

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

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Appeal from Charleston County
Court of Common Pleas

S.C. SUPREME COURT

Stephanie P. McDonald, Circuit Court Judge

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

Otha Delaney,

Petitioner,

v.

First Financial of Charleston, Inc.,

Respondent.

MOTION TO DISMISS 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

NOW COMES Respondent, First Financial of Charleston, Inc., by and through its undersigned counsel, and, on the following grounds, moves this Honorable Court to dismiss the petition for a writ of certiorari in this matter:

1. The Court of Appeals decided this appeal by opinion filed Wednesday, September 28, 2016, affirming the trial court's dismissal of the complaint of Petitioner, Otha Delaney. (A copy of the opinion is attached hereto as Exhibit 1.)

2. Under Rule 221(a), SCACR, "Petitions for rehearing must be *actually received* by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court[;]"¹ therefore, the initial deadline for the Court of Appeals to "actually receive[]"² a petition for rehearing from Mr. Delaney was Thursday, October 13, 2016, i.e., the 15th day after the opinion was filed, as computed under Rule 263(a), SCACR.³

¹ (emphasis added).

² Generally, under Rule 262(a)(2), SCACR, documents may be filed with the appellate court by mail, with the date of filing deemed to be the date of mailing; however, Rule 262(a) makes two express exceptions to this rule: petitions for rehearing and motions for reinstatement.

³ Rule 263(a) states,

In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be

3. The initial deadline was, however, altered by this Court's order of October 10, 2016 (Order No. 2016-10-10-01) regarding Hurricane Matthew (the "Hurricane Matthew Order"), which provided as follows:

On October 4, 2016, the Governor of South Carolina directed the closure of State, County and Municipal Government Offices in twenty-six counties in South Carolina from October 5 through October 7, 2016. This action was taken to facilitate the planned evacuations necessary due to Hurricane Matthew. As the administrative head of the Unified Judicial System in South Carolina, the Chief Justice directed all levels of the Judicial System to comply with this closure.

Subsequently, the Governor issued Executive Orders providing for evacuations in Jasper, Beaufort, Colleton, Charleston, Dorchester, Berkeley, Georgetown and Horry Counties. Several hundred thousand South Carolina citizens evacuated these areas, and the impacts of these evacuations were felt in counties which were not subject to any closure or evacuation. Further, Hurricane Matthew caused significant damage in South Carolina, and this will adversely affect the ability of many lawyers and litigants to comply with deadlines in court proceedings through the end of this week.

Accordingly, this Court finds it appropriate to declare the days of Wednesday, October 5, 2016, though Friday, October 14, 2016, to be statewide "holidays" for the purposes of computing time under Rule 263 of the South Carolina Appellate Court Rules, Rule 6 of the South Carolina Rules Civil Procedure, Rule 35 of the South

included, unless it is a Saturday, Sunday or a state or federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

Carolina Rules of Criminal Procedure, and Rule 3 of the
South Carolina Rules of Magistrates Court.

(footnotes omitted.) (A copy of the Hurricane Matthew Order is attached hereto as Exhibit 2.)

4. What had been the initial deadline for Mr. Delaney's petition for rehearing (Thursday, October 13, 2016) was thus declared "to be [a] statewide 'holiday[]' for the purpose[] of computing time under Rule 263 of the South Carolina Appellate Court Rules . . . [,]" as was the next day, Friday, October 14, 2016. (Ex. 2.) And October 15th and 16th, 2016, were a Saturday and Sunday, respectively.

5. Accordingly, computing time in accordance with Rule 263 and the Hurricane Matthew Order, the time period in which any petition for rehearing by Mr. Delaney had to be "actually received" by the Court of Appeals ran until the end of Monday, October 17, 2016, i.e., "the end of the next day which [wa]s neither a Saturday, Sunday nor [a] holiday."

6. Having not received a petition for rehearing from Mr. Delaney, the Court of Appeals remitted the case to the trial court on Wednesday, October 19, 2016. (A copy of the remittitur is attached hereto as Exhibit 3.)

7. Mailed October 18, 2016, Mr. Delaney's Motion for Extension of Time to File Motion for Rehearing was received by the Court of Appeals on October 20, 2016. (A copy of the motion is attached hereto as Exhibit 4.)

8. In response to Mr. Delaney's motion, Respondent's counsel wrote the Court of Appeals on October 28, 2016, advising that it was Respondent's position that the appeal had been concluded with finality and that Respondent did not consent to Mr. Delaney's motion for an extension of time to petition for rehearing; nor would it consent to recall of the remittitur. (A copy of the letter is attached hereto as Exhibit 5.)

9. On November 2, 2016, the Court of Appeals filed an order recalling the remittitur; it read as follows:

This Court's remittitur was sent to the Clerk of Charleston County on October 19, 2016. It is now necessary for this Court to recall the remittitur. The Clerk of Charleston County is directed to return the remittitur to the Clerk of the South Carolina Court of Appeals within ten days of the date of this order.

(A copy of the order recalling the remittitur is attached hereto as Exhibit 6.)

10. On November 3, 2016, the Court of Appeals filed an order extending the time for Mr. Delaney to petition for rehearing until November 18, 2016. (A copy of the order extending the time for Mr. Delaney to petition for rehearing is attached hereto as Exhibit 7.)

11. Mailed by the clerk of the trial court on November 9, 2016, the remittitur was received by the Court of Appeals on November 14, 2016. (A copy of the trial court's mailing to the Court of Appeals with the remittitur is attached hereto as Exhibit 8.)

12. The Court of Appeals received Mr. Delaney's petition for rehearing on November 18, 2016. (A copy of the petition is attached hereto as Exhibit 9.)

13. Respondent made a return to Mr. Delaney's petition and, in addition to addressing the merits, argued that the Court of Appeals had properly sent the remittitur to the trial court on October 19, 2016, at which point the appeal was finally decided; that there was no longer appellate jurisdiction; and that the Court of Appeals improperly recalled the remittitur and extended the time for Mr. Delaney to petition for rehearing. (A copy of the return is attached hereto as Exhibit 10.)

14. The Court of Appeals denied the petition for rehearing by order filed February 16, 2017. (A copy of the order denying rehearing is attached hereto as Exhibit 11.)

15. Mr. Delaney's petition to this Court for a writ of certiorari to review the Court of Appeals' September 28, 2016, decision is now pending.

16. "When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. *The only exception* to this rule is when the remittitur is sent down by mistake, error or inadvertence *of the Court.*" *Wise v. S.C. Dep't of Corrections*, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) (emphasis added) (internal citations omitted).

17. Here, there was no error “of the Court” in sending down the remittitur on October 19, 2016; nor, indeed, was any such error cited in the Court of Appeals’ order recalling the remittitur. (*See Ex. 6.*)

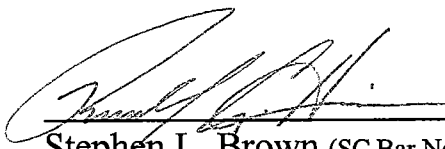
18. Accordingly, the Court of Appeals’ orders recalling the remittitur and extending the deadline for Mr. Delaney to petition for rehearing were erroneous.

19. When the Court of Appeals properly sent the remittitur to the trial court on October 19, 2016, appellate jurisdiction ended, and the appeal was decided with finality (in accordance with the September 28, 2016, opinion affirming the trial court’s dismissal of Mr. Delaney’s complaint as time barred); the remittitur having been properly sent down, it could not thereafter be properly recalled; and in consequence, appellate jurisdiction—having been properly ended and never properly reacquired—is lacking over this matter, which, most respectfully, must be dismissed. *See Wise*, 372 S.C. at 174, 642 S.E.2d at 551 (“The remittitur in this case was not sent down by mistake, error or inadvertence of the Court of Appeals. Instead, it was correctly sent after fifteen days had elapsed from the date of the order dismissing the appeal without the proper filing of a petition for reinstatement. Accordingly, this Court does not have jurisdiction to act in this matter. The documents filed by appellant are hereby dismissed.”) (internal citation omitted).

WHEREFORE, Respondent moves this Honorable Court to dismiss Mr. Delaney's petition for a writ of certiorari and, in conjunction with the dismissal, to grant it whatever relief may be required for the record to properly show that this appeal was decided with finality in accordance with the majority opinion of the Court of Appeals filed September 28, 2016, affirming the dismissal of Mr. Delaney's complaint against Respondent.

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

Charleston, South Carolina

Dated: 5/11/17

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442
Submitted March 1, 2016 – Filed September 28, 2016

AFFIRMED

Philip L. Fairbanks, of Beaufort, for Appellant.

Stephen L. Brown, Russell G. Hines, and Perry M.
Buckner, IV, all of Young Clement Rivers, of
Charleston, for Respondent.

SHORT, J.: Otha Delaney appeals the trial court's grant of First Financial of Charleston, Inc.'s motion to dismiss his class action complaint for damages and equitable relief under the Uniform Commercial Code (UCC), alleging the court erred in (1) dismissing the complaint as time-barred by applying the incorrect

statute of limitations,¹ and (2) determining the date the statute of limitations began to run. We affirm.

On October 12, 2007, Delaney entered into a Retail Installment Contract (the Contract) to purchase a truck from Coliseum Motors. The Contract was assigned to First Financial, making it a secured party under the UCC. After Delaney failed to make payments, First Financial repossessed the vehicle. On May 2, 2008, First Financial sent Delaney a "Notice of Private Sale of Collateral" (notice of sale) advising Delaney of its intention to sell the vehicle. On December 15, 2008, First Financial sold the vehicle.

On October 4, 2011, Delaney, as a putative member of a class, filed this class action, alleging (1) the notice of sale was insufficient under the UCC, and (2) he was entitled to relief under section 36-9-625 of the South Carolina Code (2003) (providing remedies for a secured party's failure to comply with the UCC). Delaney sought recovery on behalf of the class members.

First Financial moved to dismiss, arguing Delaney's claim was barred under the one-year statute of limitations applicable for statutory penalties set forth in South Carolina Code § 15-3-570 (2005) (providing a one-year statute of limitations for actions based on a statute for a penalty). Delaney filed a response to the motion to dismiss, arguing the claim was not a statutory penalty, but it was a remedial claim for damages under section 36-9-625. Delaney argued that because the claim is remedial, the UCC's six-year statute of limitations in section 36-2-725(1) (2003) of the South Carolina Code governing breaches of contract for the sale of goods applied. In the alternative, Delaney argued if the recovery is a penalty rather than a compensable remedy, the action is governed by the three-year statute of limitations provided in South Carolina Code section 15-3-540(2) (2005) (applying to "[a]n action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation").

At a hearing on its motion to dismiss, First Financial argued the action was for a penalty because no contract was alleged to have been breached; there was no plea for compensatory damages; the complaint did not allege a tort; and the plea for

¹ We combine Delaney's second and third issues and address them as the first issue.

relief consisted of the finance charge and ten percent of the principal amount under the Contract. According to First Financial, such a plea was governed by the one-year statute of limitations provided for in section 15-3-570, which would be triggered by the "commission of the offense." First Financial also argued Delaney's claim was time-barred under the three-year statute of limitations, which was triggered by the issuance of the notice of sale.

Delaney argued neither the one-year nor the three-year statute of limitations applied, and even if the three-year statute of limitations in section 15-3-540(2) applied, the time had not expired at the time of the filing because the statute would have been triggered "not when the letter [was] received[, but] . . . only when the collateral was disposed of." Delaney maintained that setting minimum statutory damages of ten percent of the contract plus finance charges ensures compliance by creditors and "that[,] in and of itself doesn't turn it into a penalty because it is clearly a substitute for actual damages."

In an order filed April 30, 2013, the trial court granted the motion to dismiss. The court found Delaney's sole cause of action was a statutory penalty because it requested the finance charge and ten percent of the principal amount of the obligation, which is the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2). Noting the Official Comment 4 to section 36-9-625(c)(2), which provides the specific relief is to be awarded "regardless of any injury that may have resulted[,]" the court found "this fixed formula is not remedial in nature but rather serves the purpose of imposing automatic liability for 'every noncompliance.'" The trial court noted our supreme court has interpreted the same provision as a statutory penalty in several cases, and it further noted other courts have similarly classified the statutory award based on the uniform UCC model statute, upon which South Carolina based its code.

The court next rejected Delaney's argument that section 36-2-725(1) applied, which provides a six-year limitations period for a breach of contract for the sale of goods under the UCC. The court noted Delaney did not plead breach of contract; thus, section 36-2-725(1) did not apply. The court found the case concerned the sufficiency of notice prior to the disposition of collateral; thus, the case dealt "entirely with Article 9's provisions concerning secured transactions. Article 2's provisions pertaining to the sale of goods [were] wholly irrelevant." The court also found general rules of statutory construction prevented the application of the six-year limitations period. The court found the "controlling limitations period should be either S.C. Code Ann. § 15-3-570 or § 15-3-540(2), respectively one or three

years." The court noted general rules of statutory construction require a specific statute to prevail over a more general statute, and because Delaney's desired recovery was a statutory penalty, sections 15-3-570 and 15-3-540(2) spoke "more directly to the actual allegations in this lawsuit."

Finally, the court found Delaney's complaint was time-barred under either section 15-3-570 or 15-3-540(2). The court found "[w]hile either statute might be reasonably applied to this matter, the Court need not decide this inquiry as [Delaney's] cause of action accrued upon receipt of the alleged noncompliant Notice of Sale and either statute would therefore serve as a bar to . . . recovery." As to section 15-3-570,² the statute specifically states the commission of the offense serves as the date of accrual. The court found the statute began to run in May 2008 and expired in May 2009.

As to section 15-3-540(2),³ the court noted the statute did not specifically delineate a date of accrual, and it found "the alleged commission of the offense should similarly serve as the commencement of the three year statute of limitations." The court continued,

Unlike an action for actual or compensatory damages, [Delaney's] action for a penalty focuses on a specific act of non-compliance . . . that awards automatic relief. The right to bring the action and thus the proper date of accrual should be determined by the date on which that alleged noncompliance occurred. However, this date of accrual would also coincide with the date on which [Delaney] either knew or should have known that a violation had occurred.

² "An action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense." S.C. Code Ann. § 15-3-570 (2005).

³ "Within three years . . . : (2) An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation." S.C. Code Ann. § 15-3-540(2).

Furthermore, I find that the legislature intended [§§] 15-3-570 and 15-3-540 to have similar dates of accrual. Both govern actions for a statutory penalty and are nearly identical in language but for the length of the limitations period. Given that the legislature specifically enumerated the date of accrual for penalty actions under § 15-3-570 to be the date of the commission of the offense, this Court sees no logical purpose in creating an alternative date of accrual for penalty actions under § 15-3-540(2).

The court granted First Financial's motion to dismiss. After a hearing, the court denied Delaney's motion for reconsideration. This appeal followed.

ISSUES

- I. Did the trial court err in applying the statute of limitations?
- II. Did the trial court err in finding the action accrued at the time the notice of sale was received rather than at the time First Financial disposed of the collateral?

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). The appellate court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and reasonably deducible inferences in the complaint would entitle the plaintiff to relief on any theory of the case. *Id.* The court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

LAW/ANALYSIS

- I. **Applicable Statutes of Limitations**

Delaney argues the trial court erred in finding the six-year statute of limitations in section 36-2-725 did not apply and in finding Delaney's action barred by either the limitations period provided by section 15-3-540(2) or by section 15-3-570. We disagree.

In this case, Delaney alleged he was entitled to the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2) due to First Financial's insufficient notice of sale. Section 36-9-625, found in Article 9 of the UCC, establishes remedies for a secured party's failure to comply with Article 9, providing the following:

(a) If it is established that a secured party is not proceeding in accordance with this chapter, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

* * *

[c](2) if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

S.C. Code Ann. § 36-9-625 (2003). "Article 9 of the U.C.C. does not now nor has it ever included a statute of limitations." Richard H. Nowka, *The Secured Party Fiddles While the Article 2 Statute of Limitations Clock Ticks-Why the Article 2 Statute of Limitations Should Not Apply to Deficiency Actions*, 7 Fla. St. U. Bus. Rev. 1, 2 n.4 (2008). Thus, Delaney argues the statute of limitations in Article 2 of the UCC, section 36-2-725(1) applies, providing six years. We disagree.

First, Delaney did not allege a breach of contract. Rather, Delaney alleged the violation of the notice of sale requirements, and his prayer for relief requested the statutory penalty of the finance charge and ten percent of the principal amount of the obligation under section 36-9-625(c)(2). Thus, section 36-2-725(1) did not apply because it provides as follows: "An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued." S.C.

Code Ann. § 36-2-725(1) (2003). Because Delaney did not allege a breach of contract, we agree section 36-2-725(1) did not apply. Instead, we look to Title 15 governing civil remedies.

Sections 15-3-540 and -570 provide statutes of limitations for actions upon statutes for a penalty. *See* S.C. Code Ann. § 15-3-540(2) (2005) (providing a three-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture"); S.C. Code Ann. § 15-3-570 (2005) (establishing a one-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense"). Like the trial court, we find the controlling limitations period is either section 15-3-570 or section 15-3-540(2), respectively one or three years, because Delaney sought a statutory penalty.

"As a general principle, the legislature has the authority to provide civil penalties to enforce observance of a legislative policy." *S.C. Dep't of Health & Envtl. Control v. Kennedy*, 289 S.C. 73, 76, 344 S.E.2d 859, 861 (Ct. App. 1986). A statutory penalty is defined as a penalty "an individual is allowed to recover against a wrongdoer as satisfaction for wrong or injury suffered, without reference to actual damage sustained." *Black's Law Dictionary* 1412 (6th ed. 1990). Although not addressing the statute of limitations issue, at least three South Carolina Supreme Court cases have identified the "damages" in section 36-9-625(c)(2) as a statutory penalty.

Citing the former version of section 36-9-625(c)(2), the supreme court in *Crane v. Citicorp National Services, Inc.*, 313 S.C. 70, 72, 437 S.E.2d 50, 51-52 (1993) (superseded by statute on other grounds), addressed whether co-obligors, who did not have title or right to possession of a mobile home, could recover under the penalty provision of the UCC for the creditor's failure to comply with the notice requirements. The court found the Cranes were entitled to notice. *Id.* at 74, 437 S.E.2d at 53. The court continued as follows:

If the notice provision relates to the obligation, then it would seem logical that the penalty provision for breach of the notice requirements must also be related to the obligation, and therefore, applicable to co-obligators of consumer goods security agreements. Additionally, the statutory penalty is evidence of the legislature's recognition that the small amount of compensatory

damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code's provisions.

Id. at 74-75, 437 S.E.2d at 53.

In *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 375, 534 S.E.2d 688, 690 (2000), Brockbank sued Best Capital Corp. after the repossession and sale of his mobile home, alleging, among other things, a violation of Article 9's notice provision. Best Capital admitted it had not sent notice of the sale, but it argued Article 9 did not apply to the parties' agreement because there was not a security interest. *Id.* at 377, 534 S.E.2d at 691. The court found notice was required, and stated "[i]f a secured party fails to give the required notice, a debtor may seek to recover the statutory penalty under Article 9." *Id.* at 385, 534 S.E.2d at 695 (noting the former version of section 36-9-625(c)(2), section 36-9-507(1), which embodies nearly identical language as the current version); *id.* at 384, 534 S.E.2d at 694 (concluding "the outcome in this case is largely dictated by *Crane*").

More recently, in *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 373, 595 S.E.2d 461, 463 (2004), Mr. and Mrs. Singleton filed an action based in part on the UCC, claiming Stokes Motors, Inc. failed to notify them of its intent to sell the Singletons' repossessed vehicle. Citing the former version of section 36-9-625(c)(2), the court in *Singleton* referred to the statute's "penalty" provision in finding both Singletons were entitled to recover because both were entitled to notice. *Id.* at 378, 595 S.E.2d at 466.⁴

We find no merit to Delaney's argument that our supreme court's references to the statutory penalty in these cases is the result of "loose language" and "unconsidered dictum (sic)" and the court interchangeably used the terms "compensatory damages" and "penalty" in its opinions. Based on the definition of a penalty and the cases referring to the mandatory, pre-determined amount of "damages" for failure to comply with the notice of sale requirements, we find the remedy Delaney sought in section 36-9-625(c)(2) was a penalty, and either section 15-3-570 or section 15-3-540(2) applied.

⁴ The court noted that under the revision of 2001, a secured party's liability under section 36-9-625(c)(2) is limited to one penalty "with respect to any one secured transaction." *Id.*

First Financial sent the notice of sale on May 2, 2008, and sold the vehicle on December 15, 2008. Delaney filed this action in October 2011. Under section 15-3-570, providing a one-year statute of limitations, Delaney's action is clearly barred. Under section 15-3-540(2), providing a three-year statute of limitations, whether the action is barred depends on when the action accrued.

II. Date of Accrual

Delaney argues the trial court erred in finding the cause of action accrued when the notice of sale was received rather than on the date of the sale of the collateral. We disagree.

Under the three-year statute of limitations, Delaney's complaint was untimely filed unless the accrual date is the date First Financial sold the vehicle rather than the date of the notice of sale. However, like the trial court, we need not decide whether section 15-3-570 or section 15-3-540(2) applied because we find the accrual date is the date the notice of sale was received, and Delaney failed to timely serve and file his complaint under either statute of limitations.

As to section 15-3-570, the statute specifically provides the action "must be commenced within one year after the commission of the offense." S.C. Code Ann. § 15-3-570 (2005). The offense alleged in this case is insufficient notice of sale. As noted by the trial court, "this date . . . coincide[s] with the date on which [Delaney] either knew or should have known that a violation had occurred."

Regarding section 15-3-540(2), the statute is silent as to a date of accrual. To interpret this section for the present case, we must apply the rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck (VIN # JM2UF1132N0294812)*, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *Corbin v. Carlin*, 366 S.C. 187, 193, 620 S.E.2d 745, 749 (Ct. App.

2005) (quoting *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)).

Delaney's complaint alleges violations of the notice required prior to the disposition of goods in a consumer goods transaction. See S.C. Code Ann. § 36-9-611(b) (2003) (requiring notification prior to disposition of collateral); S.C. Code Ann. § 36-9-614 (2003) (providing specific requirements for a notification). His right to recovery for a violation of the required notice arises under section 36-9-625(c)(2). The cause of action depends on a specific act of non-compliance by the creditor. Even under the discovery rule, the date of the notice of sale would be the date of discovery of the cause of action for a failure to comply with the UCC regarding the notice. We find the legislature did not intend to impose a different date for the statute of limitation to accrue. See *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

The dissent maintains section 15-3-540(2)'s three-year statute of limitations did not begin to run until First Financial disposed of the collateral in December 2008 because a secured party must provide reasonable notice of sale only if it disposes of the collateral. According to the dissent, "the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral." Further, the dissent maintains if the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b), and if a secured party sends unreasonable notice to a debtor but subsequently fails to dispose of the collateral, it has not failed to comply with section 36-9-611(b). In support of its position that a secured party must provide reasonable notice only if it disposes of the collateral, the dissent cites Official Comment eight to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." We respectfully disagree with the dissent's interpretation of section 36-9-611(b) and determination of the date the three-year statute of limitations began to run.

We believe the statute of limitations begins to run when the secured party sends noncompliant notice to the debtor, not when the secured party disposes of the collateral. Initially, we note section 36-9-625 provides several remedies for noncompliance with the notice requirement. Among them, the statute provides, "[i]f it is established that a secured party is not proceeding in accordance with this

chapter, a court may order or restrain . . . disposition of collateral on appropriate terms and conditions." §36-9-625(a). It is clear a party must be able to state a cause of action in order to request a court restrain disposition of the collateral. Therefore, if Delaney could have asked a court to restrain disposition of his collateral, his cause of action must have arisen upon his receipt of the noncompliant notice. *See Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000) ("Statutes should be construed in light of their intended purposes, and in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole.").

Further, we believe the Official Comments to section 36-9-611 and 36-9-625(c)(2) supports our conclusions. First, Comment two to section 36-9-611 provides, "This 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." (emphasis added). Comment two does not state that the secured party must actually dispose of the collateral to be required to send reasonable notification; it simply requires that the secured party "wish" to dispose of the collateral. Based on our reading of Comments two and eight to section 36-9-611, we believe after the secured party gives notice, the secured party can elect not to dispose of the property; however, if the secured party initially wishes to dispose of the property, the secured party must provide appropriate notice. Therefore, we do not believe that disposition of the collateral is a prerequisite to being penalized for failing to give reasonable notice.

In addition, Official Comment four to the penalty provision, section 36-9-625(c)(2), states the penalty "is designed to ensure that every noncompliance with the requirements of Part 6 [§§ 36-9-601 to -629 (2003 & Supp. 2015)] in a consumer-goods transaction results in liability, regardless of any injury that may have resulted." Because an injury is not required for a secured party to be liable for failing to comply with the notice requirement, the statute of limitations can begin to run before the secured party injures the debtor by disposing of the collateral in a commercially unreasonable manner.

Accordingly, we believe section 15-3-540(2)'s three-year statute of limitations began to run in May 2008 when Respondent received the notice of sale from First Financial. *See generally Rashaw v. United Consumers Credit Union*, 685 F.3d 739, 744 (8th Cir. 2012) ("[W]e agree that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.");

Erdmann v. Rants, 442 N.W.2d 441, 444 (N.D. 1989) (explaining the penalty available for failure to comply with the notice of sale requirements exists regardless of whether a commercially reasonable sale is held and regardless of whether the debtor sustained a loss).

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.⁵

LOCKEMY, C.J., concurs.

THOMAS, J., concurring in part, dissenting in part: I concur with the majority's conclusion that the statute of limitations found in section 36-2-725(1) of the South Carolina Code (2003) does not apply to Appellant's claims. However, I respectfully dissent and would reverse because a three-year statute of limitations applies to Appellant's claims and Appellant filed this action within three years of the date Respondent disposed of the collateral, which, I believe, is when the statute of limitations began to run.

Under section 15-3-540(2), the statute of limitations is three years for "[a]n action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation." By its plain language, this section's three-year statute of limitations applies to actions seeking recovery of a statutory penalty when only the aggrieved party can bring the action for the penalty.

In this case, Appellant brought his action to recover the statutory penalty found in section 36-9-625(c)(2) of the South Carolina Code (2003). This section allows only the "debtor or a secondary obligor at the time a secured party failed to comply" to recover the statutory penalty. Thus, Appellant was the only person who could have brought an action to recover the statutory penalty because he was the debtor at the time Respondent allegedly failed to provide reasonable notice of disposition of the collateral. Because Appellant, as the aggrieved party, was the only person who could have brought the action, section 15-3-540(2) provided the

⁵ We decide this case without oral argument pursuant to Rule 215, SCACR.

applicable statute of limitations. Accordingly, the statute of limitations for Appellant's action was three years.

Finding the applicable statute of limitations was three years, we must next consider when the statute began to run. I respectfully disagree with the majority's finding that the statute of limitations began to run when Respondent sent the allegedly unreasonable notice in May 2008.

Section 36-9-625(c)(2) provides "a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover" a statutory penalty for the failure to comply. The debtor can recover this penalty only if the secured party fails to comply. Under section 36-9-611(b) of the South Carolina Code (2003), "a secured party that disposes of collateral under [s]ection 36-9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition." Appellant's claim is that Respondent failed to comply with the notice requirement and, thus, Appellant is entitled to recover the statutory penalty found in section 36-9-625(c)(2) because of that failure to comply.

In my view, based on the plain language of section 36-9-611(b), the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral. Section 36-9-611(b) requires "a secured party *that disposes of collateral*" to provide reasonable notice. (emphasis added). Based on this plain language, a secured party must provide reasonable notice only if it disposes of the collateral. If the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b). Thus, if a secured party sends an unreasonable notice to a debtor but subsequently fails, for whatever reason, to dispose of the collateral, it has not failed to comply with section 36-9-611(b). And the debtor who receives an unreasonable notice cannot bring an action to recover the statutory penalty if the secured party never disposed of the collateral because the statutory penalty is authorized only if the secured party failed to comply with section 36-9-611(b). As noted above, the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

This conclusion is supported by the official comments to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." Thus, this comment contemplates that a secured party may send a revised notification in order to comply with the notice

requirement in section 36-9-611(b). If a secured party sent an unreasonable notice to a debtor and subsequently, but prior to disposition, sent a reasonable second notice, the secured party would be in compliance with section 36-9-611, and the debtor would not have an action to recover the statutory penalty based on a failure to comply. Additionally, comment eight contemplates that a secured party may send a notification and later decide not to dispose of the collateral in which case the secured party would not have failed to comply with section 36-9-611(b), and the debtor could not recover the statutory penalty under section 36-9-625(c)(2).

This conclusion is further supported by examination of the purpose underlying the notice requirement, which is, in part, to allow the debtor to see that the sale is conducted in a commercially reasonable manner. *See Brockbank v. Best Capital Corp.*, 341 S.C. 372, 384, 534 S.E.2d 688, 695 (2000) ("The purpose of the notice is to allow the debtor to discharge the debt and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner."). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, the purpose of the notice requirement is accomplished because the debtor received a reasonable notice and can see the sale is conducted in a commercially reasonable manner. Therefore, the purpose underlying the notice requirement supports the conclusion that the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

Furthermore, this conclusion is supported by examination of the purpose underlying the statutory penalty. The penalty is necessary to motivate secured parties to comply with the code's provisions. *See id.* at 385, 534 S.E.2d at 695 ("The statutory penalty is evidence of the legislature's recognition that the small amount of compensatory damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the [c]ode's provisions." (brackets removed)). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, imposing the statutory penalty based on the initial unreasonable notice would not serve the penalty's purpose because the secured party would have ultimately complied with the notice requirement.

The majority contends Appellant's cause of action "must have arisen upon his receipt" of the unreasonable notice because section 36-9-625(a) allows a party to request the circuit court to restrain disposition of the collateral, presumably through an injunction, if the "secured party is not proceeding in accordance with this chapter." Because section 36-9-625(c)(2) is a statutory penalty, it is available

only in the specific circumstances prescribed by the statute. *See State ex rel. Callison v. Nat'l Linen Serv. Corp.*, 225 S.C. 232, 234, 81 S.E.2d 342, 343 (1954) ("The prime rule requires strict construction of a statutory provision which would work a forfeiture or inflict a penalty."); *King v. Atl. Coast Line R.R. Co.*, 86 S.C. 510, 513, 68 S.E. 769, 770 (1910) (noting a statutory penalty "is the creature of the statute, and comes into existence when all statutory conditions exist, and not otherwise"). As discussed above, the penalty in section 36-9-625(c)(2) is available only when a secured party fails to comply. Alternatively, the statute providing for the possibility of an injunction does not require a failure to comply; rather an injunction is available at any time a secured party is not proceeding in accordance with Article Nine. Because the legislature used different language in sections 36-9-625(a) and 36-9-625(c)(2) to express when each remedy is available to a debtor, we must assume the legislature intended to draw a distinction between the two remedies. *See Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.").

Thus, the monetary penalty in section 36-9-625(c)(2) and the injunction in section 36-9-625(a) have different thresholds for applicability, and they are not necessarily available to a debtor at the same time. As a result, even if we assume, due to the possibility of an injunction, a cause of action or right arises when a secured party sends an unreasonable notice, such an assumption does not lead automatically to the conclusion, as found by the majority, that the monetary penalty is also available when a secured party sends an unreasonable notice.

Accordingly, I would find a debtor does not have a cause of action to recover the statutory penalty based on a secured party failing to provide reasonable notice as required by section 36-9-611(b) until the secured party disposes of the collateral. As a result, the statute of limitations would not begin to run until the secured party disposes of the collateral. *See Walsh v. Woods*, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) ("In analyzing a limitations defense, the fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. Thus, a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it." (citations and internal quotation marks omitted) (brackets removed)).

Here, Respondent could not have failed to comply with section 36-9-611(b) until it disposed of the collateral without providing reasonable notice, and Appellant could not have brought an action to recover the statutory penalty based on a failure to comply until Respondent disposed of the collateral. Thus, the statute of limitations

began to run in December 2008 when Respondent disposed of the collateral. Appellant filed this action in October 2011, which was within the applicable three-year statute of limitations, and I would find the circuit court erred by dismissing Appellant's complaint.

The Supreme Court of South Carolina

Re: Hurricane Matthew

ORDER

On October 4, 2016, the Governor of South Carolina directed the closure of State, County and Municipal Government Offices in twenty-six counties in South Carolina from October 5 through October 7, 2016.¹ This action was taken to facilitate the planned evacuations necessary due to Hurricane Matthew. As the administrative head of the Unified Judicial System in South Carolina, the Chief Justice directed all levels of the Judicial System to comply with this closure.

Subsequently, the Governor issued Executive Orders providing for evacuations in Jasper, Beaufort, Colleton, Charleston, Dorchester, Berkeley, Georgetown and Horry Counties.² Several hundred thousand South Carolina citizens evacuated these areas, and the impacts of these evacuations were felt in counties which were not subject to any closure or evacuation. Further, Hurricane Matthew caused significant damage in South Carolina, and this will adversely affect the ability of many lawyers and litigants to comply with deadlines in court proceedings through the end of this week.

Accordingly, this Court finds it appropriate to declare the days of Wednesday, October 5, 2016, though Friday, October 14, 2016, to be statewide "holidays" for the purposes of computing time under Rule 263 of the South Carolina Appellate Court Rules, Rule 6 of the South Carolina Rules Civil Procedure, Rule 35 of the South Carolina Rules of Criminal Procedure, and Rule 3 of the South Carolina Rules of Magistrates Court.³

s/Costa M. Pleicones C.J.

s/Donald W. Beatty J.

s/John W. Kittredge J.

s/Kaye G. Hearn J.

s/John Cannon Few J.

Columbia, South Carolina
October 10, 2016

¹ Executive Order 2016-29.

² Executive Orders 2016-31, - 32 and -33.

³ Monday, October 10, 2016, is already a holiday under these rules since it is a federal holiday.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
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POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 19, 2016

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Otha Delaney v. First Financial
Lower Court Case No. 2011CP0707166
Appellate Case No. 2014-000824

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire

Exhibit 3

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442
Submitted March 1, 2016 – Filed September 28, 2016

AFFIRMED

Philip L. Fairbanks, of Beaufort, for Appellant.

Stephen L. Brown, Russell G. Hines, and Perry M.
Buckner, IV, all of Young Clement Rivers, of
Charleston, for Respondent.

SHORT, J.: Otha Delaney appeals the trial court's grant of First Financial of Charleston, Inc.'s motion to dismiss his class action complaint for damages and equitable relief under the Uniform Commercial Code (UCC), alleging the court erred in (1) dismissing the complaint as time-barred by applying the incorrect

statute of limitations,¹ and (2) determining the date the statute of limitations began to run. We affirm.

On October 12, 2007, Delaney entered into a Retail Installment Contract (the Contract) to purchase a truck from Coliseum Motors. The Contract was assigned to First Financial, making it a secured party under the UCC. After Delaney failed to make payments, First Financial repossessed the vehicle. On May 2, 2008, First Financial sent Delaney a "Notice of Private Sale of Collateral" (notice of sale) advising Delaney of its intention to sell the vehicle. On December 15, 2008, First Financial sold the vehicle.

On October 4, 2011, Delaney, as a putative member of a class, filed this class action, alleging (1) the notice of sale was insufficient under the UCC, and (2) he was entitled to relief under section 36-9-625 of the South Carolina Code (2003) (providing remedies for a secured party's failure to comply with the UCC). Delaney sought recovery on behalf of the class members.

First Financial moved to dismiss, arguing Delaney's claim was barred under the one-year statute of limitations applicable for statutory penalties set forth in South Carolina Code § 15-3-570 (2005) (providing a one-year statute of limitations for actions based on a statute for a penalty). Delaney filed a response to the motion to dismiss, arguing the claim was not a statutory penalty, but it was a remedial claim for damages under section 36-9-625. Delaney argued that because the claim is remedial, the UCC's six-year statute of limitations in section 36-2-725(1) (2003) of the South Carolina Code governing breaches of contract for the sale of goods applied. In the alternative, Delaney argued if the recovery is a penalty rather than a compensable remedy, the action is governed by the three-year statute of limitations provided in South Carolina Code section 15-3-540(2) (2005) (applying to "[a]n action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation").

At a hearing on its motion to dismiss, First Financial argued the action was for a penalty because no contract was alleged to have been breached; there was no plea for compensatory damages; the complaint did not allege a tort; and the plea for

¹ We combine Delaney's second and third issues and address them as the first issue.

relief consisted of the finance charge and ten percent of the principal amount under the Contract. According to First Financial, such a plea was governed by the one-year statute of limitations provided for in section 15-3-570, which would be triggered by the "commission of the offense." First Financial also argued Delaney's claim was time-barred under the three-year statute of limitations, which was triggered by the issuance of the notice of sale.

Delaney argued neither the one-year nor the three-year statute of limitations applied, and even if the three-year statute of limitations in section 15-3-540(2) applied, the time had not expired at the time of the filing because the statute would have been triggered "not when the letter [was] received[, but] . . . only when the collateral was disposed of." Delaney maintained that setting minimum statutory damages of ten percent of the contract plus finance charges ensures compliance by creditors and "that[,] in and of itself doesn't turn it into a penalty because it is clearly a substitute for actual damages."

In an order filed April 30, 2013, the trial court granted the motion to dismiss. The court found Delaney's sole cause of action was a statutory penalty because it requested the finance charge and ten percent of the principal amount of the obligation, which is the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2). Noting the Official Comment 4 to section 36-9-625(c)(2), which provides the specific relief is to be awarded "regardless of any injury that may have resulted[,]" the court found "this fixed formula is not remedial in nature but rather serves the purpose of imposing automatic liability for 'every noncompliance.'" The trial court noted our supreme court has interpreted the same provision as a statutory penalty in several cases, and it further noted other courts have similarly classified the statutory award based on the uniform UCC model statute, upon which South Carolina based its code.

The court next rejected Delaney's argument that section 36-2-725(1) applied, which provides a six-year limitations period for a breach of contract for the sale of goods under the UCC. The court noted Delaney did not plead breach of contract; thus, section 36-2-725(1) did not apply. The court found the case concerned the sufficiency of notice prior to the disposition of collateral; thus, the case dealt "entirely with Article 9's provisions concerning secured transactions. Article 2's provisions pertaining to the sale of goods [were] wholly irrelevant." The court also found general rules of statutory construction prevented the application of the six-year limitations period. The court found the "controlling limitations period should be either S.C. Code Ann. § 15-3-570 or § 15-3-540(2), respectively one or three

years." The court noted general rules of statutory construction require a specific statute to prevail over a more general statute, and because Delaney's desired recovery was a statutory penalty, sections 15-3-570 and 15-3-540(2) spoke "more directly to the actual allegations in this lawsuit."

Finally, the court found Delaney's complaint was time-barred under either section 15-3-570 or 15-3-540(2). The court found "[w]hile either statute might be reasonably applied to this matter, the Court need not decide this inquiry as [Delaney's] cause of action accrued upon receipt of the alleged noncompliant Notice of Sale and either statute would therefore serve as a bar to . . . recovery." As to section 15-3-570,² the statute specifically states the commission of the offense serves as the date of accrual. The court found the statute began to run in May 2008 and expired in May 2009.

As to section 15-3-540(2),³ the court noted the statute did not specifically delineate a date of accrual, and it found "the alleged commission of the offense should similarly serve as the commencement of the three year statute of limitations." The court continued,

Unlike an action for actual or compensatory damages, [Delaney's] action for a penalty focuses on a specific act of non-compliance . . . that awards automatic relief. The right to bring the action and thus the proper date of accrual should be determined by the date on which that alleged noncompliance occurred. However, this date of accrual would also coincide with the date on which [Delaney] either knew or should have known that a violation had occurred.

² "An action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense." S.C. Code Ann. § 15-3-570 (2005).

³ "Within three years . . . : (2) An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation." S.C. Code Ann. § 15-3-540(2).

Furthermore, I find that the legislature intended [§§] 15-3-570 and 15-3-540 to have similar dates of accrual. Both govern actions for a statutory penalty and are nearly identical in language but for the length of the limitations period. Given that the legislature specifically enumerated the date of accrual for penalty actions under § 15-3-570 to be the date of the commission of the offense, this Court sees no logical purpose in creating an alternative date of accrual for penalty actions under § 15-3-540(2).

The court granted First Financial's motion to dismiss. After a hearing, the court denied Delaney's motion for reconsideration. This appeal followed.

ISSUES

- I. Did the trial court err in applying the statute of limitations?
- II. Did the trial court err in finding the action accrued at the time the notice of sale was received rather than at the time First Financial disposed of the collateral?

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). The appellate court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and reasonably deducible inferences in the complaint would entitle the plaintiff to relief on any theory of the case. *Id.* The court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

LAW/ANALYSIS

I. Applicable Statutes of Limitations

Delaney argues the trial court erred in finding the six-year statute of limitations in section 36-2-725 did not apply and in finding Delaney's action barred by either the limitations period provided by section 15-3-540(2) or by section 15-3-570. We disagree.

In this case, Delaney alleged he was entitled to the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2) due to First Financial's insufficient notice of sale. Section 36-9-625, found in Article 9 of the UCC, establishes remedies for a secured party's failure to comply with Article 9, providing the following:

(a) If it is established that a secured party is not proceeding in accordance with this chapter, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

* * *

[c](2) if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

S.C. Code Ann. § 36-9-625 (2003). "Article 9 of the U.C.C. does not now nor has it ever included a statute of limitations." Richard H. Nowka, *The Secured Party Fiddles While the Article 2 Statute of Limitations Clock Ticks-Why the Article 2 Statute of Limitations Should Not Apply to Deficiency Actions*, 7 Fla. St. U. Bus. Rev. 1, 2 n.4 (2008). Thus, Delaney argues the statute of limitations in Article 2 of the UCC, section 36-2-725(1) applies, providing six years. We disagree.

First, Delaney did not allege a breach of contract. Rather, Delaney alleged the violation of the notice of sale requirements, and his prayer for relief requested the statutory penalty of the finance charge and ten percent of the principal amount of the obligation under section 36-9-625(c)(2). Thus, section 36-2-725(1) did not apply because it provides as follows: "An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued." S.C.

Code Ann. § 36-2-725(1) (2003). Because Delaney did not allege a breach of contract, we agree section 36-2-725(1) did not apply. Instead, we look to Title 15 governing civil remedies.

Sections 15-3-540 and -570 provide statutes of limitations for actions upon statutes for a penalty. *See* S.C. Code Ann. § 15-3-540(2) (2005) (providing a three-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture"); S.C. Code Ann. § 15-3-570 (2005) (establishing a one-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense"). Like the trial court, we find the controlling limitations period is either section 15-3-570 or section 15-3-540(2), respectively one or three years, because Delaney sought a statutory penalty.

"As a general principle, the legislature has the authority to provide civil penalties to enforce observance of a legislative policy." *S.C. Dep't of Health & Envtl. Control v. Kennedy*, 289 S.C. 73, 76, 344 S.E.2d 859, 861 (Ct. App. 1986). A statutory penalty is defined as a penalty "an individual is allowed to recover against a wrongdoer as satisfaction for wrong or injury suffered, without reference to actual damage sustained." *Black's Law Dictionary* 1412 (6th ed. 1990). Although not addressing the statute of limitations issue, at least three South Carolina Supreme Court cases have identified the "damages" in section 36-9-625(c)(2) as a statutory penalty.

Citing the former version of section 36-9-625(c)(2), the supreme court in *Crane v. Citicorp National Services, Inc.*, 313 S.C. 70, 72, 437 S.E.2d 50, 51-52 (1993) (superseded by statute on other grounds), addressed whether co-obligors, who did not have title or right to possession of a mobile home, could recover under the penalty provision of the UCC for the creditor's failure to comply with the notice requirements. The court found the Cranes were entitled to notice. *Id.* at 74, 437 S.E.2d at 53. The court continued as follows:

If the notice provision relates to the obligation, then it would seem logical that the penalty provision for breach of the notice requirements must also be related to the obligation, and therefore, applicable to co-obligators of consumer goods security agreements. Additionally, the statutory penalty is evidence of the legislature's recognition that the small amount of compensatory

damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code's provisions.

Id. at 74-75, 437 S.E.2d at 53.

In *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 375, 534 S.E.2d 688, 690 (2000), Brockbank sued Best Capital Corp. after the repossession and sale of his mobile home, alleging, among other things, a violation of Article 9's notice provision. Best Capital admitted it had not sent notice of the sale, but it argued Article 9 did not apply to the parties' agreement because there was not a security interest. *Id.* at 377, 534 S.E.2d at 691. The court found notice was required, and stated "[i]f a secured party fails to give the required notice, a debtor may seek to recover the statutory penalty under Article 9." *Id.* at 385, 534 S.E.2d at 695 (noting the former version of section 36-9-625(c)(2), section 36-9-507(1), which embodies nearly identical language as the current version); *id.* at 384, 534 S.E.2d at 694 (concluding "the outcome in this case is largely dictated by *Crane*").

More recently, in *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 373, 595 S.E.2d 461, 463 (2004), Mr. and Mrs. Singleton filed an action based in part on the UCC, claiming Stokes Motors, Inc. failed to notify them of its intent to sell the Singletons' repossessed vehicle. Citing the former version of section 36-9-625(c)(2), the court in *Singleton* referred to the statute's "penalty" provision in finding both Singletons were entitled to recover because both were entitled to notice. *Id.* at 378, 595 S.E.2d at 466.⁴

We find no merit to Delaney's argument that our supreme court's references to the statutory penalty in these cases is the result of "loose language" and "unconsidered dictum (sic)" and the court interchangeably used the terms "compensatory damages" and "penalty" in its opinions. Based on the definition of a penalty and the cases referring to the mandatory, pre-determined amount of "damages" for failure to comply with the notice of sale requirements, we find the remedy Delaney sought in section 36-9-625(c)(2) was a penalty, and either section 15-3-570 or section 15-3-540(2) applied.

⁴ The court noted that under the revision of 2001, a secured party's liability under section 36-9-625(c)(2) is limited to one penalty "with respect to any one secured transaction." *Id.*

First Financial sent the notice of sale on May 2, 2008, and sold the vehicle on December 15, 2008. Delaney filed this action in October 2011. Under section 15-3-570, providing a one-year statute of limitations, Delaney's action is clearly barred. Under section 15-3-540(2), providing a three-year statute of limitations, whether the action is barred depends on when the action accrued.

II. Date of Accrual

Delaney argues the trial court erred in finding the cause of action accrued when the notice of sale was received rather than on the date of the sale of the collateral. We disagree.

Under the three-year statute of limitations, Delaney's complaint was untimely filed unless the accrual date is the date First Financial sold the vehicle rather than the date of the notice of sale. However, like the trial court, we need not decide whether section 15-3-570 or section 15-3-540(2) applied because we find the accrual date is the date the notice of sale was received, and Delaney failed to timely serve and file his complaint under either statute of limitations.

As to section 15-3-570, the statute specifically provides the action "must be commenced within one year after the commission of the offense." S.C. Code Ann. § 15-3-570 (2005). The offense alleged in this case is insufficient notice of sale. As noted by the trial court, "this date . . . coincide[s] with the date on which [Delaney] either knew or should have known that a violation had occurred."

Regarding section 15-3-540(2), the statute is silent as to a date of accrual. To interpret this section for the present case, we must apply the rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck (VIN # JM2UF1132N0294812)*, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *Corbin v. Carlin*, 366 S.C. 187, 193, 620 S.E.2d 745, 749 (Ct. App.

2005) (quoting *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)).

Delaney's complaint alleges violations of the notice required prior to the disposition of goods in a consumer goods transaction. *See* S.C. Code Ann. § 36-9-611(b) (2003) (requiring notification prior to disposition of collateral); S.C. Code Ann. § 36-9-614 (2003) (providing specific requirements for a notification). His right to recovery for a violation of the required notice arises under section 36-9-625(c)(2). The cause of action depends on a specific act of non-compliance by the creditor. Even under the discovery rule, the date of the notice of sale would be the date of discovery of the cause of action for a failure to comply with the UCC regarding the notice. We find the legislature did not intend to impose a different date for the statute of limitation to accrue. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

The dissent maintains section 15-3-540(2)'s three-year statute of limitations did not begin to run until First Financial disposed of the collateral in December 2008 because a secured party must provide reasonable notice of sale only if it disposes of the collateral. According to the dissent, "the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral." Further, the dissent maintains if the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b), and if a secured party sends unreasonable notice to a debtor but subsequently fails to dispose of the collateral, it has not failed to comply with section 36-9-611(b). In support of its position that a secured party must provide reasonable notice only if it disposes of the collateral, the dissent cites Official Comment eight to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." We respectfully disagree with the dissent's interpretation of section 36-9-611(b) and determination of the date the three-year statute of limitations began to run.

We believe the statute of limitations begins to run when the secured party sends noncompliant notice to the debtor, not when the secured party disposes of the collateral. Initially, we note section 36-9-625 provides several remedies for noncompliance with the notice requirement. Among them, the statute provides, "[i]f it is established that a secured party is not proceeding in accordance with this

chapter, a court may order or restrain . . . disposition of collateral on appropriate terms and conditions." §36-9-625(a). It is clear a party must be able to state a cause of action in order to request a court restrain disposition of the collateral. Therefore, if Delaney could have asked a court to restrain disposition of his collateral, his cause of action must have arisen upon his receipt of the noncompliant notice. *See Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000) ("Statutes should be construed in light of their intended purposes, and in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole.").

Further, we believe the Official Comments to section 36-9-611 and 36-9-625(c)(2) supports our conclusions. First, Comment two to section 36-9-611 provides, "This 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." (emphasis added). Comment two does not state that the secured party must actually dispose of the collateral to be required to send reasonable notification; it simply requires that the secured party "wish" to dispose of the collateral. Based on our reading of Comments two and eight to section 36-9-611, we believe after the secured party gives notice, the secured party can elect not to dispose of the property; however, if the secured party initially wishes to dispose of the property, the secured party must provide appropriate notice. Therefore, we do not believe that disposition of the collateral is a prerequisite to being penalized for failing to give reasonable notice.

In addition, Official Comment four to the penalty provision, section 36-9-625(c)(2), states the penalty "is designed to ensure that every noncompliance with the requirements of Part 6 [§§ 36-9-601 to -629 (2003 & Supp. 2015)] in a consumer-goods transaction results in liability, regardless of any injury that may have resulted." Because an injury is not required for a secured party to be liable for failing to comply with the notice requirement, the statute of limitations can begin to run before the secured party injures the debtor by disposing of the collateral in a commercially unreasonable manner.

Accordingly, we believe section 15-3-540(2)'s three-year statute of limitations began to run in May 2008 when Respondent received the notice of sale from First Financial. *See generally Rashaw v. United Consumers Credit Union*, 685 F.3d 739, 744 (8th Cir. 2012) ("[W]e agree that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.");

Erdmann v. Rants, 442 N.W.2d 441, 444 (N.D. 1989) (explaining the penalty available for failure to comply with the notice of sale requirements exists regardless of whether a commercially reasonable sale is held and regardless of whether the debtor sustained a loss).

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.⁵

LOCKEMY, C.J., concurs.

THOMAS, J., concurring in part, dissenting in part: I concur with the majority's conclusion that the statute of limitations found in section 36-2-725(1) of the South Carolina Code (2003) does not apply to Appellant's claims. However, I respectfully dissent and would reverse because a three-year statute of limitations applies to Appellant's claims and Appellant filed this action within three years of the date Respondent disposed of the collateral, which, I believe, is when the statute of limitations began to run.

Under section 15-3-540(2), the statute of limitations is three years for "[a]n action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation." By its plain language, this section's three-year statute of limitations applies to actions seeking recovery of a statutory penalty when only the aggrieved party can bring the action for the penalty.

In this case, Appellant brought his action to recover the statutory penalty found in section 36-9-625(c)(2) of the South Carolina Code (2003). This section allows only the "debtor or a secondary obligor at the time a secured party failed to comply" to recover the statutory penalty. Thus, Appellant was the only person who could have brought an action to recover the statutory penalty because he was the debtor at the time Respondent allegedly failed to provide reasonable notice of disposition of the collateral. Because Appellant, as the aggrieved party, was the only person who could have brought the action, section 15-3-540(2) provided the

⁵ We decide this case without oral argument pursuant to Rule 215, SCACR.

applicable statute of limitations. Accordingly, the statute of limitations for Appellant's action was three years.

Finding the applicable statute of limitations was three years, we must next consider when the statute began to run. I respectfully disagree with the majority's finding that the statute of limitations began to run when Respondent sent the allegedly unreasonable notice in May 2008.

Section 36-9-625(c)(2) provides "a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover" a statutory penalty for the failure to comply. The debtor can recover this penalty only if the secured party fails to comply. Under section 36-9-611(b) of the South Carolina Code (2003), "a secured party that disposes of collateral under [s]ection 36-9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition." Appellant's claim is that Respondent failed to comply with the notice requirement and, thus, Appellant is entitled to recover the statutory penalty found in section 36-9-625(c)(2) because of that failure to comply.

In my view, based on the plain language of section 36-9-611(b), the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral. Section 36-9-611(b) requires "a secured party *that disposes of collateral*" to provide reasonable notice. (emphasis added). Based on this plain language, a secured party must provide reasonable notice only if it disposes of the collateral. If the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b). Thus, if a secured party sends an unreasonable notice to a debtor but subsequently fails, for whatever reason, to dispose of the collateral, it has not failed to comply with section 36-9-611(b). And the debtor who receives an unreasonable notice cannot bring an action to recover the statutory penalty if the secured party never disposed of the collateral because the statutory penalty is authorized only if the secured party failed to comply with section 36-9-611(b). As noted above, the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

This conclusion is supported by the official comments to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." Thus, this comment contemplates that a secured party may send a revised notification in order to comply with the notice

requirement in section 36-9-611(b). If a secured party sent an unreasonable notice to a debtor and subsequently, but prior to disposition, sent a reasonable second notice, the secured party would be in compliance with section 36-9-611, and the debtor would not have an action to recover the statutory penalty based on a failure to comply. Additionally, comment eight contemplates that a secured party may send a notification and later decide not to dispose of the collateral in which case the secured party would not have failed to comply with section 36-9-611(b), and the debtor could not recover the statutory penalty under section 36-9-625(c)(2).

This conclusion is further supported by examination of the purpose underlying the notice requirement, which is, in part, to allow the debtor to see that the sale is conducted in a commercially reasonable manner. *See Brockbank v. Best Capital Corp.*, 341 S.C. 372, 384, 534 S.E.2d 688, 695 (2000) ("The purpose of the notice is to allow the debtor to discharge the debt and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner."). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, the purpose of the notice requirement is accomplished because the debtor received a reasonable notice and can see the sale is conducted in a commercially reasonable manner. Therefore, the purpose underlying the notice requirement supports the conclusion that the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

Furthermore, this conclusion is supported by examination of the purpose underlying the statutory penalty. The penalty is necessary to motivate secured parties to comply with the code's provisions. *See id.* at 385, 534 S.E.2d at 695 ("The statutory penalty is evidence of the legislature's recognition that the small amount of compensatory damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the [c]ode's provisions." (brackets removed)). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, imposing the statutory penalty based on the initial unreasonable notice would not serve the penalty's purpose because the secured party would have ultimately complied with the notice requirement.

The majority contends Appellant's cause of action "must have arisen upon his receipt" of the unreasonable notice because section 36-9-625(a) allows a party to request the circuit court to restrain disposition of the collateral, presumably through an injunction, if the "secured party is not proceeding in accordance with this chapter." Because section 36-9-625(c)(2) is a statutory penalty, it is available

only in the specific circumstances prescribed by the statute. *See State ex rel. Callison v. Nat'l Linen Serv. Corp.*, 225 S.C. 232, 234, 81 S.E.2d 342, 343 (1954) ("The prime rule requires strict construction of a statutory provision which would work a forfeiture or inflict a penalty."); *King v. Atl. Coast Line R.R. Co.*, 86 S.C. 510, 513, 68 S.E. 769, 770 (1910) (noting a statutory penalty "is the creature of the statute, and comes into existence when all statutory conditions exist, and not otherwise"). As discussed above, the penalty in section 36-9-625(c)(2) is available only when a secured party fails to comply. Alternatively, the statute providing for the possibility of an injunction does not require a failure to comply; rather an injunction is available at any time a secured party is not proceeding in accordance with Article Nine. Because the legislature used different language in sections 36-9-625(a) and 36-9-625(c)(2) to express when each remedy is available to a debtor, we must assume the legislature intended to draw a distinction between the two remedies. *See Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.").

Thus, the monetary penalty in section 36-9-625(c)(2) and the injunction in section 36-9-625(a) have different thresholds for applicability, and they are not necessarily available to a debtor at the same time. As a result, even if we assume, due to the possibility of an injunction, a cause of action or right arises when a secured party sends an unreasonable notice, such an assumption does not lead automatically to the conclusion, as found by the majority, that the monetary penalty is also available when a secured party sends an unreasonable notice.

Accordingly, I would find a debtor does not have a cause of action to recover the statutory penalty based on a secured party failing to provide reasonable notice as required by section 36-9-611(b) until the secured party disposes of the collateral. As a result, the statute of limitations would not begin to run until the secured party disposes of the collateral. *See Walsh v. Woods*, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) ("In analyzing a limitations defense, the fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. Thus, a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it." (citations and internal quotation marks omitted) (brackets removed)).

Here, Respondent could not have failed to comply with section 36-9-611(b) until it disposed of the collateral without providing reasonable notice, and Appellant could not have brought an action to recover the statutory penalty based on a failure to comply until Respondent disposed of the collateral. Thus, the statute of limitations

began to run in December 2008 when Respondent disposed of the collateral. Appellant filed this action in October 2011, which was within the applicable three-year statute of limitations, and I would find the circuit court erred by dismissing Appellant's complaint.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Otha Delaney, ... Appellant,

v.

First Financial of Charleston, Inc., ... Respondent.

RECEIVED

OCT 20 2016

SC Court of Appeals

Appellate Case No. 2014-000824

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442

Submitted March 1, 2016 – Filed September 28, 2016

MOTION FOR EXTENSION OF TIME
TO FILE MOTION FOR REHEARING

The appellant, Otha Delaney, pursuant to Rule 263(b), SCACR, moves the court to extend the time for filing a motion for rehearing by appellant by fifteen (15) days. In support of the motion, the appellant shows the following to the Court:

1. Due to Hurricane Matthew, appellant's counsel requires additional time to draft an adequate motion for rehearing and supporting memorandum.
2. Although the Court's decision was apparently received in counsel's office on the afternoon of Friday, September 30, 2016, counsel was out of the state and did not personally receive a copy of the decision until the following Monday, October 3, 2016, as the hurricane bore down on Beaufort County, causing delays and interruptions in counsel's travel plans to return to the state.
3. Prior to his return home, Counsel and his wife (as well as his staff) were subject to mandatory evacuation orders effective on October 5, 2016, for Beaufort County. Reentry to Beaufort County was prohibited until October 11, 2016, at the earliest. Much of Beaufort County remained inaccessible for several more days.

Exhibit 4

4. Members of counsel's staff were without electrical power and/or water, or both, until the end of the week of October 10, 2016, at the earliest. Counsel's office lacked electrical power until approximately October 12, 2016, and, because of the necessity of replacing technology equipment, lacked reliable internet service until approximately October 14, 2016.

5. Counsel's home, and the homes of members of counsel's staff, needed repairs, mud and water removal, and clean-up, which required substantial personal time and effort up to and including this past weekend, in some cases despite the lack of power, water, and other necessities.

6. Although Appellant's counsel has endeavored to complete Appellant's motion for rehearing in a timely fashion, the lack of basic resources has made doing so impossible. As a result, counsel seeks a fifteen (15) day extension to file and serve the motion.

7. Counsel does not believe that the requested extension will prejudice the Appellee.

WHEREFORE, the appellant, by counsel, respectfully submits that good cause exists for the Court to extend the time for filing the Appellant's motion for rehearing by fifteen (15) days, which, with the extension, would allow the Appellant through and including November 1, 2016, to file and serve the motion.

Respectfully Submitted,

PHILIP FAIRBANKS, ESQ., P.C.

Philip Fairbanks SC Bar # 1943

1214 King Street

Beaufort, South Carolina 29902

Telephone: (843) 521-1580

Telefax: (843) 521-1590

E-mail: chris@lowcountrybankruptcy.com

Beaufort, South Carolina

October 18, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Otha Delaney, ... Appellant,

v.

First Financial of Charleston, Inc., ... Respondent.

RECEIVED

OCT 20 2016

SC Court of Appeals

Appellate Case No. 2014-000824

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442

Submitted March 1, 2016 — Filed September 28, 2016

PROOF OF SERVICE

I certify that I have served the foregoing Motion for Extension of Time to File Motion for Rehearing on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2016, addressed to:

Stephen L. Brown, Esq.
Russell G. Hines, Esq.
Perry M. Buckner, IV, Esq.
YOUNG CLEMENT RIVERS, LLP
25 Calhoun St, Suite 400
Charleston, SC 29401

its attorneys of record.

PHILIP FAIRBANKS, ESQ., P.C.

Philip Fairbanks SC Bar ID # 1943
1214 King Street
Beaufort, SC 29902
Telephone: (843) 521-1580
Telefax: (843) 521-1590
Attorney for the Appellant

Exhibit 4

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Otha Delaney, ... Appellant,

v.

First Financial of Charleston, Inc., ... Respondent.

Appellate Case No. 2014-000824

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442
Submitted March 1, 2016 – Filed September 28, 2016

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TO FILE MOTION FOR REHEARING

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SC Court of Appeals

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5. Counsel's home, and the homes of members of counsel's staff, needed repairs, mud and water removal, and clean-up, which required substantial personal time and effort up to and including this past weekend, in some cases despite the lack of power, water, and other necessities.

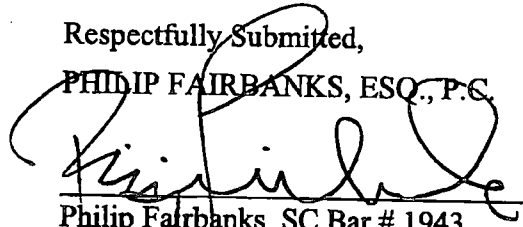
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7. Counsel does not believe that the requested extension will prejudice the Appellee.

WHEREFORE, the appellant, by counsel, respectfully submits that good cause exists for the Court to extend the time for filing the Appellant's motion for rehearing by fifteen (15) days, which, with the extension, would allow the Appellant through and including November 1, 2016, to file and serve the motion.

Respectfully Submitted,

PHILIP FAIRBANKS, ESQ., P.C.



Philip Fairbanks SC Bar # 1943

1214 King Street

Beaufort, South Carolina 29902

Telephone: (843) 521-1580

Telefax: (843) 521-1590

E-mail: chris@lowcountrybankruptcy.com

Beaufort, South Carolina

October 18, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Otha Delaney, ... Appellant,

v.

First Financial of Charleston, Inc., ... Respondent.

Appellate Case No. 2014-000824

Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442
Submitted March 1, 2016 – Filed September 28, 2016

PROOF OF SERVICE

I certify that I have served the foregoing Motion for Extension of Time to File Motion for Rehearing on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2016, addressed to:

Stephen L. Brown, Esq.
Russell G. Hines, Esq.
Perry M. Buckner, IV, Esq.
YOUNG CLEMENT RIVERS, LLP
25 Calhoun St, Suite 400
Charleston, SC 29401

its attorneys of record.

PHILIP FAIRBANKS, ESQ., P.C.

Philip Fairbanks, SC Bar ID # 1943
1214 King Street
Beaufort, SC 29902
Telephone: (843) 521-1580
Telefax: (843) 521-1590
Attorney for the Appellant

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OCT 20 2016

SC Court of Appeals

Exhibit 4

Philip L. Fairbanks, Esq., P.C.

Attorneys at Law

1214 King Street, Beaufort, SC 29902
Phone 843.521.1580 / Fax 843.521.1590
mail@LowcountryBankruptcy.com
www.LowcountryBankruptcy.com

October 18, 2016

Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
OCT 20 2016
SC Court of Appeals

Re: *Otha Delaney v. First Financial of Charleston, Inc.*, App. Case No.: 2014-000824
Opinion No.: 5442 September 28, 2016

Dear Ms. Kitchings:

Enclosed for filing with the Court, please find the original and six copies of:

1. Appellant's Motion for Extension of Time to File Motion for Rehearing on behalf of Otha Delaney; and,
2. Proof of Service on counsel for First Financial of Charleston, Inc.,

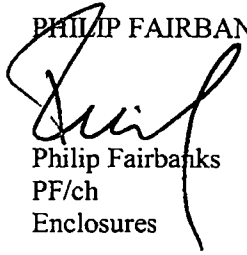
along with six (6) copies of each, in compliance with Rules 224 and 263 of the S.C. Appellate Court Rules. Also enclosed is my law firm's check for the filing fee in the amount of \$25.00.

I would be grateful for your acknowledgement of receipt by your office of these documents, either by mail or e-mail, at the addresses provided above.

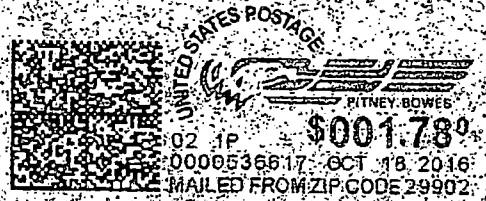
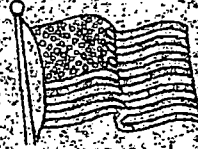
With warm regards, I am,

Sincerely,

PHILIP FAIRBANKS, ESQ., P.C.


Philip Fairbanks
PF/ch
Enclosures

FIRM



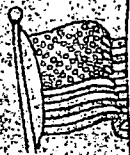
Jenny Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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OCT 20 2016
SC Court of Appeals

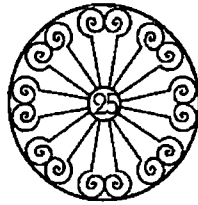


Exhibit 4

FAIRBANKS LAW FIRM
1214 KING STREET
BEAUFORT SC 29902



Jenny Kitching
Clerk of Court
SC Court of Appeals
PO Box 11629
Columbia, SC 29



YCR LAW
Young Clement Rivers, LLP

Russell G. Hines
Partner

Direct Dial: (843) 720-5488
Direct Fax: (843) 579-1327
E-mail: RHines@ycrlaw.com

October 28, 2016

VIA U.S. MAIL & FACSIMILE

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Otha Delaney v. First Financial of Charleston, Inc.
Appellate Case No.: 2014-000824
Trial Court Case No.: 2011-CP-10-7166
YCR File No.: 14768-20110934

Dear Ms. Kitchings:

Our law firm represents Respondent First Financial of Charleston, Inc., in the above-referenced matter, which the Court decided by opinion filed September 28, 2016, affirming the trial court's dismissal of Appellant's suit against Respondent. We are in receipt of Appellant's Motion for Extension of Time to File Motion for Rehearing (the "Motion"), dated October 18, 2016, which, it appears, the Court received on October 20, 2016;¹ however, because the Court remitted the case to the trial court on October 19, 2016, it is our understanding that this appeal has been finally disposed of, there is no longer appellate jurisdiction over the matter, and the Motion cannot be heard. Wise v. S.C. Dep't of Corrections, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) ("When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court.") (internal citations omitted). To the extent that our understanding is incorrect and this Matter can be heard, please let us know, and Respondent will submit a formal return to the Motion; moreover, in light of Respondent's obvious interest in the conclusion of this matter in its favor, we are compelled to make clear that Respondent does not consent to the Motion or to recall of the remittitur and reserves all rights in furtherance of its position that this matter has been concluded with finality.

¹ The deadline for the Court to have received a petition for rehearing was Monday, October 17, 2016. See Opinion No. 5442 (filed September 28, 2016); Rule 221(a) and (b), SCACR; Rule 263(a) and (b), SCACR; S.C. Sup. Ct. Order No. 2016-10-10-01 ("Re: Hurricane Matthew").

VIA U.S. MAIL & FACSIMILE
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
October 28, 2016
Page 2 of 2

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP



Russell G. Hines
Partner

RGH/kbb

cc: Graham E. Hawkins, III, Esquire (via U.S. Mail and email)
Philip L. Fairbanks, Esquire (via U.S. Mail and email)

The South Carolina Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

The Honorable Stephanie P. McDonald
Charleston County
Trial Court Case No. 2011CP0707166

ORDER

This Court's remittitur was sent to the Clerk of Charleston County on October 19, 2016. It is now necessary for this Court to recall the remittitur. The Clerk of Charleston County is directed to return the remittitur to the Clerk of the South Carolina Court of Appeals within ten days of the date of this order.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:

Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire
Julie J. Armstrong

FILED

Nov. 2, 2016 AS

Exhibit 6

The South Carolina Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

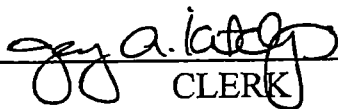
The Honorable Stephanie P. McDonald
Charleston County
Trial Court Case No. 2011CP0707166

ORDER

The time for serving and filing the appellant's petition for rehearing is hereby extended until November 18, 2016, the date on which the petition for rehearing must be received by the Court.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

cc:

Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire

FILED

11/3/16 As

Exhibit 7



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

October 19, 2016

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Otha Delaney v. First Financial ¹⁰
Lower Court Case No. 2011CP0707166
Appellate Case No. 2014-000824

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire

FILED
2016 OCT 21 AM 11:54
JULIE J. ARMSTRONG
CLERK OF COURT

Exhibit 8

remittitur
on 11/8/16

2011-CP-10-7166

The South Carolina Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

The Honorable Stephanie P. McDonald
Charleston County
Trial Court Case No. 2011CP0707166

RECEIVED

NOV 14 2016

SC Court of Appeals

FILED
2016 NOV -4 PM 2:50
CLERK OF COURT

ORDER

This Court's remittitur was sent to the Clerk of Charleston County on October 19, 2016. It is now necessary for this Court to recall the remittitur. The Clerk of Charleston County is directed to return the remittitur to the Clerk of the South Carolina Court of Appeals within ten days of the date of this order.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:
Philip L. Fairbanks, Esquire
Stephen Lynwood Brown, Esquire
Perry McPherson Buckner, IV, Esquire
Russell Grainger Hines, Esquire
Julie J. Armstrong

FILED

Nov. 2, 2016 AS

Exhibit 8

2011-CP-10-7166

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 14 2016

SC Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5442

Submitted March 1, 2016 – Filed September 28, 2016

AFFIRMED

Philip L. Fairbanks, of Beaufort, for Appellant.

Stephen L. Brown, Russell G. Hines, and Perry M.
Buckner, IV, all of Young Clement Rivers, of
Charleston, for Respondent.

SHORT, J.: Otha Delaney appeals the trial court's grant of First Financial of Charleston, Inc.'s motion to dismiss his class action complaint for damages and equitable relief under the Uniform Commercial Code (UCC), alleging the court erred in (1) dismissing the complaint as time-barred by applying the incorrect

Exhibit 8

statute of limitations,¹ and (2) determining the date the statute of limitations began to run. We affirm.

On October 12, 2007, Delaney entered into a Retail Installment Contract (the Contract) to purchase a truck from Coliseum Motors. The Contract was assigned to First Financial, making it a secured party under the UCC. After Delaney failed to make payments, First Financial repossessed the vehicle. On May 2, 2008, First Financial sent Delaney a "Notice of Private Sale of Collateral" (notice of sale) advising Delaney of its intention to sell the vehicle. On December 15, 2008, First Financial sold the vehicle.

On October 4, 2011, Delaney, as a putative member of a class, filed this class action, alleging (1) the notice of sale was insufficient under the UCC, and (2) he was entitled to relief under section 36-9-625 of the South Carolina Code (2003) (providing remedies for a secured party's failure to comply with the UCC). Delaney sought recovery on behalf of the class members.

First Financial moved to dismiss, arguing Delaney's claim was barred under the one-year statute of limitations applicable for statutory penalties set forth in South Carolina Code § 15-3-570 (2005) (providing a one-year statute of limitations for actions based on a statute for a penalty). Delaney filed a response to the motion to dismiss, arguing the claim was not a statutory penalty, but it was a remedial claim for damages under section 36-9-625. Delaney argued that because the claim is remedial, the UCC's six-year statute of limitations in section 36-2-725(1) (2003) of the South Carolina Code governing breaches of contract for the sale of goods applied. In the alternative, Delaney argued if the recovery is a penalty rather than a compensable remedy, the action is governed by the three-year statute of limitations provided in South Carolina Code section 15-3-540(2) (2005) (applying to "[a]n action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation").

At a hearing on its motion to dismiss, First Financial argued the action was for a penalty because no contract was alleged to have been breached; there was no plea for compensatory damages; the complaint did not allege a tort; and the plea for

¹ We combine Delaney's second and third issues and address them as the first issue.

relief consisted of the finance charge and ten percent of the principal amount under the Contract. According to First Financial, such a plea was governed by the one-year statute of limitations provided for in section 15-3-570, which would be triggered by the "commission of the offense." First Financial also argued Delaney's claim was time-barred under the three-year statute of limitations, which was triggered by the issuance of the notice of sale.

Delaney argued neither the one-year nor the three-year statute of limitations applied, and even if the three-year statute of limitations in section 15-3-540(2) applied, the time had not expired at the time of the filing because the statute would have been triggered "not when the letter [was] received[, but] . . . only when the collateral was disposed of." Delaney maintained that setting minimum statutory damages of ten percent of the contract plus finance charges ensures compliance by creditors and "that[,] in and of itself doesn't turn it into a penalty because it is clearly a substitute for actual damages."

In an order filed April 30, 2013, the trial court granted the motion to dismiss. The court found Delaney's sole cause of action was a statutory penalty because it requested the finance charge and ten percent of the principal amount of the obligation, which is the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2). Noting the Official Comment 4 to section 36-9-625(c)(2), which provides the specific relief is to be awarded "regardless of any injury that may have resulted[.]" the court found "this fixed formula is not remedial in nature but rather serves the purpose of imposing automatic liability for 'every noncompliance.'" The trial court noted our supreme court has interpreted the same provision as a statutory penalty in several cases, and it further noted other courts have similarly classified the statutory award based on the uniform UCC model statute, upon which South Carolina based its code.

The court next rejected Delaney's argument that section 36-2-725(1) applied, which provides a six-year limitations period for a breach of contract for the sale of goods under the UCC. The court noted Delaney did not plead breach of contract; thus, section 36-2-725(1) did not apply. The court found the case concerned the sufficiency of notice prior to the disposition of collateral; thus, the case dealt "entirely with Article 9's provisions concerning secured transactions. Article 2's provisions pertaining to the sale of goods [were] wholly irrelevant." The court also found general rules of statutory construction prevented the application of the six-year limitations period. The court found the "controlling limitations period should be either S.C. Code Ann. § 15-3-570 or § 15-3-540(2), respectively one or three

years." The court noted general rules of statutory construction require a specific statute to prevail over a more general statute, and because Delaney's desired recovery was a statutory penalty, sections 15-3-570 and 15-3-540(2) spoke "more directly to the actual allegations in this lawsuit."

Finally, the court found Delaney's complaint was time-barred under either section 15-3-570 or 15-3-540(2). The court found "[w]hile either statute might be reasonably applied to this matter, the Court need not decide this inquiry as [Delaney's] cause of action accrued upon receipt of the alleged noncompliant Notice of Sale and either statute would therefore serve as a bar to . . . recovery." As to section 15-3-570,² the statute specifically states the commission of the offense serves as the date of accrual. The court found the statute began to run in May 2008 and expired in May 2009.

As to section 15-3-540(2),³ the court noted the statute did not specifically delineate a date of accrual, and it found "the alleged commission of the offense should similarly serve as the commencement of the three year statute of limitations." The court continued,

Unlike an action for actual or compensatory damages, [Delaney's] action for a penalty focuses on a specific act of non-compliance . . . that awards automatic relief. The right to bring the action and thus the proper date of accrual should be determined by the date on which that alleged noncompliance occurred. However, this date of accrual would also coincide with the date on which [Delaney] either knew or should have known that a violation had occurred.

² "An action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense." S.C. Code Ann. § 15-3-570 (2005).

³ "Within three years . . . : (2) An action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation." S.C. Code Ann. § 15-3-540(2).

Furthermore, I find that the legislature intended [§§] 15-3-570 and 15-3-540 to have similar dates of accrual. Both govern actions for a statutory penalty and are nearly identical in language but for the length of the limitations period. Given that the legislature specifically enumerated the date of accrual for penalty actions under § 15-3-570 to be the date of the commission of the offense, this Court sees no logical purpose in creating an alternative date of accrual for penalty actions under § 15-3-540(2).

The court granted First Financial's motion to dismiss. After a hearing, the court denied Delaney's motion for reconsideration. This appeal followed.

ISSUES

- I. Did the trial court err in applying the statute of limitations?
- II. Did the trial court err in finding the action accrued at the time the notice of sale was received rather than at the time First Financial disposed of the collateral?

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). The appellate court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and reasonably deducible inferences in the complaint would entitle the plaintiff to relief on any theory of the case. *Id.* The court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

LAW/ANALYSIS

- I. **Applicable Statutes of Limitations**

Delaney argues the trial court erred in finding the six-year statute of limitations in section 36-2-725 did not apply and in finding Delaney's action barred by either the limitations period provided by section 15-3-540(2) or by section 15-3-570. We disagree.

In this case, Delaney alleged he was entitled to the statutorily-mandated award for a violation of the notice provision pursuant to section 36-9-625(c)(2) due to First Financial's insufficient notice of sale. Section 36-9-625, found in Article 9 of the UCC, establishes remedies for a secured party's failure to comply with Article 9, providing the following:

(a) If it is established that a secured party is not proceeding in accordance with this chapter, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

* * *

[c](2) if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price.

S.C. Code Ann. § 36-9-625 (2003). "Article 9 of the U.C.C. does not now nor has it ever included a statute of limitations." Richard H. Nowka, *The Secured Party Fiddles While the Article 2 Statute of Limitations Clock Ticks-Why the Article 2 Statute of Limitations Should Not Apply to Deficiency Actions*, 7 Fla. St. U. Bus. Rev. 1, 2 n.4 (2008). Thus, Delaney argues the statute of limitations in Article 2 of the UCC, section 36-2-725(1) applies, providing six years. We disagree.

First, Delaney did not allege a breach of contract. Rather, Delaney alleged the violation of the notice of sale requirements, and his prayer for relief requested the statutory penalty of the finance charge and ten percent of the principal amount of the obligation under section 36-9-625(c)(2). Thus, section 36-2-725(1) did not apply because it provides as follows: "An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued." S.C.

Code Ann. § 36-2-725(1) (2003). Because Delaney did not allege a breach of contract, we agree section 36-2-725(1) did not apply. Instead, we look to Title 15 governing civil remedies.

Sections 15-3-540 and -570 provide statutes of limitations for actions upon statutes for a penalty. See S.C. Code Ann. § 15-3-540(2) (2005) (providing a three-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture"); S.C. Code Ann. § 15-3-570 (2005) (establishing a one-year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for it must be commenced within one year after the commission of the offense"). Like the trial court, we find the controlling limitations period is either section 15-3-570 or section 15-3-540(2), respectively one or three years, because Delaney sought a statutory penalty.

"As a general principle, the legislature has the authority to provide civil penalties to enforce observance of a legislative policy." *S.C. Dep't of Health & Envtl. Control v. Kennedy*, 289 S.C. 73, 76, 344 S.E.2d 859, 861 (Ct. App. 1986). A statutory penalty is defined as a penalty "an individual is allowed to recover against a wrongdoer as satisfaction for wrong or injury suffered, without reference to actual damage sustained." *Black's Law Dictionary* 1412 (6th ed. 1990). Although not addressing the statute of limitations issue, at least three South Carolina Supreme Court cases have identified the "damages" in section 36-9-625(c)(2) as a statutory penalty.

Citing the former version of section 36-9-625(c)(2), the supreme court in *Crane v. Citicorp National Services, Inc.*, 313 S.C. 70, 72, 437 S.E.2d 50, 51-52 (1993) (superseded by statute on other grounds), addressed whether co-obligors, who did not have title or right to possession of a mobile home, could recover under the penalty provision of the UCC for the creditor's failure to comply with the notice requirements. The court found the Cranes were entitled to notice. *Id.* at 74, 437 S.E.2d at 53. The court continued as follows:

If the notice provision relates to the obligation, then it would seem logical that the penalty provision for breach of the notice requirements must also be related to the obligation, and therefore, applicable to co-obligators of consumer goods security agreements. Additionally, the statutory penalty is evidence of the legislature's recognition that the small amount of compensatory

damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the Code's provisions.

Id. at 74-75, 437 S.E.2d at 53.

In *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 375, 534 S.E.2d 688, 690 (2000), Brockbank sued Best Capital Corp. after the repossession and sale of his mobile home, alleging, among other things, a violation of Article 9's notice provision. Best Capital admitted it had not sent notice of the sale, but it argued Article 9 did not apply to the parties' agreement because there was not a security interest. *Id.* at 377, 534 S.E.2d at 691. The court found notice was required, and stated "[i]f a secured party fails to give the required notice, a debtor may seek to recover the statutory penalty under Article 9." *Id.* at 385, 534 S.E.2d at 695 (noting the former version of section 36-9-625(c)(2), section 36-9-507(1), which embodies nearly identical language as the current version); *id.* at 384, 534 S.E.2d at 694 (concluding "the outcome in this case is largely dictated by *Crane*").

More recently, in *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 373, 595 S.E.2d 461, 463 (2004), Mr. and Mrs. Singleton filed an action based in part on the UCC, claiming Stokes Motors, Inc. failed to notify them of its intent to sell the Singletons' repossessed vehicle. Citing the former version of section 36-9-625(c)(2), the court in *Singleton* referred to the statute's "penalty" provision in finding both Singletons were entitled to recover because both were entitled to notice. *Id.* at 378, 595 S.E.2d at 466.⁴

We find no merit to Delaney's argument that our supreme court's references to the statutory penalty in these cases is the result of "loose language" and "unconsidered dictum (sic)" and the court interchangeably used the terms "compensatory damages" and "penalty" in its opinions. Based on the definition of a penalty and the cases referring to the mandatory, pre-determined amount of "damages" for failure to comply with the notice of sale requirements, we find the remedy Delaney sought in section 36-9-625(c)(2) was a penalty, and either section 15-3-570 or section 15-3-540(2) applied.

⁴ The court noted that under the revision of 2001, a secured party's liability under section 36-9-625(c)(2) is limited to one penalty "with respect to any one secured transaction." *Id.*

First Financial sent the notice of sale on May 2, 2008, and sold the vehicle on December 15, 2008. Delaney filed this action in October 2011. Under section 15-3-570, providing a one-year statute of limitations, Delaney's action is clearly barred. Under section 15-3-540(2), providing a three-year statute of limitations, whether the action is barred depends on when the action accrued.

II. Date of Accrual

Delaney argues the trial court erred in finding the cause of action accrued when the notice of sale was received rather than on the date of the sale of the collateral. We disagree.

Under the three-year statute of limitations, Delaney's complaint was untimely filed unless the accrual date is the date First Financial sold the vehicle rather than the date of the notice of sale. However, like the trial court, we need not decide whether section 15-3-570 or section 15-3-540(2) applied because we find the accrual date is the date the notice of sale was received, and Delaney failed to timely serve and file his complaint under either statute of limitations.

As to section 15-3-570, the statute specifically provides the action "must be commenced within one year after the commission of the offense." S.C. Code Ann. § 15-3-570 (2005). The offense alleged in this case is insufficient notice of sale. As noted by the trial court, "this date . . . coincide[s] with the date on which [Delaney] either knew or should have known that a violation had occurred."

Regarding section 15-3-540(2), the statute is silent as to a date of accrual. To interpret this section for the present case, we must apply the rules of statutory construction. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck (VIN # JM2UF1132N0294812)*, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." *Corbin v. Carlin*, 366 S.C. 187, 193, 620 S.E.2d 745, 749 (Ct. App.

2005) (quoting *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)).

Delaney's complaint alleges violations of the notice required prior to the disposition of goods in a consumer goods transaction. See S.C. Code Ann. § 36-9-611(b) (2003) (requiring notification prior to disposition of collateral); S.C. Code Ann. § 36-9-614 (2003) (providing specific requirements for a notification). His right to recovery for a violation of the required notice arises under section 36-9-625(c)(2). The cause of action depends on a specific act of non-compliance by the creditor. Even under the discovery rule, the date of the notice of sale would be the date of discovery of the cause of action for a failure to comply with the UCC regarding the notice. We find the legislature did not intend to impose a different date for the statute of limitation to accrue. See *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

The dissent maintains section 15-3-540(2)'s three-year statute of limitations did not begin to run until First Financial disposed of the collateral in December 2008 because a secured party must provide reasonable notice of sale only if it disposes of the collateral. According to the dissent, "the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral." Further, the dissent maintains if the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b), and if a secured party sends unreasonable notice to a debtor but subsequently fails to dispose of the collateral, it has not failed to comply with section 36-9-611(b). In support of its position that a secured party must provide reasonable notice only if it disposes of the collateral, the dissent cites Official Comment eight to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." We respectfully disagree with the dissent's interpretation of section 36-9-611(b) and determination of the date the three-year statute of limitations began to run.

We believe the statute of limitations begins to run when the secured party sends noncompliant notice to the debtor, not when the secured party disposes of the collateral. Initially, we note section 36-9-625 provides several remedies for noncompliance with the notice requirement. Among them, the statute provides, "[i]f it is established that a secured party is not proceeding in accordance with this

chapter, a court may order or restrain . . . disposition of collateral on appropriate terms and conditions." §36-9-625(a). It is clear a party must be able to state a cause of action in order to request a court restrain disposition of the collateral. Therefore, if Delaney could have asked a court to restrain disposition of his collateral, his cause of action must have arisen upon his receipt of the noncompliant notice. See *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 84, 529 S.E.2d 6, 8 (2000) ("Statutes should be construed in light of their intended purposes, and in ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole.").

Further, we believe the Official Comments to section 36-9-611 and 36-9-625(c)(2) supports our conclusions. First, Comment two to section 36-9-611 provides, "This 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." (emphasis added). Comment two does not state that the secured party must actually dispose of the collateral to be required to send reasonable notification; it simply requires that the secured party "wish" to dispose of the collateral. Based on our reading of Comments two and eight to section 36-9-611, we believe after the secured party gives notice, the secured party can elect not to dispose of the property; however, if the secured party initially wishes to dispose of the property, the secured party must provide appropriate notice. Therefore, we do not believe that disposition of the collateral is a prerequisite to being penalized for failing to give reasonable notice.

In addition, Official Comment four to the penalty provision, section 36-9-625(c)(2), states the penalty "is designed to ensure that every noncompliance with the requirements of Part 6 [§§ 36-9-601 to -629 (2003 & Supp. 2015)] in a consumer-goods transaction results in liability, regardless of any injury that may have resulted." Because an injury is not required for a secured party to be liable for failing to comply with the notice requirement, the statute of limitations can begin to run before the secured party injures the debtor by disposing of the collateral in a commercially unreasonable manner.

Accordingly, we believe section 15-3-540(2)'s three-year statute of limitations began to run in May 2008 when Respondent received the notice of sale from First Financial. See generally *Rashaw v. United Consumers Credit Union*, 685 F.3d 739, 744 (8th Cir. 2012) ("[W]e agree that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.");

Erdmann v. Rants, 442 N.W.2d 441, 444 (N.D. 1989) (explaining the penalty available for failure to comply with the notice of sale requirements exists regardless of whether a commercially reasonable sale is held and regardless of whether the debtor sustained a loss).

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.⁵

LOCKEMY, C.J., concurs.

THOMAS, J., concurring in part, dissenting in part: I concur with the majority's conclusion that the statute of limitations found in section 36-2-725(1) of the South Carolina Code (2003) does not apply to Appellant's claims. However, I respectfully dissent and would reverse because a three-year statute of limitations applies to Appellant's claims and Appellant filed this action within three years of the date Respondent disposed of the collateral, which, I believe, is when the statute of limitations began to run.

Under section 15-3-540(2), the statute of limitations is three years for "[a]n action upon a statute for a penalty or forfeiture when the action is given to the party aggrieved or to such party and the State, except when the statute imposing it prescribes a different limitation." By its plain language, this section's three-year statute of limitations applies to actions seeking recovery of a statutory penalty when only the aggrieved party can bring the action for the penalty.

In this case, Appellant brought his action to recover the statutory penalty found in section 36-9-625(c)(2) of the South Carolina Code (2003). This section allows only the "debtor or a secondary obligor at the time a secured party failed to comply" to recover the statutory penalty. Thus, Appellant was the only person who could have brought an action to recover the statutory penalty because he was the debtor at the time Respondent allegedly failed to provide reasonable notice of disposition of the collateral. Because Appellant, as the aggrieved party, was the only person who could have brought the action, section 15-3-540(2) provided the

⁵ We decide this case without oral argument pursuant to Rule 215, SCACR.

applicable statute of limitations. Accordingly, the statute of limitations for Appellant's action was three years.

Finding the applicable statute of limitations was three years, we must next consider when the statute began to run. I respectfully disagree with the majority's finding that the statute of limitations began to run when Respondent sent the allegedly unreasonable notice in May 2008.

Section 36-9-625(c)(2) provides "a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover" a statutory penalty for the failure to comply. The debtor can recover this penalty only if the secured party fails to comply. Under section 36-9-611(b) of the South Carolina Code (2003), "a secured party that disposes of collateral under [s]ection 36-9-610 shall send to the persons specified in subsection (c) a reasonable authenticated notification of disposition." Appellant's claim is that Respondent failed to comply with the notice requirement and, thus, Appellant is entitled to recover the statutory penalty found in section 36-9-625(c)(2) because of that failure to comply.

In my view, based on the plain language of section 36-9-611(b), the only way a secured party can fail to comply with section 36-9-611(b) is by failing to give reasonable notice AND disposing of the collateral. Section 36-9-611(b) requires "a secured party *that disposes of collateral*" to provide reasonable notice. (emphasis added). Based on this plain language, a secured party must provide reasonable notice only if it disposes of the collateral. If the secured party never disposes of the collateral, it never has to provide notice under section 36-9-611(b). Thus, if a secured party sends an unreasonable notice to a debtor but subsequently fails, for whatever reason, to dispose of the collateral, it has not failed to comply with section 36-9-611(b). And the debtor who receives an unreasonable notice cannot bring an action to recover the statutory penalty if the secured party never disposed of the collateral because the statutory penalty is authorized only if the secured party failed to comply with section 36-9-611(b). As noted above, the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

This conclusion is supported by the official comments to section 36-9-611. Comment eight states, "Nothing in this Article prevents a secured party from electing not to conduct a disposition after sending a notification. Nor does this Article prevent a secured party from electing to send a revised notification if its plans for disposition change." Thus, this comment contemplates that a secured party may send a revised notification in order to comply with the notice

requirement in section 36-9-611(b). If a secured party sent an unreasonable notice to a debtor and subsequently, but prior to disposition, sent a reasonable second notice, the secured party would be in compliance with section 36-9-611, and the debtor would not have an action to recover the statutory penalty based on a failure to comply. Additionally, comment eight contemplates that a secured party may send a notification and later decide not to dispose of the collateral in which case the secured party would not have failed to comply with section 36-9-611(b), and the debtor could not recover the statutory penalty under section 36-9-625(c)(2).

This conclusion is further supported by examination of the purpose underlying the notice requirement, which is, in part, to allow the debtor to see that the sale is conducted in a commercially reasonable manner. See *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 384, 534 S.E.2d 688, 695 (2000) ("The purpose of the notice is to allow the debtor to discharge the debt and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner."). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, the purpose of the notice requirement is accomplished because the debtor received a reasonable notice and can see the sale is conducted in a commercially reasonable manner. Therefore, the purpose underlying the notice requirement supports the conclusion that the secured party has not failed to comply with section 36-9-611(b) unless and until it disposes of the collateral.

Furthermore, this conclusion is supported by examination of the purpose underlying the statutory penalty. The penalty is necessary to motivate secured parties to comply with the code's provisions. See *id.* at 385, 534 S.E.2d at 695 ("The statutory penalty is evidence of the legislature's recognition that the small amount of compensatory damages that may be proven in a consumer goods repossession and sale would be insufficient to ensure creditor compliance with the [c]ode's provisions." (brackets removed)). If the secured party initially sends an unreasonable notice and subsequently sends a reasonable second notice, imposing the statutory penalty based on the initial unreasonable notice would not serve the penalty's purpose because the secured party would have ultimately complied with the notice requirement.

The majority contends Appellant's cause of action "must have arisen upon his receipt" of the unreasonable notice because section 36-9-625(a) allows a party to request the circuit court to restrain disposition of the collateral, presumably through an injunction, if the "secured party is not proceeding in accordance with this chapter." Because section 36-9-625(c)(2) is a statutory penalty, it is available

only in the specific circumstances prescribed by the statute. *See State ex rel. Callison v. Nat'l Linen Serv. Corp.*, 225 S.C. 232, 234, 81 S.E.2d 342, 343 (1954) ("The prime rule requires strict construction of a statutory provision which would work a forfeiture or inflict a penalty."); *King v. Atl. Coast Line R.R. Co.*, 86 S.C. 510, 513, 68 S.E. 769, 770 (1910) (noting a statutory penalty "is the creature of the statute, and comes into existence when all statutory conditions exist, and not otherwise"). As discussed above, the penalty in section 36-9-625(c)(2) is available only when a secured party fails to comply. Alternatively, the statute providing for the possibility of an injunction does not require a failure to comply; rather an injunction is available at any time a secured party is not proceeding in accordance with Article Nine. Because the legislature used different language in sections 36-9-625(a) and 36-9-625(c)(2) to express when each remedy is available to a debtor, we must assume the legislature intended to draw a distinction between the two remedies. *See Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.").

Thus, the monetary penalty in section 36-9-625(c)(2) and the injunction in section 36-9-625(a) have different thresholds for applicability, and they are not necessarily available to a debtor at the same time. As a result, even if we assume, due to the possibility of an injunction, a cause of action or right arises when a secured party sends an unreasonable notice, such an assumption does not lead automatically to the conclusion; as found by the majority, that the monetary penalty is also available when a secured party sends an unreasonable notice.

Accordingly, I would find a debtor does not have a cause of action to recover the statutory penalty based on a secured party failing to provide reasonable notice as required by section 36-9-611(b) until the secured party disposes of the collateral. As a result, the statute of limitations would not begin to run until the secured party disposes of the collateral. *See Walsh v. Woods*, 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) ("In analyzing a limitations defense, the fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. Thus, a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it." (citations and internal quotation marks omitted) (brackets removed)).

Here, Respondent could not have failed to comply with section 36-9-611(b) until it disposed of the collateral without providing reasonable notice, and Appellant could not have brought an action to recover the statutory penalty based on a failure to comply until Respondent disposed of the collateral. Thus, the statute of limitations

began to run in December 2008 when Respondent disposed of the collateral. Appellant filed this action in October 2011, which was within the applicable three-year statute of limitations, and I would find the circuit court erred by dismissing Appellant's complaint.

IF NOT DELIVERED IN FIVE DAYS, RETURN TO
JULIE J. ARMSTRONG
CLERK OF COURT, FAMILY COURT
CHARLESTON COUNTY
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Exhibit 8

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FIRST CLASS



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SC Court of Appeals

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**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

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NOV 18 2016

SC Court of Appeals

Otha Delaney, Appellant

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

**Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge**

APPELLANT'S PETITION FOR REHEARING

Philip L. Fairbanks
Attorney for Appellant
1214 King Street
Beaufort, SC 29902
(843) 521-1580

November 18, 2016

Exhibit 9

PETITION FOR REHEARING

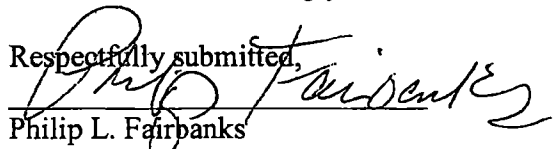
Pursuant to Rule 221, SCACR, and this Court's Order of November 3, 2016,¹ Appellant Otha Delaney ("Delaney") hereby Petitions this Court for Rehearing and modification of its Opinion No. 5442, dated September 18, 2016.

In support of this Petition Delaney respectfully submits that this Court erroneously construed or misapplied controlling provisions of law in one or more of the following respects and submits the following points and authorities:

1. This Court overlooked a cardinal rule of statutory construction that unambiguous words of limitation or restriction found within a statutory cause of action must be given their plain and ordinary meaning.
2. The Court of Appeals' construction of § 9-611(b) leads to an "absurd result" that is not supported by any controlling authority.
3. The Court overlooked controlling authority that a civil "penalty" must be strictly and narrowly construed against the penalized party.

WHEREFORE, for these reasons and other reasons more fully set forth in Appellant Otha Delaney's prior briefings, Appellant submits his Petition for Rehearing and requests this Court to modify its Opinion of September 18, 2016, accordingly.

Respectfully submitted,


Philip L. Fairbanks
Attorney for the Appellant Otha Delaney
1214 King Street
Beaufort, SC 29902
(843) 521-1580
philip@lowcountrybankruptcy.com

November 18, 2016

¹ This Order granted Appellant Delaney permission to file his Petition for Rehearing no later than November 18, 2016.

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Otha Delaney, Appellant

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

**Appeal from Charleston County
Stephanie P. McDonald, Circuit Court Judge**

**APPELLANT'S MEMORANDUM IN SUPPORT
OF PETITION FOR REHEARING**

Philip L. Fairbanks
Attorney for Appellant Otha Delaney
1214 King Street
Beaufort, SC 29902
(843) 521-1580

November 18, 2016

APPELLANT'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

1. This Court overlooked a cardinal rule of statutory construction that *unambiguous words of limitation or restriction found within a statutory cause of action must be given their plain and ordinary meaning.*

The issue in this appeal is what is the appropriate accrual event for Appellant Otha Delaney's ("Delaney's") single cause of action under the Uniform Commercial Code, § 36-9-611(b), SC Code Ann. (2003), "**Notification before disposition of collateral**," ("9-611(b)"). As this Court correctly noted, Slip op. at 10, Delaney has alleged that the secured party, First Financial of Charleston, Inc. ("First Financial"), violated § 9-611(b) which provides:

[A] *secured party that disposes of collateral* under Section 36-9-610¹ shall send to the persons specified in subsection (a) [*i.e.*, 'the debtor' and 'any secondary obligor'] reasonable authenticated notification of disposition.

§ 36-9-611(b) (emphasis added.)

Delaney submits that a statutory cause of action accrues for statute of limitations purposes only when the plaintiff has a "complete and present" cause of action:

The most helpful canon in this context is 'the standard rule' for limitations periods... Ordinarily, a 'limitations period commences *when the plaintiff has a complete and present cause of action.*'... "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can obtain relief... Although the standard rule can be displaced such that the limitations period begins to run *before* the plaintiff can file suit, we "will not infer such an *odd result* in the absence of any such indication" in the text of the limitations period.

Green v. Brennan, __ U.S. __, 136 S.Ct. 1769, 1776 (2016) (internal citations omitted) (emphasis added); *Stephens v. Draffin*, 488 S.E.2d 307, 309 (SC 1997) (Cause of action accrues at the moment when a plaintiff has a legal right to sue on it, and the law presumes nominal damages at that point such that substantial damages did not occur until later is immaterial to determining

¹ Section 36-9-610(a) provides: "After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral[.]"

when action accrued or arose.); *Walsh v. Woods*, 594 S.E.2d 548, 551 (SC App. 2004) (“In analyzing a limitations defense, the fundamental test for determining when a cause of action has accrued is whether the party asserting the claim can maintain a legal action to enforce it. Thus a particular cause of action accrues at the moment when the plaintiff has a legal right to sue on it.”)

Determining when a statutory cause of action is “complete and present” – such that a plaintiff may obtain relief and the limitations period begins to run against him – starts with an examination of the plain wording of the statute at issue. *Gay v. Arial*, 673 S.E.2d 418, 420 (SC 2010) (Where a statute’s language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.)

Here, the cause of action provides that “a secured party *that disposes of collateral* in [a commercially reasonable disposition] shall send [to the ‘debtor’ and any ‘secondary obligor’] reasonable authenticated notification of disposition.” (emphasis added.) Delaney’s statutory cause of action thus incorporate three separate components or elements: (1) it establishes the exact duty that is being imposed (to send “a reasonable notification of disposition”); (2) it establishes upon whom that duty is imposed (upon a “secured party *that disposes of collateral*”); and, (3) it establishes to whom the duty is owed (to any “debtor” or “secondary obligor.”) Simply put, a secured party that does *not* dispose of collateral has no obligation to any “debtor” or “secondary obligor” with respect to notification under § 9-611(b) – as the phrase “*that disposes of collateral*” is an express restriction or limitation upon the universe of all secured parties who have taken possession of collateral following the debtor’s default.

Conversely, the legislature could have used words of inclusion if it had meant to include within § 9-611(b)’s statutory obligations a secured party that merely “*plans* to dispose of

collateral” or “that *intends* to dispose of collateral.” The use of the present tense (“a secured party that *disposes* of collateral shall send reasonable notification”) – and not the use of the conditional (such as, “any secured party that *may* dispose of collateral shall send reasonable notification”) – is also clear in its meaning and conforms to this interpretation. Finally, this interpretation is the only one consistent with the statutory caption, *i.e.*, “Notification before *disposition*,” not “Notification before *intended disposition*.”

Because the duty to send reasonable notification is expressly limited to those secured parties “that dispose[] of collateral,” the “disposition” is an essential element of the cause of action at hand, and there can be no violation of § 9-611(b) upon which the limitations period begins to run until and unless a “disposition” takes place.² *Berkebile v. Outen*, 426 S.E.2d 760 (SC 1993) (Where statutory language is clear and unambiguous, it must be limited to its terms and applied according to its literal meaning.) As in the statute at issue in *Green v. Brennan*, *supra*, there is no indication that the legislature intended such an “odd result” for a cause of action under § 9-611(b) to accrue, and to run *against* the consumer debtor, before he has a “complete and present” cause of action.

Delaney submits that the Court overlooked controlling authority providing that only when a statute’s language is ambiguous is the court permitted to construe the statutory text. *Town of Mt. Pleasant v. Roberts*, 713 S.E.2d 278, 283 (SC 2011), citing *Lester v. S.C. Workers’ Comp. Comm’n.*, 514 S.E.2d 751, 752 (SC 1999). Moreover, to the extent he is wrong and § 9-611(b) is indeed ambiguous, it is well settled that any ambiguity should be resolved in favor of a just, equitable and beneficial operation of the law. *Bennett v. Sullivan’s Island Bd. of Adjustment*, 438 S.E.2 273, 274 (SC App. 1993). Therefore, even if it were appropriate to construe § 9-611(b) on

² This is not to say there can be no violation with respect to a secured party that fails or refuses to conduct a timely disposition of repossessed collateral, as § 36-9-610 requires that all aspects of the disposition shall be commercially reasonable.

grounds of ambiguity, it must be construed “in favor of” and not *against* the consumer debtor, the express beneficiary of the statutory notification requirement, so that the clock does not start running against him before he loses his collateral to a disposition.

2. The Court of Appeals’ construction of § 9-611(b) leads to an “absurd result” that is not supported by any controlling authority.

A goal of any court in construing an ambiguous statute is “to prevent an interpretation that would lead to a result that is plainly absurd.” *Florence County v. Moore*, 545 S.E.2d 507, 510 (SC 2001). Here, the Court effectively ruled that a violation under § 9-611 is “complete and present” at the time of the notification. (“We believe the statute of limitations begins to run when the secured party sends noncompliant notice to the debtor, not when the secured party disposes of the collateral.”) (Slip op. at 10). Because the statute of limitations will run from the time of notification under this ruling, it follows that the consumer debtor may sue for a § 9-611(b) violation at the time of notification – regardless of whether a disposition ever occurs.

There are any number of reasons an intended, noticed disposition might never occur. There are also several reasons that a debtor may allege the notification is not “reasonable” under § 9-611(b). The comments instruct that a notification must be reasonable as to its timeliness and its contents. Cmt. 2, Official Comments to UCC § 9-611. Section 9-612 provides that whether a notification is timely is a question of fact. Therefore, under the Court’s ruling, for example, a jury could find that a debtor who was sent a notification a day or so before the sale was not sent “reasonable notice” under § 9-611(b) due to the shortened redemption period, *and* this finding would require the imposition of mandatory statutory damages under § 36-9-625(c)(2), even if the debtor is able to redeem prior to sale despite the shortened redemption period.

Another scenario would arise when the debtor redeems by paying off the contract balance prior to sale after being sent a notification that is not “reasonable” due to its insufficient contents. He may nevertheless redeem the collateral after receipt of that notification *and* still collect his statutory damages, if his cause of action is determined to be “complete and present” at the time of the notification. Similarly, the intended disposition may never occur under a more common scenario – when the parties voluntarily enter into a cure arrangement whereby the debtor cures his default prior to sale by paying less than the contractual balance, his collateral is returned, and the payment terms of the contract are continued. Again, under the Court’s reasoning that a § 9-611(b) violation is fully actionable at the time of the notification, this debtor may cure his default by agreement *and* he would still be able to recover full statutory damages for the secured party’s purported violation of § 9-611(b), if the notification contents are subsequently determined not be “reasonable.” Finally, the same result would be reached if the secured party sent a non-reasonable notification, but subsequently sent a second or revised, reasonable notification. Under the Court’s ruling that the statutory violation was complete and present at the time of the first notification, he could recover statutory damages even when any resulting disposition was conducted in conformity with the second, compliant notice.³

The result is that this Court has greatly expanded the secured party’s exposure under § 9-611(b) to many common scenarios where it is *neither* a secured party “that disposes of collateral,” nor where it has disposed of collateral following a noncompliant first notification. Moreover, in all of the former scenarios the notification’s purpose was fully met – timely

³ This result would be directly contrary to Comment 8 of the Official Comments to UCC § 9-611, which specifically permits the secured party to send a second “revised notification” and by doing so to escape liability: “Nor does this Article prevent a secured party from electing to send a revised notification if its plan for disposition changes. This assumes, however, that the secured party acts in good faith, *the revised notification is reasonable*, and the revised plan for disposition and any attendant delay are commercially reasonable.” Cmt. 8, Official Comment to UCC § 9-611 (emphasis added.)

redemption of the collateral by the debtor and prevention of an unwanted foreclosure sale of his collateral. Under the latter scenario, the disposition has occurred, but only after the debtor has received the exact notification by way of a corrected notice that he was statutorily entitled to receive. By expanding the statutory cause of action in this way, the Court's interpretation requires a result that is not only divorced from the express, statutory limiting language, it requires one that is divorced from its recognized purpose as well. *Brockbank v. Best Capital*, 534 S.E.2d 688, 695 (SC 2000) ("The purpose of the notice is to allow the debtor to discharge the debt and redeem the collateral[.]") *South Carolina Ins. Reserve Fund v. East Richland County Public Service Dist.* 789 S.E.2d 63, 67-68 (SC Ct. App. 2016) (Courts will generally "reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intent.")

In *Vasquez v. Karjanis & Sons Motors, LLC*, 2012 WL 6965392 at *1 (Conn. Sup. Ct. Dec. 21 2012), the secured party failed to send a UCC notification to the consumer debtor after repossession, and the debtor sued the secured party for statutory damages under UCC § 9-625(c)(2). However, the collateral was never disposed of and was in the secured party's possession at the time the complaint was heard. A question arose whether the debtor had any cause of action under UCC § 9-611 when the collateral had not been sold. *Vasquez* at * 3. The court noted that the notification provision of UCC "must be read in the context of § 42a-9-611 of the UCC, which sets forth the requirement of notification. In subsection (b) it states... 'a secured party that disposes of collateral under section 42a-9-610 shall send to ['the debtor' and the 'secondary obligor'] a reasonable notification of disposition.'" *Id.*

The *Vasquez* court reasoned that the UCC notification statutes "become relevant in a case where collateral *has in fact been disposed of by the secured party*." *Id.* (emphasis added.)

However, prior decisions giving the debtor a right to recover for a notification violation following the secured party's sale of collateral cannot be read "as giving some affirmative right of action in a situation where *no sale has ever occurred (as here)* because of the failure to comply with notice provisions that would apply to a *hypothetical sale[.]*" *Id.* (emphasis added.)

In reaching its contrary result, this Court did not rely upon a single, on-point decision interpreting or construing UCC § 9-611(b), a provision of a uniform code. Instead, it relied upon two decisions, one of which was *Rashaw v. United Consumers Credit Union*, 685 F.3d 739, 744 (8th Cir. 2012) ("We agree that these claims clearly accrued when plaintiffs received the allegedly deficient collateral disposition notices.") (Slip op. at 11.) In *Rashaw* the Court of Appeals, applying Missouri law, determined that it need not decide whether a five year statute of limitations for "statutory liabilities" applied, versus a three year statute for "actions upon a statute for a penalty or forfeiture where the action is given to the aggrieved party," because the plaintiff's notification claim was filed six years after notification. *Rashaw*, 685 F.3 at 744. Unlike the present appeal, no question of a later accrual event was raised, and thus the *Rashaw* court never mentioned UCC § 9-611(b), did not address the effect of the phrase "a secured party that disposes of collateral," and did not alternatively consider whether the cause of action arose at the time of disposition – all questions that were not before the *Rashaw* court but which were squarely raised and decided adversely to Delaney in this appeal.

The Court also relied upon *Erdmann v. Rants*, 442 N.W.2d 441 (Sup. Ct. N.D. 1989), Slip op. at 12, which the Court cites as "explaining the penalty available for failure to comply with the notice of sale requirements exists *regardless whether a commercially reasonable sale is held* and regardless whether the debtor sustained a loss." (emphasis added.) Respectfully, this overstates *Erdmann* as it relates to this case. In *Erdmann*, decided under the pre-2001 revision of

to Conduct Notified Disposition.” (Cmt. 8.) Therefore, in context, Delaney submits that as the heading implies, Comment 2 is addressing the matter of what constitutes “a reasonable notification,” and it does not imply that the cause of action fully accrues at the time of notification by a secured party that merely “wishes to dispose of collateral.” To construe the Comment as this Court has done is to construe it directly contrary to the express statutory language limiting a secured party’s notification obligations with respect to “a secured party *that disposes of collateral*.” The only Comment that addresses a notification that is *not* followed by a disposition is Comment 8, “Failure to Conduct Notified Disposition,” which expressly provides that “nothing in this Article prevents a secured party from electing *not* to conduct a disposition after sending a notification.” (emphasis added.) Comment 8 thus sanctions the parties’ resolution of the default by cure or redemption *after* notification of disposition is sent, resulting in no liability for the secured party. Moreover, this Court’s interpretation of Comment 2 is directly contra to the South Carolina Reporter’s Comment to the same statute: “Section 36-9-611 imposes a notification requirement upon secured parties *who dispose of collateral* under Section 36-9-610.” (emphasis added.)

3. The Court overlooked controlling authority that a civil “penalty” must be strictly and narrowly construed against the penalized party.

Delaney’s position is that § 36-9-625(c)(2) provides a “statutory damages” “remedy for a secured party’s failure to comply with this chapter” in a consumer transaction, including the secured party’s violation of § 9-611(b) with respect to the consumer debtor. Therefore, it functions more as a liquidated damages provision, not a statutory penalty.⁶

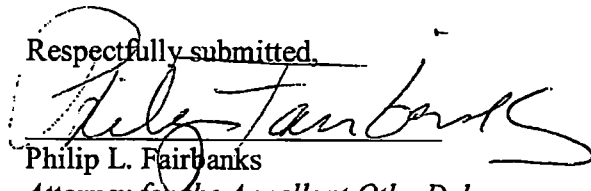
⁶ Article 9 contains a provision that is sometimes called the “consumer penalty.” If a secured party fails to comply with Article 9 in disposing of consumer goods, the Code permits the debtor or secondary obligor to recover an amount not less than the credit service charge plus 10 percent of the cash price[.]” U.C.C. § 9-625(c)(2)... Because this provision is appended onto Article 9’s

This Court disagreed. If, however, the damages provision at issue is indeed a “penalty” as this Court has determined, this categorization provides another reason *not* to expand the secured party’s violation of § 9-611(b) beyond its express and limited terms applicable only to secured parties “that dispose of collateral” – because any violation of § 9-611(b) subjects that secured party to a mandatory “statutory penalty.” A statutory penalty, even if based upon an ambiguous statute, should not be construed broadly with respect to a party whose conduct does not strictly fit within the express terms of the statute. *See, e.g., Town of Mt. Pleasant v. Roberts*, 713 S.E.2d 278 at 283, (“When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant,” and applying this rule to a civil statutory penalty); *Bostic v. American Home Mortg. Servicing, Inc.*, 650 S.C.2d 479, 482 (SC App. 2007) (“South Carolina has long recognized the principle that penal statutes are to be strictly construed.”) Accordingly, the *Bostic* court found no violation where plaintiff failed to prove a violation under the exact, express terms of the civil penal statute at issue. *Bostic* at 486.

CONCLUSION

For these reasons and other reasons more fully set forth in Appellant Otha Delaney’s prior briefings, Appellant submits his Petition for Rehearing and requests this Court to modify its Opinion of September 18, 2016, accordingly.

Respectfully submitted,


Philip L. Fairbanks

Attorney for the Appellant Otha Delaney
1214 King Street

basic damages provision and establishes an amount recoverable “in any event,” one should read the consumer penalty *as a substitute for ordinary monetary damages*... In other words, the section functions to a certain extent *as a liquidated damages provision*[.] fn. (Fn. Indeed the provision appears to serve both a punitive *and a liquidated damages function, concepts that are antithetical in normal contract law. The term “consumer penalty” is thus something of a misnomer.*)

Understanding Secured Transaction, 5th Ed., William H. Lawrence, et al., § 9-625(c), p. 469. (emphasis added.)

Beaufort, SC 29902
(843) 521-1580
philip@lowcountrybankruptcy.com

November 18, 2016

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

RECEIVED

JAN 11 2017

SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

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

Otha Delaney,

Appellant,

v.

First Financial of Charleston, Inc.,

Respondent.

**RESPONDENT'S RETURN
TO APPELLANT'S PETITION FOR REHEARING**

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
First Financial of Charleston, Inc.*

By and through its undersigned counsel, Respondent First Financial of Charleston, Inc. ("First Financial"), makes this return to the petition for rehearing submitted by Appellant Otha Delaney ("Mr. Delaney").

1. **Assuming, *arguendo*, it is proper to consider the petition on the merits, the petition should be denied because the majority did not overlook or misapprehend any material point and correctly affirmed the trial court's dismissal of Mr. Delaney's complaint as time barred.**

As the Court is, of course, aware, a return to a petition for rehearing is not required unless requested by the Court. Rule 240(e), SCACR. The Court did not request this return, and indeed, in the absence of the jurisdictional issue addressed below, it would not be submitted.

The majority did not overlook or misapprehend any material point in affirming the trial court's dismissal of Mr. Delaney's complaint as time barred; rather, as its opinion reflects, its holding was the product of careful—and correct—legal analysis. In this regard, First Financial would note especially the support for its decision that the majority rightfully found in the Official Comments to S.C. Code Ann. §§ 36-9-611 and 36-9-625(c)(2). All of the points Mr. Delaney raises in his petition about legislative intent are belied by the express legislative commentary that § 36-9-611 "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 . . . ,"¹ and that § 36-9-625(c)(2) "is designed 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." Comment 4.

Accordingly, assuming, *arguendo*, it is proper to consider the petition on the merits, there is no cause to grant it; the majority did not overlook or misapprehend any material point and correctly affirmed the trial court's dismissal of Mr. Delaney's complaint as time barred.²

¹ Comment 2 (emphasis added).

² Further regarding the merits, in the interest of brevity, First Financial simply incorporates herein by reference the analysis already presented in its brief. Of course, in considering Mr. Delaney's petition, if the Court wishes to hear more from First Financial in this regard, it will gladly submit a return or such other additional substantive briefing directed to the merits as the Court may direct.

2. **Most respectfully, the Court properly sent the remittitur to the trial court on October 19, 2016, at which point the appeal was decided with finality (in accordance with the majority's September 28, 2016, decision affirming the trial court's dismissal of Mr. Delaney's complaint as time barred) and the Court no longer had appellate jurisdiction; it was error for the Court to issue its orders recalling the remittitur and extending the time for Mr. Delaney to petition for rehearing; and the Court should now confirm that the remittitur was not properly recalled or re-emit the case to the trial court or take such other procedurally appropriate step(s) as may be required to reflect that this appeal has been decided with finality in accordance with the majority's September 28th decision and that there is no longer appellate jurisdiction to alter the trial court's dismissal of Mr. Delaney's complaint.**

The Court finally decided this appeal by opinion filed Wednesday, September 28, 2016. Under Rule 221(a), SCACR, "Petitions for rehearing must be *actually received* by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." (emphasis added). Therefore, the initial deadline for the Court to "actually receive[]"³ a petition for rehearing from Mr. Delaney was Thursday, October 13, 2016, i.e., the 15th day after the opinion was filed, as computed under Rule 263(a), SCACR.⁴

³ Generally, under Rule 262(a)(2), SCACR, documents may be filed with the appellate court by mail, with the date of filing deemed to be the date of mailing; however, Rule 262(a) makes two express exceptions to this rule: petitions for rehearing and motions for reinstatement.

⁴ Rule 263(a) states,

In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be

This initial deadline was, however, altered by order of our state Supreme Court; specifically, Order No. 2016-10-10-01 ("Re: Hurricane Matthew"), filed October 10, 2016 (the "Hurricane Matthew Order"). The Hurricane Matthew Order provided as follows:

On October 4, 2016, the Governor of South Carolina directed the closure of State, County and Municipal Government Offices in twenty-six counties in South Carolina from October 5 through October 7, 2016. This action was taken to facilitate the planned evacuations necessary due to Hurricane Matthew. As the administrative head of the Unified Judicial System in South Carolina, the Chief Justice directed all levels of the Judicial System to comply with this closure.

Subsequently, the Governor issued Executive Orders providing for evacuations in Jasper, Beaufort, Colleton, Charleston, Dorchester, Berkeley, Georgetown and Horry Counties. Several hundred thousand South Carolina citizens evacuated these areas, and the impacts of these evacuations were felt in counties which were not subject to any closure or evacuation. Further, Hurricane Matthew caused significant damage in South Carolina, and this will adversely affect the ability of many lawyers and litigants to comply with deadlines in court proceedings through the end of this week.

Accordingly, this Court finds it appropriate to declare the days of Wednesday, October 5, 2016, through Friday, October 14, 2016, to be statewide "holidays" for the purposes of computing time under Rule 263 of the South Carolina Appellate Court Rules, Rule 6 of the South

included, unless it is a Saturday, Sunday or a state or federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

Carolina Rules Civil Procedure, Rule 35 of the South
Carolina Rules of Criminal Procedure, and Rule 3 of the
South Carolina Rules of Magistrates Court.

(footnotes omitted.) The initial deadline for Mr. Delaney's petition for rehearing, Thursday, October 13, 2016, was thus declared "to be [a] statewide 'holiday[]' for the purpose[] of computing time under Rule 263 of the South Carolina Appellate Court Rules" For that matter, so was Friday, October 14, 2016, and the two days thereafter, the 15th and the 16th, were Saturday and Sunday, respectively. Accordingly, computing time in accordance with Rule 263 and the Hurricane Matthew Order, the time period in which any petition for rehearing by Mr. Delaney had to be "actually received" ran until the end Monday, October 17, 2016, i.e., the end of the next day which is neither a Saturday, Sunday nor holiday.

Having not "actually received" a petition for rehearing by Mr. Delaney, the Court remitted the case to the trial court on Wednesday, October 19, 2016. On October 20, 2016, the Court received from Mr. Delaney a Motion for Extension of Time to File Motion for Rehearing, which had been mailed on October 18, 2016. On November 2, 2016, the Court filed an order directing the trial court to return the remittitur. On November 3, 2016, the Court filed an order extending the time for Mr. Delaney to petition for rehearing until November 18, 2016. Thereafter, the Court received Mr. Delaney's petition for rehearing on November 18, 2016.

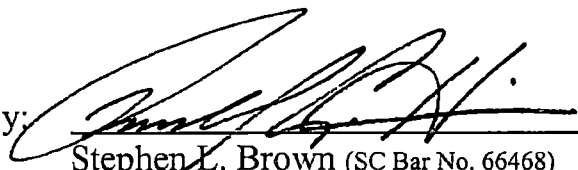
“When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. *The only exception* to this rule is when the remittitur is sent down by mistake, error or inadvertence *of the Court.*” Wise v. S.C. Dep’t of Corrections, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) (emphasis added) (internal citations omitted). There was no error “of the Court” in sending down the remittitur on October 19, 2016, and no such error was cited in the Court’s November 2, 2016, order recalling the remittitur, which order, like the Court’s November 3, 2016, order extending the deadline for Mr. Delaney to petition for rehearing until November 18, 2016, was erroneously issued without jurisdiction.

Accordingly, and certainly most respectfully, the Court properly sent the remittitur to the trial court on October 19, 2016, at which point the appeal was decided with finality (in accordance with the majority’s September 28, 2016, decision affirming the trial court’s dismissal of Mr. Delaney’s complaint as time barred), and the Court no longer had appellate jurisdiction; it was error for the Court to issue its orders recalling the remittitur and extending the time for Mr. Delaney to petition for rehearing; and the Court should now confirm that the remittitur was not properly recalled or re-remit the case to the trial court or take such other procedurally appropriate step(s) as may be required to reflect that this appeal has been decided with finality in accordance with the majority’s September

28th decision and that there is no longer appellate jurisdiction to alter the trial court's dismissal of Mr. Delaney's complaint.

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

First Financial of Charleston, Inc.

Charleston, South Carolina

Dated: 1/9/17

the UCC, the question was whether the debtor could still recover his “statutory damages” under the predecessor statute to § 36-9-625(c), based upon the secured party’s failure to provide any notification, but where the resulting disposition was otherwise commercially reasonable such that he had no actual damages. *Erdmann* at 442. However, there clearly *was* a disposition in *Erdmann*: “Under the plain language of NDCC § 41-09-53(1) [UCC 9-507]⁴ if a secured party does not proceed in accordance with part 5⁵ of Article 9...*and disposition has occurred*, ...and... if the collateral is consumer goods, the debtor is entitled to a minimum recovery, which is not less than the credit service charge plus ten percent of the principal amount of the debt[.]” *Erdmann* at 443. (emphasis added.) Thus *Erdmann* did not address the issue of what UCC violations had occurred, if any, in connection with a notification that is *not* followed by a disposition, or whether a notification claim was complete and present prior to disposition.

It appears that the Court was persuaded to interpret the statute broadly and contrary to Delaney’s position in reliance upon the emphasized language below in Comment 2 of the Official Comments to § 9-611:

Reasonable Notification. This 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. The notification must be reasonable as to the manner in which it was it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content.

Slip op. at 11. (emphasis added.)

The subsequent Comments are entitled “Notification to Debtors and Secondary Obligors.” (Cmt. 3); “Notification to Other Secured Parties.” (Cmt. 4); “Authentication Requirement.” (Cmt. 5); “Second Try.” (Cmt. 6); “Recognized Market.” (Cmt. 7); and, “Failure

⁴ Now UCC § 9-625(c)(2).

⁵ Part 5 (Default) is now Part 6 (Default).

The South Carolina Court of Appeals

Otha Delaney, Appellant,

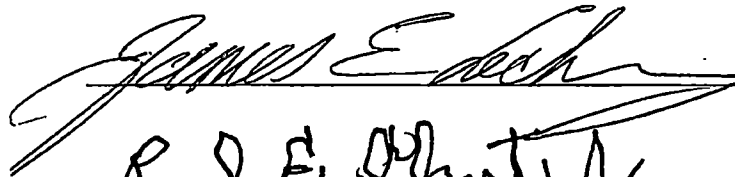
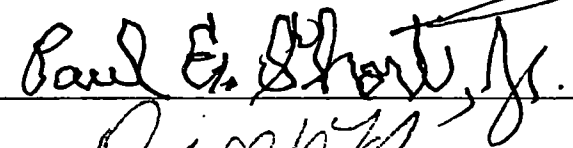
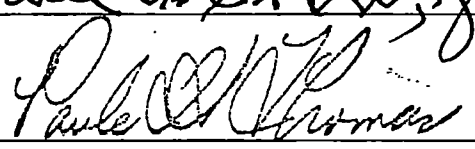
v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Philip L. Fairbanks, Esquire

Stephen Lynwood Brown, Esquire

Perry McPherson Buckner, IV, Esquire

Russell Grainger Hines, Esquire

FILED

February 16, 2017

Exhibit 11

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

RECEIVED

MAY 15 2017

Appeal from Charleston County
Court of Common Pleas

S.C. SUPREME COURT

Stephanie P. McDonald, Circuit Court Judge

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

Otha Delaney,

Petitioner,

v.

First Financial of Charleston, Inc.,

Respondent.

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 **MOTION TO DISMISS 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