THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 5442 (S.C. Ct. App. filed Sept. 28, 2016)

Otha Delaney, Petitioner,

v.

First Financial of Charleston, Inc., Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
Perry M. Buckner, IV (SC Bar No. 100031)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Counsel for Respondent

INDEX

COUNTERSTATEMENT OF QUESTIONS PRESENTED 1

COUNTERSTATEMENT OF THE CASE 2

ARGUMENT

I. **The Court of Appeals did not err in affirming the trial court's dismissal of Mr. Delaney's complaint as time barred.** 3

II. **Question/Argument II in Mr. Delaney's petition for a writ of certiorari—regarding the Court of Appeals' alleged failure to rule that his claim is governed by a three-year, and not a one-year, statute of limitations—is not properly before the Court because it was not included in his petition to the Court of Appeals for rehearing.** 10

CONCLUSION 11

Respondent, First Financial of Charleston, Inc. ("First Financial"), makes this return in opposition to Otha Delaney's petition for this Supreme Court to issue a writ of certiorari to review the Court of Appeals' decision in this matter.[1]

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. In *October of 2011*, borrower/debtor Mr. Delaney (whose truck had been repossessed and sold after he had defaulted on an auto loan) commenced this action against secured creditor First Financial claiming it had unlawfully failed to comply with S.C. Code Ann. § 36-9-611(b) (which is in Chapter 9 of the state's commercial code, dealing with secured transactions) by sending him—in *May of 2008*—an insufficient notification of disposition of his collateral. The trial court dismissed Mr. Delaney's complaint holding that the statute of limitations for his claim was at most three years; that his claim had accrued and its limitations period had started to run when First Financial sent the subject notification in May of 2008; and accordingly, that his claim had become time barred by the time he brought this suit in October of 2011. Consequently, this question is presented: Did the Court of Appeals err in affirming the trial court's dismissal of Mr. Delaney's complaint as time barred?

II. In light of a discrepancy between Mr. Delaney's prior petition to the Court of Appeals for rehearing and his instant petition to this Court for a writ of certiorari, this question is also presented: Is Question/Argument II in Mr. Delaney's cert petition—regarding the Court of Appeals' alleged failure to rule that his claim is governed by a three-year, and not a one-year, statute of limitations—properly before the Court now where it was not included in his prior petition for rehearing?

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[1] To be clear, this return is subject to and without waiving First Financial's motion (of even date herewith) seeking dismissal of Mr. Delaney's petition for lack of appellate jurisdiction.

COUNTERSTATEMENT OF THE CASE[2]

Mr. Delaney, as the putative representative of a class of others similarly situated, commenced this action against First Financial on October 4, 2011, alleging a claim under S.C. Code Ann. § 36-9-625(c)(2) for noncompliance with Part 6 (addressing default) in South Carolina's enactment of Article 9[3] (addressing secured transactions) of the Uniform Commercial Code (the "UCC"). (*See generally* App. pp. 20-27.) Specifically, he alleged that in May of 2008 First Financial had sent him a notification of disposition of his collateral (a truck First Financial had earlier repossessed from him after he had 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. (*See generally* App. pp. 21-27.)[4]

Citing Mr. Delaney's averment that the allegedly insufficient notification of disposition was sent in May of 2008,[5] First Financial moved to dismiss the

[2] In accordance with the Rule 12(b)(6), SCRCP, standard, for the purpose of this return, the allegations of the complaint are taken as true and viewed in the light most favorable to Mr. Delaney.

[3] The South Carolina Code addresses secured transactions in "Chapter" 9 of its commercial code.

[4] To be clear, the notification of disposition requirement is in § 36-9-611; the contents of the notification are addressed in §§ 36-9-613 and -614.

[5] (App. p. 23 at ¶ 14.)

complaint as time barred. (App. pp. 32-33.)

After briefing and a hearing, the trial court granted First Financial's motion and dismissed Mr. Delaney's complaint holding that his claim had accrued when the allegedly insufficient notification of disposition was sent in May of 2008 and that, to avoid the claim being barred by the statute of limitations, his suit had to have been commenced no later than three years thereafter, but it was not, having been commenced October 4, 2011. (App. pp. 3-10, pp. 35-54, pp. 89-104.) Subsequently, after more briefing and another hearing, the trial court denied Mr. Delaney's motion to reconsider, reaffirming its dismissal in a detailed order. (App. pp. 11-19, pp. 55-83, pp. 88-89, pp. 106-28.)

The Court of Appeals affirmed the trial court in a 2-1 decision filed September 28, 2016. (App. pp. 184-99.) It thereafter denied Mr. Delaney's petition for rehearing in February 16, 2017, order signed by all three members of the panel. (App. p. 235.)

The instant petition to the Court for a writ of certiorari follows.

ARGUMENT

I. The Court of Appeals did not err in affirming the trial court's dismissal of Mr. Delaney's complaint as time barred.

Essentially, Mr. Delaney argues that his claim did not accrue until—and, indeed, could not have accrued in the absence of—the disposition (i.e., sale) of his collateral, which occurred in December of 2008, less than three years before he

commenced this action in October of 2011; accordingly, the essential premise of the trial court's dismissal—that the statute of limitations for the claim began to run when the allegedly insufficient notification of disposition was sent in May of 2008—is flawed, and the Court of Appeals erred in affirming the dismissal.

According to Mr. Delaney, the Court of Appeals erred "in concluding that a 'disposition' is not a 'prerequisite' for a legal claim of noncompliance under [§ 36-9-611]." (Pet. p. 11.) Stated differently, according to Mr. Delaney, a disposition *is* a prerequisite for a legal claim of noncompliance with § 36-9-611. Most respectfully, this is just not so.

While § 36-9-611 (in conjunction with §§ 36-9-613 and -614) provides the requirement with which Mr. Delaney alleges First Financial failed to comply, it is § 36-9-625 that provides his remedies for the alleged noncompliance, and per its plain language, a claim for relief is triggered by a mere failure—*any* failure—to comply "with this chapter [(i.e., Chapter 9 on secured transactions)]." *See* 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 [Chapter].*") (emphasis added).

Thus, it cannot reasonably be disputed that, for instance, were a secured party to send an insufficient notification of disposition, a debtor could, even before disposition, bring a claim for injunctive relief under subsection (a) to "restrain . . . disposition of [their] collateral" on account of the secured party "not proceeding in accordance with this chapter" and also, under subsection (b), bring a claim for "any loss caused by [the] failure to comply with this chapter." Not only does Mr. Delaney's position—that a disposition was a prerequisite for his claim—find no support in the language of § 36-9-625, it is flatly inconsistent with it. Moreover, given the relief a debtor is clearly allowed to seek under subsections (a) and (b) before disposition of the collateral, it would defy the rule against claim splitting—which is not displaced by the UCC[6]—for the same act of pre-disposition noncompliance (e.g., sending a noncompliant notice of disposition) giving rise to a debtor's claim for relief under subsections (a), (b), and (c)(2) to be to broken up

[6] *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.").

and sued upon in different ways before and after disposition of the collateral. *See Ayers v. Guess*, 217 S.C. 233, 241, 60 S.E.2d 315, 318 (1950) (Taylor, J., dissenting) ("The entire claim arising out of a civil transaction, whether in nature of contract or tort, cannot be divided into separate and distinct claims, and each form basis of an action.").[7]

While not so broad as to cover any noncompliance with Chapter 9 like subsections (a) and (b), but rather tailored to Part 6 of the chapter, § 36-9-625(c)(2) (i.e., the subsection providing for Mr. Delaney's claim) is triggered by *any* noncompliance with that part—not merely the particular failure of compliance that Mr. Delaney alleges in this case—and it contains no language requiring disposition of the collateral as a prerequisite to the liability it establishes. Notably, 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)

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[7] In this regard, First Financial notes that, as a practical matter, neither the basis for Mr. Delaney's claim nor the relief he seeks to obtain are impacted by the disposition of the collateral or any other event after the notification of disposition was sent in May of 2008. (*See* Pet. p. 19 ("[Mr. Delaney] is not alleging that First Financial injured him 'by disposing of collateral in a commercially unreasonable manner' in violation of § 36-9-610.'")

(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 action to amend this language out of Chapter 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 Chapter 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).

The sole basis of Mr. Delaney's claim under § 36-9-625(c)(2), i.e., the only allegation of noncompliance with Part 6 of Chapter 9, is that First Financial's notification of disposition, which it was required to send to him under § 36-9-611, and which it did send to him in May of 2008, did not contain the contents required by §§ 36-9-613 and -614. (App. p. 23 at ¶¶ 13-15, pp. 25-26 at ¶¶ 24-25; *see generally* App. pp. 3-19.) To be clear, the essential premise of Mr. Delaney's

claim is that *the* notification of disposition that was actually sent to him by First Financial in May of 2008 was insufficient, not that First Financial did not send him a notification of disposition.

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 (emphasis added). 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 view that the alleged failure of compliance (and along with it Mr. Delaney's claim) occurred (and the corresponding claim accrued) in May of 2008.

The trial court properly rejected Mr. Delaney's argument that the allegedly noncompliant notification of disposition sent in May of 2008, the only alleged noncompliance in this case, was not actually a noncompliance in May of 2008—i.e., that while it was (allegedly) noncompliant with the statute, it was still not yet a noncompliance—and did not become a noncompliance until the later disposition of

the collateral. As explained above, 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). In the face of this clearly-expressed intent, the legislative design should not be judicially undone. *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 trial court's determination that Mr. Delaney's cause of action under § 36-9-625(c)(2) accrued 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 this 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).

The Court of Appeals did not err in affirming the trial court's dismissal of Mr. Delaney's complaint as time barred.

II. Question/Argument II in Mr. Delaney's petition for a writ of certiorari—regarding the Court of Appeals' alleged failure to rule that his claim is governed by a three-year, and not a one-year, statute of limitations—is not properly before the Court because it was not included in his petition to the Court of Appeals for rehearing.

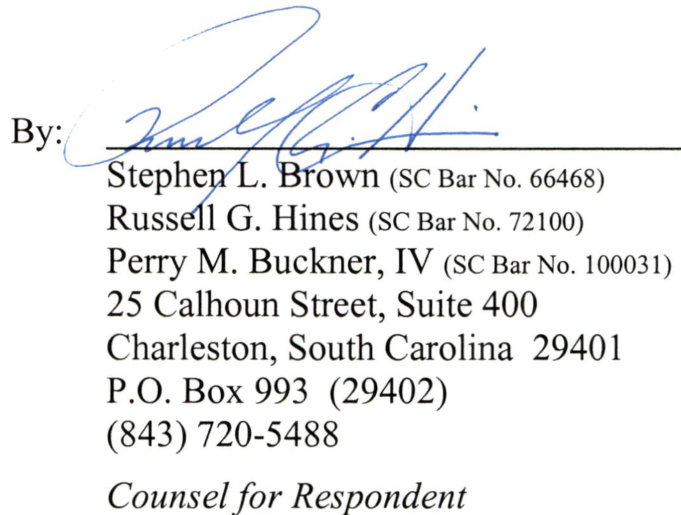
"Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2), SCACR. Question/Argument II in Mr. Delaney's instant petition for a writ of certiorari—regarding the Court of Appeals' alleged failure to rule that his claim is governed by a three-year, and not a one-year, statute of limitations—was not included in his petition for rehearing in the Court of Appeals. (*See generally* App. pp. 209-222.) It is not properly before this Court now.

CONCLUSION

For the foregoing reasons, as well as any other reasons supporting this conclusion set forth in the decisions of the trial court and Court of Appeals themselves or otherwise appearing in the record (all of which are incorporated herein by reference), First Financial asks this Honorable Court to deny Mr. Delaney's petition for a writ of certiorari.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP



By: ______________________

Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
Perry M. Buckner, IV (SC Bar No. 100031)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Counsel for Respondent

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PROOF OF SERVICE

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
Perry M. Buckner, IV (SC Bar No. 100031)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Counsel for Respondent

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent, hereby certify that the foregoing **RETURN TO PETITION FOR A WRIT OF CERTIORARI** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on May 11, 2017, properly posted for delivery to the following addressees:

Philip L. Fairbanks, Esquire
Law Offices of Philip L. Fairbanks, LLC
1214 King Street
Beaufort, SC 29902

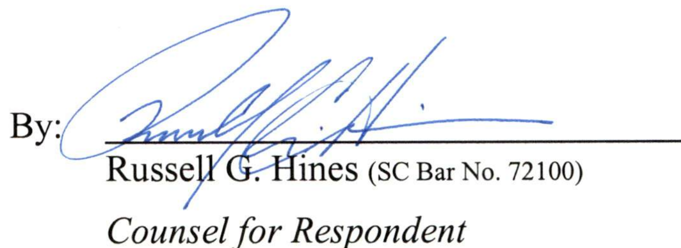
-and-

Frederick M. Corley, Esquire
1214 King Street
Beaufort, SC 29902

Counsel for Petitioner

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP



By: ______________________________
Russell G. Hines (SC Bar No. 72100)
Counsel for Respondent

Charleston, South Carolina

Dated: 5/11/17