

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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**SC Court of Appeals**

AUG 21 2012

**RECEIVED**

Mark Christianson ..... Appellant

v.

MBNA America Bank NA ..... Respondent

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REPLY BRIEF OF APPELLANT

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## STATEMENT OF THE ISSUES

- I. The Trial Court erred in not finding extrinsic fraud by Respondent in obtaining its judgment.
- II. The Trial Court erred in finding Res Judicata barred Appellant from the requested relief.
- III. The Trial Court erred in finding the requested relief as being untimely.

## 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)

A review of Respondent's conduct in enrolling the subject arbitration award failed to comply not only with the rules of court for serving a complaint, but also in its correspondence to the Court...And in failing to advise the trial court of the correspondence its counsel had received from Appellant's counsel. Instead of informing the trial court of Appellant's objection to the enrollment, Respondent obtained the enrollment.

As an officer of the Court, Respondent had a duty to advise the trial court that its correspondence was inaccurate.

In this instance, Respondent was negligent in filing and serving the complaint, and then requested entry of the enrollment. When Respondent received the notice from Appellant as to his objection and inability to clock in the Objection, Respondent failed to advise the trial court.

Even if Respondent acted in good faith in the original filing and service, upon learning of the Appellant's objection, there was a duty to advise the trial court. Respondent had a duty to disclose the after-acquired facts. See ERVIN'S SOUTH CAROLINA REQUESTS TO CHARGE Fraud §21-13, and Lawson v. Citizens & Southern Nat'l Bank 259 S.C. 477, 193 S.E.2d 124 (1972)

Upon learning of the Appellant's Objection, Respondent's counsel had a duty to advise the trial court. SCACR Rule 3.3(d), which reads

In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Clearly, upon learning of Appellant's objection and the inability to clock the objection, Respondent's counsel had a duty to advise the trial court. Instead, Respondent was silent.

Respondent's conduct was extrinsic fraud, and this matter was properly raised by Appellant in this suit. The trial court erred in not recognizing the extrinsic fraud prevalent in this suit.

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.

The Order of the Honorable Edward W. Miller dated 9/26/07 (ROA 9) denying Defendant's Motion to vacate the Order enrolling the arbitration award was because the "motion[was] not timely filed." Order at 2 ROA 10. The merits of the extrinsic fraud have been adjudicated.

The trial court erred in barring the suit on the basis of res judicata.

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 5-6)

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

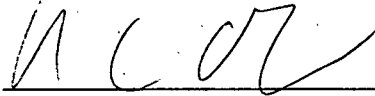
Following the Supreme Court affirming the prior suit order, this suit followed. There was no dilatory conduct by Appellant.

## 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. The silence by Respondent's counsel upon receipt of Appellant's objection, and failure to inform the trial court, is extrinsic fraud. This suit was timely filed.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D C Alford', written over a horizontal line.

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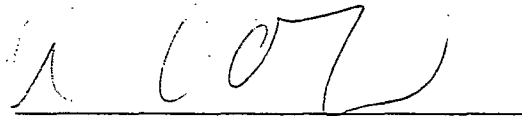
v.

MBNA America Bank NA.....Respondent

**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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