THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

The Honorable Robin B. Stilwell

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Case No. **10-CP- 23 - 3793**

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Mark Christianson. ..... Appellant
v.
MBNA America Bank NA ..... Respondent

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# BRIEF OF APPELLANT

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III. The Trial Court erred in finding the requested relief as being untimely.

## STATEMENT OF THE CASE

Appellant originally filed a motion to vacate a judgment on a foreign arbitration award. MBNA v Christianson 2006-CP-23-3740. The Motion was denied by the trial court, and the issue was appealed. The SC Supreme Court heard and affirmed the Order of the trial court, which denied the Motion on the basis it was filed more than one year late. The Motion was filed pursuant to Rule 60, SCRCP. However, Rule 60 also allows for an independent action to seek the relief. This suit followed.

### History of the Case

The sequence of events giving rise to the judgment in 2006-CP-23-3740 is germane to this suit. The procedural history is set out in this Complaint and in the Exhibits attached as Exhibit A to Plaintiff's Brief.

### Procedural History of MBNA v. Christianson 2006-CP-23-3740

Absent any Civil Cover Sheet, or caption assigned by the Clerk of Court, MBNA served a Notice of Application to Confirm Arbitration Award dated May 3, 2006 (ROA 43), upon Defendant Christianson as shown by Affidavit of Service of the Greenville County Sheriff's Office. Service was effective May 16, 2006.

It is significant to note that this service did not include any copy of the underlying arbitration award to be enrolled, or the underlying arbitration agreement. Further, the Notice of Application contained as its Caption the entry "File No. 237536." No CP number was assigned.

On June 1, 2006, Defendant, through his counsel, attempted to file an Objection to Notice of Application (ROA 45), with service upon Plaintiff through its counsel. Defendant's counsel David C Alford filed his affidavit (ROA 98) with

accompanying disclosure by the Office of the Clerk of Court for Greenville County that the filing was not recorded absent an assignment of case Number.

Plaintiff was served with the Objection on June 1, 2006, as verified on the Certificate of Service (ROA 100).

Despite the Objection, Plaintiff then undertook the following action:

On June 13, 2006, Plaintiff filed its Application for Confirmation of Arbitration Award (ROA 50-54), with attendant Civil Action Cover Sheet and a certificate of service upon the Defendant, paid its $150 filing fee,

Upon filing on June 13, 2006, the Clerk of Court assigned the Application the case number 2006-CP-23-3740.

Plaintiff never attached its arbitration agreement or the arbitration award to any of its filings.

With the Application, Plaintiff then filed a Motion for enrollment of the arbitration award (ROA 55-63). On June 19, 2006, the Clerk of Court issued its form Notice of Non-Jury Hearing Date setting July 27, 2006 (ROA 56), as the date for the hearing. This standard form includes the following language for adherence by Plaintiff:

**IT IS THE MOVING PARTY'S RESPONSIBILITY TO NOTIFY ALL COUNSEL AND/OR PARTIES OF THE DATE AND TIME OF THIS MOTION HEARING.**

Despite setting the hearing date, it is believed Plaintiff submitted a proposed order for the Court This is substantiated by the Findings set out in the Order of

Court by the Honorable Edward Miller dated 9/26/07 (ROA 9), wherein the Findings in ¶ 3 include:

> 3. On June 2, 2006 Attorney Gilbert [Plaintiff's counsel] sent an Affidavit of Service, an Application for Confirmation of Arbitration Award, A Certificate of Service, a proposed Order of Court and a filing fee to the Clerk of Court with a copy to Mark Christianson.

No hearing was held. Instead, the Honorable GE Welmaker issued its Order of 6/16/06 (ROA 12), enrolling a judgment obtained by Plaintiff in the National Arbitration Forum as against Defendant.

Following the entry of the Order enrolling the judgment, on June 29, 2006, Plaintiff then clocked with the Clerk of Court its purported copy of the underlying arbitration agreement (ROA 57-63). It is significant to note that the filing was not served upon the Defendant, and was filed after the Court signed the proposed Order enrolling the judgment on June 16, 2006. Further, this filing is absent any supporting affidavit, or any other indicia showing the agreement even pertains to the Defendant.

As set out In Defendant Mark Christianson Affidavit (ROA 97), Appellant never received notice of the hearing or any other communication regarding the proposed Order or the entry of the Order, until he attempted to refinance his mortgage and was informed of the enrolled judgment.

Defendant filed his Motion to vacate the judgment (ROA 65). Defendant filed his Motion and supporting Memorandum(ROA 69-81), along with the supporting affidavit of Mark Christianson and of his counsel David C. Alford.

In response to the Motion, Respondent filed its Memorandum of Law (ROA 82-96). With that Memorandum, Plaintiff attached its copy of the Award

issued by the National Arbitration Forum (ROA 91). This is the first record of such Order issued by the Arbitration proceeding.

Also attached to MBNA's Memorandum is a letter addressed to Defendant's counsel, dated March 5, 2007 (ROA 94), concerning another matter that was before the Court of Appeals. This letter is from Plaintiff's counsel and addresses a Return to Respondents Motion to Dismiss an Appeal filed by this same Plaintiff in another matter (see MBNA v. Christianson, (Opinion No. 4349 Heard February 5, 2008 – Filed March 4, 2008) [1] dealing with an unsuccessful appeal by MBNA to overturn a trial court order denying enrollment of arbitration.

By Affidavit of Defendant's counsel David C. Alford (ROA 98), counsel denies receiving a copy of any hearing in this matter, nor the Order issued by the Court, nor the Order purportedly attached to the March 5 letter.

Following a hearing on September 6, 2007, the Honorable Edward Miller issued his Order on 9/26/07 (ROA 9) denying Defendant's Motion to vacate the judgment as being more than one year in its filing, and an Appeal followed. The Order was affirmed by the SC Supreme Court, in its Order filed February 1, 2010.

Procedural History of this Suit

This suit (Complaint ROA 13; Answer ROA 20 ) was filed May 13, 2010, relying upon an independent action to seek relief from judgment pursuant to Rule 60.

Prior to this case being called to trial, the parties stipulated as to the facts of the case and submitted the issue to the Court for a ruling on the briefs

[1] This referenced appeal involved the same parties, denying the enrollment of an arbitration award on another matter involving arbitration.

submitted by each party. (Appellant's Brief ROA 22-119; Respondent's Brief ROA 120-148).

The trial court ruled in favor of Respondent MBNA in its Order (ROA 1), dismissing the suit, and this Appeal followed.

## ARGUMENT

I. The Trial Court erred in not finding extrinsic fraud by Respondent in obtaining its judgment.

In its Order, the trial court found that Plaintiff failed to demonstrate extrinsic fraud warranting relief. Order at 8, ROA 8.

Rule 60, SCRCP, reads in pertinent part

> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. **This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.** During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Emphasis added

Hagy v. Pruitt 529 S.E.2d 714, 339 S.C. 425 (2000) held

> [a] judgment may be set aside on the ground of fraud only if the fraud is "extrinsic" and not "intrinsic" [cite omitted] Extrinsic fraud is collateral or external to the trial of the matter. [cite omitted] It is "fraud that induces a person not to present a case or **deprives a person of the opportunity to be heard**."

Id. At 717 (emphasis added)

As set out in the procedural history of the underlying case, 2006-CP-23-3740, Respondent failed to serve the enrollment of the foreign award in compliance with the Rules of Civil Procedure, Rule 3, SCRCP; it failed to inform the trial court it had received a notice of objection, and filed a purported arbitration award absent any affidavit, failing to comply with SC Code 15-48-170 or 9 USC 13, which reads

> Before a circuit court confirms an arbitration award subject to the Federal Arbitration Act, there must be evidence of an arbitration agreement. 9 U.S.C.A. § 13 (1999).

Everything Respondent did failed to provide opportunity for Appellant to be heard. The conduct made a mockery of the rules of civil procedure, candor to the court, and clearly denied Appellant with his opportunity to be heard.

The trial court erred in finding the procedural history did not rise to extrinsic fraud.

II. The Trial Court erred in finding Res Judicata barred Appellant from the requested relief.

As cited in the trial court's Order, p. 4 (ROA 4) the elements for res judicata include

> (1)The judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in the first, and (3)

the second action must involve matter properly included in the first action.

The first appeal involved relief by motion, which was not timely filed. There was no adjudication on the merits of the appeal. Further, in filing this independent action, the court has the power to set aside the judgment for fraud, an action independent of the motion.

Rule 60 specifically states:

**This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.**

Res Judicata is not implicated in this suit.

III. The Trial Court erred in finding the requested relief as being untimely.

The trial court found this suit was not brought timely, commenting on four years from the date of the original judgment. Order 5 and 6, ROA 5 and 6.

However, as acknowledged by the trial court, "there is no specified time limit for bringing an independent action." Order at 6, ROA 6.

Following the Supreme Court affirming the prior suit order, this suit followed. There was no dilatory conduct by Appellant.

## CONCLUSION

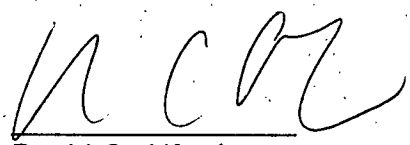
The underlying judgment was procured by conduct that makes a mockery of civil procedure, and most significantly, a defendant's right for opportunity to be heard.

This issue of confirming arbitration awards absent the existence of proof of arbitration, and ignoring the debtor's objection to any arbitration agreement,

appears to be the coming wave if MBNA's position is supported. MBNA has abused the system. This travesty must be corrected.

For the above reasons, the Order of the trial court should be reversed.

Respectfully submitted,



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**Certificate of Compliance Rule 211**

I certify that Appellants final Brief and final Reply Brief comply with the requirements of Rule 211(b).

September 20, 2012

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