THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

Common Pleas Case Nos. 2007-CP-38-196 & 2007-CP-38-201
Appellate Case No. 2014-001634

First Citizens Bank and Trust Company,..........................Appellant/Respondent,

v.

Clyde B. Livingston; Technico Marketing & Distribution, Inc.; B. Livingston and Charlotte V. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of whom Clyde B. Livingston is the..Respondent/Appellant.

And

First Citizens Bank and Trust Company,..........................Appellant/Respondent,

v.

Clyde B. Livingston; American First Federal Inc.; Citibank South Dakota, N.A.; Branch Banking and Trust Company of South Carolina; G&G Rentals; Miller Communications, Inc.; and Wells Fargo Bank, N.A., Defendants,

Of whom Clyde B. Livingston is the..Respondent/Appellant.

RESPONDENT/APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF ISSUES

I. Should the grant of summary judgment on the Unfair Trade Practices Act claim be affirmed under Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), as an additional sustaining ground?

II. Should the grant of summary judgment on the Unfair Trade Practices Act claim be affirmed on a statute of limitations basis as an additional sustaining ground?

ARGUMENT

Appellant/Respondent (hereinafter, along with Community Resource Bank, N.A. and Orangeburg National Bank, referred to as "the Bank") raises a number of arguments in its respondent's brief in an attempt to get this court to affirm the lower court's grant of summary judgment on what the Bank claims are additional sustaining grounds. Rather than rehash the arguments from Respondent/Appellant (hereinafter "Livingston")'s initial appellant's brief that already address why arguments raised in the Bank's brief are wrong, this reply brief addresses the arguments the Bank now offers as additional sustaining grounds. The Bank's additional sustaining grounds arguments are wrong, and this reply brief is the appropriate place to address them. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address additional sustaining ground arguments in reply brief).

I. Hambrick v. GMAC is not the shield the Bank thinks it is. Hambrick has been overruled or abrogated by decisions of the Supreme Court.

The Bank argues that Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006), presents a ground on which this court could affirm the grant of summary judgment on Livingston's claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA"). In so doing, the Bank ignores more recent case law by the Supreme Court of South Carolina that shows that Hambrick and its rationale do not square with precedent of this state's highest court. As Livingston argued below, the Supreme Court's decision in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011), has overruled or abrogated Hambrick. (R. p. 441 ln. 19 through p. 442 ln.

20.) Hambrick has at least been overruled to the extent that Hambrick held that if the factual background giving rise to a cause of action includes a party's having engaged in the unauthorized practice of law, the circuit court lacks any power to entertain the cause of action.

In Hambrick, Kristy and Scott Hambrick sued GMAC Mortgage Corporation, doing business as Ditech.com, where GMAC conducted the closing of a mortgage loan for the Hambricks and charged them for ostensible attorney's fees in connection with the closing when the closing was not conducted or supervised by an attorney. 634 S.E.2d at 6. "Each allegation stemmed from the Hambricks' claim that Ditech charged them for legal fees that were not provided nor could be provided due to Ditech's failure to utilize an attorney." Id. GMAC moved to dismiss the complaint, and the circuit court granted the motion, concluding that it lacked jurisdiction to hear the claim because "the only claim that could be brought based on an allegation of the unauthorized practice of law is a request for declaratory relief brought in the original jurisdiction of the Supreme Court." Id. at 7. This court affirmed, on the same rationale. Id. at 6, 9.

Respectfully, Livingston must note that what this court did in Hambrick was to allow a tortfeasor to have immunity for its actions – actions that would be tortious *regardless of whether unauthorized practice of law was involved* – as long as the unauthorized practice of law formed some part of the facts giving rise to the cause of action. Imagine this scenario: A property management company charges a property owner $350.00 as ostensible reimbursement for money spent to pay a plumber to fix a drain in the owner's house managed by the company. The company, however, did

not actually use the services of a plumber to repair the drain (and, thus, did not incur the $350.00 cost charged to the owner); instead, one of the company's employees fixed the drain for no charge to the company. It turns out that this property management company does this regularly. Few would doubt that this constitutes an actionable unfair trade practice as well as actionable conduct under a number of other legal theories.

Under the reasoning of Hambrick, though, as long as we replace the charges for the non-existent services of a non-existent plumber with charges for the non-existent services of a non-existent attorney, the company has a good argument that the circuit court cannot hear a case against it for billing its customer for charges that were never incurred. The Hambricks sued GMAC for making them "reimburse" GMAC for charges that GMAC had never incurred. Id. at 6. Hambrick essentially gave GMAC a pass *because* it engaged in the unlawful activity of the unauthorized practice of law. Id. at 8-9. Imagine how this would play out in a case against someone who, despite not being a lawyer, undertook to represent someone as an attorney and was then sued after his or her negligence in that regard caused damages to the client.

A look at how the Supreme Court decided Matrix Financial shows that our state's highest court has rejected the Hambrick rationale, thereby overruling or abrogating Hambrick, as the rationale of the Matrix holding is at odds with that of Hambrick. In Matrix, the Court held that the master-in-equity not only should have taken into account whether the activity of closing a mortgage loan without an attorney was the unauthorized practice of law but also should have used that as a basis to

decide the case. 394 S.C. at 138-40. Because the Supreme Court's decisions bind the Court of Appeals as precedents, S.C. Const. Art. V, § 9, Hambrick's reasoning that a circuit court cannot hear such matters has been abrogated and Hambrick overruled.

Livingston is not suing the Bank for unauthorizedly practicing law. His UTPA counterclaim is based on the Bank's actions in systematically depriving borrowers of counsel in making mortgage loans, seizing upon the opportunity that created to foist upon him a unilaterally imposed "term" of the mortgage loan, then reneging even upon that term. Hambrick does not provide the Bank with a defense that is, basically, two wrongs (both by the Bank, the unauthorized law practice and the failure to honor its lending obligations) really do make a right. Hambrick is not and never should have been a way for a party to use one of its unlawful activities to shield itself from liability for another.

II. Even if Hambrick has not been overruled or abrogated, it should be.

As discussed above, the result in in Hambrick is baffling. See 634 S.E.2d at 6, 9. Though it remains Livingston's position that Matrix has already overruled Hambrick, even if that is determined not to be correct, Hambrick should be overruled. As discussed above, the Hambrick decision essentially provided a party a defense to a claim *because of* that party's illegal conduct. 634 S.E.2d at 6-9. If this court does not hold that Matrix has overruled or abrogated Hambrick, then this court should overrule its decision in Hambrick. The Hambrick rationale is unjust and unfair, and its application rewards wrongdoers in circumstances where, but for the presence of the unauthorized practice of law in the fact pattern, they would be held accountable for their actions.

Not only is Hambrick inconsistent with the Supreme Court's decision in Matrix, it is also inconsistent with earlier Supreme Court precedent, namely Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2002). Contrary to what is implied in Hambrick, 634 S.E.2d at 7-9, Linder expressly provided for the circuit court to remedy Insurance Claims Consultants' unauthorized practice of law, as the passage quoted below illustrates:

> We have found that respondents did commit some acts that amounted to the unauthorized practice of law. We note, however, that the majority of respondents' work appears to have *not* entailed the unauthorized practice of law. We therefore hold that **the most appropriate manner in which to sanction respondents for their transgressions is for the trial court, in the underlying action, to determine the value of respondents' work which did not constitute the unauthorized practice of law. Respondents are entitled to that amount, but are not to be compensated for any amount attributable to their unauthorized activities.**

Linder, 348 S.C. at 496 (emphasis added).

Further, in Linder (unlike in Hambrick) the Court did *not* throw out the Linders' causes of action because unauthorized law practice was a part of the factual milieu from which they arose; rather, the Court held that "there is no private right of action *for* the unauthorized practice of law." In other words, a person cannot sue another person *simply* because the second person practiced law without a license. That is a far cry from allowing a person to use the very unlawful nature of unauthorized law practice as a shield from liability. The latter, however, is exactly what Hambrick appears to permit. 634 S.E.2d at 7-9.

If this court needs to in order to reverse the grant of summary judgment below, it should overrule Hambrick. Hambrick is a deeply flawed decision.

III. Livingston agrees that he has not raised an argument in this appeal about the grant of summary judgment on the UTPA claim in the -201 action.

The Bank argues that Livingston's arguments about why the grant of summary judgment on the UTPA claim should be reversed involve only facts that relate to the credit line subject of the action ending in case number -196 and not the action ending in case number -201. That is correct. Livingston's arguments are directed at the UTPA claim in the -196 action.

IV. The Bank's statute of limitations argument asks the court to view the facts in a light favorable to the Bank, not Livingston, in violation of the standard of review.

The Bank appears to argue that because it thinks it *likely* that its refusal to allow Livingston to draw any more than $45,000.00 on the line of credit occurred more than three years before the claim was asserted, Livingston's UTPA claim is barred by the statute of limitations. The Bank would like for this court to gloss over, as the Bank does, the fact that to read the record that way would be to construe it in favor of the party that moved for summary judgment. To so view the record would violate one of the most basic principles of summary judgment jurisprudence.

At the summary judgment stage, "the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the

evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004).

The trial court determined that to grant summary judgment on the UTPA claim on a statute of limitations basis would be improper. (R. p. 44.) In so noting, Judge Jackson referenced his reasoning for denying summary judgment on Livingston's breach of contract claim. (R. p. 44.) That reasoning is set forth below:

> The Plaintiff argues that the statute of limitations on the breach of contract claim began to run at the closing (and thus ran more than three years before this action was brought); however, the Court disagrees. The statute of limitations period on this claim could not have begun to run until the bank had received information that Defendant Livingston had painted his house and then refused to allow him to borrow on the credit line beyond $45,000.00. There is nothing in the record that tells the Court when it was that those events happened. Accordingly, the Plaintiff has not established the burden it carries to show as a matter of law that the statute of limitations on this claim has run.

(R. p. 38.)

Judge Jackson was right about that.

A defense that a claim is barred by a statute of limitations is an affirmative defense. Eldridge v. Eldridge, 398 S.C. 113, 120, 728 S.E.2d 24, 27 (2012); Arant v. Kressler, 327 S.C. 225, 228 n. 1, 489 S.E.2d 206, 208 n. 1 (1997); Glenn v. Sch. Dist. No. Five of Anderson Cty., 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide." Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636,

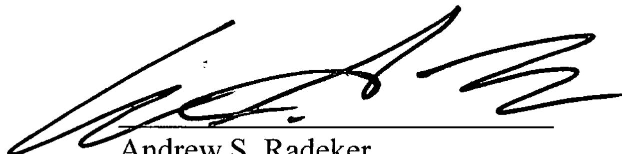
641 (Ct. App. 2009). Only "when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence [does] the determination . . . become[] a matter of law[.]" Id.

It is not incumbent on Livingston to prove that his UTPA claim is *not* barred by the applicable statute of limitations, S.C. Code Ann. § 39-5-150; rather, the burden is on the Bank to prove that it is. Eldridge, 398 S.C. at 120; Arant, 327 S.C. at 228 n. 1; Turner, 381 S.C. at 110; Glenn, 294 S.C. at 533. At the summary judgment stage, that would mean showing that there is *no* genuine issue of material fact about this and that *all* the facts in the record demonstrate *clearly* that the claim is barred by the statute of limitations. The Bank did not meet that burden.

CONCLUSION

The circuit court erred in granting summary judgment on the UTPA claim, and the Bank's offerings of additional sustaining grounds lack the substance they would need to prevail. The court should reverse the grant of summary judgment on the UTPA claim and remand the case for a jury trial.

Respectfully submitted,



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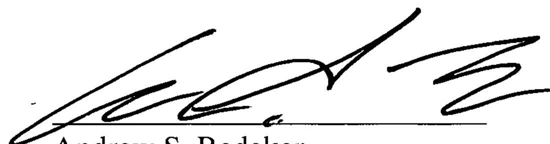
CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I served the Respondent/Appellant's final briefs by depositing a copy of them on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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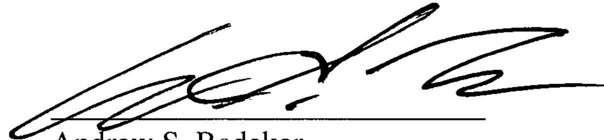

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