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**SC Court of Appeals**

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

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**APPEAL FROM MARLBORO COUNTY  
Court of Common Pleas**

**Michael S. Holt  
Circuit Court Judge**

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**Appellate Case No. 2024-000280  
Marlboro County Case No. 2021-CP-34-00228**

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Synchrony Bank, ..... **Appellant,**

**v.**

Michael Hudson..... **Respondent**

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**INITIAL BRIEF OF RESPONDENT**

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## **COUNTER-STATEMENT OF ISSUES ON APPEAL**

### **I**

Is the denial of Appellant's motion for summary judgment properly before this Court?

### **II**

Was the Circuit Court's decision to dismiss this action for Appellant's refusal to mediate controlled by an error of law or unsupported by evidence?

## COUNTER-STATEMENT OF THE CASE

This is the appeal of the dismissal of a debt collection action for failure to comply with South Carolina's ADR rules. The Appellant (Synchrony Bank) claims the Respondent (Michael Hudson) opened a credit account with Appellant (*i.e.*, a credit card) and failed to make the required payments to Appellant under their alleged agreement. (Complaint pp. 1-2). The Appellant filed suit on August 23, 2021. (Summons & Complaint). Respondent filed his answer on November 10, 2021. (Answer). Appellant filed a motion for summary judgment on April 7, 2022, and the Respondent filed an affidavit opposing this motion on September 13, 2022. (First MSJ; Aff. of Hudson). Appellant's motion for summary judgment was heard and denied on June 20, 2023. (01/23/2024 Order p. 1).

This case was called for trial for the week of November 13, 2023; on October 11, 2023, Respondent's counsel moved to continue this trial due to (1) his November 14, 2023, arguments before the South Carolina Supreme Court in a separate case and (2) the fact that the case had not yet been mediated. (Mtn. for Con.). The Circuit Court granted this motion by order dated October 12, 2023. (10/12/2023 Order).

On October 16, 2023, Appellant filed a second motion for summary judgment. (Second MSJ). On January 4, 2024, Respondent filed his own motion for summary judgment, requesting this action be dismissed for failure to comply with South Carolina's ADR rules. (Resp. MSJ).

The late Judge Michael Holt heard both parties' motions on January 16, 2024. (Resp. MSJ p. 1). On January 23, 2024, he issued the following order:

This matter comes before this Court on the parties' cross-motions for summary judgment, which were heard by this Court on January 16, 2024, at the Marlboro County Courthouse. Plaintiff argues that there is no genuine issue of material fact regarding the existence of Defendant's debt to the Plaintiff and is entitled to judgment as a matter of law. Defendant argues that this action should be dismissed for failure to comply with South Carolina's Alternate Dispute Resolution Rules. After considering the submissions and arguments of counsel, this Court finds and concludes as follows.

#### Plaintiff's Motion for Summary Judgment

This Court finds no material change in the proof for this motion from Plaintiff's motion for summary judgment Judge Burch denied from the bench on June 20, 2023. This Court agrees with Judge Burch and finds there are genuine issues of material fact that must be considered by the jury, not by a judge. *See* Rule 56, SCRPC; *Kitchen Planners, LLC v. Freidman*, 440 S.C. 456, 892 S.E.2d 297 (2023). Plaintiff's motion for summary judgment is denied.

#### Defendant's Motion for Summary Judgment

As to Defendant's motion for summary judgment, this Court will treat this as a motion for sanctions under Rule 10(b), SCADR, as that is the motion's stated basis. *See Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (The substance of the relief, not the form of the motion, is what matters.). This Court would note that the summons and complaint in this case [were] filed on August 23, 2021; according to South Carolina's ADR rules, this matter "shall" be mediated within 300 days after filing. Rule 5(f), SCADR. South Carolina's ADR rules provide for sanctions for violations of those rules without good cause. Rule 10(b), SCADR. Here, the parties have not mediated this matter in accordance with Rule 5(f) and no party has requested exemption from South Carolina's ADR requirement. Plaintiff argues that because no ADR notice was issued by this Court or the Clerk of Court, it is excused from ADR. This argument does not constitute "good cause" – our ADR rules clearly and unambiguously mandate ADR. Rule 3(a), SCADR.

Rule 10(b), [SCADR], provides any sanction under Rule 37(b), SCRPC, is appropriate for violations of South Carolina's ADR Rules. Rule 37(b)(2)(C), SCRPC, provides authority to dismiss an action. This Court also possesses the inherent power to control its dockets and manage its affairs, including the ability to strike pleadings. *See Crestwood Golf*

*Club, Inc. v. Potter*, 328 S.C. 201, 211-212, 493 S.E.2d 826, 832 (1997). This case, which was filed in 2021, was to be tried on November 13, 2023. Defendant's October 11, 2023, motion to continue the trial noted, *inter alia*, that this action had not been mediated. After trial was continued, [...] instead of pursuing mediation the Plaintiff filed a second motion for summary judgment. This conduct is sufficiently intentional, the resolution of this matter has been sufficiently delayed, and the Defendant has been sufficiently prejudiced defending it to warrant the sanction of dismissal. Defendant's motion is granted, and this action is dismissed. Because this action cannot be refiled and served within the requisite limitations period, this dismissal is with prejudice. *See* Rule 3(a), SCRCP; S.C. Code §§ 15-3-20 & 15-3-520.

**Accordingly**, it is **ordered, adjudged, and decreed** that Plaintiff's motion for summary judgment is **denied**, Defendant's motion for summary judgment (treated as a motion for sanctions) is **granted**, and this action is **dismissed with prejudice**.

**It is so Ordered.**

(01/23/2024 Order pp. 1-2) (emphasis in original).

On February 19, 2024, the Appellant filed its Notice of Appeal with the Marlboro County Circuit Court. Appellant did not serve (as the rules understood at the time) Respondent with the Notice of Appeal until March 12, 2024. On March 26, 2024, Respondent filed a Motion to Dismiss for failure to serve, which this Court denied by order dated April 26, 2024, citing *Eberly v. Advanced Flooring & Design Div. of ISI, LLC*, Op. No. 28199 (S.C. Sup. Ct. filed Apr. 24, 2024) (Howard Adv. Sh. No. 15 at 16-20).

On May 31, 2024, Appellant served its Initial Brief. However, Appellant's Initial Brief contained no citations to the record, as required by Rule 208(b)(4), SCACR. Appellant also did not serve a Designation of Matter, as required by Rule 209, SCACR. Respondent filed a Motion to Dismiss based on Appellant's deficiencies.

Appellant did not respond to Respondent's motion.

On July 12, 2024, this Court denied Respondent's motion. This order stated, verbatim:

Appellant filed its initial brief on May 31, 2024. Respondent filed a motion to dismiss, arguing Appellant's failure to include citations to the record and a designation of matter was a fatal deficiency. Appellant did not file a return. After careful consideration, we deny the motion to dismiss without prejudice to a motion to strike. *See* Rule 208(b)(4), SCACR (explaining the initial "brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials. . . ."); Rule 209(a), SCACR (providing for a party to serve a designation of matter at the same time the party serves his initial brief).

*Synchrony Bank v. Hudson*, No. 2024-000280 (S.C. Ct. App. Order dated July 12, 2024). On July 15, 2024, Respondent filed a petition for rehearing of his motion to dismiss (or, in the alternative, a motion to strike).

In the interest of moving this long-delayed appeal forward, Respondent filed and served his Initial Brief on July 19, 2024. Though the Appellant had never served a Designation of Matter under Rule 209, SCACR, Respondent served his own, designating Judge Holt's January 23, 2024, order for the record.

On September 5, 2024, this Court notified Appellant that the time to serve the Record on Appeal has expired and in order to proceed it would have to file a motion to serve the Record on Appeal out of time. On September 16, 2024, Appellant moved accordingly and provided its proposed Record on Appeal; Respondent opposed Appellant's motion. On October 14, 2024, Respondent filed his Final Brief (as best as it could be prepared under the existing record).

On October 16, 2024, this Court resolved both Respondent's pending Petition

for Rehearing and Appellant's Motion for Leave to File with the following order:

On July 12, 2024, this court denied Respondent's motion to dismiss the appeal. Therefore, this court takes no action on Respondent's petition to rehear the denial of its motion to dismiss the action. *See* Rule 221(c), SCACR ("The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal."). However, we grant Respondent's alternative motion to strike Appellant's initial brief. *See* Rule 208(b)(4), SCACR ("The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged. References shall also be made to where relevant objections and rulings occurred in the transcript. In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced ...."); Rule 209(a), SCACR ("At the same time a party serves his initial briefs) under Rule 208, to include a reply brief, he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal which shall set forth with specificity those parts of the transcript, pleadings, orders, exhibits, or other materials which he proposes to include in the record on appeal."). Appellant's amended initial brief and designation of matter shall be served and filed within twenty days from the date of this order. Respondent may file an amended initial brief and designation of matter within thirty days of service of Appellant's amended initial brief and designation of matter.

In light of this court's decision to strike Appellant's initial brief, Appellant's motion to file the record on appeal outside of time is denied. After Appellant serves and files his amended initial brief and designation of matter and Respondent serves his amended initial brief and designation of matter—should Respondent choose to do so—then Appellant must serve and file a record on appeal that complies with this court's rules. *See* Rule 210(c), SCACR ("The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267.").

*Synchrony Bank v. Hudson*, No. 2024-000280 (S.C. Ct. App. Order dated October 16, 2024). Appellant filed its Amended Initial Brief on November 5, 2024.

## STANDARD OF REVIEW

### Summary Judgment

“In reviewing an order for summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56 of the South Carolina Rules of Civil Procedure.” *M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008). “Summary judgment is appropriate when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Id.* (quoting Rule 56(c), SCRCP); *see also Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023) (affirming that only a genuine issue of material fact will defeat a motion for summary judgment). A material issue is one that constitutes a legal defense or that affects the result of the action. *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988).

“On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below.” *Id.* (quoting *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004)). Summary judgment should not be granted if further development of the facts would assist in the application of the law. *Mosteller v. Cty. of Lexington*, 336 S.C. 360, 362, 520 S.E.2d 620, 621 (1999). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. *Id.*

## **Motion for Sanctions under Rule 10(b), SCADR**

South Carolina's ADR rules provide a court may award "any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCF." Rule 10(b), SCADR. "A trial judge's exercise of his discretionary powers with respect to sanctions [under Rule 37] will not be disturbed on appeal absent a clear abuse of discretion." *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). The burden is on the party appealing from the order to demonstrate the trial court abused its discretion. *Id.* An abuse of discretion occurs when the ruling is controlled by an error of law, or when based on factual conclusions, is without evidentiary support. *McKinney v. Pedery*, 413 S.C. 475, 482, 776 S.E.2d 566, 570 (2015).

## ARGUMENT

### **I. Denial of Summary Judgment is not appealable.**

It is well-settled in South Carolina that “the denial of a motion for summary judgment is not immediately appealable.” *Olson v. Fac. House of Carolina, Inc.*, 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003); *see also Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994) (“This Court has repeatedly held that the denial of summary judgment is not directly appealable.”). Accordingly, the Circuit Court’s denial of Appellant’s motion for summary judgment must be affirmed.

### **II. The Circuit Court’s dismissal of this action was not controlled by an error of law, and all of the Circuit Court’s findings are supported by evidence.**

While Respondent’s original motion was one for summary judgment, the Circuit Court correctly treated it as a motion for sanctions, as that was its stated basis. *See Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (The substance of the relief, not the form of the motion, is what matters.). Accordingly, this Court reviews the Circuit Court for an abuse of discretion, requiring an error of law or factual findings without evidentiary support. *See McKinney, supra*. Respondent has failed to show this Court how the following material facts from the Circuit Court’s order are unsupported by the evidence:

- (1) This case was filed on August 23, 2021.
- (2) Rule 5(f), SCADR, states this case “shall” be mediated within 300 days after filing.
- (3) Respondent’s October 11, 2023, motion to continue trial noted this case had not yet been mediated.

- (4) After this motion, instead of seeking mediation the Appellant filed a second motion for summary judgment.
- (5) Resolution of this action was delayed by this second motion for summary judgment.
- (6) Respondent has been prejudiced in defending this matter.

*Synchrony Bank v. Hudson*, No. 2021-CP-34-00228 (S.C. Ct. Comm. Pl. Order dated January 23, 2024). Accordingly, the Circuit Court did not abuse its discretion.

Appellant also does not identify any errors of law in the Circuit Court's decision. Appellant argues its failure to mediate is excused because the Clerk of Court did not appoint mediators or issue a Notice of ADR pursuant to Rule 4(c), SCADR. (App. Br. pp. 9-11). However, Rule 10, SCADR, does not require these acts as conditions precedent to the imposition of sanctions. Further, the purpose of Rule 4(c) (to remind the parties of the obligation to mediate) was met when Respondent noted the case had not been mediated on October 11, 2023.

Appellant also argues the Circuit Court should have issued a rule to show cause under Rule 10(a), SCADR, instead of sanctioning Appellant. (App. Br. pp. 9-10). Rule 10(a) provides a court the authority to *sua sponte* issue a rule to show cause for failure to file a Proof of ADR. Rule 10(a), SCADR; *see also* Rule 7(f), SCADR (requirement to file Proof of ADR). This argument is a red herring - the Circuit Court sanctioned Appellant under Rule 10(b), which authorizes the court or the parties to move for sanctions for "violat[ing] any provision of the ADR Rules without good cause..." Rule 10(b), SCADR.

Rule 10(b), SCADR, allowed the Circuit Court to impose sanctions consistent with Rule 37(b), SCRCF, and it did exactly that. Though no case law exists to guide a court applying sanctions under Rule 10(b), SCADR, dismissal under Rule 37, SCRCF, is appropriate in circumstances of willful conduct and/or gross indifference to the opposing party's rights. *See, e.g., McNair v. Fairfield Cty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008). Not only is the mediation requirement of Rule 5(f), SCACR, explicit and unambiguous, the Appellant was reminded of this requirement on October 11, 2023. In response, the Appellant refused to mediate and instead proceeded with a second, frivolous, motion for summary judgment. This conduct is sufficiently intentional and grossly indifferent to Respondent's rights to warrant dismissal of this case. *Accord Mobile Mini Storage Solutions v. Bethea*, No. 2021-CP-34-00265, 2024 WL 3402785 (S.C. Ct. Comm. Pl. Order dated April 12, 2024) (Dismissal for failure to mediate, as alternate ground). Because the statute of limitations for this claim passed long ago, dismissal with prejudice is appropriate, as the case could not be re-filed if the case had been dismissed without prejudice.<sup>1</sup> *See* Rule 3(a), SCRCF; S.C. Code §§ 15-3-20 & 15-3-520.

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<sup>1</sup> To the extent this case should have been dismissed without prejudice, said error is harmless. "[T]he harmless error rule embodies a commonsense principle our appellate courts have long recognized—'whatever doesn't make any difference, doesn't matter.'" *State v. Reyes*, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (quoting *State v. Jolly*, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991)); *see also* Rule 61, SCRCF (harmless error to be disregarded).

**III. Appellant’s failure to prosecute constitutes an additional sustaining ground to affirm.**

This Court is empowered to “affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR; *see also* Rule 208(b)(2), SCACR (Respondent may include additional sustaining grounds in brief.). This Court also possesses the inherent power to control its dockets and manage its affairs, including the ability to strike pleadings. *See Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 211-212, 493 S.E.2d 826, 832 (1997); *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 301 S.E.2d 757 (1983) (trial court may properly dismiss an action for plaintiff’s unreasonable neglect in proceeding with his cause). The same facts set forth in Argument II also support dismissal of Appellant’s case for its failure to prosecute this matter.

**IV. Appellant’s failure to comply with this Court’s orders constitutes grounds to dismiss this appeal.**

The Statement of the Case of Appellant’s Amended Initial Brief does not contain a single citation to the record. *See* Rule 208(b)(4), SCACR (citations to record necessary). It also contains an exhibit of a document that was never presented to the trial court. *See* Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”). This Court has repeatedly ordered Appellant to comply with South Carolina’s appellate court rules, and this rule specifically. “[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.” *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). Appellant’s noncompliance, responsible for months of

delays, is sufficient to dismiss this appeal. *See* Rule 260(a), SCACR ("Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court.").

### **CONCLUSION**

The Circuit Court must be affirmed and/or this appeal must be dismissed.

Dated: 11/12/2024

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