

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2014-000824
Case No. 2011-CP-10-7166

Otha Delaney,

Appellant,

v.

First Financial of Charleston, Inc.,

Respondent.

SUPPLEMENTAL RECORD ON APPEAL

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INDEX

1.	Caption/Index for “Transcript of Record (Two Hearings)”	1
2.	Transcript of Hearing held April 26, 2012	3
3.	Transcript of Hearing held October 23, 2013	18
4.	Certificate of Counsel	42

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHARLESTON) COURT OF COMMON PLEAS
3) No. 2011 CP 10 7166
4 OTHA DELANEY)
5 Plaintiff)
6 versus) TRANSCRIPT OF RECORD
7) (Two Hearings)
8 FIRST FINANCIAL OF)
9 CHARLESTON)
10 Defendant)
11 Charleston, South Carolina
12 April 26, 2012
October 23, 2013

13 B E F O R E :

14 HONORABLE STEPHANIE P. McDONALD, Judge

15 A P P E A R A N C E S :

16 For the Plaintiff: PHILIP L. FAIRBANKS, Esq.

17 For the Defendant: PERRY BUCKNER, Esq.

18 Reporter Present: PHYLLIS NORTON

21 HARRIET P. BENNETT
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23 46 Regency Oaks Drive
Summerville, S. C. 29485

I N D E X

1		
2	HEARING, April 26, 2012	Beginning page 3
3	Mr. Buckner, Pages 3 and 13	
4	Mr. Fairbanks, Page 6	
5	(Taking under advisement)	
6	Certificate, Page 17	
7	HEARING, October 23, 2013	Beginning page 18
8	Mr. Fairbanks, Pages 18 and 34	
9	Mr. Buckner, Page 31	
10	Ruling, Page 40	
11	Certificate, Page 41	
12		
13		
14		
15		
16		
17		
18		
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21		
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1 (The within matter came before the Court on April 26,
2 2012)

3 MR. BUCKNER: Your Honor, we're here for the Delaney
4 versus First Financial.

5 THE COURT: Okay. Is everybody here and ready to go?
6 Come on up. I have two case numbers.

7 MR. BUCKNER: This is 2011 7166.

8 THE COURT: All right. (Speaking to other counsel)

9 MR. FAIRBANKS: This is our response to the Motion.

10 THE COURT: All right, I'll be happy to hear from you.

11 MR. BUCKNER: Thank you, Your Honor. As you know, we
12 filed this Motion under Rule 12 B Six.

13 Our position is that this claim is contoured under --
14 I believe it's 15 3 470.

15 Let me first say that our position is that the action
16 they brought pursuant to 36 9 611 and 614, which are the
17 statutes that they claim were violated, and what they're
18 saying is that essentially, by their own words, that the
19 letter which was sent -- I believe the date is May third of
20 2008 -- failed to comply with the South Carolina law and,
21 specifically, those outlined statutes.

22 The relief they seek, and the only relief they seek,
23 is pursuant to 6 25 C two, and that calls for a fixed --
24 for a pre-determined award that's based on that transaction,
25 and it asks that they be entitled to the finance charge and

1 ten percent of the principal amount.

2 There are no actual or compensatory damages that have
3 been pled. There is no tort action or breach of contract.

4 It is simply that statutory cause of action, and we
5 believe because of that it fits in addition 15 3 370 which
6 is for penalty.

7 We are taking the position that it is under the six
8 year statute of limitations pursuant to Article Two, and
9 it may be -- it may also be entitled to other penalty sta-
10 tutes of three years.

11 So the first issue for us is that is there a penalty,
12 and we think it clearly is because I know of three cases
13 where the South Carolina Supreme Court has called under
14 this exact statute for a statutory penalty.

15 Now, I think there are three cases, and they acknow-
16 ledge this in their response as that the statute is guided
17 by those, and there is the identical language as 6 25 C
18 two.

19 I think that that is really dispositive of that issue.

20 The South Carolina Supreme Court has determined it
21 three times and called it a statutory penalty.

22 They have explained their rationale, you know, saying
23 that the purpose of it is not to (inaudible); the purpose
24 of it is insure the class is penalized.

25 In other words, it is no longer held beyond reason,

1 and we think that makes good sense.

2 Although there has been no dispute in the comments
3 they refer to damage. In the actual statutory language
4 the comments refer to damage and I don't think that takes
5 it out of the realm of the penalty statute.

6 Sort of generically speaking, I guess the penalty is
7 a form of damages, but it is still within the confines of
8 15 3 570.

9 I think the six year statute of limitations, Article
10 Two, really has nothing to do with this cause of action.

11 No breach of contract has been pled, although it re-
12 lates to a contract for sale of goods.

13 There is no contract that is alleged to have been
14 breached on the face of the Complaint, and I think that
15 their interpretation of 36 2.705 is somehow seeking to
16 state a cause of action that relates to a sale of goods,
17 to be the six year statute of limitations, and that is in-
18 correct.

19 So what we think really is that if the penalty stat-
20 ute is applicable, it has got to be either the one year
21 or the three year.

22 In either of them, the Plaintiff is time-warped, be-
23 cause it then triggers the accrual of this action as when
24 they received the notice that they claim violates the South
25 Carolina law.

1 So whether that claim expired on May third of 2009 or
2 May third of 2011, their Complaint is untimely, and it
3 doesn't -- we tried to do a little research on this to
4 sort of clarify whether the discovery rule would be doc-
5 tored --as I read it -- the one year statute of limitations
6 actually says, from the commission of the offense and the
7 three year penalty statute doesn't seem to clarify that,
8 but under any scenario when they get that letter that is
9 when the violation of South Carolina law is said to have
10 been alleged to occur.

11 That is the triggering of that, even under the discov-
12 ery rules.

13 We think that because of that, under any scenario,
14 that their claim is untimely and should be dismissed.

15 THE COURT: Okay.

16 MR. BUCKNER: Thank you, Your Honor.

17 THE COURT: The issue is whether this category rises
18 to a statutory penalty or not.

19 MR. BUCKNER: The South Carolina Courts have said
20 over and over again -- have called this exact statute a
21 statutory penalty, and they have explained why.

22 THE COURT: And I'm looking at one of the cases right
23 now.

24 Tell me why . .

25 MR. FAIRBANKS: Thank you, Your Honor. I will be

1 glad to explain it at this time.

2 Your Honor, first of all, in the penalty statute, to
3 distinguish between the two -- 570 is the one with the
4 shorter one year statute of limitations.

5 That is clearly applicable to statutes that allow
6 someone other than the injured party to collect a penalty.
7 That is not the case in this situation.

8 This cause of action is specifically to provide for
9 the consumer who is injured by the alleged lack of notice
10 to collect the statutory damage.

11 So that simply is not applicable to this cause of ac-
12 tion that we have or under our circumstance.

13 The second one -- I'm sorry. That's 570. Five forty
14 is the second one with the three year statute of limitations,
15 although we don't think that is applicable either because
16 it is not a penalty.

17 That is one where the harmed individual has a cause
18 of action.

19 So if either one of them were applicable, it would be
20 certainly the three year statute of limitations under 540.

21 THE COURT: But they say that neither the three year
22 statute under 540 or the one year statute of limitations
23 would apply.

24 MR. FAIRBANKS: Again, if either of those statutory --
25 either of those statutes of limitations were applicable, we

1 haven't listed under the three year, and the reason we have
2 not listed is because the offense, if you want to call it
3 an offense -- the cause of action arises not when the let-
4 ter is sent and not when the letter is received, and the
5 reason is because the cause of action under the UCC 9 6 25
6 arises only when the collateral was disposed of.

7 The reason for that is because the burden of this no-
8 tice provision is against the consumer, as the Supreme
9 Court has said in Crane, and I think as well in Singletary
10 -- I think the earlier one I believe you're looking at as
11 well.

12 The purpose of this notice provision under the UCC is
13 to give the consumer notice of the intended disposition of
14 the collateral because by doing that the consumer has the
15 ability to expect that sale.

16 The reason for giving the consumer that right is to
17 give the consumer the ability to redeem the collateral. It
18 gives the consumer time to find other potential bidders
19 at that sale, which would affect the price and the disposi-
20 tion sums which would affect the consumer's deficiency if
21 there is a deficiency.

22 So it is all about the sale and disposition of the
23 collateral. Sending out the letter has nothing to do with
24 it.

25 The creditor can send out the worst letter in the

1 world and wait a year and then send out a correct letter,
2 and there would be no violation of statute.

3 So clearly sending the letter or receiving the letter
4 has nothing to do with it and it does not create a cause
5 of action.

6 So under any circumstance, the three year statute of
7 limitations, if it were applicable -- we submit that we
8 filed in October. The disposition took place in December.

9 But, Your Honor, I think that whole discussion is aca-
10 demic, and the reason it's academic is for the reasons
11 that were nicely summed up by a Bankruptcy Judge in Alabama
12 in a case that I had the misfortune to be involved in, (In-
13 audible)

14 The Bankruptcy Judge was looking at a res judicata is-
15 sue, Your Honor, where a debtor in a bankruptcy case had
16 failed to list a cause of action under the Alabama statute,
17 which is much the same as 507 in this case, the exact same
18 language as 6 9 625.

19 The Bankruptcy Judge said that by statute the require-
20 ments of notice of disposition of collateral, which is Sec-
21 tion 507, in terms of the security agreement breach of the
22 notice requirement is breach of the contract.

23 Therefore, under Section 507, it is in essence an ac-
24 tion for breach of contract.

25 Plaintiff's notice rights under the UCC became part

1 of the terms of the original contract, and I can give you
2 a cite for that case.

3 THE COURT: Thank you.

4 MR. FAIRBANKS: So that means the Plaintiffs -- and
5 there the Judge cites some cases and all that, but there
6 are a number of other cases that make the same point.

7 If you have a contract that is referred to as a retail
8 consumer sales contract, that contract, for a number of
9 reasons, and, again, the reason I have cited before in the
10 (inaudible) Doctrine, is because that makes the downstream
11 holders of commercial paper liable for anything that hap-
12 pened, anything that the consumer under the original con-
13 tract is liable for.

14 And so there is this continuity that arises by virtue
15 of the contract, and this discourse we have noted what the
16 other Courts have pointed out.

17 If you have a contract, under that contract is a se-
18 curity agreement which gives the creditor certain rights,
19 such as the right to repossess that collateral, which this
20 creditor exercised.

21 Attached to that security agreement there come certain
22 responsibilities, including the responsibility under what
23 is now 9 625 to give proper notice.

24 If he doesn't do that, there are penalties for not
25 doing that.

1 That includes a penalty that Mr. Delaney has sought,
2 the damages sought.

3 In Stone, Singleton and Crane, and probably in Broad-
4 bank -- in all of these cases, our Supreme Court refers
5 to this from time to time and frequently as a statutory
6 penalty.

7 If you read these cases from across the country, the
8 Judges use the term statutory penalty interchangeably with
9 statutory damages.

10 You know, that doesn't rise to the level of dicta. It
11 is just careless use of language, but if you read the stat-
12 ute, the statute itself, the language first of all in the
13 statute repeatedly refers to damages.

14 More importantly, Your Honor, our Courts have repeat-
15 edly said that when you are looking at language of statutes
16 that, first of all, you don't take one part of the statute
17 -- take that by itself and read it.

18 You don't take it out of context and read it, so the
19 point there is that this particular provision which allows
20 a consumer to choose minimum statutory damages -- the con-
21 sumer can take actual damages, and it is up to the Plain-
22 tiff to choose which of those remedies he or she wants to
23 choose.

24 What the Legislature says is that -- what the commenta-
25 tor -- I think it's the South Carolina UCC commentator says

1 is that these are minimum statutory damages, and they are
2 to make sure that any time there is non-compliance by a
3 creditor with respect to these notice provisions there is
4 going to be a liability.

5 Now, that in and of itself doesn't turn it into a pen-
6 alty because it is clearly a substitute for actual damages.

7 Your Honor, I think a good analogy for that is unliqui-
8 dated damages provisions, and the Courts have gone over and
9 over again that when a Court imposes the unliquidated dam-
10 ages provisions they are going to enforce it because it is
11 a reasonable reflection for actual damages that a party
12 might suffer if there is a breach, or it is an unenforcible
13 penalty for forfeiture, which has no relationship to the
14 damages that have already been suffered.

15 These are clearly related to the actual damages that
16 the Plaintiff has suffered. The logical purpose of that
17 and the proof of that proposition is that if the actual dam-
18 ages are warranted consumer is going to choose the actual
19 damages. They are clearly a substitute for that. They
20 are minimum damages.

21 So there is no question, Your Honor, that what this
22 provision is, is it's not a penalty. I certainly has the
23 additional purpose of requiring and helping to induce credi-
24 tors to comply with its provisions, but then the Courts have
25 said it is a part of the contract.

1 Secondly, it is a substitute for damages, so we think
2 it is clearly controlled by the statute of limitations as
3 is provided under the UCC, which is the overall statutory
4 scheme under which this provision arises.

5 Thank you.

6 THE COURT: Thank you, and that would be the statute
7 of limitations in contracts of sale?.

8 MR. FAIRBANKS: It is, Your Honor. It is the statute
9 of limitations in -- I think it's 2 725.

10 THE COURT: It is.

11 MR. FAIRBANKS: Thank you, Judge.

12 THE COURT: Okay. Tell me why the penalty under 36 9
13 625 B two is for statutory damages, super options, and is
14 not sort of a by the Attorney General type penalty?

15 MR. BUCKNER: Well, the reason I think it's the pen-
16 alty is because in the statutory comments what they refer
17 to as damages -- I really think that is in the generic
18 sense, any sort of relief that any Plaintiff can obtain is
19 damage.

20 But the South Carolina Supreme Court in this State
21 goes on to explain the purpose or rationale of 625 C two is
22 to say that damages aren't sufficient because we need to in-
23 sure compliance with the statute.

24 They are all but saying this is a penalty, and that
25 is coming right out of their mouth three times in three

1 different cases.

2 Even though the Legislature doesn't speak to damages
3 in their comments, the South Carolina Supreme Court has
4 right along said damages, right on point.

5 THE COURT: Then you do not look at it in the context
6 of the statutory (inaudible)?

7 MR. BUCKNER: No, we do not, Your Honor.

8 The context of his arguments for breach of contract
9 -- Plaintiff's comments in the Complaint will not be based
10 on a cause of action that is not pled --- what they are say-
11 ing is in essence that this is a breach of contract action
12 but there is no plea of breach of contract. There is no
13 contract that we know has been breached.

14 They had an opportunity and the right to do that, and
15 the reason they haven't done that is that they don't have
16 contract damages.

17 THE COURT: How about that?

18 MR. FAIRBANKS: We are not arguing that it is a breach
19 of contract. We are arguing that the remedy is a contract-
20 ual remedy in the nature of being contracted rather than
21 a penalty. That's the point I would make.

22 THE COURT: But that would put it back under the
23 three year statute?

24 MR. FAIRBANKS: No, maam, I don't believe it does. I
25 think that again we are provided with a cause of action.

1 The cause of action provides revenue. The question
2 here is whether or not that remedy is controlled as far
3 as the statute of limitations goes.

4 In my opinion, the statute of limitations, if it's
5 contractual, it's controlled under the statute of limita-
6 tions which is included in the statutory scheme, and we
7 say it is.

8 THE COURT: Okay. I am going to take this under advise-
9 ment.

10 Thank you for being patient with me. I want to take
11 a look at the statute and also look at the way the Supreme
12 Court uses the statute and the penalty.

13 I want to look at all of it a little bit, but it's
14 hard to tell -- you know, sometimes it appears they are
15 saying one thing and sometimes something else.

16 So I will take it under advisement, and I will let
17 you all know.

18 Thank you.

19 MR. BUCKNER: If I understand what they want in the
20 way of damages, in this case they have said we want the
21 specified formula as far as damages.

22 THE COURT: Okay.

23 MR. FAIRBANKS: And, Your Honor, if I could hand up
24 to the Court at this point . .

25 THE COURT: Yes, go right ahead.

1 MR. FAIRBANKS: I would hand up Tilley versus Pace Center,
2 which was a separate statute . . .

3 THE COURT: Okay, thank you.

4 -----END OF REQUESTED TRANSCRIPT OF RECORD-----

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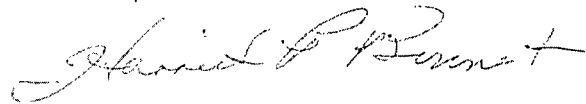
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CERTIFICATE

I, HARRIET P. BENNETT, Court Reporter for South Carolina Court Administration, hereby certify that the foregoing Transcript was prepared to the best of my ability from the records of Phyllis Norton, having been heard in the Court of Common Pleas for Charleston County on April 26, 2012.

FURTHER, I certify that I am neither of kin nor counsel, nor do I have any interest in the within matter.

This 19th day of June 2014.



1 (The within matter came before the Court for hearing
2 on October 23, 2013)

3 MR. FAIRBANKS: Your Honor, I represent the Plaintiff
4 in this matter.

5 THE COURT: Why don't you all put your names on the
6 record, and that will help my Court Reporter.

7 MR. BUCKNER: Perry Buckner, here for First Financial
8 of Charleston, Your Honor.

9 MR. BROWN: Steve Brown, same party.

10 THE COURT: All right.

11 MR. FAIRBANKS: Phillip Fairbanks for the Plaintiff
12 Delaney.

13 THE COURT: All right, Mr. Fairbanks, I believe this
14 is your Motion to reconsider, and I will be glad to hear
15 anything you want to tell me.

16 MR. FAIRBANKS: Thank you, Your Honor.

17 THE COURT: Yes, sir.

18 MR. FAIRBANKS: Your Honor, the basis for our Motion
19 in this case is that we believe the Court misapprehended
20 the Plaintiff's claim and cause of action, and as a result
21 of this miscomprehension committed a clear error of law.

22 With the greatest respect, I would like to go through
23 where we think the source of that error is.

24 THE COURT: Okay.

25 MR. FAIRBANKS: First of all, Your Honor, the Defendant

1 in response to our motion writes, and I quote, in paragraph
2 seven of the response, Your Honor -- quote, because Plain-
3 tiff's allegations of non-compliance relate to the accuracy
4 of the notice of sale, the commission of the offense under
5 section 15 3 570 took place in May 2008 upon receipt.

6 The Plaintiff's Complaint makes no allegation regarding
7 the propriety or legality of the sale of the collateral.

8 Your Honor, in the Order the first full paragraph on
9 page seven of the Order of April 29th.

10 I think that paragraph reveals the problem, and the
11 Court notes first . .

12 THE COURT: Give me the page again of the Order.

13 MR. FAIRBANKS: Page seven, Your Honor, of the Order
14 of . .

15 THE COURT: I have it. .

16 MR. FAIRBANKS: On page seven, the first full paragraph
17 which is the second paragraph, the Court first notes that
18 under Section 15 3 570, the date of accrual is the date of
19 commission of the offense.

20 It goes on to state that undoubtedly as the Plaintiff
21 alleges that the notice of sale failed to comply with South
22 Carolina Law, the offense in this case occurred upon deliv-
23 ery and receipt of that notice of sale. If I could address it?

24 THE COURT: Okay.

25 MR. FAIRBANKS: The Court goes on to say the Plaintiff's

1 Complaint does not allege that the sale of the repossessed
2 vehicle violated any provision of South Carolina law and no
3 offense is alleged to have occurred upon disposition in
4 December of 2008.

5 Without question, the only offense which the Plaintiff
6 alleges concerning the adequacy of the notice provided prior
7 to sale, close quote.

8 However, Your Honor, it's not true that the Plaintiff
9 made no allegations regarding the sale of the collateral,
10 and a cursory review of the class action Plaintiff filed
11 demonstrates otherwise.

12 THE COURT: I have that in front of me.

13 MR. FAIRBANKS: Okay. If you'll bear with me?

14 The Complaint filed in October of 2011 -- in the intro-
15 duction the Plaintiff referred to Sections 9 600 thru 635 of
16 Section 36 of the Code, and the Plaintiff refers to it, and
17 I quote, as a comprehensive scheme governing disposition
18 by a repossessing secured creditor of repossessed collateral,
19 a clear reference to the fact that the Plaintiff's claim
20 involves the disposition of collateral.

21 THE COURT: Okay. Accepting the reference to the com-
22 prehensive statutory scheme, what about the number of times
23 in the Complaint that informed notice wasn't complained of?

24 MR. FAIRBANKS: Okay.

25 THE COURT: Direct me to something specific other than

1 that informed notice is the problematic thing?

2 MR. FAIRBANKS: All right. Paragraph Twelve, Your Honor.
3 Paragraph Twelve alleges that on or about December 15 of
4 2008 the Defendant disposed of Plaintiff's collateral, quote,
5 thereby terminating any right on the part of the Plaintiff to
6 redeem the vehicle.

7 Redemption or the right to redeem, Your Honor, is . .

8 THE COURT: On or about December 15 of 2008, First Fi-
9 nancial entered into a contract for sale of the vehicle. I
10 just want to make sure I'm on the right paragraph.

11 MR. FAIRBANKS: Let me . .

12 THE COURT: Thereby terminating any right on the part
13 of the Plaintiff to redeem the vehicle by disposing of the
14 vehicle.

15 MR. FAIRBANKS: Disposing of the vehicle, exactly. Re-
16 demption and right to redeem collateral is the principal ra-
17 tionale of the UCC Commissioner's insistence on proper pre-
18 disposition notice.

19 Because after disposition, redemption is no longer
20 available to a consumer because there is no longer any col-
21 lateral.

22 That's the whole point. If the . .

23 THE COURT: Was it a problem with the actual sale it-
24 self or was it just the problem with the notice?

25 I realize that the sale is derivative of the notice

1 problem, but . .

2 MR. FAIRBANKS: That's right. I'm sorry I interrupted
3 you, Your Honor.

4 THE COURT: Just answer my question.

5 MR. FAIRBANKS: Well, the premise of your question is
6 that the sale is . .

7 THE COURT: The sale -- in an ideal world, a sale will
8 follow a proper notice. Correct?

9 MR. FAIRBANKS: And the proper notice is one aspect of
10 it.

11 THE COURT: Okay, so that . .

12 MR. FAIRBANKS: One aspect . .

13 THE COURT: That is the problem you have, isn't it,
14 the notice?

15 MR. FAIRBANKS: Well, the notice wasn't the problem ne-
16 cessarily, and it didn't become the problem until there was
17 a sale.

18 And, if you'll allow me, Your Honor, . .

19 THE COURT: I just wanted an answer to my question.

20 MR. FAIRBANKS: If you'll indulge me, Your Honor, you
21 will -- if you'll indulge me, Your Honor, I think you will
22 see that I'm going to get to authority that will answer your
23 question.

24 THE COURT: I will give . .

25 MR. FAIRBANKS: I would appreciate your indulgence.

1 (Counsel and the Court speaking at the same time)

2 THE COURT: I will hear your argument. I have one
3 jury out and the jury . .

4 MR. FAIRBANKS: I understand.

5 THE COURT: This is a motion to reconsider, and I am
6 happy to hear your argument, but if you would -- if you
7 would answer my question it would make it easier for me to
8 understand.

9 Okay?

10 MR. FAIRBANKS: The only thing after the notice was
11 the sale.

12 THE COURT: Thank you.

13 MR. FAIRBANKS: But the sale is critical.

14 THE COURT: Okay.

15 MR. FAIRBANKS: That is true, and I appreciate your
16 indulgence, Your Honor. I appreciate your interest.

17 I just want to point out that redemption is the whole
18 point of the statutory scheme.

19 Paragraphs 13 and 14 of the Complaint, Your Honor,
20 allege the Plaintiff's cause of action against the Defen-
21 dant, namely the Defendant's failure to provide notice
22 to my client prior to disposition of the collateral.

23 Paragraph 17 of the Complaint alleges facts relating
24 to the Defendant's disposition of the class members' motor
25 vehicles.

1 Paragraph 18 contains the proposed class definition,
2 Your Honor, which requires -- requires, Your Honor, that
3 the class member be an individual with collateral being dis-
4 posed of.

5 Paragraph 24 basically sets forth that the Plaintiff
6 requires -- it refers to Section 36 9 611, which requires a
7 security holder to send reasonable notice of disposition be-
8 fore the creditor enters a contract of sale, sells, or other-
9 wise disposes of the collateral, the repossessed collateral,
10 and I would point that out, Your Honor.

11 In Paragraph 25, it says that First Financial disposed
12 of Plaintiff's and class members' motor vehicle collateral
13 without having first provided notice of that ^{proposed} disposition of
14 the collateral.

15 I don't know how to say it any more plainly that the
16 disposal of the collateral is the cause of why we're in
17 this thing here.

18 I just want to say, Your Honor, that we think that is
19 absolutely incredible, so let's talk a little bit about the
20 UCC, 36 9 610.

21 We think that the essential provision of this section,
22 the default section, that section of 36 9 610 sets forth
23 the remedies available to the repossessing creditor in a
24 normal security agreement.

25 That says -- it's called disposition of collateral,

1 and it says that after default the securing party may sell,
2 lease or otherwise dispose of any and all the collateral.

3 Part B says that every aspect of disposition of col-
4 lateral, including the method, manner, and time, place and
5 other terms, must be commercially reasonable.

6 The emphasis is on the commercial reasonableness, and
7 one must be commercially reasonable to comply with the re-
8 quirements of the article.

9 It is not what type of sale they had, not the price that
10 was paid, not the type of notice or when the sale occurs,
11 or whether the collateral was approved prior to sale, or
12 anything else.

13 None of these things is determinative although each can
14 affect the commercial reasonableness.

15 In determining compliance with the UCC's disposal rules
16 whether it must be commercially reasonable is none of those
17 things necessarily. It is the disposition that has to be
18 commercially reasonable.

19 Your Honor, again I'm going to leave off the rest of
20 it because I think other than the UCC -- I know you've got
21 juries waiting, but I would just like to point out, Your
22 Honor, that there are one or two more practical considera-
23 tions.

24 If what these gentlemen propose and Your Honor's rul-
25 ing is in fact the case, what you've ruled is that short

1 statute -- the short statute of limitations based on the
2 date notice was served determines when the statute of lim-
3 itations runs -- it doesn't work. It doesn't work for us,
4 and a couple of examples demonstrate that.

5 If you give the receipt or the delivery date of the
6 notice as the accrual date, it doesn't give anything.

7 If there was a public sale followed by a private and
8 public sale notice, followed by a private sale, the accrual
9 date has passed.

10 And what about if there were a notice that lacked
11 the information telling what the consumer was entitled
12 to, an accounting -- it didn't have that.

13 The consumer was entitled to that but it did not hap-
14 pen.

15 The consumer received notice but without the proper
16 information, and then some six months later there was a
17 private sale although it was a public sale notice, so that
18 makes twice. The accounting error and again the public-
19 private sale, and the private sale occurs.

20 Your Honor, in this case, what if there had been no
21 sale?

22 If there had been no sale, could Mr. Delaney have
23 sued First Financial because the notice had been defec-
24 tive?

25 So there are all kinds of problems that arise when

1 there is attempted delivery of or receipt of notice in or-
2 der to say that is when the cause of action arises, Your
3 Honor.

4 Even if no sale occurs, that doesn't affect the no-
5 tice. Secondly, the defective notice or not disclosing
6 the collateral doesn't violate the statute, no.

7 THE COURT: But you are saying the harm occurred when
8 the item was sold or vehicle was sold and that affects the
9 validity of the sale?

10 MR. FAIRBANKS: It is one of the things that would
11 determine commercial reasonableness, Your Honor.

12 If they sent out the notice without information the
13 consumer was entitled to at the time, two weeks before
14 they sold the vehicle. If they sent out notice saying,
15 we forgot to give you an accounting, or a postcard that
16 says, oh, by the way, you are entitled to an accounting.

17 The fact that . .

18 THE COURT: Well, let me ask you something.

19 MR. FAIRBANKS: Yes, maam.

20 THE COURT: What does the gambling statute have to
21 do with anything? I mean 32 110 . .

22 MR. FAIRBANKS: I think that refers back to . .

23 (The Court and Counsel speaking at the same time;
24 portion inaudible)

25 MR. FAIRBANKS: Your Honor, in their initial Motion

1 for consideration as I understood it, I think I have
2 r...nded to that and . .

3 THE COURT: You did, and that's where I recall we are
4 right now, at 32 110.

5 MR. FAIRBANKS: Your Honor, and I think . .

6 THE COURT: Looking right now at number eight, I think
7 I saw a supplemental motion to reconsideration.

8 Let's see.

9 (Brief pause in proceeding)

10 Onpage 7 of the motion to reconsider ruling on motion
11 to dismiss -- sale of Plaintiff's vehicle on December 15,
12 2008. The action commenced October 4, 2011, within the
13 three year limitations period -- 32 110.

14 It might just be a citation problem, citation error.

15 MR. FAIRBANKS: Yeah, I think it is a citation matter,
16 Your Honor, and . .

17 THE COURT: It is clear that if the -- the next para-
18 graph -- statutory damages were initially provided, 9 of
19 625, subsection C two, it would be a penalty. 32 110.

20 That the three year period established by 32 110 is the
21 applicable statute of limitations.

22 MR. FAIRBANKS: Yes, maam. I think the argument was
23 there -- maybe it's a typographical error. However, since
24 the argument was that there would be a penalty, we will
25 agree that the element of penalty would arise, but for the

1 sake of argument we would agree that it is one of those
2 two, and it ought to be the three year statute because
3 the first penalty statute has to do with someone collect-
4 ing a penalty for someone else. The second is someone who
5 is collecting a penalty for themselves.

6 So it should be the three year statute instead of the
7 one, and because the case was filed in October and Decem-
8 ber is the date of distribution, Your Honor, it is not any
9 . .

10 THE COURT: No, no. I just want to make sure that I
11 understand as well as I can the issues.

12 MR. FAIRBANKS: I understand.

13 THE COURT: I have one other question for you, and
14 then I'll be happy to hear from you in reply.

15 One of the points that I found quite persuasive in
16 the First Financial brief when I granted the motion is the
17 way that our Supreme Court has called for a penalty -- has
18 called certain provisions statutory penalties.

19 How do you respond to that particular argument?

20 MR. FAIRBANKS: I respond to that by saying that if
21 you go back and read the cases involving this particular
22 provision of the UCC, starting with -- I think probably
23 Crane was the first one -- you will find that our Supreme
24 Court, along with Supreme Courts all over the country --
25 all over the country -- regularly refer to the statutory

1 damages and statutory penalties interchangeably.

2 There are Courts around the country -- I wouldn't ven-
3 ture to give statistics, but I would venture to say that
4 Courts that looked at that particular issue have determined
5 that these are not penalties in the technical sense of the
6 word, but these are compensatory.

7 The best illustration -- of them, I think the best
8 illustration of that is in our statute which is the same
9 statute everybody else has.

10 What it is, it's a substitute for actual damages, and
11 it is very clear in the statute and in the structure of
12 the statute what even the Legislature says -- and our Court
13 says -- for sure, it's in Crane -- says this is the Legis-
14 lature's recognition that the damage, the actual damages,
15 that are likely to be recovered by a consumer in a small
16 repossession and sale situation are likely to be too small
17 to make it worth bringing a law suit.

18 So it has the element of attempting to coerce credi-
19 tors' compliance, which is a very penal concept, but it is
20 a substitute for actual damages.

21 It is a formula that substitutes for actual damages,
22 and many Courts have held for hundreds of years that where
23 a statute has mixed purposes, one of the purposes being
24 to compell compliance with lending policy purposes.

25 But the other purpose is to compensate a private

1 individual, and where the damage was not large, applying
2 those to a private individual as compensation.

3 That takes it out of the category of penalties; says
4 it is not a penalty. That says it is not a penalty.

5 THE COURT: Okay. Well, I need to hear from Mr.
6 Buckner and Mr. Brown. Then you can tell me what you need
7 to tell me.

8 MR. BUCKNER: Your Honor, I'll try to be fairly brief,
9 and we're really down to two issues in the motion to recon-
10 sider.

11 Judge, 36 9 625 C two provides for a penalty, and
12 then, secondly, what is the accrual date of this action.

13 I would say the first argument is pretty clear cut.
14 There are three cases actually, Crane versus City Corp,
15 Broadbank versus (inaudible) and Singleton that say just
16 exactly that.

17 They say it is a penalty provision, and in Broadbank
18 they say here is exactly why. The Legislature wrote the
19 law, and I can read it there.

20 I think upon reading it and reading the statutory sub-
21 sections that it elaborates and says this penalty is sup-
22 posed to be awarded regardless of any injury, but to the
23 extent there could be some sort of confusion the Courts
24 have come down and said this is a penalty provision.

25 So I think that sort of wipes away any confusion that

1 might otherwise be existing there, and one argument that
2 the Plaintiff has made I think sort of confuses the issue.
3 This is -- the point is that there are actual damages that
4 are awarded under some of these similar provisions, but not
5 where they have filed a lawsuit.

6 Obviously, the sole purpose of our hearing today is
7 within the confines of the Complaint under -- obviously the
8 sole purpose of our hearing today is the confines of the
9 Complaint, and the only provision which they have requested
10 an award under is 3 69 625 C Two.

11 They don't cite a South Carolina case that says that
12 is compensatory in any way. They cite an Ohio case which
13 talks about the Ohio companion to 396 9 625 B, which has
14 nothing to do with what we are here to argue about, and
15 I am not sure that I can even respond to it.

16 In their prayer for relief there is but one statute
17 referenced, which that is 3 69 625 C two, which the South
18 Carolina rules have told us that is a penalty provision, so
19 that is dispositive on this, I think.

20 The second point which I think Plaintiff's counsel has
21 mentioned is the date of accrual, and our perspective on
22 that is that 15 3 570 says that the commission of the of-
23 fense is the date of accrual.

24 The commission of the offense in this case is the
25 alleged insufficiency of the notice of sale.

1 Now, they say that it doesn't say that, but we take
2 the position that it does say that, and it says that and
3 in his entire Complaint relative to that alleged insuffi-
4 ciency.

5 A cursory reading of the Complaint says that 36 9 613
6 and 36 9 614 are the bases for the wrong notice in this
7 case.

8 They allege that we have not complied with those pro-
9 visions, and those provisions concern the propriety of the
10 contents of the notice of sale only.

11 We think that everything in this case flows to that
12 notice of sale.

13 The commission of the offense can only be when the
14 alleged insufficient notice was sent out.

15 I mean, Plaintiff's counsel pointed out here some in-
16 teresting scenarios, but we take the position that the
17 scenarios are different than what we have here before you,
18 Your Honor.

19 We do have a notice of sale, which we believe was
20 compliant, but for the purposes of today we will assume that
21 it wasn't.

22 It was sent to them prior to the sale, and that is
23 the basis for the allegations of liability in this case.

24 I think that one of the things they sort of argued is
25 that, you know, this accrues only at the sale, or if there

1 is a sale. This case isn't operated though by that discov-
2 ery rule.

3 If it were, then they might have a different argument
4 that they could make.

5 This is a commission, and it is almost as if it were
6 quasi-criminal, a specific act of non-compliance, that is
7 the start of the operative date.

8 For everything else, I think we will just rest on our
9 brief.

10 We believe the Court's Order is proper, Your Honor.
11 Every thing that was raised here today has been extensively
12 briefed and argued previously.

13 Thank you.

14 THE COURT: All right. Thank you, and I will cer-
15 tainly incorporate the briefs into the record.

16 Is there anything in reply?

17 MR. FAIRBANKS: Yes, I do want to say a few things
18 in reply.

19 THE COURT: All right.

20 MR. FAIRBANKS: Your Honor, if you read the penalty
21 provision, 625 C two, and you read it carefully, you will
22 find that the same provision, the same sub-section, pro-
23 vides for the statutory damages.

24 It is the same provision that provides for actual
25 damages. It is all in one.

1 If you read it -- well, let's look at it for just
2 a minute.

3 It is very clear that the consumer can decide to take
4 actual damages, just like anybody else, consumer or not,
5 but the consumer can also elect the statutory damages
6 formula.

7 So, contrary to what my colleague says, it is not from
8 some completely different statute. It is clear . .

9 THE COURT: Well, what about the terms in Broadback?
10 That's what I . .

11 MR. FAIRBANKS: Broadback is . .

12 THE COURT: And Crane. The way the Appellate Courts
13 have referred to the . .

14 MR. FAIRBANKS: To the way . .

15 THE COURT: . . determination . .

16 (The Court and counsel speaking at the same time)

17 MR. FAIRBANKS: Well, the way that damages and penal-
18 ties are established is the issue. With any suggestion
19 that any South Carolina Appellate Court has ever held --
20 nobody has ever held that it's a penalty.

21 Nobody has ever held it's a penalty. They have re-
22 ferred to it as penalties; they have referred to it as
23 damages, but nobody has held that it's a penalty that I
24 know of.

25 Thank you.

1 THE COURT: Thank you.

2 (Brief pause in proceeding)

3 THE COURT: I would say your argument, Mr. Fairbanks,
4 would be that the Courts have referred to the statutory
5 penalty, but it is not dispositive or persuasive as a posi-
6 tion?

7 MR. FAIRBANKS: Well, they have referred to it both
8 ways, Your Honor. They have referred to it both ways, and
9 nobody has -- again, as I say, they have said it's a pen-
10 alty. They have called it a penalty, they have called it
11 damages.

12 By the same token, I can say I wouldn't call it dam-
13 ages, and, therefore, it is something that is not -- it
14 is not dispositive one way or another.

15 THE COURT: Okay. I was just looking at it, and it
16 seems pretty clearly a reference to statutory penalties
17 but they also . .

18 MR. FAIRBANKS: Your Honor, . .

19 THE COURT: . . call it damages, of course, or an award
20 of damages, so that I would need to be concerned about
21 the Court's reference to statutory penalties.

22 MR. FAIRBANKS: But other than the fact that the statute
23 itself, if I'm not mistaken, only refers to a statutory pen-
24 alty.

25 MR. BUCKNER: Your Honor, we don't take the position

1 that the penalty provision doesn't award damages in its
2 most broad sense.

3 They are in fact damages . . .

4 THE COURT: Right.

5 MR. BUCKNER: . . just not real or compensatory dam-
6 ages.

7 If we were trying this case, Your Honor, in front of
8 a jury and they provided these penalty provisions, they
9 would be awarding damages in the broadest sense.

10 I think there is the fact that the Court has also ex-
11 plained why it's a penalty provision also clarifies what
12 it means when it does refer to it as damages.

13 THE COURT: Okay.

14 (Brief pause)

15 THE COURT: One thing that troubles me in the Motion
16 to reconsider is that there could be something that I failed
17 to rule on, and I want you all to be able to properly appeal
18 my decision.

19 On page seven, the Courts have specifically ruled that,
20 quote, the Court need not decide whether a three year stat-
21 ute applies?

22 MR. BUCKNER: Yes, maam.

23 THE COURT: If we need to amend the Order, I think what
24 I held in determining that it's a penalty is that the six
25 year statute did not apply.

1 MR. BUCKNER: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. BUCKNER: We simply made the argument that the six
4 year statute doesn't apply, and whether the Court ordered
5 that the one year or three year was applicable didn't mat-
6 ter which is their tabloid under . .

7 THE COURT: Right. If we use the date of accrual as
8 being the date of the notice, the allegedly defective no-
9 tice, then even under the three year statute . .

10 MR. BUCKNER: That's correct.

11 THE COURT: You understand that?

12 MR. BUCKNER: Yes.

13 THE COURT: We don't need to correct that or amend
14 that?

15 MR. FAIRBANKS: Well, I think if you use the accrual
16 date as, you know -- another issue is which of the statute
17 of limitations apply.

18 Your Honor, for example, if you were to rule the date
19 of accrual as being the date of receipt of the notice, then
20 it tends to -- if Your Honor is reversed on the issue of
21 which statute of limitations applies, then under the six
22 year statute the classes could expand considerably.

23 THE COURT: Well, that only happens if we ignore this
24 language in Crane from the Supreme Court as written by
25 Chief Justice Toal.

1 The issue is presented in this appeal of whether a
2 co-obligee on a debt secured by consumer goods
3 without actual right to possession of goods
4 can, one, recover in conversion against the
5 creditor's wrongful repossession under South
6 Carolina Consumer Protection Code, or, two, re-
7 cover under the statutory penalty provided in UCC
8 . . .

9 Is that correct?

10 MR. BUCKNER: I think that is ignoring -- she is talk-
11 ing about whether or not conversion, which is a tort and
12 which involves taking possession of such property, is con-
13 sistent with a claim that somebody has repossessed and has
14 sold something.

15 They are two inconsistent causes of action, and I
16 don't think that is determinative by any means of whether
17 or not the Court was characterizing for purposes of deter-
18 mining statutes of limitations or whether or not there
19 is a dispute under the Commercial Code of commercial reason-
20 ableness involving penalty and damages, or remedies involv-
21 ing penalties and damages.

22 THE COURT: The reference to the notice provisions or
23 the different applications.

24 MR. BUCKNER: In reference to the -- it is a former ci-
25 tation but it is the same as 925 C two.

1 We stipulate to that. We're aware of that. I think
2 when they modified the Code they just . .

3 MR. FAIRBANKS: For the purpose of this case, the
4 language is virtually the same.

5 THE COURT: Okay, I appreciate that.

6 All right. The Motion to reconsider is denied, but
7 if you all need a more detailed Order I'll be happy to sign
8 one.

9 Do you all want to present proposed Orders? If so, we
10 will go from there.

11 Thank you.

12 -----END OF REQUESTED TRANSCRIPT OF HEARING-----

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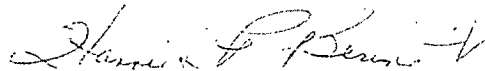
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CERTIFICATE

I, HARRIET P. BENNETT, Court Reporter for South Carolina Court Administration, hereby certify that the foregoing Transcript was prepared to the best of my ability from the records of Phyllis Norton, having been heard in the Court of Common Pleas for Charleston County on October 23, 2013.

FURTHER, I certify that I am neither of kin nor counsel in this matter, nor do I have any interest therein.

This 19th day of June 2014



CERTIFICATE OF COUNSEL

In accordance with Rule 210(g), SCACR, the undersigned hereby certifies that this **Supplemental Record on Appeal** contains material properly included in the Record on Appeal and not any other material. Additionally, the undersigned hereby certifies that this **Supplemental Record on Appeal** complies with the Supreme Court order dated August 13, 2007.

Respectfully submitted,

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Charleston, South Carolina

Dated: 11/18/14

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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas

RECEIVED

NOV 20 2014

SC Court of Appeals

Stephanie P. McDonald, Circuit Court Judge

Appellate Case No. 2014-000824
Case No. 2011-CP-10-7166

Otha Delaney,

Appellant,

v.

First Financial of Charleston, Inc.,

Respondent.

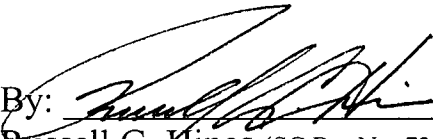
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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent above named, do hereby certify that I have served the **Supplemental Record on Appeal** on the above-named Appellant by depositing a copy of the same in the United States Mail, postage prepaid, on November 18, 2014, addressed as follows to Appellant's counsel of record:

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