THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2023-001601

Portfolio Recovery Associates, LLC
Assignee of Synchrony Bank/HH Gregg,
Petitioner

v.

Jennifer Campney, Respondent

and

Jennifer Campney, Third-Party Plaintiff

v.

Cooling & Winter, LLC, Third-party Defendant,
of whom Jennifer Campney is the Respondent

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S.C. SUPREME COURT

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COUNTER STATEMENT OF THE CASE

Respondent Jennifer Campney ("Campney") files this Return to Petitioner Portfolio Recovery Associates, LLC's ("PRA") Petition for Writ of Certiorari ("Petition"). Campney will only cite such facts as are necessary for the decision of the issues raised in this appeal. Only PRA has appealed the opinion of the Court of Appeals. Campney has not filed any cross-appeal of that opinion.

Campney asserts that PRA's characterization of the reasons why the trial court ruled against Campney's claim that PRA violated the South Carolina Consumer Protection Code's ("SCCPC") Notice of Right to Cure ("NORTC") provisions is inaccurate. PRA claims that there were three reasons, but the trial court's Order (R. p. 14-15) on this issue only states two reasons. First, the trial court held that the SCCPC did not apply to Campney's consumer credit card account (R. pp. 14-15). The trial court devotes two paragraphs to this argument, including one citing a South Carolina district court case in support. The next two paragraphs from the trial court's order support the court's second reason for its ruling, which is that "… the Right to Cure notice provisions do not apply to assignees…" (R. p. 15, 2nd full par.) and "PRA…do[es] not fall within the definition of a creditor." (R. p. 15, 3rd full par.) Although the court does mention in the third full paragraph on that page that "… neither the assignor nor the assignee had any expectation that payments were being made or would be made on the account," this assertion does not constitute a third reason for the court's ruling. Campney asserts that PRA has inaccurately characterized this language in the court's order to support a new argument that it has raised on appeal regarding "substantial impairment," which Campney will discuss below, and which term the trial court does not use in its order.

Reference to PRA's Final Brief of Respondent, filed March 20, 2021, and to the Table of Authorities (p.v), will show that PRA cited S.C. Code Ann. § 37-5-110, but not §§ 37-5-109 or 37-5-111. PRA's Final Brief listed only two reasons why PRA believed that the NORTC statute was not violated by PRA (*see* Brief, pp.15-18). First, PRA claimed that Campney's credit card debt was not a consumer credit transaction under the SCCPC. Second, PRA claimed that it was an assignee, and not a creditor under the NORTC statute, so the NORTC requirements did not apply.

After final briefing by the parties was complete, the South Carolina Department of Consumer Affairs ("SCDCA") filed a motion requesting permission to file an amicus curiae brief, which was granted. After SCDCA filed its brief, the parties were given 30 days to file a response. PRA filed its Response on August 25, 2021; however, Campney did not file a response because Campney agreed with the SCDCA brief. In the PRA Response to the SCDCA brief, for the first time, PRA raised several new matters on appeal. Those new matters include most of the issues raised in PRA's Petition for Writ of Certiorari, including PRA's arguments (1) that the SCCPC's requirement that a creditor send a consumer a NORTC after default is preempted by federal law, (2) that the doctrine of "significant impairment" relieves a creditor of the obligation to send a NORTC, (3) that other federal laws can protect consumers even without the SCCPC being applicable, (4) that the timing and impact of the charge-off of the debt matters, and (5) that the monthly credit card account statements substantially complied with the NORTC requirement. After receiving the PRA Brief in Response to its amicus brief, on August 31, 2021, SCDCA filed a motion to be allowed to file a reply brief, or in the alternative that the Court of Appeals strike the new arguments that PRA raised on appeal. SCDCA acknowledged it was filing an "unorthodox motion to offer expertise on two new, novel arguments that had not been argued or raised to any

court in this case prior to [PRA's] response brief." (Motion p. 2). The Court of Appeals, however, summarily denied this motion by order of Chief Judge Lockemy filed October 18, 2021.

On April 7, 2023, Campney filed a Motion to Strike and In Limine to prevent the new PRA appellate arguments from being heard at oral argument, but this Motion was denied by the clerk of court on April 19, 2023. At oral argument on May 1, 2023, Judge Lockemy admitted that, in hindsight, he probably should have allowed SCDCA to file a reply brief to PRA's Response to the SCDCA amicus brief. After oral argument, the court allowed SCDCA to file a list of supplemental citations only, after which PRA was allowed to file a list of supplemental citations. The Opinion of the Court of Appeals ignored the new arguments that PRA raised on appeal and the court later denied PRA's Petition for Rehearing.

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY FOUND THAT THE SCCPC APPLIES TO CONSUMER CREDIT CARD DEBT.

Concerning the first of two issues that was actually raised to and ruled upon by the trial court, the Court of Appeals correctly ruled that the SCCPC applies to the collection of consumer credit card debt, which they found to be a type of consumer loan subject to the NORTC statute (COA Opinion, Sec. 2.a.). Oddly, PRA doesn't even give this argument in their Petition a numbered heading, choosing only to briefly cite one unpublished district court case in support on page 4, which is *Bracken v. Simmons First Nat'l Bank*, No. 6:13-1377-TMC-KFM, 2014 U.S. Dist. LEXIS 78974, at *12-13 (D.S.C. May 6, 2014), *adopted in full*, 2014 U.S. Dist. LEXIS 78025, at *2 (D.S.C. June 9, 2014), which the trial court also relied upon when ruling on this issue in its Order (R. p. 15). Campney understands this citation to violate Rule 268(d)(2), SCACR, and if this Court agrees, Campney requests that this Court disregard it. The primary holding of this case is that the SCCPC does not apply to the collection of consumer credit card debt, because a consumer

credit card is not a consumer credit sale and, therefore, is not a consumer credit transaction. Although it is true that a credit card debt is not a consumer credit sale, that holding is irrelevant, since the Court of Appeals correctly found that a consumer credit card is a consumer loan, which is another type of consumer credit transaction governed by the SCCPC. The district court case also held in footnote 2 of that opinion that a consumer credit card was not a consumer loan, but the district court offered no reason for that holding, which appears to be self-evidently in error. In any case, the holding of a federal district court on a novel issue of South Carolina state law is not binding precedent. At most, this case could only be used for persuasive authority, but it has no persuasive value since the district court offers no reasoning for its conclusory finding that a consumer credit card is not a consumer loan and is contrary to near universal understanding of the nature of a consumer credit card transaction. *See* S.C. Code Ann. §§ 37-1-301(16) and 37-3-201(2) (2015).

The Court of Appeals correctly lists the applicable statutory definition sections to show that a consumer credit card debt collection is subject to the SCCPC. PRA doesn't try to contest that fact, other than by its conclusory citation to this case, without any argument or explanation about why PRA believes it to be correct. Although the Court of Appeals does not specifically discuss this case in its Opinion, its clear finding is that a consumer credit card debt is a consumer loan and a consumer credit transaction regulated by the SCCPC. The Court of Appeals also correctly points out (COA Opinion, footnote 8) that PRA admitted in its response to Campney's First Request for Admissions that Campney's credit card debt was a consumer credit transaction under the SCCPC (R. p. 402). Thus, PRA's unexplained attempt to avoid this admission in its briefing and its Petition contradicts its own legal position. Indeed, Campney is not aware of any time that PRA has ever attempted to defend the *Bracken* decision or explain its holding.

Nonetheless, PRA and other creditors continue to cite the erroneous decision in collection cases throughout South Carolina, a practice that should end if this Court denies the Writ of Certiorari.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT AN ASSIGNEE IS A CREDITOR SUBJECT TO THE NORTC STATUTES IN THE SCCPC.

Concerning the second of two issues that was actually raised to and ruled upon by the trial court, the Court of Appeals correctly ruled that PRA, even as an assignee of a national bank, is a creditor subject to the requirements of the NORTC statute in the SCCPC. The Court of Appeals is correct that if it were to rule otherwise, an original creditor could avoid the application of the NORTC requirement by failing to send the NORTC, since they have no intention of suing the consumer after charge-off anyway, and the assignee, as PRA has done in this case, could argue that only the original creditor had the duty to send the NORTC, thereby defeating the intent of the legislature in enacting the statute. Thus, PRA's argument would create an absurd result (see COA Opinion, Sec. 2.a., near end). PRA's argument also glosses over the fact that the statute it cites on the SCCPC definition of a creditor, S.C. Code Ann. § 37-1-301(13), actually says that the term "creditor" includes not only an original creditor but "…except as otherwise provided, an assignee of a creditor's right to payment, but the term does not itself impose on an assignee any obligation of his assignor." Therefore, the default definition of a creditor includes an assignee unless the SCCPC specifically provides otherwise regarding a particular type of assignee, which it has not done regarding consumer credit card account assignees. Under the definition, the assignee would not be responsible for a duty connected with the outset of the transaction, say, for example, a vehicle dealer sells a credit sale buyer a warranty package with an installment sale, and fails to timely provide that service or registration. An assignee of the receivables of that transaction might not have a responsibility to perform those duties. What an assignee *is* responsible for, however, is

the ongoing duty not to accelerate maturity of the obligation until the cure notice has been sent under S.C. Code Ann. § 37-5-111(1) (2015).

PRA is merely being required to comply with the obligations imposed on a creditor under the NORTC statute because they are a creditor by definition and without any recognized exception, not because the use of the term itself imposes additional requirements on them over and above what any original creditor might be required to do. Oddly, PRA argues that as an assignee of the original creditor that they have all the rights of that original creditor, but none of the responsibility under the NORTC statute (PRA's Final Brief of Respondent, pp. 8, 16-18). This also would be an absurd result, which the Court of Appeals stated should be avoided when interpreting a statute.

As SCDCA explained in its amicus brief, the notice and right to cure requirements apply to all consumer credit transactions. Though the timing and content of the notice may vary depending on which type of credit transaction is involved, the requirement to provide notice and opportunity to cure applies, nonetheless. This is true regardless of whether the transaction is secured or unsecured. S.C. Code Ann. § 37-5-111(1) (2015). In this case, Campney's lender credit card account is a revolving loan account as defined in Section 37-3-108. As such, the creditor is required to issue a notice of right to cure before accelerating the debt as long as the creditor has not issued an effective notice of right to cure within the previous twelve months. S.C. Code Ann. § 37-5-111(2) (2015).

PRA argues the requirement to issue a notice of right to cure before suing Campney disappeared when PRA bought the debt from Synchrony Bank, but Campney disagrees. The notice and right to cure statutes use the word "creditor" without any qualification or exception. S.C. Code Ann. §§ 37-5-110 and -111 (2015). The SCCPC defines creditor as "the person who grants credit in a credit transaction ***or, except as otherwise provided, an assignee of a creditor's right to***

payment, but the use of the term does not itself impose on an assignee any obligation of his assignor." S.C. Code Ann. § 37-1-301(13) (2015) (emphasis added). The General Assembly did not carve out assignees from the definition of creditor in the notice and right to cure statutes. In fact, as PRA argued, the General Assembly knew how to distinguish a creditor from an assignee and did so in several statutes:

- S.C. Code Ann. § 37-2-305(1) (credit sale assignee not required to file and post maximum rate schedule);
- S.C. Code Ann. § 37-2-408(2) (seller in cross-collateral transaction does not include an assignee not related to original seller);
- S.C. Code Ann. § 37-3-305(1) (loan assignee not required to file and post maximum rate schedule).

When reading the notice and right to cure statutes in conjunction with the definition of creditor, the General Assembly's intent is clear: a creditor, including an assignee, must provide notice of right to cure to the consumer. Statutes must be read as a whole and sections that are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992).

PRA focuses on the latter portion of the definition when it argues "even though the term 'creditor' includes a creditor's assignee unless expressly stated otherwise, the inclusion of assignees within the definition of creditor does not, ***without more***, impose any duty of a creditor on its assignee." (PRA Final Brief, p. 17) (emphasis in original). PRA argues that even though the General Assembly included assignees in the general definition of creditor and did not carve out assignees in the notice and right to cure statutes as it had done in other statutes, the General Assembly needed to add something more to make it clear the assignee was responsible for ensuring

a notice of right to cure was issued before suing on the debt. This argument is unsupported by South Carolina law and would lead to an absurd result. See Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001) (quoting Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999) ("Statutes should not be construed so as to lead to an absurd result."); see also Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) ("If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect."); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (the court should reject a meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature). Moreover, in contractual matters, South Carolina law is clear that the assignee "stands in the shoes of the assignor." Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 639–640, 518 S.E.2d 44, 46 (1999) (quoting Singletary v. Aetna Cas. & Sur. Co., 316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct. App. 1994)); Rosemond v. Campbell, 288 S.C. 516, 522-23, 343 S.E. 2d 641, 645 (Ct. App. 1986). SCDCA has consistently interpreted and enforced the SCCPC against creditors and assignees unless statutory provisions direct otherwise. See S.C. Dep't of Consumer Affairs Administrative Interpretation No. 7.108-1003 at 2–3 (Jun. 29, 2010) (assignee of credit counseling contract need not duplicate the efforts of the licensed assignor but merely ensure that the assignor's education program, budget analysis, and contract complied with the statutory requirements); see also S.C. Dep't of Consumer Affairs Administrative Interpretation No. 3.501,502-1501 at 2 (Jul. 27, 2015) (debt buyer who takes assignment of supervised loans is required to have a supervised lender license before attempting to collect the debt or enforce rights against the debtor).

Consider what often happens in the automotive finance industry. A consumer purchases a car from a dealership and gets approved for financing while at the dealership. The contract is

immediately assigned to the financing company. Under PRA's theory, the financing company would have no obligation to send a notice of right to cure upon a consumer's default because that duty would not transfer upon assignment. This would mean a consumer's car could be repossessed after missing one payment without receiving the statutorily required notice of right to cure. This would effectively make Section 37-5-110 absolutely meaningless and would negate the whole purpose of including the right to cure statutes in the SCCPC as a great majority of automobile financing is done as this type of sales finance. It is unimaginable that the General Assembly envisioned a creditor could circumvent the requirement to give a consumer a notice of the right to cure simply by selling the debt to another party. It would be absurd that the car dealer would be required to issue a notice of right to cure but the financing company would not.

In an Administrative Interpretation in 1977, SCDCA discussed Official Comment 3 to Section 5.110 of the Uniform Consumer Credit Code when explaining the importance of the notice of right to cure provisions:

> Official Comment 3 goes on to explain that the cure provisions are intended to prevent creditors from repossessing collateral when a payment is only a few days late and to give "the average consumer the opportunity to rehabilitate his account, bring a billing error to the attention of or present a breach of warranty claim to the creditor, or negotiate a refinancing or deferral arrangement that may be required by a change in his financial circumstances." By reading [S.C. Code Ann. § 37-5-110] and [S.C. Code Ann. § 37-5-111] together, it is apparent that the drafters intended that the minimum twenty day period prior to which a creditor may not proceed against the collateral is also the minimum period of time during which the consumer may cure the default.

S.C. Dep't of Consumer Affairs Administrative Interpretation No. 5.110-7711, at 3 (Aug. 16, 1977). If this Court held that obligations of an original creditor, such as sending the notice of right to cure, do not transfer to the assignee upon assignment, then the consumer would be deprived of the opportunity to "rehabilitate his account," "bring a billing error to the attention of the creditor,"

or "negotiate a refinancing or deferral arrangement that may be required by a change in his financial circumstances" prior to being sued or having collateral repossessed.

In addition, there is no apparent public policy reason that would justify the disparate treatment of a consumer's right to cure a default based solely on whether the creditor is the consumer's original creditor or the subsequent assignee of the original creditor. This would especially be true given the nature of the relationship among the original creditor, the assignee, and the consumer. The consumer enters into a contract with the original creditor for a consumer loan, consumer credit sale, consumer lease, or consumer rental-purchase agreement. The consumer effectively gets to choose the original creditor with whom he will do business. After the consumer enters into the original contract with the original creditor, the original creditor and assignee enter into a separate contract. The consumer then has the obligation to pay the assignee upon being notified of the assignment. See S.C. Code Ann. §§ 37-2-412; 2-711; and 3-406 (2015). The consumer is not a party to the contractual negotiations between the original creditor and the assignee, nor is the consumer even consulted about whether he would like to do business with the prospective assignee. Instead, he is merely told, after the fact, that an assignment has been made and future payments must be made to the assignee. Even if the consumer had been a party to the contract between the original creditor and the assignee, the consumer would have been prohibited from waiving his rights established by the notice and right cure statutes. See S.C. Code Ann. § 37-1-107 (2015). Certainly, the General Assembly did not intend for a consumer to be deprived of his rights to cure a default by virtue of a transaction over which he had no control. This would be contrary to the purpose of the SCCPC to protect consumers against unfair practices by some suppliers of credit. S.C. Code Ann. § 37-1-102(2)(d) (2015). Moreover, this would result in the

consumer effectively waiving his rights under the SCCPC where such a waiver is prohibited by the SCCPC. S.C. Code Ann. § 37-1-107 (2015).

Although prior to this case our state courts have not had the opportunity to construe the novel issue of whether a debt buyer is required to send a notice of right to cure before suing the consumer, there is persuasive authority from a fellow Uniform Consumer Credit Code state. See S.C. Code Ann. § 37-1-102(g) (2015) (underlying purpose and policy of Title 37 is "to make uniform the law, including administrative rules, among the various jurisdictions"); § 37-6-104(3) (2015) (requiring the Administrator to keep the SCDCA regulations in harmony with those of other Uniform Consumer Credit Code States). In Bahena v. Jefferson Capital Systems, L.L.C., 363 F. Supp. 3d 914 (W.D. Wis. 2019), Bahena defaulted on her Fingerhut consumer credit card account. Fingerhut eventually charged off her credit card account and sold it to Jefferson Capital, which is a debt buyer and debt collector. Bahena argued the debt collector violated the Fair Debt Collection Practices Act, in pertinent part, because she was entitled to a notice of right to cure pursuant to Wisconsin state law prior to the debt collector filing suit and no notice of right to cure was provided. The court was persuaded by another Wisconsin decision, which provided "[c]onsumers should not lose their consumer rights based on a creditor's choice to sell or assign the debt." 363 F. Supp. 3d at 922 (quoting Johnson v. LVNV Funding, No. 13-c-1191, 2016 U.S. Dist. LEXIS 19651, 2016 WL 676401, at *15 (E.D. Wis. 2016)). The court reasoned:

> Eliminating the notice-of-right-to-cure requirement for debt buyers would allow creditors to skirt the notice-of-right-to-cure requirement entirely simply by selling their charged-off accounts to debt buyers. This would subvert the purpose of the [Wisconsin Consumer Act], which affords consumers a meaningful opportunity to cure default and requires right-to-cure notices except in specified circumstances.

363 F. Supp. 3d at 922. The court held, "A debtor's right to notice under the [Wisconsin Consumer Act] is not contingent on the owner of the debt. If a debt buyer wishes to enforce the debt in court,

it must provide notice of right to cure or confirm that the creditor has done so." 363 F. Supp. 3d at 921. Campney agrees with this finding and urges this Court to adopt the same, as the Court of Appeals has already done.

III. THE COURT OF APPEALS PROPERLY CHOSE TO IGNORE THE NEW ARGUMENTS RAISED BY PRA AFTER APPEAL.

Other than the arguments addressed above, the rest of PRA's arguments in the Petition are new arguments raised for the first time after appeal, initially either in PRA's Brief in Response to the SCDCA amicus brief, or in PRA's Petition for Rehearing, both of which were filed after final briefing between the parties was complete. As such, the new arguments were never presented to the trial court. It is axiomatic that in order to preserve an issue for appeal, the issue must be raised and ruled upon by the trial court. In re Oxner, 440 S.C. 5, 10-11, 889 S.E.2d 586, 588 (2023); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The Court of Appeals properly chose to ignore these new appellate arguments, and this Court should do the same. These new arguments were unfair and prejudicial, and neither Campney nor SCDCA have been allowed any opportunity to file a brief in response to these new arguments, which are noted in more detail below. Although the Court of Appeals does not state its reasons for choosing to ignore these new arguments, Campney did list several reasons why the court should do so in her Motion to Strike and In Limine, which was filed with the Court of Appeals on April 7, 2023.

A. Identification of New PRA Appellate Arguments

The following arguments that PRA has raised in its Petition were made for the first time on appeal, and after final briefing by the parties was completed.

1. That the SCCPC's requirement that a creditor send a NORTC is preempted by federal law.

PRA argues that various federal laws preempt the SCCPC requirement that a creditor send a NORTC prior to accelerating a consumer debt. These federal laws include the National Bank Act, and its regulations (Petition, sec. I), and the FFIEC Rule regarding the consequences of charge-off of a credit card debt (Petition, Sec. II.B.) In its Response Brief, PRA admits that its preemption argument was not presented to the trial court (p. 5, fn 5). PRA's FFIEC Rule argument does not appear to have been raised until its Petition for Rehearing was filed with the Court of Appeals, so PRA appears to have made new arguments on at least two separate occasions in the appellate process so far.

2. That the Court of Appeals overlooked the impact and timing of the account charge-off when finding that PRA was required to send a NORTC.

PRA makes this new argument in the Petition in Section II. It appears to have first been raised in PRA's Petition for Rehearing.

3. That a creditor is not required to send a NORTC when the prospect of repayment is significantly impaired.

PRA makes this new argument in the Petition in Sections II.C. (last sentence) and III. PRA claims to have first raised this argument in the trial court (Petition, p. 17, Sec. III heading, and p. 18, first full par.), but that is false. As was noted in the Counter Statement of the Case section earlier, the trial court only listed two reasons for finding that PRA was not required to send a NORTC, the first being that the SCCPC did not apply to a consumer credit card debt collection, which was addressed above, and the second being that PRA was not a creditor, but instead an assignee, so was not required to send a NORTC. (R. p. 15), which argument is also addressed above. There is no mention of the phrase "significant impairment" in the trial court's order. Its first mention in this case was in SCDCA's amicus brief, where that brief mentioned that significant impairment was one of two ways for a creditor in a consumer credit transaction to

enforce a default (SCDCA amicus brief, p. 13). PRA's attempt to claim that this argument was ruled upon by the trial court is not true. Instead, the argument was not raised until after final briefing by the parties in the Court of Appeals was complete.

4. That the monthly credit card account statements sent by the original creditor substantially complied with the NORTC statute.

PRA makes this new argument in the Petition in Section IV. There is no finding by the trial court on this issue. It appears that PRA first raised this argument in a footnote in its Response to the SCDCA amicus brief (PRA Response, p. 8, fn 9). Although a careful comparison between the language of S.C. Code Ann. § 37-5-110(2), especially the last paragraph in that section, and the language appearing on the account statements will show that PRA's claims about complying with the statute are false, there is no need to address the merits of this issue, since it is a new argument that the Court of Appeals properly chose to ignore. Where the Code provides that a consumer notice or a filing must be made with specific language, it is not sufficient that the creditor has given other information from which the consumer might have guessed its substance. S.C. Dep't of Consumer Affairs v. Cash Central of S.C., LLC, 435 S.C. 192, 206-07, 865 S.E. 2d 789, 796-97 (Ct. App. 2021) *cert. den*. June 27, 2023.

B. It Was Improper for the Court of Appeals to Consider PRA's New Arguments

1. PRA waived these new arguments by failing to include them in its Final Brief.

As was stated by former Chief Justice Toal in her *Appellate Practice* book, "…the purpose of the [Appellant's] reply brief is to reply to any new arguments the respondent may have set forth in his brief. … Further, under the present rules, the appellant receives notice of the respondent's additional sustaining grounds through the respondent's brief." *See* Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing in the record as

provided by Rule 220(c)."); *I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (explaining the process for addressing additional sustaining grounds). Thus, the appellant may address those additional grounds in the reply brief." Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina* p. 436 (3rd ed. 2016). However, in this case that was not possible, since PRA did not include those additional sustaining grounds in its Final Brief, but instead waited until about five months later to raise these additional sustaining grounds in its Brief in Response to SCDCA, which meant that Appellant was prejudiced by being unable to include any response to these new arguments in her Reply brief. SCDCA requested permission to respond to Respondent's Brief in Response to SCDCA, but permission was denied by the court on October 18, 2021. Appellant was unable to properly respond to these new arguments during the limited amount of time allowed for oral argument, and should not have been required to do so, since PRA failed to raise them in a timely manner. As stated by our Supreme Court in the *I'on* case cited above, "[o]f course, a respondent may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—by failing to raise it in the appellate brief." *I'on* at page 420. Appellant believes, like Chief Justice Toal in her *Appellate Practice* book cited above, that the appellate brief referred to is Respondent's Final Brief, to which Appellant could have responded, and not Respondent's Brief in Response to SCDCA, to which no party in this case was given an opportunity to respond.

2. The basis for PRA's new arguments does not appear in the Record on Appeal.

In footnote 5 of its Brief in Response to SCDCA, PRA states its belief that the trial court ruled that "no notice of right to cure letter was required to be sent prior to the commencement of this action" (R. p. 15) and then cites a case standing for the proposition that this court may affirm the trial court's judgment for any reason appearing in the record on appeal. In response,

Campney wants the court to note that PRA's quote was incomplete. What the trial court order actually said was as follows: "Based on the foregoing, the Court finds that no right to cure letter was required to be sent prior to commencement of this action." (R. p. 15). So, the reasons appearing in the record on appeal for the trial court's ruling that no right to cure letter was required to be sent are found in the trial court's order on pages 14-15 of the record on appeal. There were only two reasons given in the trial court's order for this ruling. One was the trial court's reliance upon the faulty reasoning stated in the referenced *Bracken* district court case about why a consumer credit card is not a consumer loan or a consumer credit transaction under the SCCPC. The other reason is the trial court's belief that the SCCPC only applies to original creditors and not to assignees, which faulty argument is addressed above. Those were the only two reasons that the trial court gave for finding that Respondent was not required to send a notice of right to cure before filing suit. Notably absent from those two reasons was Respondent's new arguments about federal preemption. Therefore, federal preemption was not "any reason appearing in the record on appeal" to support the trial court's ruling or to allow that new issue to be raised for the first time on appeal. It is odd that Respondent chose to cite the 1886 case of *Ketchin v. McCarley* in footnote 5 in support of its argument, instead of the more modern and more frequently cited *I'on L.L.C. v Town of Mt. Pleasant* case cited above. However, reference to the *I'on* case reveals the following statement:

> The basis for respondent's additional sustaining grounds must appear in the record on appeal, but other requirements contained in former rules and pre-1990 precedent no longer apply. (citations omitted) … The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds. [9]

I'on at page 420. Regarding PRA's new argument about significant impairment under S.C. Code Ann. § 37-5-109(2), Campney does not see where this reason appears in the record on appeal either. However, unlike the federal preemption argument, PRA does not acknowledge this as a new argument. Nevertheless, it appears that all of the new arguments identified above are just as infirm as the federal preemption argument, and for the same reasons. The Court of Appeals, therefore, properly chose to ignore them when issuing its Opinion.

3. PRA violated Campney's procedural due process rights by raising the new appellate arguments in an untimely fashion.

The doctrine of procedural due process requires both adequate notice of any arguments that PRA might make in an appeal and a meaningful opportunity to be heard when responding to those arguments. *Huellmantel v. Greenville Hospital System*, 303 S.C. 549, 553, 402 SE 2d 489 (Ct. App. 1991), citing U.S. Supreme Court cases. Since PRA did not include these new arguments in its Final Brief, Campney did not have an opportunity to respond in her Reply Brief. Since Campney was forced by the Court of Appeals' denial of Campney's Motion in Limine to respond only orally to these substantial new arguments in less than 20 minutes at oral argument, Campney did not have a meaningful opportunity to be heard. Moreover, the process was fundamentally unfair since PRA suffered no similar limitations when PRA was given 30 days to respond to the SCDCA amicus brief in writing. Also, as to any new arguments indicated above that weren't raised until PRA's Petition for Rehearing, Campney wasn't even provided adequate due process notice of those arguments, let alone a meaningful opportunity to respond. Campney, therefore, believes that procedural due process concerns also could have been a reason why the Court of Appeals chose to ignore PRA's new arguments on appeal.

C. The Court of Appeals Had Discretion to Ignore PRA's New Arguments

If for any reason this Court believes that the Court of Appeals was not required to ignore PRA's new arguments on appeal, the court still had discretion to choose to ignore those new arguments.

PRA's Brief in Response to SCDCA does not properly state in the Issues on Appeal section of that brief PRA's additional sustaining grounds that PRA argues in its brief. Regarding an appellant's brief, "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. "The respondent is not required to set out a separate statement of the issues on appeal in his brief, unless the respondent is dissatisfied with the appellant's statement of the issues. Rule 208(b)(2), SCACR. In addition to restating the issues, the respondent can also identify other issues that may provide a basis for affirmance. *Id.*; *see* Rule 220(c), SCACR; *I'on, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716(2000)." Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina* p. 429 (3rd ed. 2016). As can be seen on page 1 of Respondent's Brief in Response to SCDCA, PRA states as the only issue on appeal the following: "DID THE TRIAL COURT ERR IN RULING THE SOUTH CAROLINA CONSUMER PROTECTION CODE DOES NOT APPLY TO AN ASSIGNEE'S COLLECTION ON A CONSUMER CREDIT CARD DEBT?" Respondent does not separately identify any other issues. Campney, therefore, believes that PRA's new arguments should not have been considered by the Court of Appeals, since that is how Campney believes the court would treat an appellant's failure to separately state any issues in the Statement of Issues on Appeal. Similarly, this statement of the issue on appeal by Respondent does not include the new significant impairment argument either, so this argument should not be considered by the court as well due to that failure. Indeed, the Supreme Court appears to adopt this reading of the appellate rules in the *I'on* case cited above, at page 420, where this Court cites Rule 208(b)(1)(B) in reference to a respondent's duty to state additional sustaining grounds in its issues on appeal.

If for any reason the Court of Appeals believed that it was not improper for PRA to raise any of these new arguments on appeal at the time PRA raised them, the court could have recognized, as Campney asked them to do in her Motion in Limine, based on the *I'on* case cited above, at page 420, that the court still had discretion to choose not to address these new arguments on appeal, since neither Campney nor amicus SCDCA were given an opportunity to respond in writing to the arguments. Campney believes that this Court will have better opportunities to explore these new arguments in future cases where these issues have been properly raised and ruled upon in the lower court.[1] Indeed, as this Court further stated in the *I'on* case cited above, at page 421:

> [i]n clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.[11]

Therefore, it is likely that the Court of Appeals believed that it was improper for PRA to raise these new issues on appeal, and properly chose to ignore them based on their discretion to do so.

CONCLUSION

Campney, therefore, requests that this Court grant the following relief:

1. Deny PRA's Petition for Writ of Certiorari,

[1] In a pending debt collection case in Berkeley County that has not yet gone to trial, PRA has filed an exact copy of its Brief in Response to SCDCA raising most of the same new arguments it has raised after briefing was complete in this case. *See* PRA v. Chambers, Case No. 2014CP0802072, PRA Response to MSJ, Exh. 4, filed on 11-30-22.

2. Allow this case to be remanded for such further proceedings as may be appropriate and as was ordered by the Court of Appeals in its Opinion, and

3. For such other relief as may be just and proper.

Dated this November 20, 2023

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