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

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Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

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

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Otha Delaney,

Appellant,

v.

First Financial of Charleston, Inc.,

Respondent.

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# FINAL BRIEF OF RESPONDENT

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## RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

**I. Did the circuit court err when it dismissed Appellant's complaint as time-barred?**

**A. Did the circuit court err when it determined that the six-year statute of limitations in S.C. Code Ann. § 36-2-725 is not applicable to this case?**

**B. Did the circuit court err in its determination of when Appellant's cause of action accrued?**

**II. Did Appellant properly appeal from the circuit court's order denying Appellant's motion to reconsider, and, if not, does Appellant's failure to do so doom his appeal?**

## RESPONDENT'S STATEMENT OF THE CASE[1]

Individually, and as putative representative of a class of others similarly situated, Appellant Otha Delaney ("Delaney") commenced this action against Respondent First Financial of Charleston, Inc. ("First Financial") on October 4, 2011, alleging a cause of action under S.C. Code Ann. § 36-9-625(c)(2) for certain noncompliance with Part 6 (addressing default) in South Carolina's enactment of Article 9 (addressing secured transactions) of the Uniform Commercial Code (the "UCC"). Specifically, Delaney alleged that, in May of 2008, First Financial sent him a notification of disposition of collateral (the collateral being a truck that First Financial

[1] In accordance with the Rule 12(b)(6) standard, for the purpose of this appeal only, all of the allegations of Delaney's complaint are taken as true and viewed in the light most favorable to him.

had earlier repossessed from Delaney after he defaulted under a certain Retail Installment Sales Contract) that did not contain all of the information required to be provided in a notification of disposition of collateral in a consumer-goods transaction under S.C. Code Ann. §§ 36-9-613 and -614.

Citing Delaney's averment that the allegedly insufficient notification of disposition was sent in May of 2008, First Financial moved to dismiss Delaney's complaint as time-barred. (R. pp. 30-32.)

After briefing and a hearing, the circuit court granted First Financial's motion, dismissing Delaney's complaint on the basis of its determination that his cause of action accrued when the allegedly insufficient notification of disposition was sent in May of 2008, and that, to avoid being barred by the statute of limitations, his suit had to have been commenced no later than three years thereafter, which it was not. (R. pp. 43-52; R. pp. 33-42; Supp. R. pp. 1-17; R. pp. 1-8.)

The circuit court thereafter denied Delaney's motion to reconsider—again following briefing and a hearing—reaffirming its dismissal of Delaney's complaint in a detailed order. (R. pp. 53-60; R. pp. 69-76; R. pp. 61-68; R. pp. 77-82; Supp. R. pp. 1-2, 18-41; R. pp. 9-17.)

This appeal followed. (Notice of Appeal.) Specifically, Delaney's notice of appeal reads as follows:

> Otha Delaney appeals the Order Granting Motion to Dismiss of the Honorable Stephanie P. McDonald dated April 29, 2013. [Delaney]'s timely motion for a new trial pursuant to Rule 59 of the S.C. Rules of Civil Procedure was denied by the Court on March 17, 2014. [Delaney] received written notice of entry of the Order on March 20, 2014.

(Id.)

## ARGUMENT

### I. The circuit court did not err when it dismissed Delaney's complaint as time-barred.

#### A. The circuit court did not err when it determined that the six-year statute of limitations in § 36-2-725 is not applicable to this case.

In responding to Delaney's appellate challenge, First Financial believes it is helpful to begin with analyzing—and refuting—Delaney's contention that the six-year statute of limitations in § 36-2-725 applies to this case.

Section 36-2-725 is, of course, not found in Article 9 of the UCC, addressing secured transactions, but in Article 2, which addresses contracts for the sale of goods. South Carolina Code Ann. § 36-2-102 sets forth the scope of Article 2 (a/k/a "Chapter 2" of South Carolina's Commercial Code) and it provides as follows, which, First Financial submits, is alone dispositive of this issue in its (and the circuit court's) favor:

> Unless the context otherwise requires, this Chapter applies to transactions in goods; **it does <u>not</u> apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction** nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

(emphasis added). The official commentary to § 36-2-102 advises that the term "'Security transaction' is used in the same sense as in the Article on Secured Transactions (Article 9)" and that "Article [2] leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the **general sales aspects** of such transactions." (emphasis added).

Without question, the subject Retail Installment Sales Contract was intended only to operate as a security transaction. And, of course, Delaney's cause of action relates solely to alleged noncompliance with Part 6 of Article 9, not to any "general sales aspect[]" of the transaction.

For this/these reason(s), along with the reasoning set forth in the circuit court's orders relating to its determination that the statute of limitations in § 36-2-725 does not apply to this case, which reasoning is, for the sake of brevity and efficiency, incorporated herein by reference, the

circuit court did not err in this regard.[2]

### B. The circuit court did not err in its determination of when Delaney's cause of action accrued.

In the course of this litigation, the only argument that Delaney has advanced in favor of the application of a statute of limitations longer than three years is that founded upon § 36-2-725—which was addressed and refuted above—and Delaney has not argued for the applicability of any common-law device, such as the discovery rule, to save his claim. Because an appellant may not raise a new argument on appeal,[3] it occurs to First Financial that the longest limitations period that could possibly be applicable here is three years, whether this period is prescribed by S.C. Code Ann. §

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[2] To the extent there may be any question about the propriety of incorporating the circuit court's reasoning by reference in support of affirmance, First Financial notes that Rule 220(c), SCACR, expressly permits an appellate court to "affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal" and Rule 208(b)(2), SCACR, authorizes a respondent's brief to "contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)." First Financial submits that such incorporation by reference is a proper way to advocate for affirmance—moreover, it is efficient, and avoids needless redundancy. *Cf.* Rule 208(b)(6), SCACR (providing that "any party may adopt by reference all or any part of the brief of another"). First Financial also submits that incorporation by reference in this manner is consistent with the legal presumption of correctness attached to an appealed order and the affirmative burden imposed upon the appellant to show any reversible error. *See* McCall v. IKON, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error, and an appellate court is obliged to reverse when error is called to its attention, but it is not in the business of figuring out on its own whether error exists).

[3] Jackson v. Speed, 326 S.C. 289, 306-07, 486 S.E.2d 750, 759 (1997) (an issue may not be raised for the first time on appeal).

15-3-540(2) or otherwise.[4]

For instance, subsection (1) of S.C. Code Ann. § 15-3-530 establishes a three-year statute of limitations for "an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520 [(which are not applicable here)]," and subsection (2) establishes a three-year statute of limitations for "an action upon a liability created by statute other than a penalty or forfeiture." Consequently, even assuming, *arguendo*, Delaney is correct that § 36-9-625(c)(2) is remedial and compensatory—not a penalty—the applicable statute of limitations here would nonetheless be no more than three years from the accrual of his cause of action; thus, in any event, begging the dispositive question as to when the cause of action accrues.

Looking then to the question of the date of accrual of Delaney's cause of action, First Financial respectfully submits that Delaney misapprehends § 36-9-625 when he argues that "[p]rior to the sale of a debtor's collateral, injunctive relief is the preferred remedy" and that it is "[o]nly when the disposition (sale) of the collateral has already occurred [that] the Code provide[s] for damages . . . ." (App's Br. p. 12.) Indeed, examination of this

[4] This assumes, *arguendo*, that S.C. Code Ann. § 15-3-570 does not impose a one-year statute of limitations. If it does, Delaney's claim is time-barred under any view of accrual.

point serves well to illustrate the flaw in Delaney's argument that the circuit court erred in its determination of the date of accrual of his cause of action—which is the (faulty) linchpin of his position.

To begin, the plain language of § 36-9-625 provides no textual basis for the sequencing of rights Delaney relies upon. In other words, nothing in § 36-9-625 prohibits an aggrieved party from seeking injunctive relief and a monetary award simultaneously before disposition of the collateral.

The language triggering either form of recovery is merely a failure to comply "with this chapter [(i.e., Article 9)]," in any respect. Section 36-9-625(a) ("If it is established that a secured party is **not proceeding in accordance with this chapter** . . . .") (emphasis added); § 36-9-625(b) ("Subject to subsections (c), (d), and (f), a person is liable for damages in the amount of any loss caused by a **failure to comply with this chapter**.") (emphasis added). Further, Official Comment 2 to § 36-9-625 explains that "[s]ubsections (a) and (b) provide the basic remedies afforded to those aggrieved by a secured party's failure to comply with this Article. . . . Unlike former Section 9-507, . . . subsections (a) and (b) are not limited to noncompliance with provisions of this Part of Article 9. **Rather, they apply**

**to noncompliance with any provision of this Article**.") (emphasis added).[5]

While not so broad as to be applicable to any noncompliance with Article 9, but tailored to Part 6 of Article 9, § 36-9-625(c)(2) is triggered by **any** noncompliance with Part 6 of Article 9—not merely the particular failure of compliance that Delaney alleges in this case—and it contains no language requiring disposition of the collateral as a prerequisite to the liability it establishes. Indeed, such language of prerequisite was a part of § 36-9-625(c)(2)'s predecessor (former S.C. Code § 36-9-507(1)), but it was amended out of existence by the legislature. *See* Singleton v. Stokes Motors, Inc., 358 S.C. 369, 375-76, 595 S.E.2d 461, 464-65 (2004) ("'**If the disposition has occurred** the debtor . . . has a right to recover from the secured party . . . ." (quoting § 36-9-507(1) (Supp. 2000)) (emphasis added) (emphasis in original omitted). Whether the legislature's intent was to change the former law to do away with a disposition prerequisite or to clarify its original intent not to have such a prerequisite, the legislature's

[5] First Financial notes that Delaney's position that the same act of pre-disposition noncompliance would first give rise to only a claim for injunctive relief, while later, after disposition, give rise to a claim for monetary relief, would also appear to violate the rule against claim splitting—which rule is not displaced by the UCC. *See* S.C. Code Ann. § 36-1-103 ("Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."); Ayers v. Guess, 217 S.C. 233, 241, 60 S.E.2d 315, 318 (1950) (Taylor, J., dissenting)

action to amend this language out of Article 9 supports the circuit court's ruling. Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) ("When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the existing law. Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent.") (citations omitted).

Also, the timing of the failure to comply with Part 6 of Article 9 is expressly addressed in § 36-9-625(c)(2) and, indeed, material to its operation. In plain language, recovery under § 36-9-625(c)(2) may only be had by "a person that was a debtor or a secondary obligor **at the time a secured party failed to comply** with this part . . . ." (emphasis added).

As the circuit correctly found, the sole basis of Delaney's cause of action under § 36-9-625(c)(2), i.e., the only allegation of noncompliance with Part 6 of Article 9, is that First Financial's notification of disposition, which it sent to him in May of 2008, did not contain the information required by §§ 36-9-613 and -614. (R. pp. 1-8; R. pp. 9-17; R. p. 21, ¶¶ 13-15.) To be clear, the essential premise of Delaney's cause of action is that the notification of disposition that First Financial sent him was insufficient, not that First Financial did not send him a notification of disposition.

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("The entire claim arising out of a civil transaction, whether in nature of contract or tort,

The official commentary to § 36-9-611 explains that "[t]his Section requires a secured party who wishes to dispose of collateral under Section 9-610 to send 'a reasonable authenticated notification of disposition' to specified interested persons, subject to certain exceptions." Official Comment 2, § 36-9-611. And § 36-9-614, which addresses the contents and form of a notification of disposition in a consumer-goods transaction, expressly provides that "[a] notice of disposition **must** provide . . ." certain information. (emphasis added). Indeed, the official commentary to this section explains that "[a] notification that lacks any of the information set forth in paragraph (1) is insufficient as a matter of law."

Logic and the plain language of § 36-9-625(c)(2) support the circuit court's ruling that the failure of compliance alleged here occurred in May of 2008. Again, the essential premise of Delaney's cause of action is that, wishing to dispose of the collateral, in May of 2008, First Financial sent him a notification of disposition that lacked the information that § 36-9-614(1) says a "notification of disposition **must** provide . . . ." (emphasis added).

The circuit court properly rejected Delaney's argument that the noncompliant notification of disposition sent in May of 2008, which is the only noncompliance upon which his cause of action is founded, was not a

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cannot be divided into separate and distinct claims, and each form basis of an action.").

noncompliance in May of 2008, but did not become a noncompliance until the later disposition of the collateral. A notification of disposition lacking the required information is "insufficient as a matter of law," and, therefore, a noncompliance, such a noncompliance being the only prerequisite to recovery under § 36-9-625(c)(2) and, indeed, the express legislative design of § 36-9-625(c)(2) being "to ensure that **every** noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted." Official Comment 4, § 36-9-625 (emphasis added). And, in the face of this clearly-expressed intent, the (hypothetical) parade of absurdities Delaney suggests, even if possible, does not authorize undoing the legislative design. *See* Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."); Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) ("We do not sit as a super legislature to second guess the wisdom or folly of decisions of the General Assembly.").

The circuit court's determination that Delaney's cause of action under § 36-9-625(c)(2) accrued—such that Delaney could have maintained an

action to enforce it—in May of 2008 is consistent with the plain statutory language (cited above) making the time of the alleged violation material to its operation in terms of determining if a person may recover thereunder and also with the fact (as noted above) that liability is intended by the legislature to be imposed thereunder for "every noncompliance . . . regardless of any injury that may have resulted." This is further consistent with our Supreme Court's recognition "that every violation of a legal right imports damage and authorizes the maintenance of an action and the recovery of at least nominal damages, regardless of whether any actual damage has been sustained." Stevens v. Allen, 342 S.C. 47, 53, 536 S.E.2d 663, 665, n. 5 (2000).

For this/these reason(s), along with the reasoning set forth in the circuit court's orders relating to the accrual of the applicable statute (or the accrual of the only potentially-applicable statute(s)) of limitations (as well as relating to the characterization of the nature of the relief Delaney seeks as a statutory penalty), which, for the sake of brevity and efficiency, is incorporated herein by reference, the circuit court did not err in ruling that Delaney's cause of action was subject to a statute of limitations not longer than three years and that it accrued in May of 2008 when the alleged noncompliance with Part 6 of Article 9 occurred; consequently, the circuit court did not err in ruling that Delaney's cause of action was time-barred,

because he did not commence this action within three years of the accrual of his cause of action.

## II. If the Court finds that Delaney did not properly appeal from the circuit court's order denying his motion to reconsider, and that this impropriety was more than mere clerical error, affirmance of the circuit court's dismissal is required.

While Delaney referenced the circuit court's order denying his motion to reconsider in his notice of appeal, as a technical matter, Delaney did not actually purport to appeal that order in his notice of appeal, nor did he attach a copy of that order to his notice of appeal, nor did he refer to that order in his statement of the case. To the extent that the Court views Delaney's failure to notice an appeal of the circuit court's order denying his motion to reconsider—which was a detailed, formal order reaffirming the dismissal—to rise above the level of mere clerical error, First Financial submits that affirmance of the dismissal is required. *See* Rule 203(b) and (e), SCACR (addressing both the time for service of and required form and content of a notice of appeal); Rule 208(b)(1)(C), SCACR, (providing that any matters stated or alleged in appellant's statement of the case shall be binding on appellant); Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) ("Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice

of intent to appeal must be served."); and First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); *cf.* Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

## CONCLUSION

For the foregoing reasons, along with any other reason that may be evident upon the record, First Financial asks the Court to affirm the circuit court's dismissal of Delaney's case.

Respectfully submitted,

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Dated: 11/18/14

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

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Stephanie P. McDonald, Circuit Court Judge

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# CERTIFICATE OF COMPLIANCE REGARDING FINAL BRIEF OF RESPONDENT

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The undersigned, an attorney in this matter for Respondent First Financial of Charleston, Inc., hereby certifies that the **Final Brief of Respondent** complies with the provisions of Rule 211(b), SCACR, and that it also complies with the Order Re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued by the Supreme Court of South Carolina on April 15, 2014.

Respectfully submitted,

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Charleston, South Carolina

Dated: 11/18/14

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**IN THE COURT OF APPEALS**

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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 **Final Brief of Respondent** 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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