 S.Ct. 1185 (1978)). "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138, 111 S.Ct. 478 (1990). Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305 (1977).

"A federal law may either expressly or impliedly preempt a state law." Priester, 401 S.C. at 44, 736 S.E.2d at 252. "Congress may expressly preempt state law through specific language clearly stating its intent." Id. "On the other hand, implied preemption occurs through 'field preemption' or 'implied conflict preemption.'" Id. "Implied conflict preemption occurs in one of two ways — either where compliance with both federal and state regulations is physically impossible or where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. (citing Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399 (1941)). "Even though preemption involves subject matter jurisdiction, the party claiming preemption bears the burden of proving it." Eldridge v. City of Greenwood, 331 S.C. 398, 411, 503 S.E.2d 191, 197 (Ct. App. 1998).

The Fair Credit Reporting Act (hereinafter referred to as "FCRA") is a "comprehensive statutory scheme designed to regulate the consumer reporting industry." Ross v. F.D.I.C., 625 F.3d 808, 812 (4th Cir. 2010); 15 U.S.C. § 1681(a). Congress recognized the "vital role" of credit reporting agencies and the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." Id. Credit reporting agencies "provide a critical economic service by collecting and

transmitting consumer credit information." Ross, 625 F.3d at 812; see Cushman v. Trans Union Corp., 115 F.3d 220, 223 (3rd Cir. 1997). However, credit reporting agencies "can make mistakes by reporting inaccurate credit information," and "[t]hese errors are detrimental to the consumer, the creditor, and the economy as a whole." Ross, 625 F.3d at 812. "Accordingly, Congress determined that while [credit reporting agencies] must be allowed to perform their function, a regulatory framework was necessary to prevent errors in credit reporting and remedy those that do occur." Id. In 1970, Congress enacted the FCRA.

As originally enacted, the FCRA's original preemption provision, 15 U.S.C. § 1681t(a), preempted state laws only "to the extent those laws are inconsistent with any provision of [the FCRA]." Congress amended the FCRA with the Consumer Credit Reporting Reform Act of 1996 ("CCRRA"), and this amendment included a much stronger preemption provision. Pub. L. No. 104-208, 110 Stat. 3009, 3009-426 to -455. "The purpose of this new subsection was, in part, to avoid a 'patchwork system of conflicting regulations.'" Ross, 625 F.3d at 813 (citing Michael Epshteyn, Note, The Fair and Accurate Credit Transactions Act of 2003: Will Preemption of State Credit Reporting Laws Harm Consumers?, 93 Geo. L.J. 1143, 1154 (2005)). Included within the new subsection added by the CCRRA is 15 U.S.C. § 1681t(b)(1)(F), which provides:

> No requirement or prohibition may be imposed under the laws of any State (1) with respect to any subject matter regulated under ... (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies....

15 U.S.C. § 1681t(b)(1)(F).

Section 1681s-2 describes the responsibilities of those who report credit information to credit reporting agencies. Section 1681s-2(a) explains the "[d]uty of furnishers of information to provide accurate information," which includes correcting any errors in reporting. 15 U.S.C. §

1681s-2(a)(1)-(2). Section 1681s-2(b) contains the duties of furnishers of information "[a]fter receiving notice ... of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency." 15 U.S.C. § 1681s-2(b)(1). These duties include investigating the dispute and correcting any errors discovered with the credit reporting agencies. Id.

The Respondent's claims for state law defamation, negligence, breach of contract, tortious interference with contract, and SCUTPA fall directly within the preemption provision of the FCRA. PHH Mortgage is a person or business creditor that furnishes monthly information to credit reporting agencies on consumers' payment history, balances, and available credit. As a result, the preemption provision in 15 U.S.C. § 1681t(b)(1)(F) applies to any lawsuit or cause of action filed against PHH Mortgage. Under this provision, state law cannot impose any requirements or prohibitions related to the "responsibilities of persons who furnish information to consumer reporting agencies," including PHH Mortgage in this action. 15 U.S.C. § 1681t(b)(1)(F). As a result, the FCRA preempts all of the Respondent's state law claims, and the Respondent is limited to filing suit under the FCRA and to any damages allowed under the FCRA. For these reasons, the trial court erred in denying PHH Mortgage's motion for directed verdict and judgment notwithstanding the verdict on the grounds the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) preempts the Respondent's state law claims.

V. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SET ASIDE DEFAULT BECAUSE PHH MORTGAGE DEMONSTRATED GOOD CAUSE FOR RELIEF FROM THE ENTRY OF DEFAULT.

Because PHH Mortgage sufficiently proved good cause for the failure to timely serve an answer to the Respondent's Complaint, the trial court erred in denying PHH Mortgage's Motion to Set Aside Default. "Rule 55(a) provides that when a party fails to respond to a complaint, the

clerk shall record an entry of default." Sundown Operating Company, Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "However, Rule 55(c) permits a party to move to set aside the entry of default." Id. "The standard for granting relief from an entry of default under Rule 55(c) is mere 'good cause.'" Id.; Rule 55(c), SCRCP. Under this standard, a party seeking relief from an entry of default under Rule 55(c) must provide "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown, 383 S.C. at 607, 681 S.E.2d at 888. If a party puts forth a satisfactory explanation for the default, the trial court must also consider: "(1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Id. at 607-08, 681 S.E.2d at 888; Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct.App.1989). "The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause." Sundown, 383 S.C. at 608, 681 S.E.2d at 888; Dixon v. Besco Engineering, Inc., 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995).

As part of PHH Mortgage's Motion to Set Aside Entry of Default, it submitted the Affidavit of Ronalda Harris-Godbolt, a director in PHH Mortgage's Loss Mitigation Department. In the affidavit, Ms. Harris-Godbolt attested that when PHH Mortgage first received the Summons and Complaint that they were sent to the company's default group with the assigned task of gathering "facts necessary to prepare an Answer and to retain local counsel to represent PHHMC." (Affidavit of Ronalda Harris-Godbolt filed August 9, 2011). However, because the Respondent's loan was not in default, the default group had no information on the Respondent's loan or the allegations of the Respondent's Complaint. (Affidavit of Ronalda Harris-Godbolt filed August 9, 2011). In other words, the Summons and Complaint originally were sent to the

wrong department within PHH Mortgage, and as a result, the default group forwarded the Summons and Complaint to the Loss Mitigation Department. (Affidavit of Ronalda Harris-Godbolt filed August 9, 2011). Given the unusual route to the Loss Mitigation Department, that department incorrectly believed that the previous department had already retained local counsel to prepare and file an answer. (Affidavit of Ronalda Harris-Godbolt filed August 9, 2011). The failure to timely serve an Answer resulted from this unfortunate miscommunication within PHH Mortgage. (Affidavit of Ronalda Harris-Godbolt filed August 9, 2011).

Contrary to the trial court's finding, the internal miscommunications within PHH Mortgage constituted good cause for failing to timely serve an Answer to the Respondent's Complaint. Unlike the cases cited by the trial court in its order denying PHH Mortgage's Motion to Set Aside Entry of Default, the failure in this case to serve an Answer resulted from a mere miscommunication by the departments at PHH Mortgage. There was no showing of negligent or willful conduct by PHH Mortgage in responding to the Respondent's Complaint. Rather, the failure resulted from the Complaint being first sent to the wrong department and then after being received by the correct department, a miscommunication about which department had been charged with the task of retaining local counsel. As a result, the trial court erred in finding that PHH Mortgage failed to demonstrate good cause in failing to timely serve an Answer to the Respondent's Complaint.

Further, PHH Mortgage satisfied the other three elements necessary to set aside an entry of default. First, PHH Mortgage served a Motion to Set Aside Entry of Default within one (1) week of realizing that it did not timely serve an Answer. (Affidavit of Ronalda Harris-Godbolt filed August 9, 2011); (PHH Mortgage's Motion to Set Aside Entry of Default filed August 9, 2011). Second, as demonstrated by the proposed Answer served and filed with the Motion to Set

Aside Entry of Default, PHH Mortgage clearly put forth sufficient facts to show that it had a meritorious defense to the Respondent's Complaint. In the proposed Answer, PHH Mortgage denied certain factual allegations by the Respondent and raised several affirmative defenses, including preemption under the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.). Third, the Respondent would have suffered no prejudice if relief from the entry of default was granted. The Respondent would have had a full and fair opportunity to pursue discovery related to her claims and try any factual disputes before a jury of her peers. For these reasons, the trial court abused it discretion in denying PHH Mortgage's Motion to Set Aside Entry of Default.

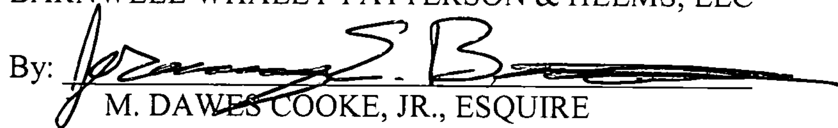
CONCLUSION

Because the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) preempts the Respondent's state law claims, PHH Mortgage respectfully asks this Honorable Court to strike the jury verdict in this matter. In the event the Court finds that the Fair Credit Reporting Act does not preempt the Respondent's state law claims, PHH Mortgage respectfully asks that this Honorable Court hold that the trial court erred in denying PHH Mortgage's Motion to Set Aside Default and remand this matter to the trial court with instructions to permit PHH Mortgage to file an answer.

If the Court upholds the trial court's rulings on the issues of preemption and setting aside the entry of default, PHH Mortgage respectfully asks this Honorable Court to remand this matter to the trial court with instructions to: (1) require the Respondent to elect among her remedies, (1) not to treble SCUTPA damages, and (3) to award a reasonable amount of attorneys' fees and costs relative to the jury's SCUTPA award. PHH Mortgage respectfully asks this Honorable Court to hold that the trial court erred in affirming the entire jury verdict because the verdict for each cause of action flowed from an identical set of facts and because the entire verdict allowed the Respondent to receive a double recovery. The Respondent cannot escape the fact that her allegations and damages for each of her five (5) causes of action are based upon the same set of facts and the same set of damages. Therefore, PHH Mortgage respectfully asks this Honorable Court to remand this matter to the trial court with instructions to require the Respondent to elect among her remedies. Further, PHH Mortgage respectfully asks this Honorable Court to find that the Respondent is not entitled to treble damages under the SCUTPA because the Respondent failed to timely make a post-trial for the trebling of damages and failed to present evidence that PHH Mortgage willfully violated SCUTPA. Finally, PHH Mortgage asks that this Honorable

Court hold that the trial court erred in awarding the Respondent the entire amount of attorneys' fees and costs associated with pursuing all of her claims and instruct the trial court to award a reasonable amount of attorneys' fees and costs in pursuing the Respondent's SCUTPA claim.

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 
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Date: July 17, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Kristi Lee Harrington, Circuit Court Judge

Case No. 2011-CP-10-3794
Court of Appeals Tracking No. 2013-000226

Lauren Lee Mattox, Respondent,

v.

PHH Mortgage Corporation a/k/a PHH Mortgage Services d/b/a Instamortgage.com, Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant upon the following by depositing a copy of it in the United States Mail, postage prepaid, on July 17, 2013, addressed as follows:

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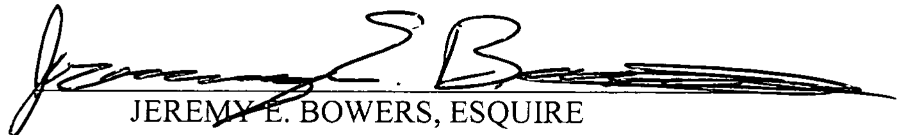

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SC Court of Appeals

APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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Pursuant to Rule 209 of the South Carolina Appellate Court Rules, Appellant hereby designates the following materials to be included in the Record on Appeal in this matter. Unless otherwise expressly stated, each item designated is to include all attachments or exhibits to the original of the referenced item. Appellant expressly reserves the right to seek supplementation to the record pursuant to Rule 209 and 212, SCACR. Appellant designates the following matters for inclusion in the Record on Appeal:

1. Summons and Complaint filed on May 27, 2011
2. Affidavit of Personal Service filed on June 9, 2011
3. Affidavit of Default filed on July 5, 2011
4. Notice of Entry of Default filed on July 5, 2011
5. PHH Mortgage's Motion to Set Aside Entry of Default filed on August 9, 2011
6. Affidavit of Ronalda Harris-Godbolt filed on August 9, 2011
7. Respondent's Memorandum in Opposition to Motion to Set Aside Entry of Default filed October 4, 2011
8. Transcript from Hearing on Motion to Set Aside Entry of Default held on October 4, 2011
9. Order Denying Motion to Set Aside Entry of Default filed on October 10, 2011
10. Transcript from Default Damages Hearing held on November 15, 2012
11. Transcript from Default Damages Hearing held on November 16, 2012
12. Deposition Excerpts of Caine Henry read at the Default Damages Hearing
13. Deposition Excerpts of Georg Finder played at the Default Damages Hearing
14. Respondent's Notice of Motion and Post-Trial Motion to Confirm Jury's Award of Damages and Request for Attorneys' Fees and Trebles Damages under SCUPTA

15. Respondent's Memorandum in Support of Post-Trial Motion to Confirm Jury's Award of Damages and Request for Attorneys' Fees and Trebles Damages under SCUPTA

16. PHH Mortgage's Reply Memorandum in Support of Post-Trial Motion for Election of Remedies

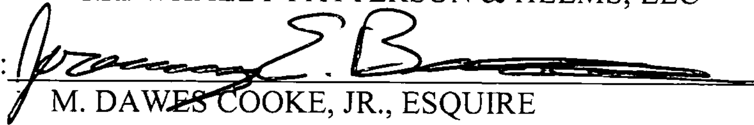
17. PHH Mortgage's Memorandum in Opposition to Respondent's Post-Trial Motion for Treble Damages and Attorneys' Fees

18. Transcript of Hearing on Post-Trial Motion held on December 12, 2012

19. Order Affirming Jury Verdict, Trebling SCUPTA Damages, and Awarding Attorneys' Fees filed on December 17, 2012

Appellant certifies, pursuant to Rule 209(c), SCACR, that the designations set forth above are relevant to the appeal in this matter and that they have not designated any matter which is irrelevant to the issues before the Court.

BARNWELL WHALEY PATTERSON & HELMS, LLC



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