

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ALLENDALE COUNTY  
Court of Common Pleas  
Perry M. Buckner, Circuit Court Judge

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Civil Action No. 2011-CP-03-127

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21st Mortgage Corporation ..... Appellant,

v.

Robert Youmans and Tonya Stoney ..... Respondents.

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**FINAL REPLY BRIEF OF APPELLANT**

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MAR 03 2014

**SC Court of Appeals**

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## STATEMENT OF THE ISSUES

1. Does the word “claim” as used in Section 37-2-404 include a default judgment entered in a lawsuit to which the creditor was not a party and was not given notice of the proceeding?
2. Is a creditor in a consumer credit transaction subject to claims for exemplary damages and attorney’s fees where there is no evidence that the creditor engaged in any misconduct?

## ARGUMENTS

- I. THE LOWER COURT ERRED IN HOLDING THAT 21<sup>ST</sup> MORTGAGE WAS BOUND BY A DEFAULT JUDGMENT IN AN ACTION THAT IT HAD NO NOTICE OF AND TO WHICH IT WAS NOT A PARTY.

In Respondents’ Initial Brief, they assert that, because Section 37-2-404 requires that the borrower attempt to resolve claims with the seller before the claim or defense can be asserted against the creditor, this somehow eliminates the creditor’s right to notice and an opportunity to defend the claims. In support of this position, Respondents contend that the statute “requires consumers to pursue the seller before asserting the claim against the debt buyer.” (Respondents’ Initial Brief, p. 6). However, this is a mischaracterization of what is required under the statute.

Subsection (2) of Section 37-2-404 states that claims and defenses can be asserted against the creditor “only if the consumer has made a good faith attempt to obtain satisfaction from the seller...” It does not require the consumer to obtain a judgment against the seller. It does not require the consumer to bring a lawsuit against the seller. More importantly, it does not in any way suggest that the creditor will be subject to a default judgment entered in a lawsuit in which the seller is the only defendant. For this

reason, the common practice in a lawsuit filed against a seller in a consumer transaction is to name both the seller and the creditor as defendants. *See Rosemond v. Campbell*, 288 S.C. 516, 343 S.E.2d 641 (Ct. App. 1986) (both home improvement contractor and lender named as defendants); *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996) (naming both automobile dealer and bank as defendants). By doing so, the creditor is bound by the results of the litigation, and the consumer is not required to prove its claims in a separate lawsuit with the creditor.

If Respondents' interpretation of the statute was correct, then it would not be necessary to name the creditor as a defendant, since the creditor would be bound by the result in the lawsuit against the seller. Indeed, such an interpretation would encourage consumers not to name the creditor as a defendant so that they would have one less party defending the claims. This would also increase the likelihood of obtaining a default judgment against the seller, as occurred in this case. Such an interpretation is wholly inconsistent with the well-established law in South Carolina that a party is not bound by a determination in an action that it did not have a full and fair opportunity to litigate. *See Carolina Renewal, Inc. v. S.C. Dept. of Transportation*, 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

II. A CREDITOR IN A CONSUMER CREDIT TRANSACTION IS NOT SUBJECT TO THE EXEMPLARY DAMAGES AND ATTORNEY'S FEES RESULTING SOLELY FROM THE MISCONDUCT OF THE SELLER.

In their Initial Brief, Respondents cite *Rosemond v. Campbell*, *supra*, and *Lafferty v. Wells Fargo Bank*, 213 Cal. App. 4<sup>th</sup> 545, 153 Cal. Rptr. 3d 240 (Cal. App. 2013), for the proposition that a creditor in a consumer credit transaction is subject to punitive

damages and attorney's fees based on the misconduct of the seller. However, this issue was not addressed in either of those cases. Instead, the issue in both of those cases was simply whether the claims against the seller could be asserted against the creditor. 21<sup>st</sup> Mortgage has never disputed that a creditor is subject to such claims.

It should be noted that Respondents' Brief makes no attempt to distinguish the South Carolina Supreme Court's recent decision in *Gause v. Smithers*, 403 S.C. 140, 742 S.E.2d 644 (2013). In that case, the Supreme Court considered whether the imputed liability created by the family purpose doctrine allows an injured party to recover punitive damages against the parent of the at-fault driver. In concluding that punitive damages could not be recovered, the Court reasoning that because "punitive damages are designed to punish the actual tortfeasor, any imputation to another party should be limited." 742 S.E.2d at 651. The same reasoning applies to the derivative liability created by Section 37-2-404 of the South Carolina Code, and 21<sup>st</sup> Mortgage is not subject to the punitive damages and attorney's fees awarded against the Seller.

III. *LAFFERTY v. WELLS FARGO BANK* SUPPORTS THE CONCLUSION THAT 21<sup>ST</sup> MORTGAGE IS NOT BOUND BY THE JUDGMENT OBTAINED BY RESPONDENTS AGAINST THE SELLER.

As noted above, Respondents' Brief cites *Lafferty v. Wells Fargo Bank*, 213 Cal. App. 4th 545, 153 Cal. Rptr. 3d 240 (Cal. App. 2013), for the proposition that a creditor in a consumer credit transaction is subject to punitive damages and attorney's fees based on the misconduct of the seller. However, not only was that not the issue in the case, a careful reading of the case supports 21<sup>st</sup> Mortgage's argument that it is not bound by the judgment entered against the Seller in this case.

In *Lafferty v. Wells Fargo Bank*, the purchasers of a motor home brought an action against the seller of the motor home and the lender that financed the purchase. The claims against the lender were based on the grounds that the purchasers were allowed “to assert all claims against the lender they otherwise had against the dealer.” 153 Cal. Rptr. 3d at 243. The trial court dismissed the claims against the lender, and the purchasers proceeded to trial against the dealer. The dealer did not appear for the trial, and the purchasers obtained a judgment against the dealer in the amount of \$210,000.

Following the trial, the purchasers appealed the dismissal of the claims against the lender. In its opinion, the California Court of Appeals held that the phrase “all claims and defenses” include all “**causes of action** that a buyer might assert against the seller.” 153 Cal. Rptr. 3d at 250 (emphasis added). However, the court did not hold that the lender was bound by the judgment that had already been entered against the dealer that sold the motor home.

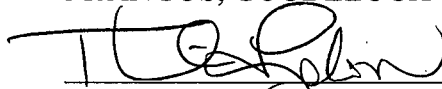
Based on its interpretation of “all claims and defenses,” the California Court of Appeals reversed the order that dismissed the claims against the lender. The court then remanded the case to the trial court so that the purchasers could proceed to trial on the causes of action against the lender. 153 Cal. Rptr. 3d at 260. Thus, in a lawsuit that the lender had notice of and was a party to, the court concluded that the purchasers had to prove their claims at a trial against the lender, even though they had already obtained a judgment against the dealer in the same proceeding.

#### CONCLUSION

21<sup>st</sup> Mortgage should not be bound by the default judgment Respondents obtained against the Dealer. 21<sup>st</sup> Mortgage does not dispute that it may be subject to causes of

action that Respondents have against the Seller, but Respondents have not asserted the causes of action and have not presented any evidence of damages. Instead, they have elected to rely solely on the judgment as a defense. Since neither 21<sup>st</sup> Mortgage nor the previous creditor was a party to that lawsuit, the judgment against the Seller cannot be used as a defense to payment of the debt. 21<sup>st</sup> Mortgage is therefore entitled to possession of the Mobile Home.

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March 3, 2014

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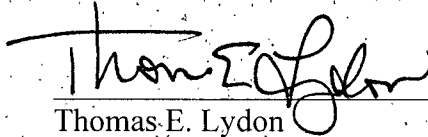
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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.



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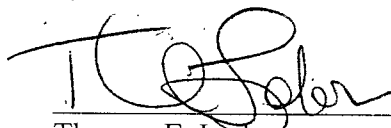
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I hereby certify that I have this 3<sup>rd</sup> day of March, 2014, served the Final Brief of Appellant and Final Reply Brief of Appellant by mailing a copy of each, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

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