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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appellate Case No. 2026-000374

U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation Trust,.....Respondent,

v.

Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased; South Carolina Department of Revenue; The United States of America acting by and through its agency, Department of the Treasury - Internal Revenue Service; and Elizabeth A. Lowery,.....Defendants,

Of whom Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased, is the.....Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner submits this reply to the Respondent's return to the petition for a writ of certiorari in this case. The Respondent's return illustrates that the central point of the petition is correct and that this Court's word on the petition's questions is needed for the health of the law.

The Respondent argues that there is no novel question here because South Carolina has already established the law on unconscionability. As the return both states and illustrates, South Carolina has several reported decisions analyzing the unconscionability of *terms* of a contract; however, what it does not have is a reported case that analyzes what "induced by unconscionable conduct" means, with regard to S.C. Code Ann. § 37-10-105(C) or otherwise. As observed by a sister court concerning a similar West Virginia statute and as is apparent from the words of South Carolina's statute section, "induced by unconscionable conduct" in S.C. Code Ann. § 37-10-105(C) means something different from the unconscionability of contractual terms. See *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 283-84 (4th Cir. 2016). We have no reported decision that speaks to that meaning. That is a novel question of law.

Though Petitioner never argued to expand the scope of *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), the Respondent argues as though *that* is what is at issue. That is a straw man argument. See *State v. Smith*, 298 P.3d 1138 (Kan. App. 2013) ("straw man argument is where the arguer wishes to respond to an argument of his or her choosing and not one that is actually presented"). It is telling that the Respondent believes that it must mischaracterize Petitioner's arguments in order to keep this court from granting certiorari. Petitioner does not need *Matrix* to change to prevail in this case, and he has not sought to change it.

“In order for res judicata to apply, the parties—or their privies—and subject matter must be identical, and the prior suit adjudicated the issue.” Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018). The Respondent argues that there has been no prior adjudication. But there has. This Court and the Court of Appeals have consistently deemed the striking of a case from the active docket under Rule 40(j), SCRPC, to be a dismissal. In re Norton, 433 S.C. 115, 118, 857 S.E.2d 1, 2 (2021); In re Stockholm, 415 S.C. 645, 648, 785 S.E.2d 361, 362, 363 (2016); In re Moody, 410 S.C. 334, 339, 764 S.E.2d 519, 522 (2014); In re Gorski, 635 S.E.2d 95, 96 (S.C. 2006); Maxwell v. Genez, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (2003); In re Weinberg, 355 S.C. 649, 651, 587 S.E.2d 101 (2003); Olmstead v. Shakespeare, 354 S.C. 421, 422, 581 S.E.2d 483 (2003); Personal Care, Inc. v. Theos, 825 S.E.2d 281, 285 (S.C. App. 2019); Goodwin v. Landquest Development, LLC, 414 S.C. 623, 630-32, 779 S.E.2d 826, 830-31 (Ct. App. 2015). It is not a dismissal provided for in Rule 41, SCRPC. (Since there was no consent to the 40(j) dismissal, it was not provided for in Rule 40(j), either. (R. pp. 286-87, 296, 302.)) Rule 41(b) explicitly provides that a dismissal for failure to prosecute as well as any other “dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits.” Rule 41(b), SCRPC.

The previous case was dismissed on the merits. (R. pp. 286-87, 296, 302.) That merits dismissal was necessarily with prejudice and “operates in subsequent litigation to the same extent as if the action had been tried to a final adjudication.” Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 773 (Ct. App. 1997).

The Respondent seems to contend that it was right for summary judgment to be granted against the Petitioner because payment has not been made on the claimed note for a long time. If this barred success on Petitioner's defenses, that would fly in the face of S.C. Code Ann. § 37-10-105(A), which specifically provides that a defense under the statute may be made "as a matter of defense by recoupment or set-off" in a debt collection action. Id. It would also effectively make any defense to a debt collection action, other than payment, a dead letter.

Respondent cannot escape that this petition presents a novel and rather important question of law, at least in this area: what "induced by unconscionable conduct" in S.C. Code Ann. § 37-10-105(C) means. It also presents issues on which the bench and bar need educating, and the Petitioner hopes this Court will speak to those in addition to answering the novel question here at issue.

The bench, the bar, and the people of this state deserve to know what "induced by unconscionable conduct" means under S.C. Code Ann. § 37-10-105(C).

WHEREFORE Petitioner prays for an order granting the petition for a writ of certiorari.

Respectfully submitted,

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