

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

Stephanie P. McDonald, Circuit Court Judge

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

OTHA DELANEY, ...PETITIONER

v.

FIRST FINANCIAL OF CHARLESTON, INC., ... RESPONDENT

APPENDIX

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S.C. SUPREME COURT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-07-7166

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SC Court of Appeals

OTHA DELANEY

Appellant,

-VS-

FIRST FINANCIAL OF CHARLESTON, INC.

Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
OTHA DELANEY,	)	CASE NO. 2011-CP-10-7166
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
FIRST FINANCIAL OF CHARLESTON,	)	
INC.,	)	
	)	
DEFENDANT.	)	

**ORDER GRANTING MOTION TO
DISMISS**

FILED
APR 30 AM 10:00
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court upon Defendant's Motion to Dismiss Plaintiff's Complaint. Defendant contends that the Plaintiff's claim, and thus all putative class claims, are time barred by the applicable statute of limitations. Having fully considered the allegations of the Complaint in the light most favorable to the Plaintiff, the Court finds that Defendant's Motion should be GRANTED.

FACTUAL & PROCEDURAL BACKGROUND

On October 12, 2007, Plaintiff entered into a Retail Installment Sales Contract (hereinafter referred to as "RISC") with Coliseum Motors for the purchase of a 2003 Chevrolet pick-up truck, intended for Plaintiff's own personal use. (Compl. ¶ 9) This RISC was then assigned to Defendant First Financial by Coliseum Motors, thus making First Financial a secured party in the consumer goods transaction. (Compl. ¶ 10) After Plaintiff failed to make payments, First Financial lawfully repossessed the vehicle. (Compl. ¶ 11) First Financial then sent the Plaintiff a "NOTICE OF PRIVATE SALE OF COLLATERAL" (hereinafter "Notice of Sale") and accompanying letter on May 2, 2008 to advise Plaintiff of its intention to sell the repossessed

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collateral. (Compl. ¶ 14) Plaintiff claims this Notice of Sale failed to comply with South Carolina law. (Compl. ¶ 13) Over seven months later, on December 15, 2008, First Financial sold the collateral. (Compl. ¶ 12) Plaintiff filed the above-captioned lawsuit on October 3, 2011, alleging that 1) the Notice of Sale of collateral that First Financial sent to the Plaintiff was insufficient under South Carolina law, specifically S.C. Code Ann. § 36-9-613 and 614, and that 2) as a result, Plaintiff is entitled to a statutory relief pursuant to S.C. Code Ann. § 36-9-625(c)(2). (Compl. ¶ 14, 22, and 25) Plaintiff, as a representative of the putative class, seeks this recovery on behalf of putative class members. (Compl. ¶ 18).

Defendant First Financial moved to dismiss Plaintiff's Complaint asserting that the Plaintiff's claims are subject to a one year statute of limitations set forth in S.C. Code Ann. § 15-3-570 which would render Plaintiff's Complaint untimely as matter of law. The basis for this argument rests on two grounds: 1) The relief sought by the Plaintiff is in the nature of a "statutory penalty" and the action is therefore governed by the provisions of S.C. Code Ann. § 15-3-570; and 2) that Plaintiff's sole cause of action accrued upon receipt of the "NOTICE OF PRIVATE SALE OF COLLATERAL." In the alternative, Defendant asserts that because this action accrued upon Plaintiff's receipt of the Notice of Sale, a three year statute of limitations, if applied, still renders the Plaintiff's action untimely as a matter of law.

STANDARD OF REVIEW

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). While the allegations must be viewed in the light most favorable to the non-moving party, the motion must be granted if facts and inferences reasonably deducible from them show that Plaintiff could not

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prevail on any theory of the case. *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997). Where the facts plead in the Complaint demonstrate that the Plaintiff's sole cause of action is time-barred, judgment as a matter of law is proper at the 12(b)(6) stage. *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003).

LAW & ANALYSIS

I. The Remedy Sought By The Plaintiff Is A Statutory Penalty

This Court finds that the Plaintiff's sole cause of action requests an award which should be deemed a statutory penalty. A statutory penalty is defined as "a penalty imposing automatic liability on a wrongdoer for a violation of a statute's terms without reference to any actual damages suffered." *Black's Law Dictionary* 1181 (8th ed. 2005) Plaintiff seeks relief "for each class member pursuant to UCC 36-9-625(c)(2) in the amount of the finance charge plus ten percent of the principal amount of the obligation applicable to that class member's contract." (Compl. ¶ 25(c)). This statutory provision is cited as the only basis for recovery in this matter. As the legislative comments to § 36-9-625(c)(2) note, this relief is to be awarded "in any event" and "regardless of any injury that may have resulted." S.C. Code Ann. § 36-9-625(c)(2) cmt 4. Based on this language, I find that this fixed formula is not remedial in nature but rather serves the purpose of imposing automatic liability for "every noncompliance." *Id.*

While the proposed award is based on each class member's respective contractual obligations, this fact alone does not demonstrate that the award is remedial in nature. Conversely, this fact exhibits only that the severity of the penalty fluctuates depending on the finance charge in an effort deter noncompliance. Notably, Plaintiff has not sought any actual damages nor is there any evidence on the face of Plaintiff's Complaint to show that cognizable

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actual damages have been suffered. Rather, Plaintiff alleges only that a statute has been violated and he is a consumer entitled to relief pursuant to that statute.

Additionally, I find that classifying the Plaintiff's desired recovery as a statutory penalty is consistent with South Carolina law. On no less than three occasions, the South Carolina Supreme Court has identified this exact provision as awarding a "statutory penalty." See *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461 (2004)("[Plaintiffs] claimed that they were entitled to collect the minimum statutory penalty")¹; *Crane v. Citicorp Nat'l Serv., Inc.*, 313 S.C. 70, 437 S.E.2d 50 (1993)("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.")²; *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)("a debtor may seek to recover the statutory penalty"). Indeed, in *Crane*, the Supreme Court not only identified Plaintiff's desired relief as a statutory penalty but also articulated the underlying legislative purpose in creating the penalty provision: the minimal amount of actual, compensatory damages available in scenarios similar to the instant matter would make enforcement less desirable. *Id.* Thus, the penalty provision incentivizes compliance with South Carolina law by providing a larger recovery otherwise not available.

Furthermore, because S.C. Code Ann. § 36-9-625(c)(2) is based on a uniform UCC model statute, other courts have also examined the appropriate classification of this statutory award. In *Beard v. Vanderbilt Mortg. & Fin., Inc.* 2008 WL 2323235 (M.D.T. June 2, 2008), the Middle District of Tennessee analyzed the precise scenario now before this Court. In granting the defendant's motion to dismiss, the court found that the putative class action, requesting relief

¹ Although the Court in *Singleton* was analyzing the provisions of former Section 9-507(1), current § 36-9-625(c)(2) embodies nearly identical language for its provisions on recovery related to improper notice of sale.

² Please See Footnote 1.

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under the identical 47-9-625(c)(2) of the Tennessee Code of Laws, was seeking a statutory penalty that subjected the plaintiff to a one year statute of limitations. In ruling on this issue, the court found that any holding which defined 47-9-625(c)(2) as remedial would be contrary to established Tennessee case law. *Id.* at 4 ("The Court cannot agree with the Plaintiff that §47-9-625(c)(2) is primarily remedial in light of the Tennessee Court of Appeals cases describing that section as a statutory penalty....."). As previously noted, South Carolina case law is equally supportive in defining the provisions of S.C. Code Ann. § 36-9-625(c)(2) as a statutory penalty. Based on the foregoing, I find that S.C. Code Ann. 36-9-625(c)(2) provides for a statutory penalty and the controlling limitations period should be either S.C Code Ann. § 15-3-570 or § 15-3-540(2), respectively one or three years.

II. S.C. Code Ann. § 36-2-725(1) Is Not Applicable To Plaintiff's Claims.

Although Plaintiff contends that the timeliness of this matter should be dictated by the six year statute of limitations found in S.C. Code Ann. § 36-2-725, the Court finds this argument unavailing for a variety of reasons. First and foremost, the explicit language of that statute limits its application to cases where a breach of contract for the sale of goods is at issue. Plaintiff has not plead a breach of contract cause of action nor does he allege any contract having ever been breached. This Court finds that the Plaintiff may not now invoke the benefits and protections of cause of action that has not been plead.

Secondly, the instant matter concerns the sufficiency of a notice of sale prior to the disposition of collateral. Therefore, this case deals entirely with Article 9's provisions concerning secured transactions. Article 2's provisions pertaining to the sale of goods are wholly irrelevant to any allegation set forth in Plaintiff's Complaint.

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Lastly, to the extent § 36-2-725 could otherwise be applied, this Court finds that general rules of statutory construction prevent the application of the six year statute of limitations. One of the universal maxims of statutory construction is that a specific statute prevails over a more general one. *Mims v. Alston*, 312 S.C. 311, 440 S.E.2d 357 (1994). Having found the Plaintiff's desired recovery is in fact a statutory penalty, both S.C. Code Ann. § 15-3-570 and S.C. Code Ann. § 15-3-540(2) speak more directly to the actual allegations in this lawsuit. Wherefore, the Court finds § 36-2-725 to be inapplicable to the instant case.

III. Plaintiff's Complaint Is Time-Barred Under Either a One Year or Three Year Statute of Limitations

Having found that the recovery which Plaintiff seeks is a statutory penalty, the sole question remaining before this Court is whether the provisions of S.C. Code Ann. § 15-3-570 or S.C. Code Ann. § 15-3-540 controls the limitations period in this matter. Both statutes pertain to actions seeking a penalty and provide a one and three year statute of limitations respectively. §'s 15-3-570 and 15-3-540 provide as follows:

S.C. Code Ann. § 15-3-570

"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. § 15-3-540

"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."

While either statute might be reasonably applied to this matter, the Court need not decide this inquiry as Plaintiff's cause of action accrued upon receipt of the alleged noncompliant

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Notice of Sale and either statute would therefore serve as a bar to Plaintiff's recovery. As demonstrated by Plaintiff's Complaint, Plaintiff received the alleged unlawful Notice of Sale on or around May 2, 2008, and did not file suit under October of 2011, more than five months after the longer statute had run.

For purposes of § 15-3-570, the statute specifically informs that the commission of the offense serves as the date of accrual. Undoubtedly, since Plaintiff alleges that the Notice of Sale failed to comply with South Carolina law, the offense in this case occurred upon delivery and receipt of that Notice of Sale, and under § 15-3-570, the statute would begin to run in May of 2008 and expire in May of 2009. Plaintiff's Complaint does not allege that the sale of the repossessed vehicle violated any provision of South Carolina law and no offense was alleged to have occurred upon disposition in December of 2008. Without question, the only offense which Plaintiff alleges concerns the adequacy of the notice provided prior to sale.

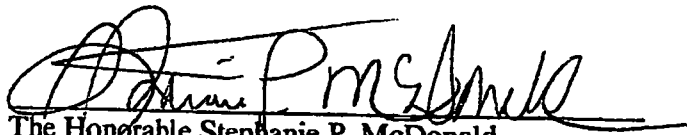
While § 15-3-540(2) does not specifically delineate a date of accrual, I find that the alleged commission of the offense should similarly serve as the commencement of ^{the} three year statute of limitations found in § 15-3-540. Unlike an action for actual or compensatory damages, Plaintiff's action for a penalty focuses on a specific act of non-compliance by the Defendant 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 the Plaintiff either knew or should have known that a violation had occurred.

Furthermore, I find that the legislature intended §'s 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

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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).

For the foregoing reasons, I find and hold that the Plaintiff's claims, and thus all putative class claims, are time-barred and Defendant's MOTION IS HEREBY GRANTED.


The Honorable Stephanie P. McDonald
Circuit Judge

Charleston, South Carolina

April 29, 2013

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

OTHA DELANEY,

PLAINTIFF,

vs.

FIRST FINANCIAL OF
CHARLESTON, INC.,

DEFENDANT.

) IN THE COURT OF COMMON PLEAS

) FOR NINTH JUDICIAL CIRCUIT

) CASE NO. 2011-CP-10-7166

ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER

2014
MAR 17 PM 4:26
CLERK OF COURT
J. ARHSTRONG

FILED

THIS MATTER COMES BEFORE THE COURT upon Plaintiff's Motion to Reconsider. On April 29, 2013, this Court granted Defendant's Motion to Dismiss Plaintiff's Complaint on the grounds that Plaintiff's claims, and thus all putative class claims, were time barred by the applicable statute of limitations. On May 7, 2013, the Plaintiff filed the instant Motion arguing that the Complaint was timely. On October 23, 2013, a hearing was held for the instant Motion. For the reasons set forth below, Plaintiff's Motion to Reconsider is hereby DENIED.

FACTUAL & PROCEDURAL BACKGROUND

On October 12, 2007, Plaintiff entered into a Retail Installment Sales Contract (hereinafter referred to as "RISC") with Coliseum Motors for the purchase of a 2003 Chevrolet pick-up truck, intended for Plaintiff's own personal use. (Compl. ¶ 9) This RISC was then assigned to Defendant First Financial by Coliseum Motors, thus making

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First Financial a secured party in the consumer goods transaction. (Compl. ¶ 10) After Plaintiff failed to make payments, First Financial lawfully repossessed the vehicle. (Compl. ¶ 11) First Financial then sent the Plaintiff a "NOTICE OF PRIVATE SALE OF COLLATERAL" (hereinafter "Notice of Sale") and accompanying letter on May 2, 2008, to advise Plaintiff of its intention to sell the repossessed collateral. (Compl. ¶ 14) Plaintiff claims this Notice of Sale failed to comply with South Carolina law. (Compl. ¶ 13) Over seven months later, on December 15, 2008, First Financial sold the collateral. (Compl. ¶ 12) Plaintiff filed the above-captioned lawsuit on October 3, 2011, alleging that 1) the Notice of Sale of collateral that First Financial sent to the Plaintiff was insufficient under South Carolina law, specifically S.C. Code Ann. § 36-9-613 and 614, and that 2) as a result, Plaintiff is entitled to a statutory relief pursuant to S.C. Code Ann. § 36-9-625(c)(2). (Compl. ¶ 14, 22, and 25). This statutory provision constitutes the *sole alleged remedy* sought by the Plaintiff. Plaintiff, as a representative of the putative class, seeks this recovery on behalf of putative class members. (Compl. ¶ 18).

Defendant First Financial moved to dismiss Plaintiff's Complaint asserting that the Plaintiff's claims are subject to a one-year statute of limitations set forth in S.C. Code Ann. § 15-3-570, which would render Plaintiff's Complaint untimely as matter of law. The basis for this argument rests on two grounds: 1) that the relief sought by the Plaintiff is in the nature of a "statutory penalty" and the action is therefore governed by the provisions of S.C. Code Ann. § 15-3-570; and 2) that Plaintiff's sole cause of action accrued upon receipt of the "NOTICE OF PRIVATE SALE OF COLLATERAL." In the alternative, Defendant asserts that because this action accrued upon Plaintiff's receipt of

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the Notice of Sale, the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-540, if applied, still renders the Plaintiff's action untimely as a matter of law.

This Court granted First Financial's Motion to Dismiss, finding that Plaintiff's claims seek recovery which is in the nature of a penalty, and that because the Plaintiff's action accrued upon receipt of the alleged unlawful Notice of Sale, both the one-year statute of limitations found in § 15-3-570 and the three-year statute of limitations found in § 15-3-540 would render Plaintiff's Complaint untimely as a matter of law.

Plaintiff moved to reconsider this Court's Order contesting both findings: that § 36-9-625(c)(2) is a penalty provision and that the action accrued upon receipt of the alleged defective Notice of Sale. For the reasons set forth below, the Court reaffirms its finding that the Plaintiff's Complaint is untimely as a matter of law.

LAW & ANALYSIS

I. The Remedy Sought by Plaintiff is a Statutory Penalty

Although conceding that the statutory award he seeks is to be given to a plaintiff "even in cases where [that] consumer can demonstrate no loss," Plaintiff nonetheless argues that § 36-9-625(c)(2) is intended to be remedial and compensatory in nature. (See Plaintiff's Motion to Reconsider at p. 2). I concluded that § 36-9-625(c)(2) awards a statutory penalty because 1) our Supreme Court has depicted it as precisely such on no less than three occasions and 2) the Legislative comments to this exact subsection specifically inform that plaintiffs are entitled to this formulaic award "regardless of any

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injury that may have resulted.” *Crane v. Citicorp Nat’l Serv.*, 313 S.C. 70, 437 S.E.2d 50 (1993); *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000); *Stokes v. Singleton*, 358 S.C. 369, 595 S.E.2d 461 (2004); S.C. Code Ann. § 36-9-625(c)(2) *cmt.* 4. In light of this Legislative commentary on the nature of the statute, I find that § 36-9-625(c)(2)’s award squarely satisfies the definition of a “statutory penalty.” *Black’s Law Dictionary* 1181 (8th ed. 2005)(a “statutory penalty” is defined as “a penalty imposing automatic liability on a wrongdoer for violation of a statute’s terms without reference to any actual damages suffered.”) This direct and controlling authority resolves any ambiguity which might otherwise be derived from the statutory language itself.

Plaintiff argues that our Supreme Court has imprecisely chosen its words in categorizing 36-9-625(c)(2) as a penalty provision, citing an Ohio federal district court opinion in support of his argument. *See Jenkins v. Hyundai Motor Financing Co.*, 389 F.Supp.2d 961 (S.D. Ohio 2005). A careful examination of *Jenkins*, however, demonstrates that the court’s analysis fails to support Plaintiff’s current argument. In *Jenkins*, the district court spoke not only to Ohio’s §9.625(C), the companion statute to S.C. Code Ann. § 36-9-625(c), but also to Ohio’s §9-625(B), whose contents are also found in the South Carolina consumer code statutory scheme at S.C. Code Ann. § 36-9-625(b). As the Plaintiff’s quotations from *Jenkins* reveal, the court’s commentary concerning actual or compensatory damages being recoverable by a consumer/plaintiff in these type of actions refers to § 9-625(B), a statute which has no bearing on Plaintiff’s allegations and was never cited as a basis for relief in this case. Rather, Plaintiff seeks an

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award under § 36-9-625(c)(2) only. The *Jenkins* court merely identified that Ohio companion statute as a “minimum statutory amount,” and not as a provision awarding actual damages.

While plaintiffs alleging inadequate notice of the disposition of collateral might choose to pursue relief under both subsections, they must be first be able to demonstrate the existence of actual damages, a prerequisite which Plaintiff's Complaint does not meet. Wherefore, in accordance with South Carolina case law, the Court finds Plaintiff's desired relief to be a statutory penalty.

In furtherance of Plaintiff's novel position, he also cites to case law outside the scope of the issues before this Court. *See e.g., Smith v. Eagle Const. Co., Inc.* 282 S.C. 140, 318 S.E.2d 8 (1984); *Edwards v. State Law Enforcement Div.* 395 S.C. 571, 720 S.E.2d 462 (2011) These opinions do not address, concern, or even reference § 36-9-625(c)(2) or any UCC provision, nor do they discuss statutory penalties.

The first case cited, *Smith v. Eagle Const. Co.*, addresses a Worker's Compensation claimant's right to lifetime benefits under a post-injury enacted statutory amendment. The question before the Court was whether the amendment could be applied retroactively or prospectively only. In determining that issue, the Court discussed the “remedial” nature of the amendment only so as to asses if it were proper for retroactive application. Quite clearly, the Court was speaking of “remedial” only in the sense of a *change in the law* related to an individual's existing legal rights. The second case cited, *Edwards*, is a criminal matter concerning the application of an amended sex offender registration law to

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a pardoned but convicted sex offender. Again, the Court discussed the "remedial" nature of a statutory amendment in the context of a *change in existing law* affecting vested rights. Neither opinion discusses the nature of civil damages being awarded by a statute, the principal question before this Court.

In essence, Plaintiff asserts that because § 36-9-625(c)(2) provides a private cause of action for plaintiffs, it creates a "new remedy for an existing right" and is therefore a compensatory statute. Under this theory, however, any and all statutes which grant a private cause of action would have to be deemed "remedial" simply by virtue of creating a basis for a lawsuit. I find that, to the extent such a generic definition could be applied, it would render both S.C. Code Ann. § 15-3-540(2) or § S.C. Code Ann. § 15-3-570 meaningless because no cause of action could ever qualify as arising "under a statute for a penalty."

S.C. Code Ann. § 36-9-625(c)(2), is "remedial" only in the broad sense that it allows a Plaintiff to recover an award due a defendant's noncompliance with S.C. Code Ann. §§ 36-9-613 and 614. However, its Legislative purpose, as noted by *Brockbank*, is "to ensure creditor compliance" under a fixed calculation of recovery even where no injury or damages exist; thus, it provides for a statutory penalty. *Brockbank*, 341 S.C. at 385, 534 S.E.2d at 695. Therefore, the limitations period in either S.C. Code Ann. § 15-3-570 or S.C. Code Ann. § 15-3-540(2) must apply to Plaintiff's claims as he seeks a penalty award in this matter.

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II. Plaintiff's Sole Cause of Action Accrued upon Receipt of the Notice of Sale and is therefore Time-Barred under Either S.C. Code Ann. § 15-3-570 or S.C. Code Ann. § 15-3-540(2)

The two statutes which might arguably establish the time limitations period for Plaintiff's claims set forth the following:

S.C. Code Ann. § 15-3-570

"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. § 15-3-540(2)

"Within three years"

"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."

This Court finds that because Plaintiff's only allegation of noncompliance relates to the adequacy of the "Notice of Sale," the "commission of the offense" under § 15-3-570 took place in May of 2008 upon receipt. Indeed, Plaintiff's Complaint alleges that because Defendant's Notice of Sale was insufficient under South Carolina law, Plaintiff is entitled to relief. Based on the allegations pled, I find that the "offense" alleged in this matter is in fact the inadequacy of the "Notice of Sale." A review of Plaintiff's Complaint demonstrates that Plaintiff does not challenge the manner or method of the sale of collateral except for the fact that proper notification of that sale is alleged to have not occurred.

I also find the date of accrual under § 15-3-540(2), if applicable, to be May of 2008 as well. Thus, Plaintiff's Complaint is time-barred under either statute. This Court

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finds that the commission of the offense is the operative date of accrual under § 15-3-540(2) for several reasons. First, the striking similarities in the § 15-3-570 and § 15-3540(2) evidence a Legislative intent for an action under either section to accrue at the time of the commission of the offense; and 2) because Plaintiff's action is based on a specific act of noncompliance and Plaintiff's entitlement to relief is based on that act of noncompliance (not on actual damages), Plaintiff's action accrues as soon as the statute's provisions are allegedly violated *i.e.* when the insufficient "Notice of Sale" is received.

Additionally, this Court finds the Eighth Circuit Court of Appeals' holding in *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012) to be persuasive. In *Rashaw*, the Court found that receipt of the Notice of Sale should in fact serve as the date of accrual in consumer actions regarding the sufficiency of notice of disposition of collateral. In affirming the lower court's dismissal of the plaintiff's claims, the Court noted the following:

We therefore affirm the district court's dismissal of the Mo UCC claims because we agree *that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.*

(*emphasis added*). The Court was interpreting a Missouri statute that is nearly verbatim to S.C. Code Ann. § 15-3-540(2), which Plaintiff claims is the more appropriate statute if this Court finds § 36-9-625(c)(2) to award a statutory penalty.

I find Plaintiff's argument that the date of accrual should be the date of the sale of collateral to be unpersuasive. Plaintiff argues that while the sufficiency of the Notice of Sale is controlled by § 36-9-613 and 614, the requirement of notice itself is mandated by § 36-9-611. Plaintiff contends that this subsection, entitled "Notice before disposition of

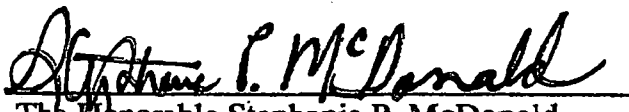
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collateral,” mandates “reasonable notification,” has been violated in this action, and contemplates only scenarios where a sale takes place. Plaintiff therefore claims that a sale is a “necessary antecedent event” which triggers the right to recovery.

First and foremost, S.C. Code Ann. § 36-9-610 outlines the various requirements for proper disposition and sale of collateral. In his Complaint, Plaintiff does not contend that this subsection was violated nor even make reference to it. Therefore, the sale itself cannot be the “offense” that is alleged to have occurred based on the allegations pled. Instead, Plaintiff’s Complaint takes issue with the contents of this Defendant’s Notice of Sale. The only provisions which control the contents of that Notice are found in § 36-9-613 and § 36-9-614, and these subsections are violated when an inadequate Notice of Sale is provided.

For the foregoing reasons, the Court finds that the Plaintiff’s claims, and thus all putative class claims, are time-barred. Plaintiff’s MOTION TO RECONSIDER IS HEREBY DENIED.

IT IS SO ORDERED.


The Honorable Stephanie P. McDonald
Presiding Judge, 9th Judicial Circuit

Charleston, South Carolina

March 13, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Case Number: 2011-CP-10-7166

OTHA DELANEY, Individually and on)
behalf of all others similarly situated,)

Plaintiff,)

vs.)

FIRST FINANCIAL OF CHARLESTON,)
INC.,)

Defendant.)

SUMMONS

BY

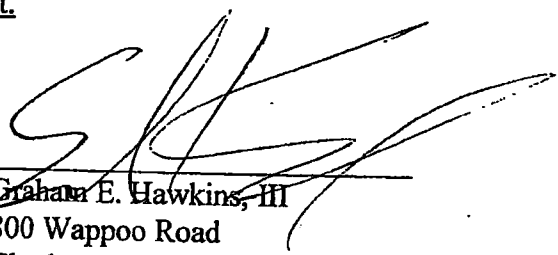
JULIE J. ARMSTRONG
CLERK OF COURT

2011 OCT -4 AM 11:20

FILED

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the plaintiff or his undersigned attorney at 1214 King Street, Beaufort, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint with the time aforesaid, judgment by default will be rendered against you for the relief demanded in said Complaint.


Graham E. Hawkins, III
800 Wappoo Road
Charleston, SC 29407
843-225-7565
hawkinslawfirm@aol.com

Beaufort, South Carolina

October 3 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Case Number: 2011-CP-10-7166

OTHA DELANEY, Individually and on)
behalf of all others similarly situated,)

Plaintiff,)

vs.)

FIRST FINANCIAL OF CHARLESTON,)
INC.,)

Defendant.)

CLASS ACTION COMPLAINT

2011 OCT -4 AM 11:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

Plaintiff OTHA DELANEY ("Delaney") brings this Class Action Complaint against FIRST FINANCIAL OF CHARLESTON, INC. ("First Financial") on his own behalf and that of all others similarly situated, seeking declaratory, injunctive and monetary relief to remedy First Financial's unlawful noncompliance with the notice requirements of the South Carolina Uniform Commercial Code.

INTRODUCTION

1. Provisions of the South Carolina Commercial Code, §§36-9-600 through 9-635 (hereinafter referred to by section number only, or as the "UCC") form a comprehensive scheme governing, *inter alia*, the disposition by a repossessing secured creditor of a consumer's repossessed collateral.

2. These provisions require a creditor, prior to disposition of repossessed collateral, to send a notice which provides a consumer with specific information about the proposed disposition.

3. When First Financial repossessed its borrowers' cars, it sent them form notices which failed to provide required information.

4. First Financial failed to send plaintiff and similarly situated South Carolina consumers a disposition Notice that complied with the requirements of the law.

PARTIES

5. Defendant First Financial is a South Carolina corporation with its principal place of business in Charleston, South Carolina. At all times material hereto, First Financial was engaged in the business of providing financing to purchasers of automobiles in South Carolina.

6. Plaintiff Otha Delaney is an adult residing at 112 Mill Road in Jacksonville, North Carolina.

JURISDICTION AND VENUE

7. This court has jurisdiction over the parties and the subject matter of this action.

8. Venue lies in this county pursuant to §15-7-30(E)(1), South Carolina Code of Laws, 1976 as amended, in that defendant's principal place of business at the time the cause of action arose was Charleston County.

FACTUAL ALLEGATIONS AS TO DELANEY

9. On or about October 12, 2007, plaintiff entered into a Retail Installment Sales Contract ("RISC") for the purchase of a 2003 Chevrolet pick-up truck for personal, family or household use. The cash price for the vehicle was \$9,399.50. The finance charge (credit service or time/price differential) was \$4,405.92.

10. The RISC was simultaneously assigned to First Financial by the seller of the vehicle, Coliseum Motors, making First Financial the secured party within the definition of that term in the UCC, §36-9-102(a)(72). A true and correct copy of the RISC is attached as **Exhibit A**.

11. Subsequently First Financial caused the vehicle to be repossessed.

12. Upon information and belief, on or about December 15, 2008, First Financial entered into a contract for the sale of the vehicle, thereby terminating any right on the part of plaintiff to redeem the vehicle, i.e., "disposing" of the vehicle. A true and correct copy of the Affidavit for Repossessed Vehicle (DMV Form 4034) is attached as **Exhibit B**.

13. Prior to First Financial's disposition of the collateral, no notice of disposition complying with the requirement of §§36-9-613 and 614 had been sent to plaintiff.

14. Prior to disposition of the vehicle on or about May 2, 2008, First Financial sent a document titled "NOTICE OF PRIVATE SALE OF COLLATERAL" to plaintiff in an apparent attempt to comply with §§36-9-613 and 614 of the UCC. The notice is attached as **Exhibit C**.

15. Plaintiff is informed and believes that **Exhibit C** is a form notice utilized by First Financial which was sent to numerous residents of South Carolina in an attempt to comply with §§36-9-613 and 614 of the UCC.

CLASS ALLEGATIONS

16. All previous allegations are hereby realleged as fully as if restated in their entirety.

17. Upon information and belief, First Financial had disposed of motor vehicles serving as collateral after sending the above form notice to consumers in the State of South Carolina in other transactions, with only the names, the dates of the RISC, and the particulars of the vehicle involved varying from form to form, with the identities and number of such consumers being known only to First Financial.

18. Plaintiff seeks to represent a class of similarly situated consumers. The class is composed of all South Carolina residents:

- a. who were parties to a RISC in which First Financial was the secured party;
- b. who had their motor vehicle repossessed in South Carolina by First Financial or its agents;

- c. who were sent a notice of disposition of collateral prior to disposition by First Financial in substantially the same form as **Exhibit C**;
- d. whose collateral was "disposed of" ;
- e. against whom First Financial has not obtained a deficiency judgment as to such RISC;
- f. who have not provided First Financial with a written waiver of the right to notice of disposition following default;
- g. who have not filed an action against First Financial based on a violation of the notice requirements of the UCC;
- h. whose statutory damages calculated according to §36-9-625 exceed \$100; and
- i. who have neither filed a Chapter 7 bankruptcy nor obtained a discharge in bankruptcy applicable to any obligation owed to First Financial arising out of the RISC.

19. Plaintiff is informed and believes that **Exhibit C** is a pre-printed form notice of disposition used by First Financial in an unsuccessful attempt to comply with the requirements of §§36-9-613 and 614, in numerous transactions involving its repossession of motor vehicle collateral in South Carolina.¹ Accordingly, the members of the proposed class are so numerous that joinder of all members is impracticable.

20. There are questions of law and fact common to the class which predominate over any questions affecting only individual class members. The principal common issues with respect to the

¹ Since 2001, First Financial has been a creditor in almost 200 bankruptcy cases in the Federal District of South Carolina according to records available on the Public Access to Court Electronic Records website. Based on the experience of plaintiff's counsel in over a decade of litigating similar UCC notice cases, these numbers suggest accounts significantly in excess of that necessary to establish numerosity (50-100 accounts). Inasmuch as defendant is uniquely situated to address this issue, plaintiff submits that, at a minimum, discovery on the issue ought to be permitted. See, *Griffin v. Harley Davidson Credit Corp.*, Slip Copy, 2010 WL 233764 (D.S.C. 2010) ("[D]istrict courts in this circuit have concluded that plaintiffs are generally entitled to pre-certification discovery to establish the record the court needs to determine whether the requirements for a class action suit have been met.") (Internal citations omitted.)

class are whether **Exhibit C** complies with the UCC; whether the failure to send compliant notices entitle class members to statutory damages as provided for by §36-9-625; whether the transactions involving First Financial and class members were “consumer transactions” within the meaning of the UCC; whether failure to provide compliant notice of disposition of collateral deprives First Financial of its right to deficiency claims against class members, and others.

21. Plaintiff is a member of, and his claims are typical of those of, the class he seeks to represent, and he will fairly and adequately protect and represent the interests of the class. To that end, he has engaged the services of counsel with extensive experience in the issues involved in this litigation – both the substantive UCC issues and the Rule 23 class action procedural issues. Finally, there are no conflicts or adversary interests between the claims of plaintiff as class representative and the claims of the proposed class, nor do class counsel have any interests in conflict with the interests of the class.

22. Plaintiff is informed and believes that his RISC is typical of the RISCs of class members. As noted above, the cash price for his vehicle was \$9,399.50, and the finance charge was \$4,405.93. According to §36-9-625, his statutory damage award would be not less than \$5,345.00. Plaintiff submits that the claims of class members will exceed \$100.00 each.

INDIVIDUAL AND CLASS CAUSES OF ACTION

23. All previous allegations are hereby realleged as fully as if restated in their entirety.

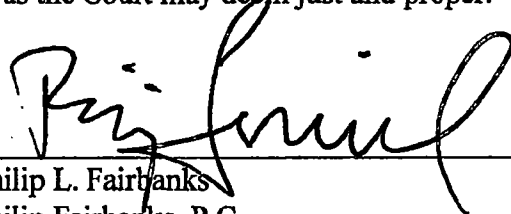
24. Before a creditor may sell, enter a contract for sale, or otherwise dispose of a repossessed vehicle, the UCC requires that it send the borrower “a reasonable authenticated notification of disposition.” UCC §36-9-611(a)(1).

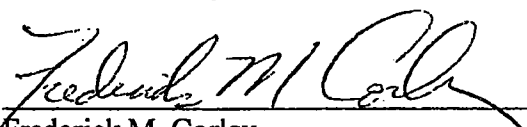
25. First Financial disposed of plaintiff's and class members' motor vehicle collateral without first having provided notice of its proposed disposition, in compliance with applicable sections of the South Carolina UCC.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays for relief as follows:

- A. For an Order certifying this case as a class action pursuant to Rule 23 of the South Carolina Rules of Civil Procedure;
- B. For an order preliminarily and permanently enjoining First Financial from engaging in the practices challenged herein;
- C. For statutory damages for each class member pursuant to UCC §36-9-625(c)(2) in the amount of the finance charge plus ten percent of the principal amount of the obligation applicable to that class member's contract;
- D. For a declaration that First Financial is barred from collecting a deficiency against class members;
- E. For pre-judgment interest to the extent permitted by law; and
- F. For such other and further relief as the Court may deem just and proper.


Philip L. Fairbanks
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843-521-1590 fax
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843-525-9442 fax
rcorley@islc.net



Graham E. Hawkins, III
800 Wappoo Road
Charleston, SC 29407
843-225-7565
hawkinslawfirm@aol.com

Beaufort, South Carolina

October 3, 2011

RETAIL INSTALMENT CONTRACT

I have today purchased from Seller, on a total sale price basis, under the terms and provisions of this agreement, The following property which is accepted in its present condition and receipt of which is acknowledged:

ACCOUNT NO. _____

DATE OCTOBER 12, 2007

BUYER Name	<u>OTIM HARVIN DELANEY</u>		CREDITOR (SELLER) Name	<u>DR. ISLEUM MOTORS</u>	
Number and Street	<u>828 MITCHING POST RD</u>		Number and Street	<u>4991 DORCHESTER ROAD</u>	
City, State and Zip Code	<u>CHARLESTON, SC 29414</u>		City, State and Zip Code	<u>N. CHARLESTON, SC 29418</u>	
PROPERTY	NEW OR USED	YEAR AND MAKE	NO. CYL.	SERIES NAME (Also "No." if applicable)	MOTOR VEH — Body Type (If Truck, tons capacity) REC. VEH. — Length - Width, Color
	<u>USED</u>	<u>2003 CHEV</u>		<u>1500</u>	<u>MPV</u>
			IDENTIFICATION NO. (Serial or Motor No.)		
			<u>1GDEC14X232296322</u>		

MOTOR VEHICLE			RECREATIONAL VEHICLE		
☐ Radio	☐ Vinyl Top	☐ Air Cond.	☐ Air Cond. Unit(s)	☐ Range	☐ Refrigerator
☐ Auto Trans.	☐ 3 Speed Trans.	☐ 4 Speed Trans.	☐ Furniture (As per Mfg. floor plan)	☐ Awnings	
☐ 5 Speed Trans.	☐ Power Brakes	☐ Power Steering	☐ Other		

Trade-in: (Year and Model) 95 CHEVROLET SILVERADO

Amount owing \$ 4,424.75 Net \$ 575.25

The allowance for the trade-in is as follows: Gross \$ 5,000.00

Amount owing on trade-in to be paid by ☒ Seller ☐ Buyer.

Property to be kept in County of CHARLESTON at my above address unless a different address inserted here

DESIGNATION OF PARTIES: As used in the document, the words "I", "Me", and "My" refer to Buyers, jointly and severally, and the words "You" and "Your" refer to Seller or Holder if this contract is assigned.

INSURANCE

I understand that the purchase of Credit Life or Credit Life and Credit Accident and Health Insurance is not required. I understand further that only the following forms of credit insurance are offered and that the seller and/or assignee of this contract may profit from its sale. I consent to this and having first examined the cost of said insurance, as indicated herein, freely and voluntarily elect to purchase the following coverages:

- ☐ Single Life Credit Life Insurance for term of contract on First Buyer signing below at a Cost of \$ N/A
- ☐ Joint Life Credit Life Insurance for term of contract at a Cost of \$ N/A
- ☐ Credit Accident and Health Insurance for term of contract on First Buyer signing at a Cost of \$ N/A

Credit Life and Credit Accident and Health Insurance (if elected) to be issued by:

Name of Insurer

Home Office Address of Insurer

Dated _____ (to be completed by Buyer)

Signature of Buyer to be insured under either form of Credit Life Insurance and Credit Accident and Health Insurance (if elected)

Signature of non-insured Buyer (if single life authorized) or co-insured under Joint Life Credit Life Insurance (but only if joint life authorized)

(NOTE: If insurance elected, all Buyers are to authorize

ITEMIZATION OF AMOUNT FINANCED

- Cash Price of Motor Vehicle (including Sales Tax) \$ 9399.50
- Less Downpayment
(Cash 849.25) (Trade-in 575.25) \$ 1424.50
- Unpaid Balance of Cash Price (1 minus 2) \$ 7975.00
- Amounts Paid to Others on My Behalf
 - Premium to Credit Life Ins. Co. \$ N/A
 - Premium to Credit Accident & Health Ins. Co. \$ N/A
 - Premium to Physical Damage Ins. Co. \$ 499.00
 - To Public Officials for Certificate of Title fees \$ 25.00
 - To Public Officials for Recording & Releasing Fees \$ N/A
 - To Public Officials for Documentary Stamps \$ N/A
 - To _____ \$ N/A
- Total Items 4 (a) + (b) + (c) + (d) + (e) + (f) + (g) \$ 524.00
- Amount Financed (3 plus 4) \$ 8499.00

I understand that I am required to have Physical Damage Insurance on the property; however I have the right to choose the agent or company through which Physical Damage Insurance is to be obtained. The total cost of such insurance, if obtained through You, is \$ N/A for a term of _____ months from the date hereof, for the following coverages:

- ☐ Comprehensive Coverage ☐ Fire & Broad Form Theft
- ☐ S. _____ Ded. Collision ☐ Combined Additional Coverage
- ☐ Towing & Labor Costs ☐ Vendor's Single Interest
- ☐ Other _____

IF PHYSICAL DAMAGE INSURANCE NOT INCLUDED HEREIN, I HAVE PURCHASED SAME FROM:

Agent's Name _____

Agent's Address _____

Name of Insurance Company _____



Insurance.]

CANCELLATION: I may within 30 days of this date cancel all insurance elected above by returning all certificates to the Assignee named below. The cost of cancelled insurance will be refunded or credited to my account.

INSURANCE AGAINST LIABILITY FOR BODILY INJURY OR PROPERTY DAMAGE TO OTHERS IS NOT INCLUDED IN THIS TRANSACTION.

OPTIONAL MECHANICAL BREAKDOWN INSURANCE/EXTENDED SERVICE CONTRACT

I have the option of electing the following:

☐ Mechanical Breakdown Insurance

☐ Extended Service Contract at a cost of \$ N/A

furnished through _____ for a term of _____ months.

I hereby elect the above insurance/contract.

BUYER

BUYER

DISCLOSURES REQUIRED BY FEDERAL LAW

ANNUAL PERCENTAGE RATE

The cost of my credit at a yearly rate.

29.50 %

FINANCE CHARGE

The dollar amount the credit will cost me.

\$ 4,485.92

Amount Financed

The amount of credit provided to me or on my behalf.

\$ 8,499.08

Total of Payments

The amount I will have paid after I have made all payments as scheduled

\$ 12,984.92

Total Sale Price

The total cost of my purchase on credit, including my down-

payment of \$ 1,624.50

\$ 14,324.42

My Payment Schedule Will Be: 36 monthly payments as follows:

(Check one block only)

☐ A first payment of

or

☐ A final payment of

with

☒ 36 payments of \$ 358.47

each, all payments payable the like date (or if no like date, then on last day of the month) of each successive month beginning NOVEMBER 11, 202007, or if no date is specified, one month after the date of this contract.

Late Charge: If a payment is not paid in full within 10 days after it is due, I will be charged 5% of the unpaid portion of the payment, with a minimum of \$6.20 but not to exceed \$15.50.

Prepayment: If I pay off early, I may be entitled to a refund of part of the Finance Charge.

Security: I am giving a security interest in the vehicle(s) being purchased.

See the remainder of both sides of this document for additional information about nonpayment, default, any repayment in full before the scheduled date and prepayment refunds.

PROMISE TO PAY: I promise to pay you, at your address, the Total of Payments shown above in consecutive monthly payments in the number, amounts and at the times shown above, plus any late charges, if applicable, subject to the provisions on the reverse side of this contract relating to prepayment. If I fail to make any payment when scheduled or if I am in default of anything I have promised to do in this agreement, you may, subject to any required notice or notice of right to cure, and after any required cure period has expired, require me to pay you at once the unpaid balance I owe you less any required rebates of unearned finance charges or insurance premiums or other rebates. My right to notice of default and right to cure is explained in the paragraph of this agreement entitled "Notice of Default and Right to Cure." You may also collect reasonable expenses incurred by you in obtaining and selling the property and, unless prohibited by law, reasonable attorney fees (not in excess of 15% of the unpaid balance) if referred to an attorney not a salaried employee of yours for collection. If I owe you anything after the maturity date of this contract, I promise to pay you interest on that amount at the Annual Percentage Rate shown above.

The following applies to the sale of all used motor vehicles, except motorcycles, with a gross vehicle weight rating of less than 8,500 pounds, a curb weight less than 6,000 pounds and a frontal area of less than 46 square feet, or unless seller is a financial institution:

NOTICE

THE INFORMATION YOU SEE ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

NOTE: Additional provisions of this contract are found on the reverse side of this document. Those provisions are incorporated by reference herein.

NOTICE TO THE BUYER: 1. DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. 2. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT YOU SIGN. 3. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND TO OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE.

Accepted: The foregoing contract is accepted by Seller and is hereby assigned under the terms of the assignment on the reverse side to the following Creditor:

FIRST FINANCIAL OF CHARLESTON

NAME OF CREDITOR

PO BOX 60424

ADDRESS

CHARLESTON

City

SC

State

29419

Zip Code

FINISER MOTORS

NAME OF SELLER

BY

TITLE

CO-SIGNERS ACKNOWLEDGE RECEIPT OF A COPY OF "NOTICE TO CO-SIGNER" PRIOR TO THE EXECUTION HEREOF.

CO-SIGNER

SEE REVERSE SIDE FOR ADDITIONAL INFORMATION

CO-SIGNER

I ACKNOWLEDGE RECEIPT OF A COPY OF THIS CONTRACT WHICH WAS COMPLETELY FILLED IN PRIOR TO MY EXECUTION HEREOF, AND I FURTHER ACKNOWLEDGE THAT I HAVE READ BOTH SIDES OF THIS CONTRACT.

BUYER

BUYER

Form No. S.C. (M.V.) 706

(Motor Vehicle - Recreational Vehicle)

FILE COPY

000029



South Carolina Department of Public Safety
AFFIDAVIT FOR REPOSSESSED MOTOR VEHICLE

4034
(Rev. 7/96)

(Entire Form to be Typed or Printed)

Under penalties of perjury, I Wayne Hixson certify that all facts set forth herein are true and correct and further certifies that the holders of other unsatisfied liens recorded against this vehicle on the records Division of Motor Vehicles, Department of Public Safety, Columbia, S.C., have been duly notified to protect their interest in the vehicle, if any, and this is to certify that the undersigned has repossessed the motor vehicle described below because of the failure of the former owner to meet this obligation for settlement of a lien or mortgage on said vehicle.

Otha Marvin Delaney
Name of Owner from Whom Vehicle Repossessed
828 Hitching Post Rd Chas SC 29414
Street City State Zip Code
Chew 1GCEC14X232296522 770850188748667B
Make Vehicle Identification Number (Serial) Title Number
03 1500 PK
Year Model Current License Number License Year Body Style

Method Of Repossession
Voluntary

Terms of Lien or Mortgage
Public Sale

(IF BY PUBLIC SALE ATTACH BILL OF SALE OF SHERIFF, OR AUTHORIZED SELLER)

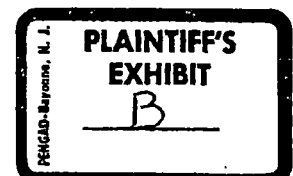
Amount of Original Lien \$ 12,904.92 Date of Lien 10.13.07
Lienholder's Name First Financial of Chas
Street, City, State, Zip Code P.O. Box 60429 Chas SC 29419
Date of Repossession 5.2.08
Signature of Lienholder Wayne Hixson Title Title Clerk

Furthermore, this is to certify that for the value received \$ _____ the above vehicle has been assigned

to: COOK motor co 9933 Hwy 78 Locks SC 29456
NAME STREET CITY STATE ZIP CODE
for disposition or sale.

By: Wayne Hixson
Date: 12.15.08

Sales Tax No.: _____



NOTICE: This form must accompany the Certificate of Title, which must be properly assigned over to the new owner on the back of the title.

(See Instructions on reverse side)

000030

First Financial Of Charleston, Inc.

5025 DORCHESTER ROAD • P.O. BOX 60429 • CHARLESTON, SC 29419-0429 • (843) 767-0050

NOTICE OF PRIVATE SALE OF COLLATERAL

(CERTIFIED MAIL, RETURN RECEIPT REQUESTED May 2, 2008)

Otha Delaney
828 Hitching Post Road
Charleston, SC 29414

Re: Account # 68289

Dear Mr. Delaney,

This is to notify you that due to default under the terms of the above referenced account, the collateral described below, which secures your account, can be sold, at our option by private sale after the close of business on the tenth (10th) day from the date of this notice. If such a date falls on a Sunday or legal holiday, then the collateral will be sold after the first business day following the tenth (10th) day.

You have the right to have the collateral returned to you upon payment of the account balance plus any repossession expenses, attorney's fees and other costs we have incurred, as may be applicable and permitted by law.

Description of Collateral: 2003 Chevrolet 1500 Vin# 1GCEC14X23Z296522

5025 Dorchester Road
Street Address

Charleston, SC 29418
City State Zip

Bob Lewis
By



000031

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
OTHA DELANEY, individually and on
behalf of others similarly situated,

PLAINTIFF,

vs.

FIRST FINANCIAL OF CHARLESTON,
INC.,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-10-7166

DEFENDANT FIRST FINANCIAL OF
CHARLESTON, INC.'S
MOTION TO DISMISS

FILED
2011 NOV 30 PM 4:23
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: PHILIP L. FAIRBANKS, FREDERICK M. CORLEY, AND GRAHAM E. HAWKINS,
III, ATTORNEYS FOR THE PLAINTIFF:

Defendant, First Financial of Charleston, Inc., hereby moves pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for an order from this Honorable Court dismissing all claims asserted against Defendant in this matter. This motion is based upon the following:

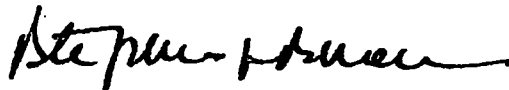
1. Plaintiff's claim is time-barred by the one-year statute of limitations for claims for statutory penalties set forth in S.C. Code Ann. § 15-3-570. As a result, the putative class claims are likewise barred.

This Motion is based on the applicable rules, case law and contents of the Complaint, as well as the memorandum to be filed with this matter.

SIGNATURE BLOCK ON FOLLOWING PAGE

000032

YOUNG CLEMENT RIVERS, LLP



By: _____

Stephen L. Brown

Perry M. Buckner, IV

P.O. Box 993, Charleston, SC 29402

Telephone: (843) 720-5488

Facsimile: (843) 579-2936

E-mail: sbrown@ycrlaw.com

pbuckner@ycrlaw.com

Attorneys for the Defendant

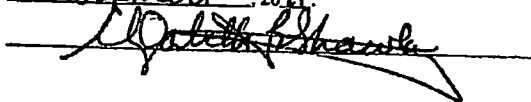
First Financial of Charleston, Inc.

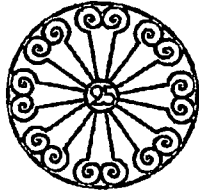
Charleston, South Carolina

Dated: Nov. 30, 2011

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to
all counsel of record in this proceeding this 30 day of
November, 2011.





YCR LAW
Young Clement Rivers, LLP

Elizabeth R. O'Neil
Paralegal

Direct Dial: (843) 724-6658
Direct Fax: (843) 579-2936
E-mail: conell@ycrlaw.com

November 30, 2011

VIA HAND DELIVERY

The Honorable Julie J. Armstrong
Charleston County Clerk of Court's Office
100 Broad Street, Suite 106
Charleston, SC 29401

Re: *Otha Delaney v. First Financial of Charleston*
Case No.: 2011-CP-10-7166
YCR File: 14768-20110934

Dear Julie:

Enclosed for filing in the above referenced matter are the original and one copy of Defendant First Financial of Charleston, Inc.'s Motion to Dismiss. Also enclosed is our firm check in the amount of \$25.00 to cover the cost of filing same. Kindly return one clocked copy to us via our courier.

Thank you, in advance, for your assistance with this.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Elizabeth R. O'Neil
Paralegal

ERO/ero
Enclosures

cc: Graham E. Hawkins, III
Frederick M. Corley
Philip L. Fairbanks

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-7166

OTHA DELANEY, Individually and)
on behalf of all others similarly situated,)

Plaintiff,)

-vs-)

FIRST FINANCIAL OF CHARLESTON,)

Defendant.)

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS

FILED
2012 APR -5 AM 9:36
JULIE J. ARRESTRONG
CLERK OF COURT
BY

COMES NOW, Otha Delaney, plaintiff above-named, and in response to the motion by the defendant, First Financial of Charleston, would show:

Defendant asserts that plaintiff's action is barred by the one-year statute of limitations imposed by S.C. Code Ann. §15-3-570 on actions for a "penalty or forfeiture given, in whole or in part, to any person who will prosecute [it]...."

As will be demonstrated below, neither that section, nor the superficially more applicable section dealing with penalties "given to the party aggrieved" (§15-3-540) provide the limitations period for plaintiff's cause of action.

Instead, because plaintiff's claim arises out of a contract for the purchase of a motor vehicle, the applicable statute of limitations is provided by the Uniform Commercial Code

I. SECTION 36-9-625 PROVIDES COMPENSATION FOR A CONSUMER'S LOSS AND IS THEREFORE REMEDIAL RATHER THAN PENAL

Article 9 of the Uniform Commercial Code, *Secured Transactions*, requires a secured party, following repossession of collateral securing a debt but prior to its disposition, to provide written notice to the debtor of the intended disposition. *S.C. Code Ann. Sections 36-9-611 through 614.*¹ The

¹ Further references to the Uniform Commercial Code shall be by reference to either the S.C. Code section (e.g., § 36-9-101, *etc.*), or to the U.C.C. section, e.g., § 9-101, *etc.*. South Carolina's version of the Uniform Commercial Code, as enacted in 2001, is virtually identical to the Uniform Code Commissioners version enacted with only minor variations in all fifty states.

failure of a secured creditor to do so has the potential to deprive the debtor of important rights related to the redemption of the collateral, as well as the ability to affect the size of a deficiency claim. See *Crane v. Citicorp Nat'l Services, Inc.*, 313 S.C. 70, 437 S.E.2d 50, 52 (1993) (Construing the pre-revision version of Article Nine – whose notice provisions were essentially the same as post-revision provisions).

A creditor's failure to comply with the notice requirements entitles a consumer debtor to recover as compensation "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." *Section 36-9-625(c)(2)*. See, *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 378, 595 S.E.2d 461, 466 ((2004) (Noting that revised Article Nine restricted recovery under the damages provision to a *single* recovery *per account*, rather than *per debtor*, but otherwise remained the same.) Furthermore, the court in *Crane*, citing a leading treatise, White and Summers, *Uniform Commercial Code* § 27-18 at 623, noted that the automatic recovery provision "...is 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."

The language of the remedial damages section is significant.

SECTION 36-9-625. Remedies for secured party's failure to comply with chapter.

(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.

(b) Subject to subsections (c), (d), and (f), a person is liable for *damages in the amount of any loss caused by a failure to comply with this chapter*. *Loss caused by a failure to comply* may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing.

(c) Except as otherwise provided in Section 36-9-628:

(1) a person that, at the time of the failure, was a debtor, was an obligor, or held a security interest in or other lien on the collateral may recover *damages* under subsection (b) *for its loss*; and

(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.

(d) A debtor whose deficiency is eliminated under Section 36-9-626 may recover *damages for the loss of any surplus*. However, a debtor or secondary obligor whose deficiency is eliminated or reduced under Section 36-9-626 may not otherwise recover under subsection (b) for noncompliance with the provisions of this part relating to collection, enforcement, disposition, or acceptance.

(e) In addition to any *damages* recoverable under subsection (b), the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover five hundred dollars in each case from a person that:

- (1) fails to comply with Section 36-9-208;
- (2) fails to comply with Section 36-9-209;
- (3) files a record that the person is not entitled to file under Section 36-9-509(a);
- (4) fails to cause the secured party of record to file or send a termination statement as required by Section 36-9-513(a) or (c);
- (5) fails to comply with Section 36-9-616(b)(1) and whose failure is part of a pattern, or consistent with a practice, of noncompliance; or
- (6) fails to comply with Section 36-9-616(b)(2).

(f) A debtor or consumer obligor may recover *damages* under subsection (b) and, in addition, five hundred dollars in each case from a person that, without reasonable cause, fails to comply with a request under Section 36-9-210. A recipient of a request under Section 36-9-210 which never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request within the meaning of this subsection.

(g) If a secured party fails to comply with a request regarding a list of collateral or a statement of account under Section 36-9-210, the secured party may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure.

HISTORY: 2001 Act No. 67, Section 12.

S.C. Code Ann. § 36-9-625 (2001) (Emphasis added). The statute clearly speaks in terms of *remedies, damages and loss* rather than *penalties*, the latter term being nowhere mentioned.

The Official Comment to § 36-9-625, paragraph 4, reads as follows:

4. Minimum Damages in Consumer-Goods Transactions. Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is patterned on former Section 9-507(1) and 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. Subsection (c)(2) leaves the treatment of statutory damages as it was under former Article 9. A secured party is not liable for statutory damages under this subsection more than once with respect to any one secured obligation (see Section 9-628(e)), nor is a secured party liable under this subsection for failure to comply with Section 9-616 (see Section 9-628(d)).

Section 36-9-625, Official Comment ¶ 4. Again, as the very title makes manifest, ("*Minimum Damages*") the Uniform Commercial Code Commissioners and the General Assembly clearly had in mind *compensation* for violations of Article Nine's notice requirements, as opposed to *penalties*.

Likewise, Paragraph 3 of the Official Comments to § 9-625, titled “Damages for Noncompliance with This Article,” speaks in terms exclusively of *damages*. The remedial provisions of the section “set[] forth the basic remedy for failure to comply with the requirements of this Article: *a damage recovery in the amount of loss caused by the noncompliance.*” *Id.* (Emphasis added).

Similarly, the South Carolina Reporter to the U.C.C. states with respect to § 9-625,

Subsection (c)(2) provides that if the collateral is consumer goods *the minimum damages* a debtor or secondary obligor can recover for a secured party's failure to comply with part 6 is an amount equal to 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.

Section 36-9-625, South Carolina Reporter's Comment ¶ 2.

The General Assembly must be presumed to comprehend the difference between a “statutory damage” and a “statutory penalty.” *See, e.g., SCDHEC v. Kennedy*, 289 S.C. 73, 344 S.E.2d 859 (S.C. App. 1986) (“Penalty for Failure to Complete Contract” §§ 59-111-530, *et seq.*; “[T]he legislature has the authority to provide civil penalties to enforce observance of a legislative policy.”) *Kennedy* presents an example of the General Assembly's intent to impose a *penalty*.

While the language used by the General Assembly is not necessarily dispositive on the question of the purpose of legislation, it is entitled to substantial defence.

The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in language used construed in light of intended purpose. The legislature's intent should be ascertained primarily from the plain language of the statute. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation, and the court has no right to look for or impose another meaning.

Rorrer v. P.J. Club, Inc., 347 S.C. 560, 566, 556 S.E.2d 726, 729 (S.C.App. 2001), *quoting S.C. Dept. of Revenue v. Collins Ent. Corp.*, 340 S.C. 77, 79, 530 S.E.2d 635, 636 (2000). By analogy to the statute in question, the statutes involved in *Rorrer* provide a compelling example of the distinction between a remedial and penal statute – an example which is instructive here.

Sections 32-1-10, *et seq.*, regulate illegal "gambling contracts" and, the first two sections, §§ 32-1-10 and 32-1-20 provide for the recovery of gambling losses.

Section 32-1-10 permits recovery by *the person who lost money*. It reads as follows:

Any person who shall at any time or sitting, by playing at cards, dice table or any other game whatsoever or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any person or persons so playing or betting, in the whole, the sum or value of fifty dollars and shall pay or deliver such sum or value or any part thereof shall be at liberty, within three months then next ensuing, to sue for and recover the money or goods so lost and paid or delivered or any part thereof from the respective winner or winners thereof, with costs of suit, by action to be prosecuted in any court of competent jurisdiction.

Id.

Section 32-1-20 permits recovery by a person *other than the person who lost money*. It reads as follows:

In case any person who shall lose such money or other thing as aforesaid shall not, within the time aforesaid, really and bona fide and without covin or collusion sue and with effect prosecute for the money or other things so by him or them lost and paid and delivered as aforesaid, it shall be lawful for any other person, by any such action or suit as aforesaid, to sue for and recover the same and treble the value thereof, with costs of suit, against such winner or winners as aforesaid, the one moiety thereof to the use of the person that will sue for the same and the other moiety to the use of the county in which the offense shall have been committed.

Id. (Emphasis added).

In the *Rorrer* case, *supra*, the Court of Appeals noted that the Supreme Court held in the case of *Francis v. Mauldin*, 215 S.C. 374, 55 S.E.2d 337 (1949), that in enacting §§ 32-1-10, *et seq.*, the General Assembly had intended *both* remedial (§ 32-1-10 – recovery by the "injured" party) and punitive relief (§ 32-1-20 – recovery by a third party to punish the illicit gambler).

The Court of Appeals wrote:

While our supreme court has determined that § 32-1-10 is remedial in nature, it has reaffirmed that § 32-1-20 is penal in nature and must be strictly construed. *See Francis v. Mauldin*, 215 S.C. 374, 381, 55 S.E.2d 337, 340 (1949). In first construing § 32-1-20, our supreme court noted that "[t]he object of the statute was manifestly to punish excessive gaming." Consequently, the statutory scheme is part remedial and part penal.

Rorrer, supra.

Section 36-9-625 is plainly intended to compensate debtors for creditors' failure to provide them notice of the type of sale the creditors intend to conduct. Both the Uniform Code Commissioners and the 50 state legislatures which have for over a half a century enacted the notice requirements and the damages section for non-compliance believe that non-compliance with the notice requirements are the cause, or potential cause, of serious injury to debtors. Defendant would have this Court "overrule" that determination. The defendant asks the Court to rule, in effect, that the General Assembly's determination that an award of damages to compensate for that injury, and in the case of "consumer transactions" the provision of an award alternatively of actual damages or a formula for the calculation of reasonable "liquidated damages", is a matter for judicial, rather than legislative, decision-making.

But defendant's plea must be rejected. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *E.g., Sloan v. S.C. Board of Physical Therapy Examiners*, 370 S.C. 452, 468, 636 S.C.2d 598, 606 (2006). Here, the terms of the statute are clear and should be enforced as drafted by the legislature, unless and until the legislature sees fit to amend them.

II. THE APPLICABLE STATUTE OF LIMITATIONS IS PROVIDED BY SECTION 36-2-725(1) "STATUTE OF LIMITATIONS IN CONTRACTS FOR SALE"

Plaintiff's claim arises out of a contract for the sale of an automobile. That contract contains a security agreement which was the basis for defendant's repossession and disposition of that automobile following plaintiff's alleged default under the terms of the contract. Compliance with the notice requirements of Article Nine of the U.C.C. are incumbent on a secured creditor enforcing its rights under a contract which contains a security agreement. Failure to comply with the requirements of Article Nine is a breach of the contract.

Section 36-2-725(1), "Statute of limitations in contracts for sale," 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."

Discussing pre-revision, but virtually identical sections of Article Nine of the U.C.C. in the context of the application of Alabama's statute of limitations for breach of contract, the Supreme Court of Alabama observed that:

The requirements of § 7-9-504(3) are imposed by law upon every secured transaction covered by Article 9 of the U.C.C. Ala. Code (1983 Supp.) § 7-9-504(3). By statute, they become terms of the security agreement. Breach of the notice requirement is breach of the contract. Therefore, the action under § 7-9-507(1) for damages for violation of these requirements is, in essence, a suit for breach of contract.

Weaver v. American National Bank, 452 So.2d 469 (Ala. 1984). See also, *In re Coleman*, 2007 WL 1526651 (Bankr. N.D. Ala. May 24, 2007) where the United States Bankruptcy Court for the Northern District of Alabama, following the *Weaver* court, recognized the applicability of its holding to the revised Code:

Section 7-9A-614 is a relatively new UCC section that replaced the former *Ala. Code* § 7-9-504(3) when the new article took effect January 1, 2002. As yet, there is no published Alabama appellate court case law interpreting Sections 7-9A-614 and/or 7-9A-625. However, state courts previously interpreted suits arising under Section 7-9-504, along with other UCC complaints, as being contract actions.

Id. Moreover, claims are part of the same cause of action when they arise out of the same transaction or series of transactions. See *Restatement (Second) Judgments* § 24 (1982).

Because plaintiff's claim "arises out of" the "Retail Installment Contract" (R.I.S.C.) which gave rise to defendant's rights and duties under Article Nine, it is fitting that a violation of those duties be regarded for limitations purposes a breach of that contract. Additionally, the R.I.S.C. at issue in this case appears to lack the "Holder In Due Course" notice mandated by 16 C.F.R. §§ 433.1 and 433.2 to be included in every consumer sale transaction.²

The "H.D.C." notice is required to be placed on the face of every consumer contract and by federal law, becomes a contractual term of every such contract. The Rule provides that any and all claims and defenses available to a consumer against the originator of commercial paper (e.g., a R.I.S.C.) is available to the consumer against any subsequent "holder" of the "paper." The

² "The Federal Trade Comm's Rule on Preservation of Consumer's Claims and Defenses," 16 C.F.R. §§ 433.1 and 433.2 (May 14, 1976). See also, S.C. C.P.C. §§ 37-2-402 & -404 and 37-3-410 & -411 and Official Comments.

Rule thus effectively abrogates the ancient "Holder In Due Course Rule" - which serves in commercial transactions to indemnify down-stream holders of commercial paper from actions and defenses to actions arising against the original holders of negotiable instruments arising out of sales transactions - in consumer goods transactions such as this.

Its relevance here is that because the H.D.C. rule is required by law to be placed in every consumer goods transaction contract and is again, by law (even in its absence) made a contractual term of every such transaction, it renders the holder of consumer goods paper liable to the consumer debtor as if the holder were the original contracting party. Given this "seamless" transition from originator of the R.I.S.C., to enforcer of the security agreement it contains, to defendant in an action for violation of the requirements attached to the lawful enforcement of those rights, the logic in imposing an *ex contractu* statute of limitations on the consumer debtor's Article Nine cause of action is apparent.

III. IF THE COURT CONCLUDES THAT THE RECOVERY UNDER SECTION 36-9-625 IS A PENALTY RATHER THAN COMPENSATORY DAMAGES, WHICH PLAINTIFF DOES NOT CONCEDE, THEN THE THREE YEAR STATUTE OF LIMITATIONS UNDER SECTION 15-3-540 APPLIES

The one-year statute of limitations period provided by S.C. Code Ann. § 15-3-570 is not, under any circumstances, the statute of limitations applicable to plaintiff's claim. Instead, assuming *arguendo* that the remedy provided by S.C. Code Ann. § 36-9-625 is a *penalty*, which plaintiff disputes, the appropriate period is three years, as provided by S.C. Code Ann. § 15-3-540.

As noted above, § 15-3-540's three (3) year limitations period clearly, on its face, applies to an action upon a statute for penalties *when the action is given to the party aggrieved*. Section 15-3-540(2) imposes a three year limitations period on:

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.

Id. (Emphasis added).

By contrast, Section 15-3-570, cited by defendant, imposes a one year limitations period on:

An action upon a statute for a penalty or forfeiture given, in whole or in part, *to any person who will prosecute [it]....*

Id. (Emphasis added).

The South Carolina Supreme Court, while not directly addressing the distinction between §§ 15-3-540 & 570, in the context of § 36-9-625, has applied the three year statute of limitations in a manner making clear that it, too, ought to be regarded as compensatory rather than penal.

In *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998) the Court held that the three year statute of limitations of § 15-3-540 applied to a class action in which the plaintiffs sought penalties under a consumer protection statute for the defendant's failure to ascertain plaintiffs' own preferences for the closing attorney and insurance agent in mortgage closings. *Id.*, 508 S.E.2d at 20. The statute at issue here, if not *ex contractu*, is clearly of the sort contemplated by § 15-3-540, *i.e.*, a cause of action given to the party aggrieved as opposed to a cause of action given to any person who will prosecute it. No third party not potentially injured by failure to provide the notice required by Article Nine, may bring an action, as a private attorney general, to recover the statutory damages provided for by § 36-9-625.

Section 15-3-570's one-year limitations period has been properly applied in just such situations, to wit: where a "private attorney general" seeks to recover a penalty provided by statute for a wrong done not to the plaintiff, but to another. *See, e.g., Rorrer v. P.J. Club, Inc.*, 347 S.C. 560, 566, 556 S.E.2d 726, 729 (S.C.App. 2001), *quoting S.C. Dept. of Revenue v. Collins Ent. Corp.*, 340 S.C. 77, 79, 530 S.E.2d 635, 636 (2000), *supra*. *See also, Montjoy v. One Stop of Abbeville, Inc.*, 325 S.C. 17, 478 S.E.2d 683, 684 (1996) (same); *Ardis v. Ward*, 321 S.C. 65, 467 S.E.2d 742, 744 (1996) (same).

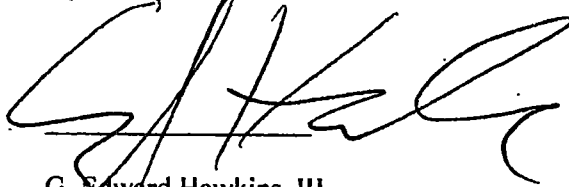
Section 36-9-625 would appear to fall precisely into the language of § 15-3-540(2) providing that it does not apply where "the statute imposing [the action] prescribes a different limitation." The statute providing for the damages available to a consumer debtor for a creditor's failure to provide

compliant notice, to wit: the U.C.C., *does* provide a different limitation, namely the six year limitation contained in § 36-2-725.

Nevertheless, should the Court conclude that § 36-2-725 is not applicable to § 36-9-625, § 15-3-540(2), and not § 15-3-570, is the appropriate statute of limitations.³

For the foregoing reasons, plaintiff respectfully requests that defendant's motion be denied, and that the Court declare that the statute of limitations applicable to plaintiff's claim under § 36-9-625 is that provided by § 36-2-725, namely six years from the date of mailing the defective notices.

Respectfully Submitted,



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³ It is worth noting that in *Tilley*, the defendant also argued that the attorney preference provision was a "penal" statute deserving strict construction. The Supreme Court, agreeing with the trial judge, disagreed, noting that, strict construction of penal statutes may be modified by affirmative legislative action. 2B Singer, *Sutherland Statutory Construction*, section 59.06. Additionally, the Court noted that rules of statutory construction must give way to the cardinal rule of legislative intent. *Gardner v. Biggart*, 308 S.C. 331, 417 S.E.2d 858 (1992). See also *Bell Finance Co. v. S.C. Dept. of Cons. Affairs*, 297 S.C. 111, 374 S.E.2d 918 (S.C. App. 1988) (penal statutes should not be subjected to strained interpretation in order to exclude from their operation cases which would otherwise be encompassed). In light of requirement of liberal construction of the CPC, a strict construction is unwarranted. Section 36-1-201 similarly requires a "liberal construction" of the Uniform Commercial Code.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
OTHA DELANEY, individually and on
behalf of other similarly situated,

PLAINTIFF,

vs.

FIRST FINANCIAL OF CHARLESTON,
INC.,

DEFENDANT.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-10-7166

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

FILED
2012 APR 20 PM 4:15
JULE J. ARMSTRONG
CLERK OF COURT

TO: PHILIP L. FAIRBANKS, FREDERICK M. CORLEY, AND GRAHAM E. HAWKINS, III,
ATTORNEYS FOR THE PLAINTIFF:

Defendant, First Financial of Charleston, Inc.(hereinafter referred to as "First Financial"), by and through its undersigned counsel, hereby submits this memorandum in support of its motion to dismiss Plaintiff's Complaint in this action for a failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Because Plaintiff and the putative class seek only statutory penalties as an award in this matter, they are subject to the one year statute of limitations set forth in S.C. Code Ann. § 15-3-570. Having failed to file the above-captioned lawsuit within one year since the action accrued, Plaintiff's claim and all putative class claims are time-barred and therefore should be dismissed as a matter of law.

BRIEF STATEMENT OF THE FACTS

On October 12, 2007, Plaintiff entered into a Retail Installment Sales Contract(hereinafter referred to as "RISC") with Coliseum Motors for the purchase of a 2003 Chevrolet pick-up truck, intended for Plaintiff's own personal use. (Compl. ¶ 9) This RISC

was then assigned to First Financial by Coliseum Motors, thus making First Financial a secured party in the consumer goods transaction. (Compl. ¶ 10) After Plaintiff failed to make payments, First Financial lawfully repossessed the vehicle. (Compl. ¶ 11) First Financial then sent the Plaintiff a "NOTICE OF PRIVATE SALE OF COLLATERAL" and accompanying letter on May 2, 2008 to advise Plaintiff of its intention to sell the repossessed collateral. (Compl. ¶ 14) Plaintiff claims this notice of disposition failed to comply with South Carolina law. (Compl. ¶ 13) Over seven months later, on December 15, 2008, First Financial sold the collateral. (Compl. ¶ 12) Plaintiff filed the above-captioned lawsuit on October 3, 2011, alleging that 1) the notice of private sale of collateral that First Financial sent to the Plaintiff was insufficient under South Carolina law, specifically S.C. Code Ann. § 36-9-613 and 614, and that 2) as a result, Plaintiff is entitled to a statutory penalty pursuant to S.C. Code Ann. § 36-9-625(c)(2). (Compl. ¶ 14, 22, and 25) Plaintiff, as a representative plaintiff, seeks these penalties on behalf of putative class members. (Compl. ¶ 18)¹

STANDARD OF REVIEW

First Financial acknowledges that the Court is required to accept the allegations contained in the Complaint as true for purposes of a Motion to Dismiss. Nonetheless, if the facts alleged and the inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, do not entitle the plaintiff to relief, then dismissal under Rule 12(b)(6) is proper. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602-03 (1995). Where a claim is time barred based on the facts plead on the face of the complaint, dismissal as a matter of law is proper.

¹ Although Plaintiff seeks these class penalties on behalf of consumers of "South Carolina", the Plaintiff's Complaint acknowledges that he is a resident of North Carolina. (Compl. ¶ 6 & 17).

ARGUMENT AND CITATION OF AUTHORITY

Plaintiff seeks a statutory remedy “for each class member pursuant to UCC 36-9-625(c)(2) in the amount of the finance charge plus ten percent of the principal amount of the obligation applicable to that class member’s contract.” (Compl. ¶ 25 (C)) As explained more fully below, this award is properly classified as a “statutory penalty,” and any action seeking this award is governed by the provisions of S.C. Code Ann. § 15-3-570. (“Any action upon a statute for a penalty.....must be commenced within one year after the commission of the offense.”) Because the alleged offense occurred upon the receipt of the May 2, 2008 notice of private sale, which date Plaintiff acknowledges in her Complaint, the statute ran in May of 2009. As a result, Plaintiff’s lawsuit was filed nearly two and half years after the running of the statute, and thus fails as a matter of law.

I. Plaintiff’s Claim Is Barred By The Statute Of Limitations Because § 36-9-625(c)(2) Provides For A Statutory Penalty And S.C. Code Ann. § 15-3-570 Mandates That Such Action Be Brought Brought Within One Year.

A. Plaintiff’s Proposed Relief Is A Penalty and South Carolina Courts Have Ruled Accordingly.

S.C. Code Ann. § 15-3-570 requires all civil actions seeking recovery under a “statute for a penalty” to be filed within one year “after the commission of the offense.” While the statute itself does not expressly note which statutory actions fall within its governance, a “statutory penalty” is defined as “a penalty imposing automatic liability on a wrongdoer for violation of a statute’s terms without reference to any actual damages suffered.” *Black’s Law Dictionary* 1181 (8th ed. 2005). The relief sought by Plaintiff in this lawsuit is in the nature of a penalty as it clearly seeks the imposition of liability without regard to any actual damages incurred. Plaintiff claims that First Financial violated provisions of Article 9 of South Carolina’s Commercial

Code, thus entitling Plaintiff to relief under S.C. Code Ann. § 36-9-625(c)(2). Plaintiff cites this statute as his sole basis for a remedy. This statute provides a fixed formula intended to penalize noncompliance “*in any event*,” and “*regardless of any injury* that may have resulted.” See S.C. Code Ann. § 36-9-625(c)(2) cmt. 4.(emphasis added) Furthermore, these penalties are established and set as a percentage of the debtor’s principal obligation for “every noncompliance.” *Id*; see also § S.C. Code Ann. § 36-9-625(c)(2). Thus, Plaintiff and the putative class members are seeking a pre-determined award from the transaction without regard to any monetary loss that was caused by First Financial, and the action is accurately categorized as “under a statute for a penalty.”

As the explicit provisions of the Plaintiff’s Complaint demonstrate, Plaintiff is not (and is incapable of) alleging or seeking any form of actual, compensatory damages. Clearly, this is because the Plaintiff has not suffered a monetary or injurious loss or any form of particularized harm from the transaction lying at the crux of this dispute. Plaintiff merely alleges non-compliance with an Article 9 statute in hopes of obtaining mechanical, formulaic relief. Plaintiff has not plead any alternative causes of action, such as the breach of any duty or of a contract. But for the existence of this statute and the penalties provided, no cognizable right of action could exist.

While South Carolina Courts have not addressed the applicability of the one year period set forth in §15-3-370 to a claim under § 36-9-625, the South Carolina Supreme Court has identified the exact recovery that Plaintiff is seeking in this case as a “statutory penalty.” In *Stokes v. Singleton*, 358 S.C. 369, 595 S.E.2d 461 (2004), the Court repeatedly referred to the statute as providing for a “minimum statutory penalty.”² In analyzing the nature of what it

² Although the Court in *Singleton* was analyzing the provisions of Section 9-507(1) of Former Article 9, current § 36-9-625(c)(2) embodies nearly identical language for its provisions on damages related to improper notice of sale

considered to be a "penalty provision," the Court went on to discuss the purpose and need for the formulaic, fixed award in § 36-9-625. *Id.* at 377, 595 S.E.2d at 465. Citing *Crane v. Citicorp Nat'l Serv.*, 313 S.C. 70, 437 S.E.2d 50 (1993), the Court noted in pertinent part:

"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.(emphasis added). Therefore, not applying the one year statute of limitations set forth in § 15-3-570 would be inconsistent with South Carolina law. *See also, Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)("a debtor may seek to recover the statutory penalty.")³

Ironically, Plaintiff cites to both *Stokes* and *Crane* in support of his position that the § 36-9-625(c)(2) awards damages rather than a statutory penalty. As noted above, these opinions directly contradict such a position as each explicitly references the statute as providing for a penalty. In fact, Plaintiff's own words provide direct support for First Financial's argument herein as he identifies § 36-9-625(c)(2) as an "automatic recovery provision." (See Plaintiff's Response to Defendant's Motion to Dismiss at p. 2) Furthermore, Plaintiff's citation to a multitude of subsections in § 36-9-625 that use the word "damages" is similarly unsupportive. *Id.* The subsections he cites which use the term "damages" are (b), (c)(1), (d), (e), and (f). Plaintiff does seek relief under any of these subsections nor reference any of them in his Complaint. The only statutory provision under which relief has been sought is § 36-9-625(c)(2). The language of this subsection does not use the term "damages" or reference any form of actual loss arising therefrom. Clearly, the award being sought is a penalty and Defendants ask this Honorable Court to rule accordingly.

to a debtor The Official Comments acknowledge that subsection (c)(2) "was patterned on former Section 9-507(1) . "

B. Other Courts Have Found Have Found This Exact Relief to Be A Penalty and Thus Subject to A One Year Statute of Limitations

Because the provisions of § 36-9-625(c)(2) are based on a uniform model UCC statute, other courts have ruled on this precise issue. In *Beard v. Vanderbilt Mortg. & Fin., Inc.*, 2008 U.S. Dist. LEXIS 43519 (M.D.T. June 2, 2008), the Middle District of Tennessee addressed the identical issue presented herein. In granting the Defendants' 12(b)(6) motion, the Court found that the putative class action was time barred under a one year statute of limitations because § 47-9-625(c)(2) of the Tennessee Code of Laws was in the nature of penalty and did not provide remedial damages that would subject the claim to a longer statute of limitations.⁴ See *Beard* at 6. In reaching this conclusion, the district court noted that because Tennessee state courts had previously acknowledged that the statute was a "statutory penalty," the one year statute of limitations should apply. See *Beard* at 7. Like the Tennessee appellate opinions referenced in *Beard*, South Carolina courts have acknowledged that the relief which Plaintiff seeks is a statutory penalty. This South Carolina precedent is dispositive on the issues presented before this Honorable Court.

Based on the facts as alleged by Plaintiff in the Complaint, Plaintiff's claim and all class claims for recovery under § 36-9-625(c)(2) should be barred by the one year statute of limitations in § 15-3-570. Plaintiff's own assertions demonstrate that he is the type of plaintiff bound by the penalty statute because he "prosecute[s]" this award as a representative of others. S.C. Code Ann. § 15-3-570(statute applies to "person who will prosecute). As previously noted, Plaintiff alleges that the improper Notice of Sale of Collateral was sent on May 2, 2008 and that the sale of collateral took place on December 15, 2008. Because § 15-3-570 declares the date of accrual for this action as the time of the alleged "commission of the offense," the Plaintiff's

³ The *Brockbank* Court was also addressing former § 9-507-1 also. See footnote 1 above

cause of action arose when the Notice of Sale of Collateral was sent, and the statute ran in May of 2009. Even if the action arose at the date of sale, the claim was still not brought within the applicable period. Moreover, assuming arguendo that a three year time period was somehow applicable, the Plaintiff still failed to file by May of 2011, three years after the alleged violation of South Carolina law. As a result, the October 3, 2011 Complaint is untimely, and this matter should be dismissed with prejudice.

II. S.C. Code Ann. § 36-2-725(1) Is Not Applicable To Plaintiff's Claims.

Plaintiff takes the position that § 36-2-725(1) applies to instant case and thus calls for a six year statute of limitations. Such a position is without merit for a variety of reasons. First and foremost, as Plaintiff concedes, § 36-2-725(1) applies to actions for breach of contract under Article 2 of the South Carolina Commercial Code. In this case, Plaintiff has not plead a cause of action for breach of contract and does not seek contract damages. Rather, as the face of Plaintiff's Complaint demonstrates, this is a lawsuit arising under Article 9 alleging violations of notice provisions found in § 36-9-613 and § 36-9-614. Indeed, Plaintiff does not even allege or reference any contract having ever been breached in the entire Complaint. Plaintiff is simply attempting to paint this lawsuit in a new light and mischaracterize the nature of this litigation for the sole purpose of reviving an otherwise time-barred claim. Plaintiff is the master of the Complaint and may choose any desired form of relief in prosecuting his case. The Plaintiff has expressly chosen not to sue for breach of contract or seek contractual damages (because no such damages exist). Thus, he may not now invoke the benefit of a breach of contract limitations period.

Secondly, no South Carolina Court has ever applied the provisions of § 36-2-725(1) to a claim arising under § 36-9-625(c)(2). § 36-2-725(1) is found within Article 2 of the Commercial

⁴ The Tennessee version of the UCC statute is identical to the South Carolina statute at issue in this lawsuit.

Code, which governs actions for the sale of goods. Plaintiff's claim does not arise under any provision of Article 2 and the Complaint makes no reference to any Article 2 statutory provision whatsoever. To be certain, the instant action holds no relevance to Article 2 in any manner. Again, Plaintiff seeks to ignore his own allegations and expand the scope and nature of this lawsuit. Under Plaintiff's interpretation, § 36-2-725(1) would be appear to be applicable to each and every action that bears any relevance to the Uniform Commercial Code despite the statute's own language.

Thirdly, in a last ditch effort to liken this action to a breach of contract claim arising under Article 2, Plaintiff cites to federal regulations which concern holder in due course requirements and for the very first time, alleges these regulations have been violated by these Defendants. These allegations are procedurally improper, untimely, and invalid. It is well established that the "factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint," and thus a Plaintiff may not simply create new factual allegations in a response to a motion to dismiss. *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). Therefore, these allegations are of no effect. For the reasons set forth above, § 36-2-725(1) is undoubtedly inapplicable.

III. Plaintiff's Reliance On S.C. Code Ann. § 15-3-540 Is Misplaced

As previously noted, these Defendants would show that § 15-3-570 is clearly the limitations period properly prescribed to the Plaintiff's cause of action. Plaintiff argues that if the award he seeks is classified as a penalty, the three year limitations period found in § 15-3-540(2) is proper. However, assuming arguendo that the three year statute of limitations for certain statutory penalties set forth in § 15-3-540(2) is applicable, it is of no avail to Plaintiff's

untimely Complaint as Plaintiff filed this action over five months after that three year statute of limitations ran.

In support of the application of this statute, Plaintiff cites to one and only case: *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998). In *Tilley*, the plaintiffs filed suit against a Nebraska Cooperation for failing to comply with the attorney and insurance agent preference provisions found in the South Carolina Consumer Protection Code. It does not appear that the application of § 15-3-570 was raised by either party. Rather, the Court singularly focused on § 15-3-540(2) and another limitations period found within the consumer protection code. In analyzing § 15-3-540(2), the South Carolina Supreme Court expressly held that the limitations period in § 15-3-540(2) accrues upon a distinct triggering event, in that instance when payments pursuant to the consumer credit sale were made. *Tilley*, 333 S.C. at 42, 508 S.E.2d at 20 (“the limitations period set forth in section § 15-3-540(2) begins to run each time a payment is made.”) In doing so, the Court was finding that a violation of the attorney and insurance agent preference statute was occurring when each payment was made. *Id.* Thus, the date of accrual is triggered when a violation of the statute which provides for a penalty occurs.

In this case, there is only one date when any alleged violation of § 36-9-625(c)(2) could have occurred. As Plaintiff concedes, that day was May 2, 2008 when the notice of sale which is alleged to have been improper was sent. (See Plaintiff's Complaint at ¶ 14.) There is no other allegation of any form of wrongdoing or violation of any statute against First Financial. Thus, even if § 15-3-540(2) is found to be applicable, the statute of limitations began to run when this notice that was sent (or shortly thereafter when Plaintiff received this notice). Plaintiff has made no allegation that this notice was received well after it was sent, and this lawsuit was filed on October 3, 2011, well over five months after the limitations period would have ran under § 15-3-

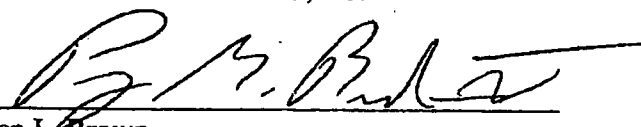
540(2), in May of 2011. Thus, Plaintiff's claim is time barred and should be dismissed with prejudice.

CONCLUSION

Based on the foregoing, Defendant First Financial of Charleston, Inc. respectfully requests that this Court enter an Order dismissing Plaintiff's Complaint because it, and thus all putative class claims, fails to state a claim upon which relief can be granted.

Respectfully submitted,

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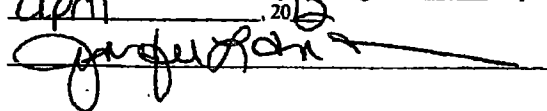
Attorneys for the Defendant First Financial of Charleston, Inc.

Charleston, South Carolina

Dated: 4/20/12

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 20th day of April, 2012



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-10-7166

OTHA DELANEY, Individually and)
on behalf of all others similarly situated,)
)
Plaintiff,)

-vs-

FIRST FINANCIAL OF CHARLESTON,)
)
Defendant.)

MOTION TO RECONSIDER RULING
ON MOTION TO DISMISS COMPLAINT

FILED
MAY -7 PM 1:53
J. ARMSTRONG
CLERK OF COURT

COMES NOW the Plaintiff, Otha Delaney, by and through his undersigned attorneys and respectfully moves the Court for an Order, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure (hereafter the "SCRCP"), setting aside the Order dated April 29, 2013, granting the Motion to Dismiss the Complaint filed by Defendant First Financial of Charleston. The grounds for Plaintiff's motion are to correct, clear error, and/or to prevent manifest injustice which would occur by dismissal of the case.

In support of said motion, Plaintiff would show the Court as follows:

INTRODUCTION

Rule 59(e) SCRCP, provides the Court with the authority to alter or amend a final order or judgment.

In discussing the need for a Rule 59(e) motion, we explained that [t]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments....

Ion, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court “alter or amend the judgment,” but also as a vehicle to seek “reconsideration” of issues and arguments. A motion under Rule 59(e) long has been viewed as “motion for reconsideration” despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

A motion for reconsideration should indicate matters counsel believes were overlooked which had they been considered might reasonably have altered the result reached by the court.

I. SECTION 36-9-625(c)(2) IS PART OF AN OVERALL REMEDIAL COMPENSATORY STATUTORY SCHEME AND IS NOT PRIMARILY A PENAL STATUTORY PROVISION

With due respect, Plaintiff submits that the Court incorrectly ruled that the remedy provided by § 36-9-625(c)(2) is a “penalty.”

It is true that courts, including our own appellate courts, often imprecisely and confusingly refer to the minimum statutory damages remedy of § 36-9-625(c)(2), which provides consumers with an alternative to the conventional “actual” damages standard, as a “penalty.” The remedy does in fact share certain characteristics with a typical penalty – it is intended to “compel creditor compliance,” it is not based on a consumer’s actual “loss,” and is awarded even in cases where a consumer can demonstrate *no* loss. As defendant points out, and as our Supreme Court has recognized, the § 625(c)(2) automatic minimum damages provision “...is 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.” *Crane v. Citicorp Nat’l Services, Inc.*, 313 S.C. 70, 437 S.E.2d 50, 52 (1993) (Emphasis added). This language does suggest an *enforcement* rationale.

However, as the court in *Jenkins v. Hyundai Motor Financing Co.*, 389 F.Supp.2d 961 (S.D.Ohio 2005) cogently observed, nearly every consumer protection statute “has a dual purpose of remedying harm to the individual and deterring socially inimical business practices....

Therefore, the Court must determine whether *the primary purpose* of the Act is more like a penalty or a remedial action....” *Id.* In considering the “primary purpose” of the automatic minimum damage provision, the district judge reasoned that:

An aggrieved consumer, however, is not *limited* to the pecuniary damages available under [§9.625(C)(2)]. The consumer has the option of recovering actual damages and minimum statutory damages amount under [§9.625(B)] and [§9.625(C)]. Both types of damages are available to consumer debtors. [§9.625(B)] provides for actual damages in the amount caused by the secured party’s failure to comply with disposition pursuant to [Article 9]. In the case of consumer debtors, [§9.625(C)(2)] provides for a minimum statutory amount to be awarded to them.

Id. Further, [UCC §1.06] provides:

The remedies provided by [Article 9]....of the Revised Code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, but neither consequential or special nor penal damages may be had except as specifically provided in those chapters or by other rule of law.

In other words, the UCC itself (1) requires a liberal interpretation with the goal of putting the aggrieved party (here, the *consumer*) in the position she would be in absent creditor non-compliance (a *contractual* damage concept) and (2) generally prohibits the imposition of penalties. As a result, the *Jenkins* court held that “the remedy provisions of the Ohio UCC set forth at [§9.625(c)(2)] include both remedial and penal/forfeiture aspects. As such, the six-year statute of limitations” for general contract actions, rather than the shorter statute of limitations for penalties and forfeitures, applies, and the claim is not time barred. *Id.*

In construing the purpose of a statutory provision, a court ought to consider it in the context of the entire statutory scheme of which it is a part. “In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.” *South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citing *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998)).

The automatic minimum damage provision of §36-9-625(c)(2) is an *alternative* remedy, available to consumer debtors who are free to avail themselves of the statutory formula for determining compensation *or* the traditional measure of compensation, to wit: by proving up their actual damages. Whichever measure of damages the consumer chooses, the remedy is *primarily* intended to compensate the consumer, and only secondarily to compel creditor compliance. *E.g., Jenkins, supra. See also, S.C. Code § 36-1-106.* Only by giving a liberal construction to §36-9-625(c)(2), which recognizes that its primary purpose is to provide a remedy for every wrong, and that the more general purpose of compelling general creditor compliance is a secondary goal, will the Court adhere to the plain legislative purpose expressed in §36-1-106.¹

There is an additional reason to conclude that §36-9-625, and each of the remedies it provides, is a remedial, rather than a penal, statute. The South Carolina Supreme Court has defined a “remedial” statute as one which:

create[s] new remedies for existing rights ... enlarge[s] the rights of persons under disability, and the like, unless [it] ... violate[s] some contract obligation.... Statutes directed to the enforcement of contracts, or merely providing an additional remedy, or enlarging or making more efficient an existing remedy, for their enforcement, do not impair the obligation of the contracts.

Smith v. Eagle Const. Co., Inc., 282 S.C. 140, 318 S.E.2d 8 (1984). See also, Edwards v. State Law Enforcement Div., 395 S.C. 571, 720 S.E.2d 462 (2011) (A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability.)

¹ While it may not be due *significant* weight, it is noteworthy that in Chapter 9 - Secured Transactions, Part 6 – Default, Subpart 2 - Noncompliance with Chapter, including “Remedies for secured party’s failure to comply with chapter”, in both the statutory language itself and in the Official Comments, the term “damages” appears thirty-five (35) times. By contrast, the term “penalty” appears not at all.

Section 36-9-625, including §36-9-625(c)(2), creates new remedies. Indeed, the Uniform Commercial Code is a creation of the Uniform Law Commissioners. The South Carolina Uniform Commercial Code was enacted into law on May 5, 1966, *See McMaster v. S.C. Retirement System*, 362 S.C. 362, 370, 608 S.E.2d 843, 847 (2005) (holding penal statutes “impose punishment and forfeiture” and are prosecuted by the state as contrasted with civil statutes that “affect private rights” and are litigated by private parties). In *McMaster*, the Supreme Court reversed a decision by a trial court regarding a statute imposing criminal penalties on public employees convicted of embezzlement of public funds, which also authorized the Attorney General to seek the placement of liens on the employee’s state pension. The trial court had ruled that because the statute imposed both criminal penalties (imprisonment) and restitution secured by the lien, it was a “penal” statute.

Reversing, the Supreme Court held that a statute can have both penal and remedial aspects. *Id.* at 369. The statute at issue in *McMaster* was challenged, *inter alia*, on constitutional double jeopardy grounds. Citing U.S. Supreme Court precedent, The S.C. Supreme Court noted that civil forfeitures were not “punitive” in the sense of a criminal sanction. Rather, they “have traditionally been viewed as civil proceedings; [because] civil forfeitures serve important nonpunitive goals... [and] as with civil forfeitures, the lien here serves an important nonpunitive goal: the recovery of public funds. *Id.*

To an even greater extent, § 36-9-625, including § 36-9-625(c)(2), simply creates a private cause of action for prosecution by private parties in order to serve a purely nonpunitive goal: ensuring that every consumer receives a “minimum statutory” recovery for violation of a purely civil statute. Thus, it is not a penal statute. To read the statute otherwise would require that every remedial statute be construed to be a penal one, a result clearly not intended by the

legislature. Furthermore, because it is remedial, it must be read liberally in order to effectuate its salutary goals.

Additionally, it is unlikely that the General Assembly, without clearly saying so, intended to cut off the right of a consumer debtor to one of several alternative remedies included in the same statute, several years earlier than the other remedies made available. *Cf.*, *Trammell v. Victor Mfg. Co.*, 102 S.C. 483, 86 S.E. 1057 (1915):

No reason has been suggested why the Legislature would have penalized the failure to pay discharged laborers whose wages are paid weekly and monthly, and not penalize the failure to pay those whose wages are paid at intermediate periods of time, while every reason which calls for the remedy in the former cases applies with equal force to the latter.... Any other construction would be strained and unnatural, and lead to absurd consequences.

Id. at 1058.

For each of the foregoing reasons, Plaintiff respectfully asks that the Court reconsider its ruling that the remedy provided by Section 36-9-625(c)(2) is a penalty, and, issue a new order holding that the automatic statutory damage provision is remedial, and subject to the six year statute of limitations provided by the Uniform Commercial Code, in S.C. Code Ann. § 36-2-725.

II. THE APPLICABLE STATUTE OF LIMITATIONS RUNS FROM THE SALE OF THE COLLATERAL, NOT FROM THE DATE THE NOTICE IS SENT OR THE DATE THE NOTICE IS RECEIVED.

It is settled law that statutes of limitations run from the time a cause of action first accrues. *E.g.*, *Walsh v. Woods*, 358 S.C. 259, 594 S.E.2d 548 (S.C. App. 2004). In analyzing a limitations defense, "[t]he 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." *Harvey v. S.C. Dept. of Corrections*, 338 S.C. 500, 508 S.E.2d 765, 769 (S.C. App. 2000) (quoting *Matthews v. City of Greenwood*, 305 S.C. 267, 269, 407 S.E.2d 668, 669 (S.C. App. 1991)).

Thus, a particular cause of action accrues "at the moment when the plaintiff has a legal right to sue on it." *Id. Accord, King v. James*, 388 S.C. 16, 694 S.E.2d 35 (S.C. App. 2010).

The statute of limitations is inert and inoperative until a right of action arises. "Both in courts of equity as well as in courts of law, a cause of action or suit arises when and as soon as the party has the right to apply to the proper tribunals for relief." *Suber v. Chandler*, 18 S.C. 526, 1883 WL 4838 (1883).

Plaintiff's cause of action for violation of the "notice requirements" following repossession but *prior to* sale of collateral, imposed on secured creditors, including defendant, cannot arise *prior to* sale of the collateral. Until the collateral has been sold, there can be no violation – because the requisite notice regarding the "intended" sale cannot yet be "noncompliant" with the commands of the U.C.C., in particular §§ 36-9-613 & 614. Or if the error is one of omission, it may yet be corrected. Accordingly, *Plaintiff could not state a cause of action pursuant to §36-9-625 prior to sale of the collateral.*

Here, the sale of Plaintiff's vehicle took place on December 15, 2008. This action was commenced on October 4, 2011, within the three (3) year limitations period of §32-1-10 (Code of Laws of S.C. 1976, as amended).

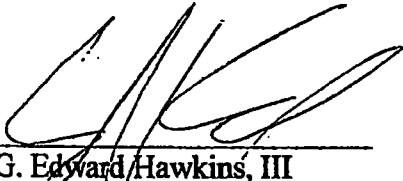
It is clear that - *if* the statutory damages remedy provided by §36-9-625(c)(2) is indeed a "penalty" - the three (3) year period established by §32-1-10 is the applicable statute of limitations. As argued in open Court at the hearing on Defendant's motion and in Plaintiff's memorandum in opposition to Defendant's motion to dismiss, the one year period established by § 32-1-20 applies to an action granted *to a party other than the injured party*, to collect a penalty *for another person*. Section § 32-1-10 establishes the limitations period for an action granted *to a party to recover a penalty for herself*, rather than for another person.

If § 36-9-625(c)(2) creates a cause of action for a penalty, it is provided solely to the injured consumer himself. No right is provided a third party to bring the action on his behalf. Defendant may be expected to respond with the "red herring" argument that Plaintiff seeks to bring this action in a "representative" capacity, to wit: as the representative of a class of similarly situated consumers, thus bringing the claim within the ambit of § 32-1-20. Plaintiff would point out that the authority to represent a class is provided not by § 36-9-625, or by the Uniform Commercial Code in general, but by Rule 23 of the South Carolina Rules of Civil Procedure.

For the foregoing reasons, Plaintiff respectfully asks that the Court reconsider its ruling that the statute of limitations applicable to Section 36-9-625(c)(2), if it is a penalty, is § 32-1-10, and cannot be §32-1-20, and, issue a new order holding that Plaintiff's cause of action is not time-barred.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Honorable Court reconsider the Order entered on April 29, 2013, and issue an amended Order denying Defendant's motion to dismiss.

By: 

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Hawkins Law Firm, P.A.
800 Wappoo Road
Charleston, SC 29407
843-225-7565
Attorney for the Plaintiff

Charleston, South Carolina

May 7, 2013

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

) CASE NO. 2011-CP-10-7166

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;

FILED
2013 MAY 13 PM 2:52
JULIE J. ARMSTRONG
CLERK OF COURT
ND GRANT

TO: PHILIP L. FAIRBANKS, FREDERICK M. CORLEY, AND GRAHAM
HAWKINS, III, ATTORNEYS FOR THE PLAINTIFF:

The Defendant, First Financial of Charleston, Inc. (hereinafter "First Financial"), by and through its undersigned counsel, hereby submits its Response in Opposition to the Plaintiff's Motion to Reconsider, further averring the arguments previously set forth in its Memorandum in Support of Defendant's Motion to Dismiss. For the reasons set forth more fully below, this Honorable Court's Order Granting Defendant's Motion to Dismiss is proper.

BRIEF FACTUAL BACKGROUND

On October 12, 2007, the Plaintiff entered into a Retail Installment Sales Contract (hereinafter referred to as "RISC") with Coliseum Motors for the purchase of a 2003 Chevrolet pick-up truck, intended for Plaintiff's own personal use. (Compl. ¶ 9) This RISC was then assigned to First Financial by Coliseum Motors, thus making First Financial a secured party in the consumer goods transaction. (Compl. ¶ 10) After Plaintiff failed to make payments, First Financial lawfully repossessed the vehicle. (Compl. ¶ 11) First Financial then sent the Plaintiff a "NOTICE OF PRIVATE SALE OF COLLATERAL" and accompanying letter on May 2, 2008

to advise Plaintiff of its intention to sell the repossessed collateral. (Compl. ¶ 14) Plaintiff claims this notice of disposition failed to comply with South Carolina law. (Compl. ¶ 13) Plaintiff filed the above-captioned lawsuit well over three years later, on October 3, 2011, alleging that 1) the notice of private sale of collateral that First Financial sent to the Plaintiff was insufficient under South Carolina law, specifically S.C. Code Ann. § 36-9-613 and 614, and that 2) as a result, Plaintiff is entitled to a statutory penalty pursuant to S.C. Code Ann. § 36-9-625(c)(2). (Compl. ¶ 14, 22, and 25) *Plaintiff cites to this specific subsection as his only basis for an award in this matter. Id.* Plaintiff, as a representative plaintiff, also seeks these penalties on behalf of putative class members. (Compl. ¶ 18)¹

BRIEF PROCEDURAL BACKGROUND

On November 20, 2011, First Financial moved to dismiss Plaintiff's claims, and thus all putative class claims, on the grounds that Plaintiff's Complaint was time-barred under either a one year statute of limitations set forth in S.C. Code Ann. § 15-3-570 or a three statute of limitations set forth in S.C. Code Ann. § 15-3-540(2). Both of these statutes govern the timeliness of actions seeking recovery of a statutory penalty, and both might reasonably be applied to this matter. However, because Plaintiff's sole cause of action seeking a penalty would have accrued upon receipt of the alleged noncompliant "Notice of Sale," both statutes render Plaintiff's Complaint untimely as a matter of law.

On April 5, 2012, the Plaintiff filed his opposition to First Financial's Motion to Dismiss contending that S.C. Code Ann. § 36-9-625(c)(2) does not provide for a statutory penalty and that the six year statute of limitations set forth in S.C. Code Ann. § 36-2-725(1) could be applied to this matter. Further, Plaintiff suggested that even if a three year statute of limitations is

¹ Although Plaintiff seeks these class penalties on behalf of consumers of "South Carolina", the Plaintiff's Complaint acknowledges that he is a resident of North Carolina. (Compl. ¶ 6 & 17).

applied, this action did not accrue until the collateral was sold rather than when the alleged noncompliant "Notice of Sale" was received.

On April 29, 2013, the Court granted the Defendant's Motion to Dismiss finding that S.C. Code Ann. § 36-9-625(c)(2) qualifies as a penalty provision and that Plaintiff's sole cause of action accrued upon receipt of the alleged noncompliant "Notice of Sale." As a result, Plaintiff's Complaint was held to be untimely under either a one year or three year statute of limitations. On May 7, 2013, Plaintiff filed the instant Motion to Reconsider.

ARGUMENT AND CITATION OF AUTHORITY

Plaintiff now argues that this Court "overlooked" two specific issues which might reasonably have altered its ruling. First, he asserts that the Court incorrectly found S.C. Code Ann. § 36-9-625(c)(2) to be a penal statute and secondarily, that even if a penal statute, his cause of action did not accrue until the sale of the collateral and therefore is timely under the three year statute of limitations. Contrary to Plaintiff's assertions, both of these issues have been extensively briefed, raised to the Court at the hearing on this matter, and the Court's findings on these subjects were thoroughly supported and addressed in its Order.

I. THIS COURT CORRECTLY RULED THAT S.C CODE ANN. § 36-9-625(C)(2) PROVIDES FOR A STATUTORY PENALTY

The Court's Order appropriately concluded that § 36-9-625(c)(2) awards a statutory penalty because 1) our Supreme Court has held precisely that on no less than three occasions and 2) because the legislative comments to this exact subsection specifically inform that plaintiffs are entitled to this formulaic award "regardless of any injury that may have resulted." *Crane v. Citicorp Nat'l Serv.*, 313 S.C. 70, 437 S.E.2d 50 (1993); *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000); *Stokes v. Singleton*, 358 S.C. 369, 595 S.E.2d 461 (2004); S.C. Code Ann. § 36-9-625(c)(2) *cmt. 4*. In light of this legislative commentary on the nature of the

companion statute to S.C. Code Ann. § 36-9-625(c), but also to Ohio's §9-625(B), whose contents are also found in the South Carolina consumer code statutory scheme at S.C. Code Ann. § 36-9-625(b). As the Plaintiff's quotations from *Jenkins* quickly reveal, the court's commentary concerning actual or compensatory damages being recoverable by a consumer/plaintiff in these type of actions refers to § 9-625(B), a statute which has no bearing on Plaintiff's allegations and was never cited as a basis for relief in this case. Rather, Plaintiff seeks an award under § 36-9-625(c)(2) only. The *Jenkins* court merely identified that Ohio companion statute as a "minimum statutory amount," and not as a provision awarding actual damages.

Ignoring the distinction made by *Jenkins*, Plaintiff seeks to infuse and join these two distinct, separate provisions to revive his time-barred claim. While plaintiffs alleging inadequate notice of disposition of collateral might choose to pursue relief under both subsections, they must be first be able to demonstrate the existence of actual damages, a prerequisite which Plaintiff's Complaint does not meet. As a result, Plaintiff's depiction of § 36-9-625(c)(2) as some sort of "alternative" or "optional" remedy is nonsensical in the context of this case as it is the sole award being sought. Wherefore, in accordance with binding South Carolina case law, the Court properly found Plaintiff's desired relief to be a statutory penalty.

B. The Plaintiff Also Relies On Case Law Which Has No Relevance To This Matter

In furtherance of Plaintiff's novel position, he also cites to case law outside the scope of the issues before this Court. See e.g., *Smith v. Eagle Const. Co., Inc.* 282 S.C. 140, 318 S.E.2d 8 (1984); *Edwards v. State Law Enforcement Div.* 395 S.C. 571, 720 S.E.2d 462 (2011). These opinions do not address, concern, or even reference § 36-9-625(c)(2) or any UCC provision, nor do they discuss statutory penalties.

The first case cited, *Smith v. Eagle Const. Co.*, addresses a Worker's Compensation claimant's right to lifetime benefits under a post-injury enacted statutory amendment. The question before the Court was whether the amendment could be applied retroactively or prospectively only. In determining that issue, the Court discussed the "remedial" nature of the amendment only so as to assess if it were proper for retroactive application. Quite clearly, the Court was speaking of "remedial" only in the sense of a *change in the law* related to an individual's existing legal rights. The second case cited, *Edwards*, is a criminal matter concerning the application of an amended sex offender registration law to a pardoned but convicted sex offender. Again, the Court discussed the "remedial" nature of a statutory amendment in the context of a *change in existing law* affecting vested rights. Neither opinion discusses the nature of civil damages being awarded by a statute, the principal question before this Court.

In essence, Plaintiff asserts that because § 36-9-625(c)(2) provides a private cause of action for plaintiffs, it creates a "new remedy for an existing right" and is therefore a compensatory statute. Under this theory, however, any and all statutes which grant a private cause of action would have to be deemed "remedial" simply by virtue of creating a basis for a lawsuit. To the extent such a generic definition could be applied, it would render both S.C. Code Ann. § 15-3-540(2) or § S.C. Code Ann. § 15-3-570 meaningless because no cause of action could ever qualify as arising "under a statute for a penalty." The cited cases regarding a statutory change in law are simply inapplicable and irrelevant.

Admittedly, S.C. Code Ann. § 36-9-625(c)(2) is "remedial" in the broad sense that it allows a Plaintiff to recover an award due a defendant's noncompliance with S.C. Code Ann. § 36-9-613 and 614. However, its legislative purpose, as noted by *Brockbank*, is "to ensure

creditor compliance" under a fixed calculation of recovery even where no injury or damages exist, and thus this Court properly found that it provides for a statutory penalty. *Brockbank*, 341 S.C. at 385, 534 S.E.2d at 695

II. THIS COURT CORRECTLY RULED THAT PLAINTIFF'S SOLE CAUSE OF ACTION ACCRUED UPON RECEIPT OF THE NOTICE OF SALE AND WAS THEREFORE TIME-BARRED UNDER EITHER S.C. CODE ANN. § 15-3-570 OR S.C. CODE ANN. § 15-3-540(2)

The two statutes which might arguably establish the time limitations period for Plaintiff's claims set forth the following:

S.C. Code Ann. § 15-3-570

"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. § 15-3-540

"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."

This Court appropriately reasoned that because Plaintiff's only allegation of noncompliance relates to the adequacy of the "Notice of Sale," the "commission of the offense" under § 15-3-570 took place in May of 2008 upon receipt. Plaintiff's Complaint makes no allegations regarding the propriety or legality of the sale of collateral. Also, the Court found the date of accrual under § 15-3-540(2), if applicable, to be May of 2008 as well. The Court's rationale was twofold: 1) The striking similarities in the two statutes evidence a legislative intent for an action under either to accrue at the time of the commission of the offense; and 2) because Plaintiff's action is based on a specific act of noncompliance and Plaintiff's entitlement to relief

is based on that act of noncompliance (not on actual damages), Plaintiffs action accrues as soon as the statute's provisions are allegedly violated i.e. when the "Notice of Sale" is received.

Plaintiff claims that his cause of action accrued in December of 2008 when the collateral sold and is thus timely under a three year statute of limitations. As an initial matter, Plaintiff's Motion to Reconsider now strangely argues that S.C. Code Ann. § 32-1-10 provides the controlling three year limitations period. This statute pertains to "suit[s] by loser at cards or other game[s] for recovery of losses." *Id.* Undoubtedly, this statute is inapplicable and Plaintiff's argument is without merit. To the extent Plaintiff inadvertently cites to this subsection rather than § 15-3-540(2), Plaintiff's argument is similarly unavailing as he presents no ground that has not been previously briefed and argued to this Court as to why the sale of collateral should serve as the date on which this action accrued.

During the pendency of First Financial's Motion to Dismiss, the Eighth Circuit Court of Appeals addressed this precise issue: the date of accrual for an action regarding inadequate notice of the disposition of collateral. In *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012), the Eighth Circuit deemed the underlying plaintiff's claims untimely and stated:

"We therefore affirm the district court's dismissal of the Mo UCC claims because we agree *that these claims clearly accrued when plaintiffs received the allegedly facially deficient collateral disposition notices.*"

(emphasis added). Furthermore, the Court was interpreting a Missouri statute that is nearly verbatim to S.C. Code Ann. § 15-3-540(2), which Plaintiff claims is the more appropriate statute if this Court finds § 36-9-625(c)(2) to award a statutory penalty. Like this Court, the Eighth Circuit correctly found no statutory support or logical purpose for finding that the sale of

collateral is the date at which the action accrues. Wherefore, this Court properly found Plaintiff's Complaint to be untimely as a matter of law.

CONCLUSION

For the reasons set forth above, First Financial respectfully requests that this Court DENY Plaintiff's Motion to Reconsider and hold that the Plaintiff's claims, and thus all putative class claims, are time-barred.

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By: 

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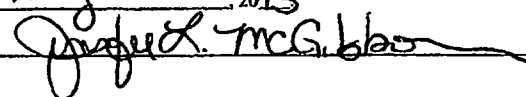
Attorneys for the Defendant First Financial of
Charleston, Inc.

Charleston, South Carolina

Dated: 5/13/13

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to
all counsel of record in this proceeding this 13 day of

May, 2013


STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-10-7166

OTHA DELANEY, Individually and)
on behalf of all others similarly situated,)
Plaintiff,)

vs.)

FIRST FINANCIAL OF CHARLESTON,)
Defendant.)

PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION TO RECONSIDER

FILED
MAY 15 AM 11:46
J. L. ARMSTRONG
CLERK OF COURT

INTRODUCTION

On April 29, 2013 this Court issued its Order granting Defendant's Motion to Dismiss on grounds that Plaintiff's Complaint was not timely. Two issues raised in Plaintiff's Motion for Reconsideration pursuant to Rule 59(e), *SCRCP*, following this Court's Order are: (1) what is the correct statute of limitations to apply to Plaintiff's single cause of action seeking alternative minimum statutory damages under the Uniform Commercial Code ("UCC") § 36-9-625(c)(2); and, (2) for statute of limitations purposes, at what point in time did her UCC cause of action begin to run.

I. PLAINTIFF'S CLAIM RUNS FROM THE DATE OF SALE, NOT DATE OF NOTICE.

Relevant Facts:

On May 2, 2008, Defendant sent Plaintiff its "Notice of Private Sale of Collateral", giving notice of its intention to sell her repossessed collateral (a 2003 Chevrolet Pick-up Truck) at a private sale. (Complaint ¶11.) Over seven months later on December 15, 2008, Defendant entered into a contract of sale of the Truck. (Complaint ¶12.)

Without abandoning her assertion that a six year statute of limitations may apply, Plaintiff alternatively asserts that in a worse-case scenario, her cause of action is controlled by a three year statute of limitations as discussed more fully herein below. If a three year statute is applicable, her Complaint, which was filed on October 3, 2011, would be *untimely if* the three years began to run from the date the Notice was sent. However, **it is timely if it runs from the date of the sale.** Therefore, one question raised by Defendant's Motion, and which Plaintiff asserts bears reconsideration, is: when does Plaintiff's UCC cause of action arise or become actionable – from the date the Notice was sent or date of the subsequent sale.

The Court ruled that the Complaint alleges that Defendant sent non-compliant notice of the intended sale of repossessed collateral in that the contents of its Notice were deficient under UCC § 36-9-613 (generally applicable to sales of all repossessed collateral) and 614 (applicable to sales of consumer goods only). Therefore the cause of action, at best for the Plaintiff, was controlled by the three year statute of limitations for a statutory penalty pursuant to § 15-3-540(2) (*Order*, p. 5), which accrues from the date the Plaintiff received the Notice. (*Id.* p. 6-7.) The Court reasoned that because § 36-9-625(c)(2) was in the nature of a statutory penalty, the “offense ... occurred upon delivery and receipt of the [May 2, 2008] Notice of Sale”[.] (*Order*, p. 7) The Court further found that because the three year statute of limitations for a statutory penalty “does not delineate a date of accrual, I find that the alleged commission of the offense should similarly serve as the commencement of the three year statute of limitations found in § 15-3-540”, which was determined to be the date the Notice was delivered and received by Plaintiff. (*Id.*) Finally, the Court noted that “the only offense which Plaintiff alleges concerns the adequacy of the notice provided prior to sale.” (*Id.*)

In Plaintiff's Response to Defendant's Motion to Dismiss he notes § 36-9-611 as the source of the Defendant's statutory obligation to send “reasonable authenticated notification” of intended sale

in connection with a "commercially reasonable sale" of his collateral. (*Plaintiff's Response to Defendant's Motion to Dismiss*, p. 1.) He alleges in his Complaint that the contents of this notification are controlled by § § 36-9-613 and 614, and that Defendant's Notice was non-compliant under the terms of those statutes (Complaint ¶13.) He also alleges that a sale of his Truck did in fact take place, and that it was not redeemed. (Complaint, ¶12.).

As Plaintiff has argued, a cause of action does not accrue until it becomes actionable. "[T]he 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." *Plaintiff's Motion to Reconsider*, p. 6., citing *Harvey v. S.C. Dept. of Corrections*, 338 S.C. 500, 508 S.E.2d 548 (S.C.App. 2000). An examination of the plain language of the UCC, as well as the logic of the relevant statutory scheme, shows *that not until the sale actually occurs will the secured party's failure to provide compliant, pre-sale notice under § 36-9-613 and 614 become actionable under §36-9-611, and thus not until that time will an action lie for statutory damages pursuant to 36-9-625(c)(2)*. Therefore, Plaintiff submits the Court erred in ruling that the statute of limitations for alleged § § 36-9-613 and 614 defects run from the date of Notice, and *not* from the date of sale.

Legal Analysis:

Part 6 ("Default") of Article 9 ("Secured Transaction") of the UCC sets forth a highly regulated and integrated statutory scheme, controlling the secured party's rights and obligations in conducting its sale of the repossessed collateral. Section 36-9-610, entitled "Disposition after default", provides the foundational cornerstone of a secured party's obligations concerning its resale of repossessed collateral; it permits the secured party to sell or otherwise dispose of the collateral, but requires that every aspect of that sale be "commercially reasonable":

(a) After default, a secured party may sell, lease of license, or otherwise dispose of any or all of the collateral[.]

(b)[E]very aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable[.]”

§ 36-9-610(a) and (b). (Emphasis added.)

A secured party’s obligation to send the debtor “reasonable notification” in connection with a § 36-9-610 sale is imposed by § 36-9-611, entitled “Notification *before disposition* of collateral”. Section 36-9-611 provides: “a secured party *that disposes of collateral under Section 36-9-610* shall send [to the debtor] reasonable authenticated notification of disposition.” (Emphasis added.) The information that must be contained within a § 36-9-611 “reasonable notification” is controlled by §§ 36-9-613 and 614, whereas the timing for sending it is controlled by § 36-9-612.

There are thus three important aspects of Defendant’s § 36-9-611-notice obligation as it pertains to Plaintiff’s statute of limitations:

First, as the title indicates, the provision pertains to “notification before disposition”, and there is no indication that § 36-9-611 applies in every case of repossession, or in those cases where no disposition occurs.¹

¹ This is not merely an academic point as the debtor has an absolute right to redeem his collateral at any time *before* the sale occurs, or a contract for sale is entered. § 36-9-623. Therefore, a redemption may occur even after the secured party sends non-compliant notice. Under the Court’s reasoning – that the statute of limitations for sending defective § 36-9-611 notice runs from the date of delivery and receipt because the cause of action was fully actionable at that time – the debtor would be allowed to recover minimum statutory damages absent an actual disposition by the secured party. In that case, he could pay off his accelerated balance to redeem his collateral, and still sue and recover under § 36-9-611 for his statutory damages in an amount that is *more* than the accelerated balance (statutory damages are based upon the entire finance charge plus 10% of the cash price. § 36-9-625(c)(2).)

While the debtor has a right to redeem the collateral at any time before sale by paying the full accelerated balance (§ 36-9-623), nothing in the UCC prevents the parties from voluntarily entering into an post-repossession agreement more like a “cure” wherein the secured party forgoes its right to sell the collateral and allows the debtor to pay less than the full accelerated balance and to resume payments under the terms of the contract. This is another real world example where a defective notice could be sent, but a disposition is never held. If the Court’s reasoning is correct that a cause of action accrues upon delivery and receipt, the debtor in this case would be able to recover his collateral, resume payments of his debt *and* recover statutory damages based upon an action for defective notice.

Second, § 36-9-611 cites § 610, such that its plain language ties the secured party's obligation to send "reasonable notification" under § 36-9-611 to those instances where a "commercially reasonable disposition" pursuant to § 36-9-610 takes place.

Finally, and perhaps most importantly, the plain language of § 611 *limits* the creditor's obligation to send "reasonable notification" of the disposition to the "secured creditor *that disposes of collateral*". Thus the occurrence of a sale, or other "commercially reasonable disposition" of the collateral, is clearly an element of the Plaintiff's cause of action under § 36-9-611, and is a necessary antecedent event triggering his right to recovery for the Defendant's failure to comply with § 36-9-611.

In summary, the secured party that chooses to protect its interest in the collateral by disposing of the collateral *may* do so, but if it chooses to dispose of the collateral it must do so in a "commercially reasonable" disposition. § 36-9-610(a) and (b). When a secured party "disposes of collateral" under § 36-9-610, however, is required to first send "reasonable notification". § 36-9-611(b), the wording of which is controlled by §§ 36-99-613 and 614. But no statutory pre-sale notification obligation whatsoever is conversely imposed upon the secured party that does *not* dispose of the collateral.

It is apparent that § 36-9-613, entitled "Contents and form of notification *before disposition of collateral: general*", and § 36-9-614, entitled "Contents and form of notification *before disposition of collateral: consumer goods transactions*", apply to a "reasonable notification" sent in compliance with § 36-9-611 "*before disposition*". (Emphasis added.) It is equally apparent, consistent with their titles and their placement in the statutory scheme, that §§ 36-9-613 and 614 are further limited *vis a vis* § 36-9-611 to a secured party (such as Defendant) "that disposes of collateral". As such, a cause of action pursuant to § 36-9-611 for failure to send "reasonable notification" – whether because the

wording of that notice does not comply § § 36-9-613 and 614 or otherwise – would neither “accrue” nor become “actionable” *until and unless* the sale or other disposition takes place. It logically follows that Plaintiff’s cause of action for statutory damages runs from the date of sale, and not the date of the Notice.

II. IF PLAINTIFF’S CAUSE OF ACTION IS NOT CONTROLLED BY THE SIX YEAR LIMITATIONS PERIOD OF § 36-2-725(1), A THREE YEAR LIMITATIONS APPLIES.

The Court ruled that the six year statute of limitations found within § 36-9-725(1) is not applicable. (*Order*, p. 5-6). However, Plaintiff asserts that the Court failed to adequately consider – or to rule – whether an alternative three year limitations period applies.² Section 15-3-530(2) applies to “an action upon a liability created by statute *other than a penalty or forfeiture*”. Alternatively, § 15-3-540(2) imposes a three year limitations period on “[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.”

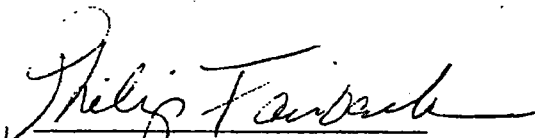
Plaintiff argues that his cause of action permits recovery of remedial damages (*e.g.*, alternative, minimum statutory damages as set forth in § 36-9-625(c)(2)) for Defendant’s failure to provide “reasonable notification” prior to the sale of his Truck pursuant to § 36-9-611, which is not an action for a “statutory penalty” within the contemplation of the one year limitations period of § 15-3-570. Accordingly, the three year limitations period found within § 15-3-530(2) applies, if the six year period pursuant to § 36-2-725(1) is not available to him, running from the date of sale. In the alternative, if the Court concluded that his cause of action is for a “statutory penalty” and is not “an action upon a liability created by statute other than a penalty or forfeiture”, the Court erred in failing

² The Court specifically ruled that “the Court need not decide” whether a three year statute applies. *Order*, p. 6.

to consider, and to rule, that the three year limitations period of § 15-3-540(2), running from the date of sale, applies.

Respectfully submitted,

Philip Fairbanks, Esq., P.C.

A handwritten signature in dark ink, appearing to read "Philip Fairbanks", written over a horizontal line.

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May 13, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-10-7166

OTHA DELANEY, Individually and
on behalf of all others similarly situated,
Plaintiff,

vs.

FIRST FINANCIAL OF CHARLESTON,
Defendant.

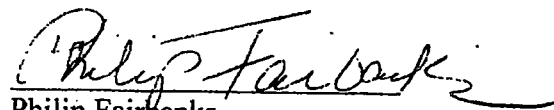
CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of Plaintiff's Memorandum in Support of Motion to Reconsider with Certificate of Service attached, by depositing the same this date into the United States Mail, with adequate First Class Postage affixed, and addressed to:

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And,

Perry M. Buckner, IV, Esq.
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FILED
2013 MAY 15 AM 11:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY

May 13, 2013

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

OTHA DELANEY, Individually and
on behalf of all others similarly situated,)

Plaintiff)

vs.)

FIRST FINANCIAL OF CHARLESTON,)

Defendant.)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-10-7166

PLAINTIFF'S REPLY TO DEFENDANT'S
RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION TO RECONSIDER

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY

INTRODUCTION

While a Reply may not ordinarily be required, it should be allowed and duly considered when *the opposing party has made a material mis-characterization*, in its Response in Opposition to Plaintiff's Motion to Reconsider pursuant to Rule 59(e), *SCRCP*, of the allegations set forth in Plaintiff's Complaint.

In its Response, dated May 13, 2013, Defendant asserts that Plaintiff's cause of action for statutory damages (for Defendant's alleged failure to send notice compliant with the UCC prior to the sale of his collateral) begins to run from the date of receipt of defective notice, not the date of sale. In connection with this argument Defendant states: **"Plaintiff's Complaint makes no allegations regarding the propriety or legality of the sale of collateral."** *Response*, p.7. (Emphasis added.)

This statement is completely and patently inaccurate, and it is logically and statutorily inconsistent with the issues that *were* directly raised in Plaintiff's Complaint.¹ When a Complaint

¹ Plaintiff alleges in his Complaint that Defendant sent him a notice of pending sale of his collateral (Complaint, ¶ 14), *in connection with a sale* that subsequently took place (*id.* ¶ 12); and that prior to sale no notice compliant with §§ 36-9-613 and 614 was ever sent to him (*id.* ¶ 13). Plaintiff further specifically alleged that a *sale* which is not preceded by "reasonable authenticated notification of disposition" violates § 36-9-611. (*Id.* ¶ 24). Accordingly, he is entitled to minimum statutory damages under § 36-9-625(c)(2) for defendant's failure to send compliant notice in connection with that sale. (*Id.* ¶¶ 20, 22, Prayer for Relief).

alleges that the secured party conducted a sale of collateral, but failed to provide "reasonable authenticated notification" of the sale prior to disposition, *it follows that the issue of the "commercial reasonableness" of the resulting sale is also called into question under §§ 36-9-610 and 611.*²

ANALYSIS

While § 36-9-610(a) permits a secured party to sell repossessed collateral after default, subsection (b) requires that "[e]very aspect of a disposition, including the method, manner, time, place and other terms, must be commercially reasonable." § 36-9-610(b). (Emphasis added.) Logic dictates that adequate, antecedent notice to the debtor (who may be liable for a deficiency following the sale) is as much an "aspect" of the "commercially reasonable" sale as any other "aspect", "term" or "manner" of sale. In case there could be any doubt, however, the next UCC section, which is cited in Plaintiff's Complaint at ¶ 24, disabuses one of such doubt. Section § 36-9-611 provides that: "*a secured party that disposes of collateral under Section 36-9-610* [e.g., in a "commercially reasonable" sale] *shall send to the debtor reasonable authenticated notification of disposition.*" §36-9-611. (Emphasis added.)³

Therefore the secured party's obligation to provide the debtor with a "commercially reasonable sale" under § 36-9-610 includes, but is not limited to, sending the debtor "reasonable notification" notice of the pending sale first. § 36-9-611. In order to further clarify what "information

² E.g., *American General Fin. Serv., Inc. v. Woods-Witcher*, 294 Ga. App. 685, 669 S.E.2d 709 (2008) (applying Virginia law in case where secured party failed to send accurate notice of disposition of consumer-goods collateral pursuant to UCC § 9-614, Georgia court noted that "[t]he Supreme Court of Virginia held that 'the failure to give the required notice of sale of collateral made the sale commercially unreasonable[.]' *Woodward v. Resource Bank*, 246 Va. 481, 487-488, 436 S.E.2d 613 (1993)." (Emphasis added.)

³ The Official Comment to § 9-611 provides:

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. The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content. See, Section 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions).

Official Comment to the Uniform Commercial Code, § 9-611, Comment 2. (Emphasis added.)

and form” the § 36-9-611 “reasonable notification” must take, § § 36-9-613 and 614 were enacted and apply. (“In a consumer goods transaction, the following rules apply: (1) *[a] notification of disposition must provide the following information...[.]*” § 36-9-614.) (Emphasis added.)

Because “reasonable notification” to the debtor is a necessary component of the “commercially reasonable” sale, imposed by statute upon the “secured party that disposes of collateral”, it follows that a Complaint alleging a secured party’s *failure* to send such notification followed by a sale, has raised the issue that the sale itself was tainted, or, more accurately stated, that the secured party failed to conduct a “commercially reasonable” sale. *See, American General Fin. Serv., Inc. v. Woods-Witcher, supra.* ⁴

Defendant’s position that Plaintiff’s Complaint raises no defect with the sale of his collateral is also a mischaracterization of his Complaint wherein he seeks § 36-9-625(c)(2) statutory damages . These damages apply to persons who were consumer obligors “*at the time a secured party failed to comply with this part*”. § 36-9-625(c)(2). (Emphasis added.) “At the time the secured party failed to comply” would necessarily encompass obligors “at the time” the secured party failed to conduct a “commercially reasonable sale”.

⁴ Because the Complaint raises the issue of Defendant’s failure to provide a “commercially reasonable” sale, it follows that the statute of limitations runs from the time of the defective sale. This is consistent with § 36-9-611 inasmuch as the secured party’s failure to provide “reasonable notification” can be “fixed” up until the time of sale. Per the Official Comments, the secured party has the *right* under § 36-9-611 to “revise” its notice before the sale if it chooses to do so, and a continuing *duty* if the first notice is either facially defective or no longer is accurate due to changed circumstances: “Nor does this Article prevent a secured party from electing to send a revised notification... 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.” Official Comment to the UCC, § 9-611, Comment 8.

While it may be true that the Plaintiff complained of no *other* defective “aspect” of the sale of his Truck in his Complaint, he has clearly placed the issue that the Notice he received was defective, that a sale occurred following Defendant’s failure to provide the requisite notice, and that this failure now raises § 36-9-611 consequences. It is the Defendant, not the Complaint, which characterizes those allegations as “mak[ing] no allegations regarding the propriety or legality of the sale”, giving no due regard either to its obligation as a “secured party that disposes of collateral” to provide a “commercially reasonable” sale in “every aspect”, or to the underlying statutory scheme at issue.

DEFENDANT’S RELIANCE UPON THE RASHAW CASE IS MISPLACED.

Defendants argue in its Response that “[t]he Eighth Circuit Court of Appeals [in *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012)] *addressed this precise issue*: the date of accrual for an action regarding inadequate notice of the disposition of collateral.” Response, p. 8. (Emphasis added.) An examination of that case, however, indicates that the issue of whether a UCC notice cause of action accrues at the date of sale, as opposed to the date of receipt of defective notice, was never raised by the parties or at issue in the case.

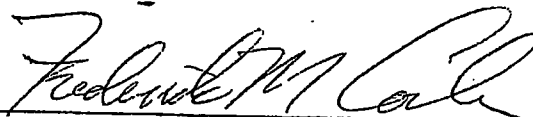
In *Rashaw* the question was whether under Missouri law (1) a 6 year statute for actions for penalties or forfeitures against “moneyed corporations” applied to the UCC notice claim at issue which was commenced nearly 6 years after receipt of notice; or (2) a 5 year statute for a an action “upon a liability created by statute *other than* a penalty or forfeiture”⁵; or (3) a 3 year statute for an action “upon a statute for a penalty or forfeiture where the action is given to the party aggrieved”. *Id.* at 741. The parties apparently agreed that the 5 years statute for actions “upon a liability created by statute other than penalty or forfeiture” would apply, which would render the claim as untimely. *Id.* However, the plaintiff also alleged that the longer 6 year applied.

⁵ This statute is comparable to § 15-3-530(2).

In ruling against the plaintiff that the longer 6-year "moneyed corporation" statute was not applicable because it applied only to penal and not civil actions, the Court held that plaintiffs claims were time barred whether they were actions upon statutory liabilities (the 5 year statute), or upon a action "for penalty or forfeiture where the cause of action is given to the aggrieved party" (the 3 year statute). *Id.* at 744-745. "Given these conclusions we do not decide and do not consider whether the remedies in §§400.9-625(c)(2) and .9-625(b) include 'penalties or forfeitures'. *Id.* at 745.

Inasmuch as the plaintiff's cause of action was filed almost 6 years after receipt of notice, the plaintiff's damages claims were untimely under *either* a 3 or 5 year statute, and the question of whether the cause of action accrued at the time of sale, as opposed to the time of receipt of notice, *was not even raised* or ruled upon in the case. It is axiomatic that an appellate court's affirmance of a lower court's ruling on an issue that is neither raised by the party, nor at issue in the case, does not "decide" that issue as Defendants claim. "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling...Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal." Toal, et al, Appellate Practice in South Carolina, 2d ed, p. 80. Accordingly, any dicta to the contrary, this matter has not been "decided" by the Eighth Circuit.

Respectfully submitted,



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May 20, 2013

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

OTHA DELANEY, Individually and
on behalf of all others similarly situated,

Plaintiff,

-vs-

FIRST FINANCIAL OF
CHARLESTON,

Defendant.

IN THE COURT OF COMMON PLEAS
CASE NO. 2011-CP-10-7166

CERTIFICATE OF MAILING

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2013 MAY 21 PM 1:24

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The undersigned hereby certifies that s/he has served the document indicated below to the person hereinafter named at the place and address stated below, by placing said document(s) in a post-paid envelope and depositing said envelope in the United States Mail on this 20 day of May, 2013.

DOCUMENT: Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Motion to Reconsider

PERSON SERVED:

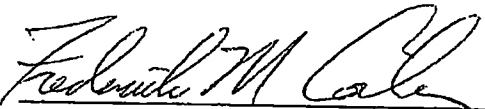
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OCT 30 2014

SC Court of Appeals



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-07-7166

OTHA DELANEY

Appellant,

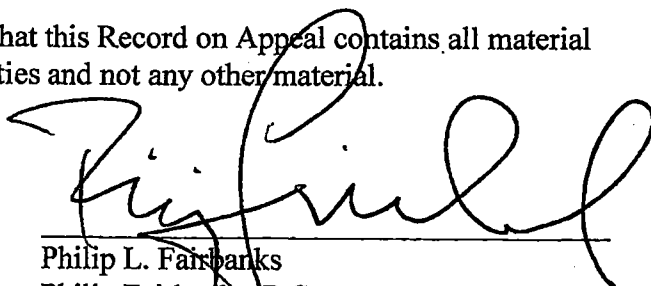
-vs-

FIRST FINANCIAL OF CHARLESTON, INC.

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-07-7166

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OCT 30 2014

SC Court of Appeals

OTHA DELANEY

Appellant,

-vs-

FIRST FINANCIAL OF CHARLESTON, INC.

Respondent.

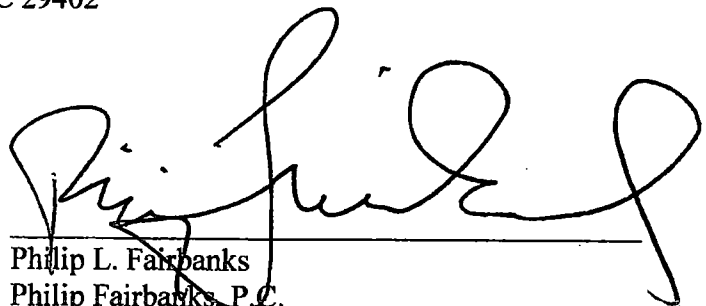
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The undersigned hereby certifies that on the date indicated below, s/he served counsel for Respondent with a copy of the RECORD ON APPEAL by mailing copies of same by United States Mail with first class postage prepaid to the following address:

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

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

Otha Delaney,

Appellant,

v.

First Financial of Charleston, Inc.,

Respondent.

SUPPLEMENTAL RECORD ON APPEAL

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHARLESTON) COURT OF COMMON PLEAS
3) No. 2011 CP 10 7166
4 OTHA DELANEY)
5 Plaintiff)
6 versus) TRANSCRIPT OF RECORD
7) (Two Hearings)
8 FIRST FINANCIAL OF)
9 CHARLESTON)
10 Defendant)
11 Charleston, South Carolina
12 April 26, 2012
October 23, 2013

13 B E F O R E :

14 HONORABLE STEPHANIE P. McDONALD, Judge

15
16 A P P E A R A N C E S :

17 For the Plaintiff: PHILIP L. FAIRBANKS, Esq.

18 For the Defendant: PERRY BUCKNER, Esq.

19
20 Reporter Present: PHYLLIS NORTON

21 HARRIET P. BENNETT
22 Reporter, S. C. Court Administration
23 46 Regency Oaks Drive
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24
25

I N D E X

1		
2	HEARING, April 26, 2012	Beginning page 3
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5	(Taking under advisement)	
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1 (The within matter came before the Court on April 26,
2 2012)

3 MR. BUCKNER: Your Honor, we're here for the Delaney
4 versus First Financial.

5 THE COURT: Okay. Is everybody here and ready to go?
6 Come on up. I have two case numbers.

7 MR. BUCKNER: This is 2011 7166.

8 THE COURT: All right. (Speaking to other counsel)

9 MR. FAIRBANKS: This is our response to the Motion.

10 THE COURT: All right, I'll be happy to hear from you.

11 MR. BUCKNER: Thank you, Your Honor. As you know, we
12 filed this Motion under Rule 12 B Six.

13 Our position is that this claim is contoured under --
14 I believe it's 15 3 470.

15 Let me first say that our position is that the action
16 they brought pursuant to 36 9 611 and 614, which are the
17 statutes that they claim were violated, and what they're
18 saying is that essentially, by their own words, that the
19 letter which was sent -- I believe the date is May third of
20 2008 -- failed to comply with the South Carolina law and,
21 specifically, those outlined statutes.

22 The relief they seek, and the only relief they seek,
23 is pursuant to 6 25 C two, and that calls for a fixed --
24 for a pre-determined award that's based on that transaction,
25 and it asks that they be entitled to the finance charge and

1 ten percent of the principal amount.

2 There are no actual or compensatory damages that have
3 been pled. There is no tort action or breach of contract.

4 It is simply that statutory cause of action, and we
5 believe because of that it fits in addition 15 3 370 which
6 is for penalty.

7 We are taking the position that it is under the six
8 year statute of limitations pursuant to Article Two, and
9 it may be -- it may also be entitled to other penalty sta-
10 tutes of three years.

11 So the first issue for us is that is there a penalty,
12 and we think it clearly is because I know of three cases
13 where the South Carolina Supreme Court has called under
14 this exact statute for a statutory penalty.

15 Now, I think there are three cases, and they acknow-
16 ledge this in their response as that the statute is guided
17 by those, and there is the identical language as 6 25 C
18 two.

19 I think that that is really dispositive of that issue.

20 The South Carolina Supreme Court has determined it
21 three times and called it a statutory penalty.

22 They have explained their rationale, you know, saying
23 that the purpose of it is not to (inaudible); the purpose
24 of it is insure the class is penalized.

25 In other words, it is no longer held beyond reason,

1 and we think that makes good sense.

2 Although there has been no dispute in the comments
3 they refer to damage. In the actual statutory language
4 the comments refer to damage and I don't think that takes
5 it out of the realm of the penalty statute.

6 Sort of generically speaking, I guess the penalty is
7 a form of damages, but it is still within the confines of
8 15 3 570.

9 I think the six year statute of limitations, Article
10 Two, really has nothing to do with this cause of action.

11 No breach of contract has been pled, although it re-
12 lates to a contract for sale of goods.

13 There is no contract that is alleged to have been
14 breached on the face of the Complaint, and I think that
15 their interpretation of 36 2.705 is somehow seeking to
16 state a cause of action that relates to a sale of goods,
17 to be the six year statute of limitations, and that is in-
18 correct.

19 So what we think really is that if the penalty stat-
20 ute is applicable, it has got to be either the one year
21 or the three year.

22 In either of them, the Plaintiff is time-warped, be-
23 cause it then triggers the accrual of this action as when
24 they received the notice that they claim violates the South
25 Carolina law.

1 So whether that claim expired on May third of 2009 or
2 May third of 2011, their Complaint is untimely, and it
3 doesn't -- we tried to do a little research on this to
4 sort of clarify whether the discovery rule would be doc-
5 tored --as I read it -- the one year statute of limitations
6 actually says, from the commission of the offense and the
7 three year penalty statute doesn't seem to clarify that,
8 but under any scenario when they get that letter that is
9 when the violation of South Carolina law is said to have
10 been alleged to occur.

11 That is the triggering of that, even under the discov-
12 ery rules.

13 We think that because of that, under any scenario,
14 that their claim is untimely and should be dismissed.

15 THE COURT: Okay.

16 MR. BUCKNER: Thank you, Your Honor.

17 THE COURT: The issue is whether this category rises
18 to a statutory penalty or not.

19 MR. BUCKNER: The South Carolina Courts have said
20 over and over again -- have called this exact statute a
21 statutory penalty, and they have explained why.

22 THE COURT: And I'm looking at one of the cases right
23 now.

24 Tell me why . . .

25 MR. FAIRBANKS: Thank you, Your Honor. I will be

1 glad to explain it at this time.

2 Your Honor, first of all, in the penalty statute, to
3 distinguish between the two -- 570 is the one with the
4 shorter one year statute of limitations.

5 That is clearly applicable to statutes that allow
6 someone other than the injured party to collect a penalty.
7 That is not the case in this situation.

8 This cause of action is specifically to provide for
9 the consumer who is injured by the alleged lack of notice
10 to collect the statutory damage.

11 So that simply is not applicable to this cause of ac-
12 tion that we have or under our circumstance.

13 The second one -- I'm sorry. That's 570. Five forty
14 is the second one with the three year statute of limitations,
15 although we don't think that is applicable either because
16 it is not a penalty.

17 That is one where the harmed individual has a cause
18 of action.

19 So if either one of them were applicable, it would be
20 certainly the three year statute of limitations under 540.

21 THE COURT: But they say that neither the three year
22 statute under 540 or the one year statute of limitations
23 would apply.

24 MR. FAIRBANKS: Again, if either of those statutory --
25 either of those statutes of limitations were applicable, we

1 haven't listed under the three year, and the reason we have
2 not listed is because the offense, if you want to call it
3 an offense -- the cause of action arises not when the let-
4 ter is sent and not when the letter is received, and the
5 reason is because the cause of action under the UCC 9 6 25
6 arises only when the collateral was disposed of.

7 The reason for that is because the burden of this no-
8 tice provision is against the consumer, as the Supreme
9 Court has said in Crane, and I think as well in Singletary
10 -- I think the earlier one I believe you're looking at as
11 well.

12 The purpose of this notice provision under the UCC is
13 to give the consumer notice of the intended disposition of
14 the collateral because by doing that the consumer has the
15 ability to expect that sale.

16 The reason for giving the consumer that right is to
17 give the consumer the ability to redeem the collateral. It
18 gives the consumer time to find other potential bidders
19 at that sale, which would affect the price and the disposi-
20 tion sums which would affect the consumer's deficiency if
21 there is a deficiency.

22 So it is all about the sale and disposition of the
23 collateral. Sending out the letter has nothing to do with
24 it.

25 The creditor can send out the worst letter in the

1 world and wait a year and then send out a correct letter,
2 and there would be no violation of statute.

3 So clearly sending the letter or receiving the letter
4 has nothing to do with it and it does not create a cause
5 of action.

6 So under any circumstance, the three year statute of
7 limitations, if it were applicable -- we submit that we
8 filed in October. The disposition took place in December.

9 But, Your Honor, I think that whole discussion is aca-
10 demic, and the reason it's academic is for the reasons
11 that were nicely summed up by a Bankruptcy Judge in Alabama
12 in a case that I had the misfortune to be involved in, (In-
13 audible)

14 The Bankruptcy Judge was looking at a res judicata is-
15 sue, Your Honor, where a debtor in a bankruptcy case had
16 failed to list a cause of action under the Alabama statute,
17 which is much the same as 507 in this case, the exact same
18 language as 6 9 625.

19 The Bankruptcy Judge said that by statute the require-
20 ments of notice of disposition of collateral, which is Sec-
21 tion 507, in terms of the security agreement breach of the
22 notice requirement is breach of the contract.

23 Therefore, under Section 507, it is in essence an ac-
24 tion for breach of contract.

25 Plaintiff's notice rights under the UCC became part

1 of the terms of the original contract, and I can give you
2 a cite for that case.

3 THE COURT: Thank you.

4 MR. FAIRBANKS: So that means the Plaintiffs -- and
5 there the Judge cites some cases and all that, but there
6 are a number of other cases that make the same point.

7 If you have a contract that is referred to as a retail
8 consumer sales contract, that contract, for a number of
9 reasons, and, again, the reason I have cited before in the
10 (inaudible) Doctrine, is because that makes the downstream
11 holders of commercial paper liable for anything that hap-
12 pened, anything that the consumer under the original con-
13 tract is liable for.

14 And so there is this continuity that arises by virtue
15 of the contract, and this discourse we have noted what the
16 other Courts have pointed out.

17 If you have a contract, under that contract is a se-
18 curity agreement which gives the creditor certain rights,
19 such as the right to repossess that collateral, which this
20 creditor exercised.

21 Attached to that security agreement there come certain
22 responsibilities, including the responsibility under what
23 is now 9 625 to give proper notice.

24 If he doesn't do that, there are penalties for not
25 doing that.

1 That includes a penalty that Mr. Delaney has sought,
2 the damages sought.

3 In Stone, Singleton and Crane, and probably in Broad-
4 bank -- in all of these cases, our Supreme Court refers
5 to this from time to time and frequently as a statutory
6 penalty.

7 If you read these cases from across the country, the
8 Judges use the term statutory penalty interchangeably with
9 statutory damages.

10 You know, that doesn't rise to the level of dicta. It
11 is just careless use of language, but if you read the stat-
12 ute, the statute itself, the language first of all in the
13 statute repeatedly refers to damages.

14 More importantly, Your Honor, our Courts have repeat-
15 edly said that when you are looking at language of statutes
16 that, first of all, you don't take one part of the statute
17 -- take that by itself and read it.

18 You don't take it out of context and read it, so the
19 point there is that this particular provision which allows
20 a consumer to choose minimum statutory damages -- the con-
21 sumer can take actual damages, and it is up to the Plain-
22 tiff to choose which of those remedies he or she wants to
23 choose.

24 What the Legislature says is that -- what the commenta-
25 tor -- I think it's the South Carolina UCC commentator says
11

1 is that these are minimum statutory damages, and they are
2 to make sure that any time there is non-compliance by a
3 creditor with respect to these notice provisions there is
4 going to be a liability.

5 Now, that in and of itself doesn't turn it into a pen-
6 alty because it is clearly a substitute for actual damages.

7 Your Honor, I think a good analogy for that is unliqui-
8 dated damages provisions, and the Courts have gone over and
9 over again that when a Court imposes the unliquidated dam-
10 ages provisions they are going to enforce it because it is
11 a reasonable reflection for actual damages that a party
12 might suffer if there is a breach, or it is an unenforcible
13 penalty for forfeiture, which has no relationship to the
14 damages that have already been suffered.

15 These are clearly related to the actual damages that
16 the Plaintiff has suffered. The logical purpose of that
17 and the proof of that proposition is that if the actual dam-
18 ages are warranted consumer is going to choose the actual
19 damages. They are clearly a substitute for that. They
20 are minimum damages.

21 So there is no question, Your Honor, that what this
22 provision is, is it's not a penalty. I certainly has the
23 additional purpose of requiring and helping to induce credi-
24 tors to comply with its provisions, but then the Courts have
25 said it is a part of the contract.

1 Secondly, it is a substitute for damages, so we think
2 it is clearly controlled by the statute of limitations as
3 is provided under the UCC, which is the overall statutory
4 scheme under which this provision arises.

5 Thank you.

6 THE COURT: Thank you, and that would be the statute
7 of limitations in contracts of sale? .

8 MR. FAIRBANKS: It is, Your Honor. It is the statute
9 of limitations in -- I think it's 2 725.

10 THE COURT: It is.

11 MR. FAIRBANKS: Thank you, Judge.

12 THE COURT: Okay. Tell me why the penalty under 36 9
13 625 B two is for statutory damages, super options, and is
14 not sort of a by the Attorney General type penalty?

15 MR. BUCKNER: Well, the reason I think it's the pen-
16 alty is because in the statutory comments what they refer
17 to as damages -- I really think that is in the generic
18 sense, any sort of relief that any Plaintiff can obtain is
19 damage.

20 But the South Carolina Supreme Court in this State
21 goes on to explain the purpose or rationale of 625 C two is
22 to say that damages aren't sufficient because we need to in-
23 sure compliance with the statute.

24 They are all but saying this is a penalty, and that
25 is coming right out of their mouth three times in three

13

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1 different cases.

2 Even though the Legislature doesn't speak to damages
3 in their comments, the South Carolina Supreme Court has
4 right along said damages, right on point.

5 THE COURT: Then you do not look at it in the context
6 of the statutory (inaudible)?

7 MR. BUCKNER: No, we do not, Your Honor.

8 The context of his arguments for breach of contract
9 -- Plaintiff's comments in the Complaint will not be based
10 on a cause of action that is not pled -- what they are say-
11 ing is in essence that this is a breach of contract action
12 but there is no plea of breach of contract. There is no
13 contract that we know has been breached.

14 They had an opportunity and the right to do that, and
15 the reason they haven't done that is that they don't have
16 contract damages.

17 THE COURT: How about that?

18 MR. FAIRBANKS: We are not arguing that it is a breach
19 of contract. We are arguing that the remedy is a contract-
20 ual remedy in the nature of being contracted rather than
21 a penalty. That's the point I would make.

22 THE COURT: But that would put it back under the
23 three year statute?

24 MR. FAIRBANKS: No, maam, I don't believe it does. I
25 think that again we are provided with a cause of action.

14

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1 The cause of action provides revenue. The question
2 here is whether or not that remedy is controlled as far
3 as the statute of limitations goes.

4 In my opinion, the statute of limitations, if it's
5 contractual, it's controlled under the statute of limita-
6 tions which is included in the statutory scheme, and we
7 say it is.

8 THE COURT: Okay. I am going to take this under advise-
9 ment.

10 Thank you for being patient with me. I want to take
11 a look at the statute and also look at the way the Supreme
12 Court uses the statute and the penalty.

13 I want to look at all of it a little bit, but it's
14 hard to tell -- you know, sometimes it appears they are
15 saying one thing and sometimes something else.

16 So I will take it under advisement, and I will let
17 you all know.

18 Thank you.

19 MR. BUCKNER: If I understand what they want in the
20 way of damages, in this case they have said we want the
21 specified formula as far as damages.

22 THE COURT: Okay.

23 MR. FAIRBANKS: And, Your Honor, if I could hand up
24 to the Court at this point . .

25 THE COURT: Yes, go right ahead.

1 MR. FAIRBANKS: I would hand up Tilley versus Pace Center,
2 which was a separate statute . . .

3 THE COURT: Okay, thank you.

4 -----END OF REQUESTED TRANSCRIPT OF RECORD-----
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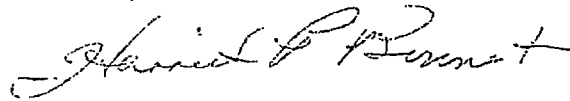
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CERTIFICATE

I, HARRIET P. BENNETT, Court Reporter for South Carolina Court Administration, hereby certify that the foregoing Transcript was prepared to the best of my ability from the records of Phyllis Norton, having been heard in the Court of Common Pleas for Charleston County on April 26, 2012.

FURTHER, I certify that I am neither of kin nor counsel, nor do I have any interest in the within matter.

This 19th day of June 2014.



1 (The within matter came before the Court for hearing
2 on October 23, 2013)

3 MR. FAIRBANKS: Your Honor, I represent the Plaintiff
4 in this matter.

5 THE COURT: Why don't you all put your names on the
6 record, and that will help my Court Reporter.

7 MR. BUCKNER: Perry Buckner, here for First Financial
8 of Charleston, Your Honor.

9 MR. BROWN: Steve Brown, same party.

10 THE COURT: All right.

11 MR. FAIRBANKS: Phillip Fairbanks for the Plaintiff
12 Delaney.

13 THE COURT: All right, Mr. Fairbanks, I believe this
14 is your Motion to reconsider, and I will be glad to hear
15 anything you want to tell me.

16 MR. FAIRBANKS: Thank you, Your Honor.

17 THE COURT: Yes, sir.

18 MR. FAIRBANKS: Your Honor, the basis for our Motion
19 in this case is that we believe the Court misapprehended
20 the Plaintiff's claim and cause of action, and as a result
21 of this miscomprehension committed a clear error of law.

22 With the greatest respect, I would like to go through
23 where we think the source of that error is.

24 THE COURT: Okay.

25 MR. FAIRBANKS: First of all, Your Honor, the Defendant

1 in response to our motion writes, and I quote, in paragraph
2 seven of the response, Your Honor -- quote, because Plain-
3 tiff's allegations of non-compliance relate to the accuracy
4 of the notice of sale, the commission of the offense under
5 section 15 3 570 took place in May 2008 upon receipt.

6 The Plaintiff's Complaint makes no allegation regarding
7 the propriety or legality of the sale of the collateral.

8 Your Honor, in the Order the first full paragraph on
9 page seven of the Order of April 29th.

10 I think that paragraph reveals the problem, and the
11 Court notes first . .

12 THE COURT: Give me the page again of the Order.

13 MR. FAIRBANKS: Page seven, Your Honor, of the Order
14 of . .

15 THE COURT: I have it. .

16 MR. FAIRBANKS: On page seven, the first full paragraph
17 which is the second paragraph, the Court first notes that
18 under Section 15 3 570, the date of accrual is the date of
19 commission of the offense.

20 It goes on to state that undoubtedly as the Plaintiff
21 alleges that the notice of sale failed to comply with South
22 Carolina Law, the offense in this case occurred upon deliv-
23 ery and receipt of that notice of sale. If I could address it?

24 THE COURT: Okay.

25 MR. FAIRBANKS: The Court goes on to say the Plaintiff's

1 Complaint does not allege that the sale of the repossessed
2 vehicle violated any provision of South Carolina law and no
3 offense is alleged to have occurred upon disposition in
4 December of 2008.

5 Without question, the only offense which the Plaintiff
6 alleges concerning the adequacy of the notice provided prior
7 to sale, close quote.

8 However, Your Honor, it's not true that the Plaintiff
9 made no allegations regarding the sale of the collateral,
10 and a cursory review of the class action Plaintiff filed
11 demonstrates otherwise.

12 THE COURT: I have that in front of me.

13 MR. FAIRBANKS: Okay. If you'll bear with me?

14 The Complaint filed in October of 2011 -- in the intro-
15 duction the Plaintiff referred to Sections 9 600 thru 635 of
16 Section 36 of the Code, and the Plaintiff refers to it, and
17 I quote, as a comprehensive scheme governing disposition
18 by a repossessing secured creditor of repossessed collateral,
19 a clear reference to the fact that the Plaintiff's claim
20 involves the disposition of collateral.

21 THE COURT: Okay. Accepting the reference to the com-
22 prehensive statutory scheme, what about the number of times
23 in the Complaint that informed notice wasn't complained of?

24 MR. FAIRBANKS: Okay.

25 THE COURT: Direct me to something specific other than

1 that informed notice is the problematic thing?

2 MR. FAIRBANKS: All right. Paragraph Twelve, Your Honor.
3 Paragraph Twelve alleges that on or about December 15 of
4 2008 the Defendant disposed of Plaintiff's collateral, quote,
5 thereby terminating any right on the part of the Plaintiff to
6 redeem the vehicle.

7 Redemption or the right to redeem, Your Honor, is . .

8 THE COURT: On or about December 15 of 2008, First Fi-
9 nancial entered into a contract for sale of the vehicle. I
10 just want to make sure I'm on the right paragraph.

11 MR. FAIRBANKS: Let me . .

12 THE COURT: Thereby terminating any right on the part
13 of the Plaintiff to redeem the vehicle by disposing of the
14 vehicle.

15 MR. FAIRBANKS: Disposing of the vehicle, exactly. Re-
16 demption and right to redeem collateral is the principal ra-
17 tionale of the UCC Commissioner's insistence on proper pre-
18 disposition notice.

19 Because after disposition, redemption is no longer
20 available to a consumer because there is no longer any col-
21 lateral.

22 That's the whole point. If the . .

23 THE COURT: Was it a problem with the actual sale it-
24 self or was it just the problem with the notice?

25 I realize that the sale is derivative of the notice

1 problem, but . .

2 MR. FAIRBANKS: That's right. I'm sorry I interrupted
3 you, Your Honor.

4 THE COURT: Just answer my question.

5 MR. FAIRBANKS: Well, the premise of your question is
6 that the sale is . .

7 THE COURT: The sale -- in an ideal world, a sale will
8 follow a proper notice. Correct?

9 MR. FAIRBANKS: And the proper notice is one aspect of
10 it.

11 THE COURT: Okay, so that . .

12 MR. FAIRBANKS: One aspect . .

13 THE COURT: That is the problem you have, isn't it,
14 the notice?

15 MR. FAIRBANKS: Well, the notice wasn't the problem ne-
16 cessarily, and it didn't become the problem until there was
17 a sale.

18 And, if you'll allow me, Your Honor, . .

19 THE COURT: I just wanted an answer to my question.

20 MR. FAIRBANKS: If you'll indulge me, Your Honor, you
21 will -- if you'll indulge me, Your Honor, I think you will
22 see that I'm going to get to authority that will answer your
23 question.

24 THE COURT: I will give . .

25 MR. FAIRBANKS: I would appreciate your indulgence.

1 (Counsel and the Court speaking at the same time)

2 THE COURT: I will hear your argument. I have one
3 jury out and the jury . .

4 MR. FAIRBANKS: I understand.

5 THE COURT: This is a motion to reconsider, and I am
6 happy to hear your argument, but if you would -- if you
7 would answer my question it would make it easier for me to
8 understand.

9 Okay?

10 MR. FAIRBANKS: The only thing after the notice was
11 the sale.

12 THE COURT: Thank you.

13 MR. FAIRBANKS: But the sale is critical.

14 THE COURT: Okay.

15 MR. FAIRBANKS: That is true, and I appreciate your
16 indulgence, Your Honor. I appreciate your interest.

17 I just want to point out that redemption is the whole
18 point of the statutory scheme.

19 Paragraphs 13 and 14 of the Complaint, Your Honor,
20 allege the Plaintiff's cause of action against the Defen-
21 dant, namely the Defendant's failure to provide notice
22 to my client prior to disposition of the collateral.

23 Paragraph 17 of the Complaint alleges facts relating
24 to the Defendant's disposition of the class members' motor
25 vehicles.

1 Paragraph 18 contains the proposed class definition,
2 Your Honor, which requires -- requires, Your Honor, that
3 the class member be an individual with collateral being dis-
4 posed of.

5 Paragraph 24 basically sets forth that the Plaintiff
6 requires -- it refers to Section 36 9 611, which requires a
7 security holder to send reasonable notice of disposition be-
8 fore the creditor enters a contract of sale, sells, or other-
9 wise disposes of the collateral, the repossessed collateral,
10 and I would point that out, Your Honor.

11 In Paragraph 25, it says that First Financial disposed
12 of Plaintiff's and class members' motor vehicle collateral
13 without having first provided notice of that ^{proposed} disposition of
14 the collateral.

15 I don't know how to say it any more plainly that the
16 disposal of the collateral is the cause of why we're in
17 this thing here.

18 I just want to say, Your Honor, that we think that is
19 absolutely incredible, so let's talk a little bit about the
20 UCC, 36 9 610.

21 We think that the essential provision of this section,
22 the default section, that section of 36 9 610 sets forth
23 the remedies available to the repossessing creditor in a
24 normal security agreement.

25 That says -- it's called disposition of collateral,

1 and it says that after default the securing party may sell,
2 lease or otherwise dispose of any and all the collateral.

3 Part B says that every aspect of disposition of col-
4 lateral, including the method, manner, and time, place and
5 other terms, must be commercially reasonable.

6 The emphasis is on the commercial reasonableness, and
7 one must be commercially reasonable to comply with the re-
8 quirements of the article.

9 It is not what type of sale they had, not the price that
10 was paid, not the type of notice or when the sale occurs,
11 or whether the collateral was approved prior to sale, or
12 anything else.

13 None of these things is determinative although each can
14 affect the commercial reasonableness.

15 In determining compliance with the UCC's disposal rules
16 whether it must be commercially reasonable is none of those
17 things necessarily. It is the disposition that has to be
18 commercially reasonable.

19 Your Honor, again I'm going to leave off the rest of
20 it because I think other than the UCC -- I know you've got
21 juries waiting, but I would just like to point out, Your
22 Honor, that there are one or two more practical considera-
23 tions.

24 If what these gentlemen propose and Your Honor's rul-
25 ing is in fact the case, what you've ruled is that short

1 statute -- the short statute of limitations based on the
2 date notice was served determines when the statute of lim-
3 itations runs -- it doesn't work. It doesn't work for us,
4 and a couple of examples demonstrate that.

5 If you give the receipt or the delivery date of the
6 notice as the accrual date, it doesn't give anything.

7 If there was a public sale followed by a private and
8 public sale notice, followed by a private sale, the accrual
9 date has passed.

10 And what about if there were a notice that lacked
11 the information telling what the consumer was entitled
12 to, an accounting -- it didn't have that.

13 The consumer was entitled to that but it did not hap-
14 pen.

15 The consumer received notice but without the proper
16 information, and then some six months later there was a
17 private sale although it was a public sale notice, so that
18 makes twice. The accounting error and again the public-
19 private sale, and the private sale occurs.

20 Your Honor, in this case, what if there had been no
21 sale?

22 If there had been no sale, could Mr. Delaney have
23 sued First Financial because the notice had been defec-
24 tive?

25 So there are all kinds of problems that arise when

1 there is attempted delivery of or receipt of notice in or-
2 der to say that is when the cause of action arises, Your
3 Honor.

4 Even if no sale occurs, that doesn't affect the no-
5 tice. Secondly, the defective notice or not disclosing
6 the collateral doesn't violate the statute, no.

7 THE COURT: But you are saying the harm occurred when
8 the item was sold or vehicle was sold and that affects the
9 validity of the sale?

10 MR. FAIRBANKS: It is one of the things that would
11 determine commercial reasonableness, Your Honor.

12 If they sent out the notice without information the
13 consumer was entitled to at the time, two weeks before
14 they sold the vehicle. If they sent out notice saying,
15 we forgot to give you an accounting, or a postcard that
16 says, oh, by the way, you are entitled to an accounting.

17 The fact that . .

18 THE COURT: Well, let me ask you something.

19 MR. FAIRBANKS: Yes, maam.

20 THE COURT: What does the gambling statute have to
21 do with anything? I mean 32 l10 . .

22 MR. FAIRBANKS: I think that refers back to . .

23 (The Court and Counsel speaking at the same time;
24 portion inaudible)

25 MR. FAIRBANKS: Your Honor, in their initial Motion

1 for consideration as I understood it, I think I have
2 r...nded to that and . .

3 THE COURT: You did, and that's where I recall we are
4 right now, at 32 110.

5 MR. FAIRBANKS: Your Honor, and I think . .

6 THE COURT: Looking right now at number eight, I think
7 I saw a supplemental motion to reconsideration.

8 Let's see.

9 (Brief pause in proceeding)

10 On page 7 of the motion to reconsider ruling on motion
11 to dismiss -- sale of Plaintiff's vehicle on December 15,
12 2008. The action commenced October 4, 2011, within the
13 three year limitations period -- 32 110.

14 It might just be a citation problem, citation error.

15 MR. FAIRBANKS: Yeah, I think it is a citation matter,
16 Your Honor, and . .

17 THE COURT: It is clear that if the -- the next para-
18 graph -- statutory damages were initially provided, 9 of
19 625, subsection C two, it would be a penalty. 32 110.

20 That the three year period established by 32 110 is the
21 applicable statute of limitations.

22 MR. FAIRBANKS: Yes, maam. I think the argument was
23 there -- maybe it's a typographical error. However, since
24 the argument was that there would be a penalty, we will
25 agree that the element of penalty would arise, but for the

28

1 sake of argument we would agree that it is one of those
2 two, and it ought to be the three year statute because
3 the first penalty statute has to do with someone collect-
4 ing a penalty for someone else. The second is someone who
5 is collecting a penalty for themselves.

6 So it should be the three year statute instead of the
7 one, and because the case was filed in October and Decem-
8 ber is the date of distribution, Your Honor, it is not any
9 . . .

10 THE COURT: No, no. I just want to make sure that I
11 understand as well as I can the issues.

12 MR. FAIRBANKS: I understand.

13 THE COURT: I have one other question for you, and
14 then I'll be happy to hear from you in reply.

15 One of the points that I found quite persuasive in
16 the First Financial brief when I granted the motion is the
17 way that our Supreme Court has called for a penalty -- has
18 called certain provisions statutory penalties.

19 How do you respond to that particular argument?

20 MR. FAIRBANKS: I respond to that by saying that if
21 you go back and read the cases involving this particular
22 provision of the UCC, starting with -- I think probably
23 Crane was the first one -- you will find that our Supreme
24 Court, along with Supreme Courts all over the country --
25 all over the country -- regularly refer to the statutory

29

1 damages and statutory penalties interchangeably.

2 There are Courts around the country -- I wouldn't ven-
3 ture to give statistics, but I would venture to say that
4 Courts that looked at that particular issue have determined
5 that these are not penalties in the technical sense of the
6 word, but these are compensatory.

7 The best illustration -- of them, I think the best
8 illustration of that is in our statute which is the same
9 statute everybody else has.

10 What it is, it's a substitute for actual damages, and
11 it is very clear in the statute and in the structure of
12 the statute what even the Legislature says -- and our Court
13 says -- for sure, it's in Crane -- says this is the Legis-
14 lature's recognition that the damage, the actual damages,
15 that are likely to be recovered by a consumer in a small
16 repossession and sale situation are likely to be too small
17 to make it worth bringing a law suit.

18 So it has the element of attempting to coerce credi-
19 tors' compliance, which is a very penal concept, but it is
20 a substitute for actual damages.

21 It is a formula that substitutes for actual damages,
22 and many Courts have held for hundreds of years that where
23 a statute has mixed purposes, one of the purposes being
24 to compell compliance with lending policy purposes.

25 But the other purpose is to compensate a private

1 individual, and where the damage was not large, applying
2 those to a private individual as compensation.

3 That takes it out of the category of penalties; says
4 it is not a penalty. That says it is not a penalty.

5 THE COURT: Okay. Well, I need to hear from Mr.
6 Buckner and Mr. Brown. Then you can tell me what you need
7 to tell me.

8 MR. BUCKNER: Your Honor, I'll try to be fairly brief,
9 and we're really down to two issues in the motion to recon-
10 sider.

11 Judge, 36 9 625 C two provides for a penalty, and
12 then, secondly, what is the accrual date of this action.

13 I would say the first argument is pretty clear cut.
14 There are three cases actually, Crane versus City Corp,
15 Broadbank versus (inaudible) and Singleton that say just
16 exactly that.

17 They say it is a penalty provision, and in Broadbank
18 they say here is exactly why. The Legislature wrote the
19 law, and I can read it there.

20 I think upon reading it and reading the statutory sub-
21 sections that it elaborates and says this penalty is sup-
22 posed to be awarded regardless of any injury, but to the
23 extent there could be some sort of confusion the Courts
24 have come down and said this is a penalty provision.

25 So I think that sort of wipes away any confusion that

1 might otherwise be existing there, and one argument that
2 the Plaintiff has made I think sort of confuses the issue.
3 This is -- the point is that there are actual damages that
4 are awarded under some of these similar provisions, but not
5 where they have filed a lawsuit.

6 Obviously, the sole purpose of our hearing today is
7 within the confines of the Complaint under -- obviously the
8 sole purpose of our hearing today is the confines of the
9 Complaint, and the only provision which they have requested
10 an award under is 3 69 625 C Two.

11 They don't cite a South Carolina case that says that
12 is compensatory in any way. They cite an Ohio case which
13 talks about the Ohio companion to 396 9 625 B, which has
14 nothing to do with what we are here to argue about, and
15 I am not sure that I can even respond to it.

16 In their prayer for relief there is but one statute
17 referenced, which that is 3 69 625 C two, which the South
18 Carolina rules have told us that is a penalty provision, so
19 that is dispositive on this, I think.

20 The second point which I think Plaintiff's counsel has
21 mentioned is the date of accrual, and our perspective on
22 that is that 15 3 570 says that the commission of the of-
23 fense is the date of accrual.

24 The commission of the offense in this case is the
25 alleged insufficiency of the notice of sale.

1 Now, they say that it doesn't say that, but we take
2 the position that it does say that, and it says that and
3 in his entire Complaint relative to that alleged insuffi-
4 ciency.

5 A cursory reading of the Complaint says that 36 9 613
6 and 36 9 614 are the bases for the wrong notice in this
7 case.

8 They allege that we have not complied with those pro-
9 visions, and those provisions concern the propriety of the
10 contents of the notice of sale only.

11 We think that everything in this case flows to that
12 notice of sale.

13 The commission of the offense can only be when the
14 alleged insufficient notice was sent out.

15 I mean, Plaintiff's counsel pointed out here some in-
16 teresting scenarios, but we take the position that the
17 scenarios are different than what we have here before you,
18 Your Honor.

19 We do have a notice of sale, which we believe was
20 compliant, but for the purposes of today we will assume that
21 it wasn't.

22 It was sent to them prior to the sale, and that is
23 the basis for the allegations of liability in this case..

24 I think that one of the things they sort of argued is
25 that, you know, this accrues only at the sale, or if there

33

1 is a sale. This case isn't operated though by that discov-
2 ery rule.

3 If it were, then they might have a different argument
4 that they could make.

5 This is a commission, and it is almost as if it were
6 quasi-criminal, a specific act of non-compliance, that is
7 the start of the operative date.

8 For everything else, I think we will just rest on our
9 brief.

10 We believe the Court's Order is proper, Your Honor.
11 Every thing that was raised here today has been extensively
12 briefed and argued previously.

13 Thank you.

14 THE COURT: All right. Thank you, and I will cer-
15 tainly incorporate the briefs into the record.

16 Is there anything in reply?

17 MR. FAIRBANKS: Yes, I do want to say a few things
18 in reply.

19 THE COURT: All right.

20 MR. FAIRBANKS: Your Honor, if you read the penalty
21 provision, 625 C two, and you read it carefully, you will
22 find that the same provision, the same sub-section, pro-
23 vides for the statutory damages.

24 It is the same provision that provides for actual
25 damages. It is all in one.

1 If you read it -- well, let's look at it for just
2 a minute.

3 It is very clear that the consumer can decide to take
4 actual damages, just like anybody else, consumer or not,
5 but the consumer can also elect the statutory damages
6 formula.

7 So, contrary to what my colleague says, it is not from
8 some completely different statute. It is clear . .

9 THE COURT: Well, what about the terms in Broadback?
10 That's what I . .

11 MR. FAIRBANKS: Broadback is . .

12 THE COURT: And Crane. The way the Appellate Courts
13 have referred to the . .

14 MR. FAIRBANKS: To the way . .

15 THE COURT: . . determination . .

16 (The Court and counsel speaking at the same time)

17 MR. FAIRBANKS: Well, the way that damages and penal-
18 ties are established is the issue. With any suggestion
19 that any South Carolina Appellate Court has ever held --
20 nobody has ever held that it's a penalty.

21 Nobody has ever held it's a penalty. They have re-
22 ferred to it as penalties; they have referred to it as
23 damages, but nobody has held that it's a penalty that I
24 know of.

25 Thank you.

35

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1 THE COURT: Thank you.

2 (Brief pause in proceeding)

3 THE COURT: I would say your argument, Mr. Fairbanks,
4 would be that the Courts have referred to the statutory
5 penalty, but it is not dispositive or persuasive as a posi-
6 tion?

7 MR. FAIRBANKS: Well, they have referred to it both
8 ways, Your Honor. They have referred to it both ways, and
9 nobody has -- again, as I say, they have said it's a pen-
10 alty. They have called it a penalty, they have called it
11 damages.

12 By the same token, I can say I wouldn't call it dam-
13 ages, and, therefore, it is something that is not -- it
14 is not dispositive one way or another.

15 THE COURT: Okay. I was just looking at it, and it
16 seems pretty clearly a reference to statutory penalties
17 but they also . .

18 MR. FAIRBANKS: Your Honor, . .

19 THE COURT: . . call it damages, of course, or an award
20 of damages, so that I would need to be concerned about
21 the Court's reference to statutory penalties.

22 MR. FAIRBANKS: But other than the fact that the statute
23 itself, if I'm not mistaken, only refers to a statutory pen-
24 alty.

25 MR. BUCKNER: Your Honor, we don't take the position

1 that the penalty provision doesn't award damages in its
2 most broad sense.

3 They are in fact damages . . .

4 THE COURT: Right.

5 MR. BUCKNER: . . just not real or compensatory dam-
6 ages.

7 If we were trying this case, Your Honor, in front of
8 a jury and they provided these penalty provisions, they
9 would be awarding damages in the broadest sense.

10 I think there is the fact that the Court has also ex-
11 plained why it's a penalty provision also clarifies what
12 it means when it does refer to it as damages.

13 THE COURT: Okay.

14 (Brief pause)

15 THE COURT: One thing that troubles me in the Motion
16 to reconsider is that there could be something that I failed
17 to rule on, and I want you all to be able to properly appeal
18 my decision.

19 On page seven, the Courts have specifically ruled that,
20 quote, the Court need not decide whether a three year stat-
21 ute applies?

22 MR. BUCKNER: Yes, maam.

23 THE COURT: If we need to amend the Order, I think what
24 I held in determining that it's a penalty is that the six
25 year statute did not apply.

1 MR. BUCKNER: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. BUCKNER: We simply made the argument that the six
4 year statute doesn't apply, and whether the Court ordered
5 that the one year or three year was applicable didn't mat-
6 ter which is their tabloid under . .

7 THE COURT: Right. If we use the date of accrual as
8 being the date of the notice, the allegedly defective no-
9 tice, then even under the three year statute . .

10 MR. BUCKNER: That's correct.

11 THE COURT: You understand that?

12 MR. BUCKNER: Yes.

13 THE COURT: We don't need to correct that or amend
14 that?

15 MR. FAIRBANKS: Well, I think if you use the accrual
16 date as, you know -- another issue is which of the statute
17 of limitations apply.

18 Your Honor, for example, if you were to rule the date
19 of accrual as being the date of receipt of the notice, then
20 it tends to -- if Your Honor is reversed on the issue of
21 which statute of limitations applies, then under the six
22 year statute the classes could expand considerably.

23 THE COURT: Well, that only happens if we ignore this
24 language in Crane from the Supreme Court as written by
25 Chief Justice Toal.

1 The issue is presented in this appeal of whether a
2 co-obligee on a debt secured by consumer goods
3 without actual right to possession of goods
4 can, one, recover in conversion against the
5 creditor's wrongful repossession under South
6 Carolina Consumer Protection Code, or, two, re-
7 cover under the statutory penalty provided in UCC

8 . . .

9 Is that correct?

10 MR. BUCKNER: I think that is ignoring -- she is talk-
11 ing about whether or not conversion, which is a tort and
12 which involves taking possession of such property, is con-
13 sistent with a claim that somebody has repossessed and has
14 sold something.

15 They are two inconsistent causes of action, and I
16 don't think that is determinative by any means of whether
17 or not the Court was characterizing for purposes of deter-
18 mining statutes of limitations or whether or not there
19 is a dispute under the Commercial Code of commercial reason-
20 ableness involving penalty and damages, or remedies involv-
21 ing penalties and damages.

22 THE COURT: The reference to the notice provisions or
23 the different applications.

24 MR. BUCKNER: In reference to the -- it is a former ci-
25 tation but it is the same as 925 C two.

1 We stipulate to that. We're aware of that. I think
2 when they modified the Code they just . .

3 MR. FAIRBANKS: For the purpose of this case, the
4 language is virtually the same.

5 THE COURT: Okay, I appreciate that.

6 All right. The Motion to reconsider is denied, but
7 if you all need a more detailed Order I'll be happy to sign
8 one.

9 Do you all want to present proposed Orders? If so, we
10 will go from there.

11 Thank you.

12 -----END OF REQUESTED TRANSCRIPT OF HEARING-----

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CERTIFICATE

I, HARRIET P. BENNETT, Court Reporter for South Carolina Court Administration, hereby certify that the foregoing Transcript was prepared to the best of my ability from the records of Phyllis Norton, having been heard in the Court of Common Pleas for Charleston County on October 23, 2013.

FURTHER, I certify that I am neither of kin nor counsel in this matter, nor do I have any interest therein.

This 19th day of June 2014

Harriet P. Bennett

CERTIFICATE OF COUNSEL

In accordance with Rule 210(g), SCACR, the undersigned hereby certifies that this **Supplemental Record on Appeal** contains material properly included in the Record on Appeal and not any other material. Additionally, the undersigned hereby certifies that this **Supplemental Record on Appeal** complies with the Supreme Court order dated August 13, 2007.

Respectfully submitted,

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Dated: 11/18/14

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SC Court of Appeals

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

Appeal from Charleston County
Court of Common Pleas

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SC Court of Appeals

Stephanie P. McDonald, Circuit Court Judge

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

Otha Delaney,

Appellant,

v.

First Financial of Charleston, Inc.,

Respondent.

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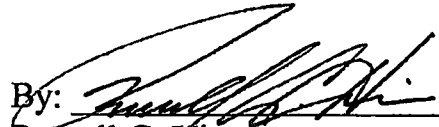
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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent above named, do hereby certify that I have served the **Supplemental Record on Appeal** on the above-named Appellant by depositing a copy of the same in the United States Mail, postage prepaid, on November 18, 2014, addressed as follows to Appellant's counsel of record:

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Charleston, South Carolina

Dated: 11/18/14

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original

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-07-7166

OTHA DELANEY Appellant,

-vs-

FIRST FINANCIAL OF CHARLESTON, INC. Respondent.

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SC Court of Appeals

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TABLE OF AUTHORITIES

CASES

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<i>Brockbank v. Best Capital Corp.</i> , 341 S.C. 372, 534 S.E.2d 688 (2000)	2, 4, 8, 10, 18
<i>Broyhill v. Resolution Management Consultants, Inc.</i> , 401 S.C. 466, 736 S.E.2d 867 (S.C.App. 2012)	4
<i>Buist v. Huggins</i> , 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006)	17
<i>Coastal States Bank v. Hanover Homes of South Carolina, LLC</i> , 2014 WL 1230237, Appellate Case No. 2012-213154 (S.C.App. March 26, 2014)	7
<i>Cosgrove v. Citizens Automobile Finance, Inc.</i> , 2010 WL 3370760 (Bankr.E.D.Pa. Aug. 26, 2010)	2
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HISTORY: 1962 Code § 10.9-101; 1966 (54) 2716; 1988 Act No. 494, § 5; 2001 Act No. 67, § 12; 2013 Act No. 96, § 1, eff July 1, 2013.

1962 CODE § 10:9-101

§ 15-3-540(2)

§15-3-570

§ 36-9-102(2)

§ 36-9-107

§ 36-9-507(1)

§ 36-9-625

§ 36-9-625(c)

§ 36-9-613

§ 36-9-614

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<i>Williston on Contracts</i> §79:14 (4 th ed.)	6

STATEMENT OF ISSUES ON APPEAL

I. BECAUSE APPELLANT'S CAUSE OF ACTION UNDER § 36-9-625(c)(2) OF THE UNIFORM COMMERCIAL CODE ACCRUED WHEN RESPONDENT DISPOSED OF THE COLLATERAL, THE COURT ERRED WHEN IT HELD THAT THIS ACTION WAS BARRED BY THE STATUTE OF LIMITATIONS

II. BECAUSE THE REMEDY PROVIDED BY § 36-9-625(c)(2) IS REMEDIAL AND COMPENSATORY, THE COURT ERRED WHEN IT HELD THAT THE STATUTES OF LIMITATIONS PROVIDED BY §§ 15-3-540(2) OR 15-3-570 FOR AN ACTION UPON A STATUTE FOR A PENALTY OR FORFEITURE ARE APPLICABLE TO THIS CASE

III. BECAUSE THE PROVISIONS OF ARTICLE 9, PART 6 OF THE U.C.C. ARE IMPOSED BY LAW UPON EVERY SECURED TRANSACTION COVERED BY ARTICLE 9 AND BECOME TERMS OF THE SECURITY AGREEMENT, BREACH OF THE ARTICLE 9 NOTICE REQUIREMENTS IS A BREACH OF THE CONTRACT. ACCORDINGLY, THE STATUTE OF LIMITATIONS APPLICABLE TO APPELLANT'S U.C.C. CAUSE OF ACTION IS PROVIDED BY § 36-2-725

STATEMENT OF THE CASE

Otha Delaney (Appellant) filed this action on October 3, 2011, alleging that the Notice of Sale of collateral that First Financial (Appellee) sent him in an attempt to comply with § 36-9-614 of South Carolina's version of the Uniform Commercial Code was defective as a matter of law. As a result, Delaney alleged that he is entitled to statutory relief pursuant to S.C. Code Ann. § 36-9-625(c)(2). Delaney, as a representative of a putative class, seeks this recovery on behalf of class members. (R. pp.18-25)

First Financial filed a motion under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure asserting a statute of limitations defense as a bar to the action because the date Delaney received the allegedly defective § 36-9-614 notice was in May, 2008, more than three years prior to the date the case was filed. (R. pp. 30-31)

On April 29, 2014, the trial court granted First Federal's motion to dismiss. (R. pp.1-8)

FACTS

The facts are not disputed. The trial court held that the action is barred by the statute of limitations as a matter of law. (R. p. 8)

Appellant respectfully disagrees and argues below that the trial court committed reversible legal error in several respects.

ARGUMENTS

INTRODUCTION

This case involves the requirement, first imposed by the Uniform Commercial Code (hereinafter the "U.C.C.")¹ in the 1960s (following similar rules in the common law of commercial relations and earlier efforts at its codification),² that a conditional seller who repossesses and disposes of collateral from a defaulting conditional buyer, provide the buyer (and guarantors) with information about the proposed disposition prior to conducting it.³

The purpose of this requirement is to permit the buyer (and guarantors) to participate in or otherwise influence the sale (disposition) in order to minimize their liability for a deficiency.⁴

Appellee, it is alleged, failed to provide Appellant (and putative class members) with notice of disposition of collateral compliant with relevant U.C.C. sections. As a result, Appellant sued Appellee, alleging the latter's liability for damages pursuant to a U.C.C. section entitling a conditional buyer or guarantor, upon proof of a secured party's disposition of repossessed collateral without, *inter alia*, compliant pre-disposition notice, to recover actual damages, and in the case of "consumer goods" transactions,⁵ to an election between recovery of actual damages or of damages in an amount based directly on the price of the goods and the interest charged in the transaction in question.⁶ (R. pp. 18-25)

¹ Further references to the Uniform Commercial Code will be to either the S.C. Code section (e.g., §36-9-101, *et seq.*), or to the Uniform Commercial Code (U.L.A.) section (e.g., § 9-101, *et seq.*). South Carolina's revised version of the Uniform Commercial Code, enacted in 2001, is virtually identical to the 1999 Uniform Code Commissioners (U.L.A.) version enacted with only minor variations in all fifty states. See, Official Comment 1, S.C. Code § 36-9-101: "This Article supersedes former Uniform Commercial Code (UCC) Article 9. [T]he Comments to former Article 9 will remain of substantial historical value and interest." Article 9, in essentially its current substance, has been the law in South Carolina, and throughout the United States, since the early 1960s. See, e.g., 1962 S.C. Code § 10.9-101, *et seq.*

² Article 9 unified the law of pledges, conditional sales, chattel mortgages, trust receipts, and other security interests in personal property. See U.C.C. U.L.A. § 9-102(2) (1995).

³ U.C.C. §§ 36-9-613 & 614.

⁴ In *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000), the Supreme Court explained the purpose of the pre-disposition notice required by §§ 36-9-613 and 614. "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." *Id.*, 341 S.C. at 384 and 534 S.E.2d at 695; citing *Crane v. Citicorp Nat'l Servs., Inc.*, 313 S.C. 70, 437 S.E.2d 50 (1993) and James J. White & Robert S. Summers, *Uniform Commercial Code* (hereinafter "White & Summers"), § 34-13 (1995). See also, *Cosgrove v. Citizens Automobile Finance, Inc.*, 2010 WL 3370760 (Bankr. E.D.Pa. Aug. 26, 2010) (The notice recognizes a debtor's "forlorn hope that if he is notified, [he] will either acquire enough money to redeem the collateral or send his friends to bid for it.") citing *Brockbank, supra*, and quoting White and Summers § 26-9 (2d ed. 1980). In *Crane*, the Court explained the rationale for providing notice to guarantors as well as primary debtors. *Crane, supra* at 313 S.C. at 73, 437 SE2d at 5 (Guarantors have the same interest as debtors in avoiding or minimizing a deficiency judgment.)

⁵ "Consumer goods transaction" is a defined term in the "U.C.C." See, § 36-9-102(24) "Consumer goods transaction" means a "consumer transaction in which:

(A) an individual incurs an obligation primarily for personal, family, or household purposes; and
(B) a security interest in consumer goods secures the obligation."

⁶ Section 36-9-625(c).

Appellee argued, and the trial court agreed, that the alternate damage remedy is a penalty subject to the one year or three year statute of limitations established, respectively, in § 15-3-540(2) and § 15-3-570. The trial court ruled that Appellant's cause of action under U.C.C. § 36-9-625(c)(2) for Appellee's noncompliance with the pre-disposition notice requirement in a consumer goods transaction accrued either when the defective notice was sent or received. Because both the date the notice was sent to and the date it was received by Appellant was more than three years prior to the date Appellant filed the action, the trial court granted Appellee's motion to dismiss the case. (R. pp.1- 8)

Following the trial court's denial of Appellant's timely motion under Rule 59(e), (R. pp.9-17), this appeal was noticed and filed.

STANDARD OF REVIEW

The affirmative defense of a statute of limitations bar, based on facts pled in complaint, may be raised by a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. *E.g., Pressley v. Tupperware Long Term Disability Plan*, 553 F.3d 334 (4th Cir. 2009).

When reviewing the trial court's ruling on a motion to dismiss on the pleadings, the Court of Appeals must apply the same standard as the trial court, viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. A trial court must deny a motion to dismiss if the evidence, etc., yields more than one reasonable inference. *Broyhill v. Resolution Management Consultants, Inc.*, 401 S.C. 466, 736 S.E.2d 867 (S.C. App. 2012); *Brazell v. Winsor*, 384 S.C. 512, 682 S.E.2d 824 (2004).

Furthermore, where a trial court properly finds that it has jurisdiction, but commits error in ruling on a dispositive motion, remand is unnecessary and may constitute error. *E.g., Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000) ("The Court of Appeals erred in remanding the case for lower court to decide the issue.") Thus, it is appropriate in a case where an appellate court determines clear error on the part of the lower court, that it simply enter judgment in favor of the appellant. *Id.*

I. BECAUSE APPELLANT'S CAUSE OF ACTION UNDER § 36-9-625(c)(2) OF THE UNIFORM COMMERCIAL CODE ACCRUED WHEN RESPONDENT DISPOSED OF THE COLLATERAL, THE COURT ERRED WHEN IT HELD THAT THIS ACTION WAS BARRED BY THE STATUTE OF LIMITATIONS

A. Statutes of Limitations Commence On Date of Accrual of Cause of Action

The trial court held, and the parties agree, that a statute of limitations commences at the moment a party has a right to initiate suit.⁷ The question of when a cause of action arises or

⁷ "Plaintiffs (sic) sole cause of action accrued upon receipt of the 'NOTICE OF PRIVATE SALE OF

accrues is a question of law. *Menezes v. W.L. Ross & Co., L.L.C.*, 403 S.C. 522, 744 S.E.2d 178 (2013). The standard as to when the limitations period begins to run is objective rather than subjective. *Turner v. Milliman*, 381 S.C. 101, 671 S.E.2d 636 (S.C.App. 2009) “When there is doubt as to which of two limitation laws applies in a given instance, the doubt must be resolved in favor of affording the longer period.”⁸

A cause of action accrues at the moment the plaintiff has a legal right to sue on it. *E.g., Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 596 S.E.2d 42 (2004), *reh’g denied* May 25, 2004; *Grillo v. Speedrite Products, Inc.*, 340 S.C. 498, 532 S.E.2d 1 (S.C.App. 2000). 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. *King v. James*, 388 S.C. 16, 694 S.E.2d 35 (S.C.App. 2010).⁹

B. Prior to the Secured Party’s Disposition of Repossessed Collateral, a Cause of Action under § 36-9-625 is Incomplete

In the Memorandum in Support of its Motion to Dismiss, Appellee made the following statement:

In this case, there is only one date when any alleged violation of § 36-9-625(c)(2) could have occurred. As Plaintiff concedes, that day was May 2, 2008 when the notice of sale which is alleged to have been improper was sent. (*See* Plaintiff’s Complaint at para. 14.) There is no other allegation of any form of wrongdoing or violation of any statute against First Financial. Thus, even if § 15-3-540(2) is found to be applicable, the statute of limitations began to run when this notice that was sent (or shortly thereafter when Plaintiff received this notice). Plaintiff has made no allegation that this notice was received well after it was sent, and this lawsuit was filed on October 3, 2011, well over five months

COLLATERAL.’ In the alternative, Defendant asserts that because this action accrued upon Plaintiff’s receipt of the Notice of Sale, a three year statute of limitations, if applied, still renders the Plaintiff’s action untimely as a matter of law.” The trial court base its ruling dismissing Appellant’s action on these arguments. *Order of Trial Court*, at 2, 5 & 8.

⁸ *State v. Life Ins. Co.*, 254 S. C. 286, 175 S. E. 2d 203 (1970); *Scovill v. Johnson*, 190 S. C. 457, 3 S.E.2d 543 (1939). *See*, 26 S.C. Jur., *Limitation of Actions* § 13, *Applicable Limitations Law*.

⁹ *See also*, 26 S.C. Jur., *Limitation of Actions* § 54 (“Under most circumstances, civil actions can be commenced only within the prescribed period after the cause of action has accrued. The general rule is that a cause of action accrues when the plaintiff has a claim to enforce, either because of a right withheld or a wrong done, and the legal right to sue upon the claim.”) *See also*, Lawrence’s *Anderson on the Uniform Commercial Code* §§ 2-725:1 & 2-725:2 (3d ed.) (Same); 31 *Williston on Contracts* § 79:14 (4th ed.) (Same); *Annot.: Solving Statutes of Limitation Problems*, 4 Am.Jur. Trials 441(Same). That rule has governed since the 1830s. *See, e.g., Bank of United States v. Daniel*, 12 Pet. 32, 56, 9 L.Ed. 989 (1838); *Evans v. Gee*, 11 Pet. 80, 84, 9 L.Ed. 639 (1837). And that definition appears in dictionaries from the 19th century up until today. *See, e.g.,* 1 A. Burrill, *A Law Dictionary and Glossary* 17 (1850) (“[A]n action *accrues* when the plaintiff has a right to commence it”); *Black’s Law Dictionary* 23 (9th ed. 2009) (defining “accrue” as “[t]o come into existence as an enforceable claim or right”).

after the limitations period would have ran under § 15-3-540(2), in May of 2011. Thus, Plaintiff's claim is time-barred and should be dismissed with prejudice.

Memorandum in Support of Defendant's Motion to Dismiss. (R. pp. 51-52)

It is true that Appellee's "NOTICE OF PRIVATE SALE OF COLLATERAL" (hereafter the "Notice") was dated, and presumably sent, on or about May 2, 2008. It is also likely that the notice was received by Appellant shortly thereafter. However, neither the date of mailing nor the date of receipt of that Notice can logically, or legally, constitute the date on which Appellant's cause of action under § 36-9-625 accrued.

There are several reasons for this, having to do with the logic, structure, and purpose of Article 9 which will be addressed below.

C. The Notices Required by §§ 36-9-613 & 614 are Required to be Given Prior to Disposition of Collateral Securing a Defaulted Installment Debt

Article 9 of the Uniform Commercial Code, *Secured Transactions*, requires a secured party, after repossession but prior to disposition of collateral securing an installment debt in default, to provide written notice to the debtor and its guarantors regarding the proposed disposition. *S.C. Code Ann. Sections 36-9-610 through 9-625*.

Section 36-9-610, entitled "**Disposition of collateral after default**," states, *inter alia*, that:

- (a) After default, a secured party may sell, lease, license, or otherwise **dispose** of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.
- (b) **Every aspect of a disposition of collateral**, including the method, manner, time place, and other terms, must be commercially reasonable.....

Id. (emphasis added).

Section 36-9-611, "**Notification before disposition of collateral**," provides, *inter alia*:

...a secured party that **disposes of collateral** under Section 36-9-610 shall send to the persons specified in subsection (c)...a reasonable authenticated **notification of disposition**

S.C. Code Ann. Section 36-9-611. (emphasis added).

Section 36-9-613, entitled "**Contents and form of notification before disposition of collateral: general**," describes the information a secured creditor must provide to the conditional purchaser and any co-obligors/guarantors, **prior to disposing of the collateral in full** or partial satisfaction of the debt it secures. (emphasis added). *E.g., Coastal States Bank v. Hanover Homes of South Carolina, LLC*, 2014 WL 1230237, Appellate Case No. 2012-213154 (S.C.App. March 26, 2014).

Section 36-9-614 (which incorporates § 36-9-613) is entitled: “**Contents and form of notification before disposition of collateral: consumer goods transaction.**” (emphasis added).

Section 36-9-614 adds information which is required to be included in notices of disposition of collateral in “consumer-goods” transactions to the list of requirements applicable to pre-disposition notices in non-consumer-transactions as described in § 36-9-613. Otherwise, as does § 36-9-613, § 36-9-614 lists information that must be given a conditional purchaser or guarantor by a secured party **prior to** the disposition of repossessed collateral in consumer goods transactions.

In *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000), the Supreme Court explained the purpose of the pre-disposition notice required by §§ 36-9-613 and 614. “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.**” *Id.*, 341 S.C. at 348 and 534 S.E.2d at 695 (emphasis added); citing *Crane v. Citicorp Nat’l Servs., Inc.*, 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993) and *White & Summers*, § 34-13 (1995).

In *Crane*,¹⁰ the Court considered the question, among others, whether a guarantor, as well as the principle debtor, was entitled to the pre-disposition notice after collateral was repossessed. The Court observed:

“The majority of courts have found guarantors are debtors under § 36-9-504(3) and thus entitled to notice. 9 Hawklund, *Uniform Commercial Code* § 9-105:05 n. 12 (1990); *see also Rhoten v. United Vir. Bank*, 221 Va. 222, 269 S.E.2d 781 (1980). We agree. As noted above, **one purpose of the notice is to assure the sale is conducted in a commercially-reasonable manner.** 2 James J. White & Robert S. Summers, *Uniform Commercial Code* § 27-12, at 599 (1988). Persons with liability on the underlying obligation have **a financial status in the creditor’s disposition or sale of the collateral** that is identical to the debtor’s interest - **liability for a deficiency.** *Id.* at 604. Accordingly, they are entitled to the same notice protection. *Id.*

Crane, supra. (emphasis added.)

In the end, whether it is the conditional purchaser unable to continue servicing the installment payments, or the guarantor of that interrupted stream of payments, the notice of proposed disposition of the collateral is critical because it allows the recipient of **compliant** notice to act so as to affect the dispositional transaction (“bidding up” the public auction or encouraging others to do so, for example).

¹⁰ Construing the pre-revision version of Article Nine (§§ 9-504 & 9-507), whose notice and damages provisions were essentially the same as the post-revision provisions (§§ 9-613, 9-614 & 9-625). *See* Footnote 1, *Order of Trial Court Dismissing Complaint*, at page 4. “Although the Court in *Singleton* was analyzing the provisions of former Section 9-507(1), current § 36-9-625(c)(2) embodies nearly identical language for its provisions on recovery related to improper notice of sale.”

This opportunity to influence the transaction in which the collateral is disposed of, and thus, the size of a deficiency claim for which a conditional purchaser/guarantor will be liable, is (1) the underlying reason for the Article 9 pre-disposition notice requirement, and (2) the reason the UCC provides **only** injunctive relief **prior to sale (disposition)** of the collateral, but provides **an action for damages once disposition has been accomplished**.

Crane, and to some extent, *Brockbank*, make clear, that the failure of a secured creditor to provide compliant notice of disposition has the potential not just to deprive the consumer of important rights related to the redemption of the collateral, but also of the ability of both consumer and guarantor to influence the size of a deficiency claim. See, *Crane, supra*. Accord, 10 *Anderson on the Uniform Commercial Code* § 9-504:439 (3d ed.) (citing *Crane*).¹¹

Because a deficiency judgment is only possible **after** disposition of the collateral, it stands to reason that the cause of action for damages under § 9-625(c),¹² both actual and formulaic, can only accrue, and the statute of limitations can only commence, when the disposition has occurred.

D. The U.C.C. Distinguishes Between Pre-Disposition and Post-Disposition Noncompliance with Article 9's Notice Requirements by Providing Different Remedies Based on the Time of the Secured Party's Noncompliance

The U.C.C. distinguishes between the sorts of remedies necessary to address the failure of a creditor to comply with the default provisions of the Code, including the requirements regarding notice of disposition. As one distinguished commentator put it:

Subsection 9-507(1) sets out the remedies for the debtor...when the secured party fails to comply with the default provisions of the Code. **If the secured party has not yet acted in noncompliance** but is about to do so, or if the secured party is presently acting in noncompliance, **this section provides for injunctive relief. If the secured party has already acted in noncompliance, this section provides for damages** and, in the case of consumer goods, sets out a minimum recovery for those damages.

¹¹ S.C. CODE ANN. "§ 36-9-101. Short title....This chapter may be cited as 'Uniform Commercial Code - Secured Transactions'....HISTORY: 1962 Code § 10.9-101; 1966 (54) 2716; 1988 Act No. 494, § 5; 2001 Act No. 67, § 12; 2013 Act No. 96, § 1, eff. July 1, 2013....OFFICIAL COMMENT j. Consumer Goods, Consumer-Goods Transactions, and Consumer Transactions. This Article (including the accompanying conforming revisions (see Appendix I) includes several special rules for 'consumer goods,' 'consumer transactions,' and 'consumer-goods transactions.'" Each term is defined in Section 9-102. Section 9-613 (contents and form of notice of disposition) applies to all secured transaction. Section 9-614 contains additional special requirements for the contents of a notification of disposition and a "safe-harbor, plain English form" of notification, for consumer-goods transactions.

¹² As opposed to the cause of action provided by § 9-625(a) for injunctive relief.

Hawkland on the UCC Series § 9-507:1 - *Secured Party's Liability for Failure to Comply with this Part* (2013) (emphasis added) (citations omitted).

The **pre-disposition, injunctive remedy** is provided by § 36-9-625(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....

while § 36-9-625(c) provides the **post-disposition damages remedies** - (c)(1) actual damages for all, or, in the case of a consumer transaction, an election of remedies - *i.e.*, (c)(1), actual damages or (c)(2), an automatic minimum recover in an amount tied directly to the size of the loan and the amount of interest charged (essentially a “liquidated damages” remedy).¹³

Although the revised sections (§§ 9-613 & 9-614) are worded somewhat differently, the intention of the drafters and the General Assembly enacting the relevant sections is self-evident. Prior to the sale of a debtor’s collateral, injunctive relief is the preferred remedy. Only when the disposition (sale) of the collateral has already occurred does the Code provide for damages to compensate the conditional purchaser and guarantors.

E. The U.C.C. Contemplates Revision and Correction of Pre-Disposition Notices by Secured Parties - Sua Sponte or by Court Order Pursuant to § 36-9-625(a) - Further Evidence that the Cause of Action for Damages Under § 36-9-625(c) Cannot Accrue Prior to Disposition

Further evidence that disposition is a prerequisite to suit for damages under either subsection

¹³ The trial judge ignored this direct relationship between the “cost” of the transaction to the consumer (and of the “risk” to the guarantor) and the § 9-625(c)(2) “automatic damages” remedy. “While the proposed award is based on each class member’s respective contractual obligations, this fact alone does not demonstrate that the award is remedial in nature. Conversely, this fact exhibits only that the severity of the penalty fluctuates depending on the finance charge in an effort deter noncompliance.” *Order Granting Motion to Dismiss*, at 3.

But the connection between the cost/risk and the “liquidated” damage is a classic “earmark” of a non-penal remedy, as has been recognized in our jurisprudence for many years. *See, Rex Trailer Co. v. United States*, 76 S.Ct. 219 (1956) (Rejecting claim that liquidated damages provision in statute which also contained criminal penalties constituted double jeopardy.) “The only question for our decision, then, is whether § 26(b)(1) is civil or penal, for ‘Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.’ But there is no requirement, statutory or judicial, that specific damages be shown.... The Government’s recovery here is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss.... [L]iquidated damages ‘serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable....’ And the fact that no damages are shown is not fatal.”)

of § 36-9-625(c) is supplied by Section 36-9-611, "Notification . before disposition of collateral." Official Comment Number 8 to this general expression of the pre- disposition notice requirement states:

Failure to Conduct Notified Disposition. 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.** 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.**

Section 36-9-611, Official Comment 8 (emphasis added).

Thus, it is clear that the drafters of the U.C.C. Article 9 notice requirements foresaw the likelihood that secured parties would on occasion find it necessary and prudent to send corrective notices - following an earlier notice which either lacked required information or which contained even *incorrect* information - prior to disposing of a conditional buyer's collateral. It is also clear that such a secured party ought thereby to be able to insulate itself from liability for damages under § 36-9-625(c), at least as far as a violation of the pre-disposition notice requirements is concerned. If corrective notice can cure the problem, no cause of action can have accrued until the creditor can no longer provide such corrective notice.

The last moment at which a secured party cannot possibly provide correct notice of the disposition is the instant when the secured party sells or otherwise unconditionally disposes of the collateral. It is at that point that "all of the essential elements of the cause of action [under § 36-9- 625(c)] are in existence, that is...the cause of action is complete...." *American Agric. Chem. Co. v. Thomas*, 206 S.C. 355, 360, 34 S.E.2d 592, 594 (1945). Cited in 4 S.C.Jur. Actions - Existence of Cause of Action, §16.

F. The Trial Court's Finding that the Cause of Action Provided by § 36-9-625(c)(2) Accrues Upon Receipt of the Defective Notice, Irrespective of the Disposition of the Collateral, Will Lead to Absurd Results

As Appellant argued below, the trial court's ruling that the cause of action for damages under § 36-9-625(c) accrues when the defective notice is sent or received may lead to absurd results. Among them:

Debtor owing \$70,000.00 to the lender for a note secured by a 2003 mobile home, sues under § 36-9-625(c)(2) for the full statutory damage award upon receipt of a defective notice - prior to sale of the mobile home - easily an award of \$50,000.00 -the finance charge plus 10% of the purchase price. The debtor then files a Chapter 7 bankruptcy having purchased a \$50,000.00 home with the proceeds, claiming the S.C. § 15-41-30 "Homestead Exemption" in the new home, and

discharging the debt to the lender.

Following debtor's Chapter 7 discharge, the secured party/lender (to whom debtor had "surrendered" his interest in the mobile home as part of the Ch.7 proceeding), sold the mobile home at a "private dealer auction." Imagining it was no longer required, the secured party/lender failed to send debtor a notice pursuant to § 36-9-914. Debtor files an action under § 36-9-625(c)(2) seeking statutory damages.

In this entirely plausible scenario, debtor has converted a \$70,000.00 debt into no debt, which a Chapter 7 bankruptcy could have accomplished in any case, but with the added bonus of a \$50,000.00 home thrown in as the result of a supposed pre-disposition violation of § 36-9-614. Additionally, debtor may succeed in collecting damages for the secured party's post-disposition violation(s).

Other similarly absurd, and highly inequitable, consequences are conceivable as a result of the trial court's holding that the § 36-9-625(c)(2) cause of action for the automatic damages provision accrues not at disposition, but when the defective notice is received.

This is why the U.C.C. provides injunctive relief prior to disposition, and damages only after a sale of the collateral has actually occurred. *See, e.g., Ray Bell Constr. Co. v. School Dist. of Greenville Co.*, 331 S.C. 19, 501 S.E.2d 725 (1998) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.") How much truer when the absurdity results from *rejecting* the "the ordinary meaning of the words used in a statute," as the trial court did in granting First Federal's motion.

II. BECAUSE THE REMEDY PROVIDED BY § 36-9-625(c)(2) IS REMEDIAL AND COMPENSATORY, THE COURT ERRED WHEN IT HELD THAT THE STATUTES OF LIMITATIONS PROVIDED BY §§ 15-3-540(2) OR 15-3-570 FOR AN ACTION UPON A STATUTE FOR A PENALTY OR FORFEITURE ARE APPLICABLE TO THIS CASE

A. The Language of the U.C.C. Supports a Construction of § 36-9-625(c)(2) as Remedial and Compensatory, Rather than Punitive and Penal

A secured party's failure to comply with Article 9's notice requirements entitles a conditional purchaser or guarantor in a "consumer goods" transaction to recover as compensation "for that failure" *either* actual damages or, in the alternative, "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." *Section 36-9-625(c)(2)*.

The language of the Article Nine remedial damages section for violation of the notice requirements is significant. The drafters of the U.C.C. used the terms "remedies", "damages,"

“loss,” “includ[ing] loss resulting from the debtor’s inability to obtain, or increased costs of, alternative financing,” and “damages...for its loss,” to refer to the remedies given to conditional buyers who prove that conditional vendees have failed to comply with Article 9. *S.C. Code Ann. § 36-9-625 (2001)*. The statute speaks in exclusively compensatory rather than punitive terms, “penalties” being nowhere mentioned.

The Official Comment, paragraph 3, expresses the general overall policy of the U.C.C. as it is reflected in § 36-9-625: “Damages for violation of the requirements of this Article...are those reasonably calculated to put an eligible claimant in the position that it would have occupied had no violation occurred.” This is a decidedly compensatory purpose.

Similarly, Official Comment 4 to § 36-9-625, states as follows:

Minimum Damages in Consumer-Goods Transactions. Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is patterned on former Section 9-507(1) and 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. Subsection (c)(2) leaves the treatment of statutory damages as it was under former Article 9. A secured party is not liable for statutory damages under this subsection more than once with respect to any one secured obligation (see Section 9-628(e)), nor is a secured party liable under this subsection for failure to comply with Section 9-616 (see Section 9-628(d)).

Section 36-9-625, Official Comment ¶ 4.

As is clear from the title of the Comment, “Minimum Damages”, the Uniform Commercial Code Commissioners and the General Assembly intended **compensation** for the victims of violations of Article Nine’s notice requirements, as opposed to **penalties**.

Likewise, Paragraph 3 of the Official Comments to § 9-625, entitled “Damages for Noncompliance with this Article,” speaks in terms exclusively of damages. The remedial provisions of the section “set[] forth the basic remedy for failure to comply with the requirements of this Article: a damage recovery in the amount of loss caused by the noncompliance.” *Id.*

Similarly, the South Carolina Reporter to the U.C.C. states with respect to § 9-625:

Subsection (c)(2) provides that if the collateral is consumer goods the **minimum damages** a debtor or secondary obligor can recover for a secured party’s failure to comply with part 6 is an amount equal to 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.

Section 36-9-625, South Carolina Reporter’s Comment ¶ 2 (emphasis added).

There is simply no ambiguity in the terms chosen by the drafters of the U.C.C. and the General Assembly, to wit: “remedy”, “damages” or “minimum recovery” that would permit the trial court to disregard the text, ostensibly, as the trial court put it, because:

[T]he minimal amount of actual, compensatory damages available in scenarios similar to the instant matter would make enforcement less desirable. Thus, the penalty provision incentivizes compliance with South Carolina law by providing a larger recovery otherwise not available.

Order Granting Motion to Dismiss, at 4. (R. p. 4)

The court was simply incorrect to suggest that the scholars who helped draft this important piece of uniform commercial legislation, and the legislature(s) that passed it, would be so cavalier and so sloppy in choosing critical terms to describe the product of their efforts.

B. The Trial Court’s Reliance on Loose Language and “Unconsidered Dictum” was Error

A court may not ignore plain statutory language because of the court’s perception of a different legislative purpose. “If a statute’s language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Buist v. Huggins*, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (Internal quotes and citation omitted) (“[I]t is beyond this Court’s power to effect a change in the statutes enacted by the Legislature.”); *State v. Corey D.*, 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000). *See also Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (The Courts do “not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly.”) Moreover, a court is not at liberty to rely on casual labels given to legislation by other courts in *dicta*, and it was error for the trial court to do so.

The main basis for the trial court’s conclusion that the § 36-9-625(c)(2) automatic damages remedy is a “penalty” as that term is used in §§ 15-3-540(2) and 570 is that “[o]n no less than three occasions, the South Carolina Supreme Court has identified this exact *provision* as awarding a ‘statutory penalty.’” *Order Granting Motion to Dismiss*, at 4 (emphasis in original). The trial court refers to three cases, *Crane v. Citicorp*, *supra*, *Singleton v. Stokes Motors, Inc.*, *supra*, and *Brockbank v. Best Capital Corp.*, *supra*. (R. p. 4)

In each of those cases, the Supreme Court uses the terms “penalty” and “damages” interchangeably when referring to the § 36-9-625(c)(2) automatic damages remedy. *Id.*¹⁴ To

¹⁴ In *Crane*, the Court referred to the remedy as “compensatory damages” once, as a “statutory penalty” four times, and once simply as a “penalty.” In *Singleton*, the Court uses the term “statutory penalty” seven times, while referring to “damages” or “statutory damages” twelve times. Finally, in *Brockbank*, the Court refers to “penalty” or “penalties” three times, and “damages” four times. *See also Rashaw v. United Consumers C.U.*, 2011 W.L. 2110806 Slip Op. at *4 (W.D. Mo. May 26, 2011) (“Plaintiffs also exert considerable effort to identify situations in which various courts have described various parts of the UCC generally, or section 9-625 specifically, as a ‘penalty.’ The problem is that the word is amenable to multiple definitions in a variety of

characterize the Supreme Court's casual and interchangeable reference to the remedy designed to ensure compensation to consumers deprived of the U.C.C.'s prophylactic requirement of pre-disposition notice as "identify[ing] this exact *provision* as awarding a 'statutory penalty,' is to overstate the case.

[A] distinction should be drawn between "obiter *dictum*," which constitutes an aside or an unnecessary extension of comments, and considered or "judicial *dictum*" where the Court...is providing a construction of a statute to guide the future conduct of inferior courts.

U.S. v. Bell, 524 F.2d 202, 206 (2d Cir. 1975). *Dictum* includes "any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion." *Black's Law Dictionary*, 454 (6th ed.1990).

It is obvious that the Supreme Court's casual use of the term "penalty," when referring to § 36-9-625(c)(2) in the cases cited by the trial court (or others), was not intended to "provid[e] a construction of a statute to guide the future conduct of inferior courts," nor was it intended to be a "statement of the law enunciated by the court...by way of illustration." *Id.*

The same point was made by the Superior Court of Pennsylvania in a case on all fours with this one.¹⁵ The plaintiff, Cubler, brought a class action alleging that a secured party, TruMark Financial Credit Union, had violated Pennsylvania's version of U.C.C. § 9-614, entitling Cubler and the class he sought to represent to the statutory damages provided in U.C.C. § 9-625(c)(2).¹⁶

Like Appellee here, TruMark argued to the trial court that § 9-625's remedy was a penalty or forfeiture subject to a Pennsylvania statute of limitations governing "[a]n action upon a statute for a civil penalty or forfeiture."¹⁷ The trial court, as here, granted TruMark's motion to dismiss based on the "penalty and forfeiture" statute of limitations. *Id.*

In a carefully reasoned opinion, the Pennsylvania Superior Court reviewed U.C.C. Article 9, Part 6, and concluded that the trial court's finding that § 9-625(c)(2)'s remedy is a "penalty" was without foundation. Because the *Cubler* opinion is absolutely on all fours with the instant appeal, it bears quotation at length.

In deciding this question, our role, as with all statutory interpretation, is to give effect to the intent of the Legislature. In ascertaining such intent, section headings and titles may be used as an aid, and words and phrases must be understood according to their common usage....

contexts. The word 'is an elastic term with many different shades of meaning.'")

¹⁵ *Cubler v. Trumark Fin. C.U.*, 83 A.3d 235 (Pa. 2013)

¹⁶ Pennsylvania's version of the U.C.C. is identical to South Carolina's.

¹⁷ *Cubler*, *supra* at 238.

[T]he drafters included this language [“in any event” and “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”] in the Official Comment, and removed the requirement for an aggrieved debtor/obligor [in a consumer goods transaction] to prove actual damages in order to recover statutory damages under § 9-625(c)(2), in recognition of the inherent difficulty for a claimant to quantify and prove actual damages. *See, e.g.*, 13 Pa. § 9-625(b) (providing that “[l]oss caused by a failure to comply with this chapter...may include loss resulting from the debtor’s inability to obtain, or increased costs of, alternative financing.”)....

We must provide “substantial weight” to the fact that, in drafting section 9-625, the General Assembly specifically chose to use the word “[r]emedies” in the heading of the statute. Furthermore, the relevant provisions involved in this case, 13 Pa.C.S.A. §§ 9-625(c)(2) and (e)(5), both specifically provide for “recover[y]” of “statutory damages.” *Id.* Importantly, *the language of section 9-625 does not contain any reference to penalties of any sort.* Accordingly, it would be anomalous for this Court to declare that a statute that the General Assembly has specifically designated as being *remedial*, and which expressly provides for *recovery of statutory damages*, is, in fact, a civil penalty or forfeiture.

Moreover, a determination that the statutory damages provided for in section 9-625 are intended to be compensatory and not penal in nature is supported by section 1-305 of the UCC [formerly § 1-106]. Section 1-305 provides that “neither consequential or special damages *nor penal damages may be had except as specifically provided* in this title or by other rule of law.” 3 Pa.C.S.A. § 1-305(a) (emphasis added).

Furthermore, section 9-625 provides a damages formula that is expressly linked to the aggrieved party’s *injury*, not to the degree of the offending party’s culpability, which is a feature inherent in penalties. *See, e.g.*, 13 Pa.C.S.A. § 9-625(b) (providing that “a person is liable for damages in the amount of any loss caused by a failure to comply with this division”); *id.* § 9-625(c)(2) (providing that an aggrieved [consumer] debtor/obligor is entitled to an award “not less than the credit service charge plus 10% of the principal amount of the obligation or the time price differential plus 10% of the cash price.”).

Finally, even if the imposition of statutory damages under section 9-625 may have the effect of encouraging compliance with the provisions of Article 9, the General Assembly intended such damages to serve primarily to compensate aggrieved claimants, not as a penalty against offending parties.

The trial court sought to support its determination that the General Assembly drafted section 9-625 with the intent to punish offending parties and incentivize compliance with the provisions of Article 9 of the UCC, rather than to compensate aggrieved parties for their losses, by pointing to the following Official Comment to section 9-625:

Subsection (c)(2) provides a minimum, statutory, damage recovery for a debtor and secondary obligor in a consumer-goods transaction. It is...designed to ensure that every non-compliance with the requirements of Part 6 in a consumer-goods transaction results in liability, *regardless of any injury that may have resulted*.

13 Pa.C.S.A. § 9-625, cmt. ¶ 4 (emphasis added); *see also* Trial Court Opinion, 4/4/13 at 7.^[18]

We find the trial court's interpretation of this Official Comment to be misguided. As stated above, the plain statutory text of section 9-625 reveals that its remedies are compensatory; the statute contains no language suggesting that it is primarily "penal." Concerning the language "regardless of any injury that may have resulted" used in the above-mentioned Official Comment, the drafters of section 9-625 did not include this language to express an intent for section 9-625 to serve as a penalty for creditor non-compliance regardless of the debtor's/obligor's injury. Rather, the drafters included this language in the Official Comment, and removed the requirement for an aggrieved [consumer] debtor/obligor to prove actual damages in order to recover statutory damages under section 9-625, in recognition of the inherent difficulty for a claimant to quantify and prove actual damages. *See, e.g.,* 13 Pa.C.S.A. § 9-625(b) (providing that "[l]oss caused by a failure to comply may include loss resulting from the debtor's inability to obtain ... alternative financing"); *accord In re Koresko*, 91 B.R. 689, 699 (Bankr.E.D.Pa. 1988) (analyzing the predecessor statute to section 6-925 and pointing out that one injury that might flow from an insufficient motor vehicle repossession notice, but is difficult for the debtor/obligor to prove, is the lost opportunity to attend the sale and affect any deficiency resulting from a sale of the vehicle for less than its fair market value).

Cubler v. Trumark Fin. C.U., 83 A.3d. at 240-42 (internal citations omitted).

C. The U.C.C. Does Not Allow Penalties

The trial court's ruling also runs counter to other provisions of the U.C.C. The U.C.C. provides its own rules of construction. *U.C.C. Article 1, Part 1. Short Title, Construction; Application and Subject Matter of the Act*. Importantly, among those provisions in Article 1, is Section 36-1-106, entitled "*Remedies to be Liberally Administered*":

The remedies provided by this title must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, but neither consequential or special damages *nor penal damages may be had except as specifically provided* in this title or by other rule of law.

Section 36-1-106(a) (emphasis added).

¹⁸ In this case, *see, Trial Court Opinion*, 4/29/13, at 3.

Neither Appellee nor the trial court has identified any part of Article 9 where penal damages have been “specifically provided” for, and of course they have not been. Further, the U.C.C. Official Comment makes clear that “remedies are to be liberally administered” but “do not include...penal damages.” *Official Comment 1 to § 36-1-106*.

The Official Comment states that another purpose of the Code is “to reject any doctrine that damages must be calculable with mathematical accuracy. Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit.” *Id.* This is consistent with the statutory damages calculation contained in § 36-9-625(c)(2) based on the loan amount and rate of interest charged. The formula recognizes the difficulty of calculating actual damages involving “loss resulting from the debtor’s inability to obtain ... alternative financing,” etc., (*see, In re Koresko, supra*) and factors such as the that the consumer debtor’s collateral (*e.g.*, an automobile) might well be located at a private “dealer’s auction” hundreds of miles away.

Finally, penal statutes require a strict construction. Finding an unexpressed intent to create a civil penalty in the U.C.C. sections under discussion would not only do violence to the rules of statutory construction, it would conflict with the Code’s expressed goal of “negat[ing] the possibility of unduly narrow or technical interpretations of remedial provisions,” to ensure a liberal construction and application of those provisions. *Section 36-1-106. Official Comment.*

In the face of extraordinarily clear text and Official Comments negating any legislative intent to create a penalty, but clearly expressing an intent to provide a compensatory remedy, the trial court erred by holding that the § 36-9-625 “minimum damages” is a “civil penalty or forfeiture.”

D. A “Penalty” Is a Defined Term in the Law Which Does Not Describe the Remedy Provided by § 36-9-625(c)(2)

Section 36-9-625(c)(2) does not constitute a “penalty.” It has long been recognized that a “penalty” is a term of art, referring to a law in which:

‘the wrong sought to be redressed is a wrong to the public’ rather than ‘to the individual,’ that is, a law ‘punish[ing] an offense against the public justice of the state’ as opposed to ‘afford[ing] a private remedy to a person injured by the wrongful act’

Huntington v. Attrill, 146 U.S. 657, 668-674 (1892).

See also, Tull v. United States, 481 U.S. 412, 422, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987) (Penalties are “intended to punish culpable individuals,” not “to extract compensation or restore the status quo.”) “[C]ivil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior.” A civil penalty is a “punishment by way of a pecuniary exaction

from the offender..., imposed and enforced by the state for a crime or offense against its law...without regard to the actual damage sustained, as a form of punishment.” 36 Am.Jur.2d *Forfeitures and Penalties*, § 2 (2013).

E. *The Trial Court’s Assertion that Other Courts Have Held that the U.C.C. § 9-625(c)(2) Remedy is a “Penalty” Overstates the Facts*

The trial court cites only one decision supporting the conclusion that the § 36-9- 625(c)(2) remedy is a “penalty.” This is apparently because there is only one case supporting that conclusion.

Beard v. Vanderbilt Mortg. & Fin., Inc.,¹⁹ an unappealed federal district court decision predicting that the state courts of Tennessee would construe § 9-625(c)(2) as a “penalty” rather than as compensation for consumer debtors, *i.e.*, as remedial, is virtually the *only* decision from *any* jurisdiction supporting the trial court’s decision. The *Beard* decision provides no analysis of Article 9, nor does the court engage in anything which might be called statutory construction. In fact, the opinion ignores overwhelming evidence of the legislature’s intent that § 9-625(c)(2) be remedial and compensatory, rather than penal. *See, Part IV, A-D, supra.*

The opinion is flawed in the very same ways as the trial court’s opinion here - it relies only on labels yet ignores plain statutory language. The *Beard* court based its prediction on *dicta* from lower Tennessee courts, in particular an intermediate appellate court case, *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 31 (Tenn. Ct.App. 1991), none of which addressed the “penalty” versus “damages” or statute of limitations issues. Instead, like our Supreme Court, the Tennessee state courts simply loosely and interchangeably labeled the Article 9 remedy “damages” and/or a “penalty.” *Beard* at *3.

By contrast, for example, both in terms of reasoning and result, the district court in *Jenkins v. Hyundai Motor Financing Co.*, 389 F.Supp.2d 961 (S.D. Ohio 2005) held that Ohio’s version of § 9-625(c)(2)²⁰ was not subject to a one-year statute of limitations period for “an action upon a statute for a penalty or forfeiture.” *Hyundai* argued that the purpose of Ohio’s version of § 9- 625(c)(2) was “to penalize noncompliance with the statute, not to compensate injured consumers.” *Id.*, at 971.

Observing that “[m]ost legislation ‘has a dual purpose of remedying harm to the individual and deterring socially inimical business practices...,’” the court concluded that it must “determine whether *the primary purpose* of the Act is more like a penalty or a remedial action.” *Id.*, 389 F.Supp.2d at 972. Conceding that Ohio’s courts, including the Supreme

¹⁹ 2008 WL 2323235 (M.D. Tenn. June 2, 2008)

²⁰ Like Tennessee’s, Ohio’s version of Part 6 of Article 9 is identical, in all material respects, to South Carolina’s.

Court, had acknowledged the penal aspects of the statutory damage award, the *Jenkins* court nevertheless observed that § 9- 625 “include[s] both remedial and penal/forfeiture aspects.” *Id.*

The court also noted that a consumer debtor has the option under § 9-625 of *electing either* actual damages *or* minimum statutory damages. Finally, the court noted that the U.C.C.’s underlying policies include the clearly remedial goal that an “aggrieved party may be put in as good a position as if the other party had fully performed,” and the non-punitive principle that “neither consequential or special nor penal damages may be had except as specifically provided in those chapters or by other rule of law.” *Id.* ²¹

As a result, after carefully weighing each factor, the *Jenkins* court declined to limit the salutary effect of the statute by imposing the restrictive “penalty and forfeiture” one-year limitations period in order to ensure that an “aggrieved party may be put in as good a position as if the other party had fully performed.” *Id.*, at 972.

In conclusion, the trial court’s statement in this case that “because S.C. Code Ann. § 36-9-625(c)(2) is based on a uniform UCC model statute, other courts have also examined the appropriate classification of this statutory award,” while true, does not support the result the court reached.

III. BECAUSE THE PROVISIONS OF ARTICLE 9, PART 6 OF THE U.C.C. ARE IMPOSED BY LAW UPON EVERY SECURED TRANSACTION COVERED BY ARTICLE 9 AND BECOME TERMS OF THE SECURITY AGREEMENT, A BREACH OF THE ARTICLE 9 NOTICE REQUIREMENTS IS A BREACH OF THE CONTRACT. ACCORDINGLY, THE STATUTE OF LIMITATIONS APPLICABLE TO APPELLANT’S CAUSE OF ACTION IS PROVIDED BY U.C.C. § 36-2-725.

The statutory damage remedy provided by U.C.C. § 36-9-625(c)(2) is an elective alternative to provable actual damages. It is nevertheless an *ex contractu* remedy, based on and arising from the contractual relationship between the parties.

Appellant’s claim arises out of a contract for the sale of an automobile. That contract contains a security agreement which was the basis for Appellee’s repossession and disposition of that automobile following Appellant’s alleged default under the terms of the contract. Compliance with the notice requirements of Article Nine of the U.C.C. is incumbent on a secured creditor enforcing its rights under a contract which contains a security agreement. Failure to comply with the requirements of Article Nine is a breach of

²¹ *Cf. Cubler, supra*, 83 A.2d at 241 (“Finally..., even if the imposition of statutory damages under section 9-625 may have the effect of encouraging compliance with the provisions of Article 9, the General Assembly intended such damages to serve primarily to compensate aggrieved claimants, not as a penalty against offending parties.”)

the contract. See, *Weaver v. American National Bank*, 452 So.2d 469 (Ala. 1984):

The requirements of 7-9-504(3) are imposed by law upon every secured transaction covered by Article 9 of the U.C.C. Ala. Code (1983 Supp.) 7-9-504(3). By statute, they become terms of the security agreement. Breach of the notice requirement is breach of the contract. Therefore, the action under 7-9-507(1) for damages for violation of these requirements is, in essence, a suit for breach of contract.

Id at 474. See also, *In re Coleman*, 2007 WL 1526651 (Bankr. N.D.Ala. May 24, 2007) where the United States Bankruptcy Court for the Northern District of Alabama recognized the applicability of *Weaver* to the revised Code:

Section 7-9A-614 is a relatively new UCC section that replaced former *Ala. Code* 7-9-504(3) when the new article took effect January 1, 2002. As yet, there is no published Alabama appellate court case law interpreting Sections 7-9A-614 and/or 7-9A-625. However, state courts previously interpreted suits arising under Section 7-9-504, along with other UCC complaints, as being contract actions.²²

Coleman's notice rights under the UCC became part of the terms of the original contract between the debtor and its secured creditor, CPS. Both claims, CPS' U.C.C. deficiency claim and Coleman's U.C.C. notice claim, arose out of the same contract and the same series of transactions. *Coleman, supra* at *4. See also, *Restatement (Second) Judgments* § 24 (1984) (Claims are part of the same cause of action when they arise out of the same transaction or series of transactions). As stated by the Eleventh Circuit in *[Wallis v.] Justice Oaks [II, Ltd]*, 898 F.2d [1544,] at 1551: "Claims are part of the same cause of action when they arise out of the same transaction or series of transactions."

The cause of action provided by § 36-9-625 arises out of and is part of the same series of transactions which gives rise to the original purchase being financed and the right of the conditional buyer to repossess the collateral upon the conditional buyer's default. Accordingly, the statute of limitations applicable to the § 36-9-625 claim is provided by § 36-2-725 of the U.C.C., Sales of Goods.

²² *Coleman* involved the application of claims preclusion as the result of a debtor's failure to disclose her § 9-625(c)(2) claim in her Chapter 13 bankruptcy schedules. The bankruptcy court granted the creditor's motion to enjoin Coleman's state court § 9-625(c)(2) action.

CONCLUSION

The cause of action given a conditional buyer and its guarantor in a consumer goods transaction for the failure of the conditional seller, following repossession of the collateral securing the debt, to provide the notice required by the Uniform Commercial Code prior to disposition of the collateral cannot possibly accrue until disposition of the collateral.

The U.C.C. contemplates revision of notices required by § 36-9-614 prior to disposition of collateral, providing clear evidence that the drafters and legislators enacting the statute intended that the cause of action in § 36-9-625 not accrue prior to disposition.

The statute of limitations for an action runs from the moment a party first has the right to bring the action. Appellant's right to sue Appellee accrued when the latter sold Appellant's motor vehicle collateral without first having provided the notice required by § 36-9-614. That date was less than three years prior to the date Appellant filed this action.

The Uniform Commercial Code expressly disclaims penalties; reserving its remedies to compensating a party to the extent necessary to make a party whole, *i.e.*, to place a party in the position it would be in had the other party fully performed its obligations under the contract. It is, therefore, contrary to the intention of the drafters of the U.C.C., as well as the legislature enacting it, to construe § 36-9-625 as a penalty.

The language of the U.C.C., including the Official Comments, militates decidedly against a construction of § 36-9-625 as a penalty. *Obiter dictum* and the use of imprecise labels by other courts provide no basis for statutory construction.

Only one court, aside from the trial court in this case, has construed § 36-9-625 as a penalty. Both the trial court here, and the single other court to agree with the trial court's conclusion, reached that conclusion with no analysis of the policies informing the statute, based on the use of superficial labels by courts not considering the issues raised by their use of such labels.

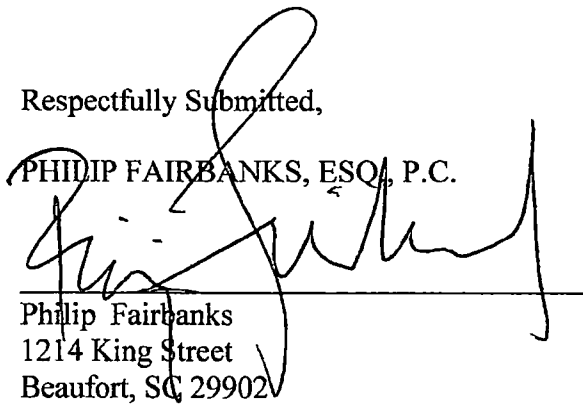
Courts considering the issue and the Restatement (Second) of Judgments hold that claims are part of the same cause of action when they arise out of the same transaction or series of transactions. The cause of action provided by § 36-9-625 arises out of and is part of the same series of transactions which gives rise to the original purchase being financed and the right of the conditional seller/secured party to repossess the collateral upon the conditional buyer's default. Accordingly, the statute of limitations applicable to the § 36-9-625 claim is provided by § 36-2-725 of the U.C.C., Sales of Goods.

For the foregoing reasons, the lower court committed reversible error when it granted Appellee's motion to dismiss Appellant's case.

Dated: February 9, 2015

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-07-7166

OTHA DELANEY

Appellant,

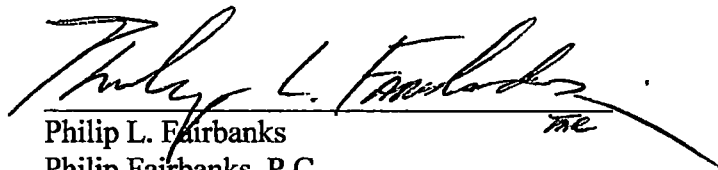
-vs-

FIRST FINANCIAL OF CHARLESTON, INC.

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with
Rule 211(b), South Carolina Appellate Court Rules.



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Dated: February 25, 2015

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SC Court of Appeals

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 9, 2015, I filed the foregoing document with the Clerk of the Court, as follows:

**MOTION FOR ENLARGEMENT OF TIME TO
SERVE AND FILE FINAL APPELLANT'S BRIEF**

and

FINAL APPELLANT'S BRIEF

And that the foregoing documents are being served this day on:

FIRST FINANCIAL OF CHARLESTON

by placement of true copies thereof in the United States mail, first class postage pre-paid,
and addressed a follows:

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Attorney for Appellant

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FEB 10 2015

SC Court of Appeals

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

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

RECEIVED
NOV 20 2014
SC Court of Appeals

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

Otha Delaney,

Appellant,

v.

First Financial of Charleston, Inc.,

Respondent.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err when it dismissed Appellant's complaint as time-barred?**
 - A. Did the circuit court err when it determined that the six-year statute of limitations in S.C. Code Ann. § 36-2-725 is not applicable to this case?**
 - B. Did the circuit court err in its determination of when Appellant's cause of action accrued?**
- II. Did Appellant properly appeal from the circuit court's order denying Appellant's motion to reconsider, and, if not, does Appellant's failure to do so doom his appeal?**

RESPONDENT'S STATEMENT OF THE CASE¹

Individually, and as putative representative of a class of others similarly situated, Appellant Otha Delaney ("Delaney") commenced this action against Respondent First Financial of Charleston, Inc. ("First Financial") on October 4, 2011, alleging a cause of action under S.C. Code Ann. § 36-9-625(c)(2) for certain noncompliance with Part 6 (addressing default) in South Carolina's enactment of Article 9 (addressing secured transactions) of the Uniform Commercial Code (the "UCC"). Specifically, Delaney alleged that, in May of 2008, First Financial sent him a notification of disposition of collateral (the collateral being a truck that First Financial

¹ In accordance with the Rule 12(b)(6) standard, for the purpose of this appeal only, all of the allegations of Delaney's complaint are taken as true and viewed in the light most favorable to him.

had earlier repossessed from Delaney after he defaulted under a certain Retail Installment Sales Contract) that did not contain all of the information required to be provided in a notification of disposition of collateral in a consumer-goods transaction under S.C. Code Ann. §§ 36-9-613 and -614.

Citing Delaney's averment that the allegedly insufficient notification of disposition was sent in May of 2008, First Financial moved to dismiss Delaney's complaint as time-barred. (R. pp. 30-32.)

After briefing and a hearing, the circuit court granted First Financial's motion, dismissing Delaney's complaint on the basis of its determination that his cause of action accrued when the allegedly insufficient notification of disposition was sent in May of 2008, and that, to avoid being barred by the statute of limitations, his suit had to have been commenced no later than three years thereafter, which it was not. (R. pp. 43-52; R. pp. 33-42; Supp. R. pp. 1-17; R. pp. 1-8.)

The circuit court thereafter denied Delaney's motion to reconsider—again following briefing and a hearing—reaffirming its dismissal of Delaney's complaint in a detailed order. (R. pp. 53-60; R. pp. 69-76; R. pp. 61-68; R. pp. 77-82; Supp. R. pp. 1-2, 18-41; R. pp. 9-17.)

This appeal followed. (Notice of Appeal.) Specifically, Delaney's notice of appeal reads as follows:

Otha Delaney appeals the Order Granting Motion to Dismiss of the Honorable Stephanie P. McDonald dated April 29, 2013. [Delaney]'s timely motion for a new trial pursuant to Rule 59 of the S.C. Rules of Civil Procedure was denied by the Court on March 17, 2014. [Delaney] received written notice of entry of the Order on March 20, 2014.

(Id.)

ARGUMENT

I. The circuit court did not err when it dismissed Delaney's complaint as time-barred.

A. The circuit court did not err when it determined that the six-year statute of limitations in § 36-2-725 is not applicable to this case.

In responding to Delaney's appellate challenge, First Financial believes it is helpful to begin with analyzing—and refuting—Delaney's contention that the six-year statute of limitations in § 36-2-725 applies to this case.

Section 36-2-725 is, of course, not found in Article 9 of the UCC, addressing secured transactions, but in Article 2, which addresses contracts for the sale of goods. South Carolina Code Ann. § 36-2-102 sets forth the scope of Article 2 (a/k/a "Chapter 2" of South Carolina's Commercial Code) and it provides as follows, which, First Financial submits, is alone dispositive of this issue in its (and the circuit court's) favor:

Unless the context otherwise requires, this Chapter applies to transactions in goods; **it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction** nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

(emphasis added). The official commentary to § 36-2-102 advises that the term “‘Security transaction’ is used in the same sense as in the Article on Secured Transactions (Article 9)” and that “Article [2] leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the **general sales aspects** of such transactions.” (emphasis added).

Without question, the subject Retail Installment Sales Contract was intended only to operate as a security transaction. And, of course, Delaney’s cause of action relates solely to alleged noncompliance with Part 6 of Article 9, not to any “general sales aspect[]” of the transaction.

For this/these reason(s), along with the reasoning set forth in the circuit court’s orders relating to its determination that the statute of limitations in § 36-2-725 does not apply to this case, which reasoning is, for the sake of brevity and efficiency, incorporated herein by reference, the

circuit court did not err in this regard.²

B. The circuit court did not err in its determination of when Delaney's cause of action accrued.

In the course of this litigation, the only argument that Delaney has advanced in favor of the application of a statute of limitations longer than three years is that founded upon § 36-2-725—which was addressed and refuted above—and Delaney has not argued for the applicability of any common-law device, such as the discovery rule, to save his claim. Because an appellant may not raise a new argument on appeal,³ it occurs to First Financial that the longest limitations period that could possibly be applicable here is three years, whether this period is prescribed by S.C. Code Ann. §

² To the extent there may be any question about the propriety of incorporating the circuit court's reasoning by reference in support of affirmance, First Financial notes that Rule 220(c), SCACR, expressly permits an appellate court to "affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal" and Rule 208(b)(2), SCACR, authorizes a respondent's brief to "contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)." First Financial submits that such incorporation by reference is a proper way to advocate for affirmance—moreover, it is efficient, and avoids needless redundancy. *Cf.* Rule 208(b)(6), SCACR (providing that "any party may adopt by reference all or any part of the brief of another"). First Financial also submits that incorporation by reference in this manner is consistent with the legal presumption of correctness attached to an appealed order and the affirmative burden imposed upon the appellant to show any reversible error. *See McCall v. IKON*, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error, and an appellate court is obliged to reverse when error is called to its attention, but it is not in the business of figuring out on its own whether error exists).

³ *Jackson v. Speed*, 326 S.C. 289, 306-07, 486 S.E.2d 750, 759 (1997) (an issue may not be raised for the first time on appeal).

15-3-540(2) or otherwise.⁴

For instance, subsection (1) of S.C. Code Ann. § 15-3-530 establishes a three-year statute of limitations for “an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520 [(which are not applicable here)],” and subsection (2) establishes a three-year statute of limitations for “an action upon a liability created by statute other than a penalty or forfeiture.” Consequently, even assuming, *arguendo*, Delaney is correct that § 36-9-625(c)(2) is remedial and compensatory—not a penalty—the applicable statute of limitations here would nonetheless be no more than three years from the accrual of his cause of action; thus, in any event, begging the dispositive question as to when the cause of action accrues.

Looking then to the question of the date of accrual of Delaney’s cause of action, First Financial respectfully submits that Delaney misapprehends § 36-9-625 when he argues that “[p]rior to the sale of a debtor’s collateral, injunctive relief is the preferred remedy” and that it is “[o]nly when the disposition (sale) of the collateral has already occurred [that] the Code provide[s] for damages” (App’s Br. p. 12.) Indeed, examination of this

⁴ This assumes, *arguendo*, that S.C. Code Ann. § 15-3-570 does not impose a one-year statute of limitations. If it does, Delaney’s claim is time-barred under any view of accrual.

point serves well to illustrate the flaw in Delaney's argument that the circuit court erred in its determination of the date of accrual of his cause of action—which is the (faulty) linchpin of his position.

To begin, the plain language of § 36-9-625 provides no textual basis for the sequencing of rights Delaney relies upon. In other words, nothing in § 36-9-625 prohibits an aggrieved party from seeking injunctive relief and a monetary award simultaneously before disposition of the collateral.

The language triggering either form of recovery is merely a failure to comply “with this chapter [(i.e., Article 9)],” in any respect. Section 36-9-625(a) (“If it is established that a secured party is **not proceeding in accordance with this chapter . . .**”) (emphasis added); § 36-9-625(b) (“Subject to subsections (c), (d), and (f), a person is liable for damages in the amount of any loss caused by a **failure to comply with this chapter.**”) (emphasis added). Further, Official Comment 2 to § 36-9-625 explains that “[s]ubsections (a) and (b) provide the basic remedies afforded to those aggrieved by a secured party's failure to comply with this Article. . . . Unlike former Section 9-507, . . . subsections (a) and (b) are not limited to noncompliance with provisions of this Part of Article 9. **Rather, they apply**

to noncompliance with any provision of this Article.”) (emphasis added).⁵

While not so broad as to be applicable to any noncompliance with Article 9, but tailored to Part 6 of Article 9, § 36-9-625(c)(2) is triggered by **any** noncompliance with Part 6 of Article 9—not merely the particular failure of compliance that Delaney alleges in this case—and it contains no language requiring disposition of the collateral as a prerequisite to the liability it establishes. Indeed, such language of prerequisite was a part of § 36-9-625(c)(2)’s predecessor (former S.C. Code § 36-9-507(1)), but it was amended out of existence by the legislature. See Singleton v. Stokes Motors, Inc., 358 S.C. 369, 375-76, 595 S.E.2d 461, 464-65 (2004) (“**If the disposition has occurred** the debtor . . . has a right to recover from the secured party” (quoting § 36-9-507(1) (Supp. 2000)) (emphasis added) (emphasis in original omitted). Whether the legislature’s intent was to change the former law to do away with a disposition prerequisite or to clarify its original intent not to have such a prerequisite, the legislature’s

⁵ First Financial notes that Delaney’s position that the same act of pre-disposition noncompliance would first give rise to only a claim for injunctive relief, while later, after disposition, give rise to a claim for monetary relief, would also appear to violate the rule against claim splitting—which rule is not displaced by the UCC. See S.C. Code Ann. § 36-1-103 (“Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.”); Ayers v. Guess, 217 S.C. 233, 241, 60 S.E.2d 315, 318 (1950) (Taylor, J., dissenting)

action to amend this language out of Article 9 supports the circuit court's ruling. Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) ("When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the existing law. Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent.") (citations omitted).

Also, the timing of the failure to comply with Part 6 of Article 9 is expressly addressed in § 36-9-625(c)(2) and, indeed, material to its operation. In plain language, recovery under § 36-9-625(c)(2) may only be had by "a person that was a debtor or a secondary obligor **at the time a secured party failed to comply** with this part" (emphasis added).

As the circuit correctly found, the sole basis of Delaney's cause of action under § 36-9-625(c)(2), i.e., the only allegation of noncompliance with Part 6 of Article 9, is that First Financial's notification of disposition, which it sent to him in May of 2008, did not contain the information required by §§ 36-9-613 and -614. (R. pp. 1-8; R. pp. 9-17; R. p. 21, ¶¶ 13-15.) To be clear, the essential premise of Delaney's cause of action is that the notification of disposition that First Financial sent him was insufficient, not that First Financial did not send him a notification of disposition.

("The entire claim arising out of a civil transaction, whether in nature of contract or tort,

The official commentary to § 36-9-611 explains that “[t]his Section requires a secured party who wishes to dispose of collateral under Section 9-610 to send ‘a reasonable authenticated notification of disposition’ to specified interested persons, subject to certain exceptions.” Official Comment 2, § 36-9-611. And § 36-9-614, which addresses the contents and form of a notification of disposition in a consumer-goods transaction, expressly provides that “[a] notice of disposition **must** provide . . .” certain information. (emphasis added). Indeed, the official commentary to this section explains that “[a] notification that lacks any of the information set forth in paragraph (1) is insufficient as a matter of law.”

Logic and the plain language of § 36-9-625(c)(2) support the circuit court’s ruling that the failure of compliance alleged here occurred in May of 2008. Again, the essential premise of Delaney’s cause of action is that, wishing to dispose of the collateral, in May of 2008, First Financial sent him a notification of disposition that lacked the information that § 36-9-614(1) says a “notification of disposition **must** provide” (emphasis added).

The circuit court properly rejected Delaney’s argument that the noncompliant notification of disposition sent in May of 2008, which is the only noncompliance upon which his cause of action is founded, was not a

cannot be divided into separate and distinct claims, and each form basis of an action.”).

noncompliance in May of 2008, but did not become a noncompliance until the later disposition of the collateral. A notification of disposition lacking the required information is “insufficient as a matter of law,” and, therefore, a noncompliance, such a noncompliance being the only prerequisite to recovery under § 36-9-625(c)(2) and, indeed, the express legislative design of § 36-9-625(c)(2) being “to ensure that every noncompliance with the requirements of Part 6 in a consumer-goods transaction results in liability, regardless of any injury that may have resulted.” Official Comment 4, § 36-9-625 (emphasis added). And, in the face of this clearly-expressed intent, the (hypothetical) parade of absurdities Delaney suggests, even if possible, does not authorize undoing the legislative design. *See Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (“All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.”); *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (“We do not sit as a super legislature to second guess the wisdom or folly of decisions of the General Assembly.”).

The circuit court’s determination that Delaney’s cause of action under § 36-9-625(c)(2) accrued—such that Delaney could have maintained an

action to enforce it—in May of 2008 is consistent with the plain statutory language (cited above) making the time of the alleged violation material to its operation in terms of determining if a person may recover thereunder and also with the fact (as noted above) that liability is intended by the legislature to be imposed thereunder for “every noncompliance . . . regardless of any injury that may have resulted.” This is further consistent with our Supreme Court’s recognition “that every violation of a legal right imports damage and authorizes the maintenance of an action and the recovery of at least nominal damages, regardless of whether any actual damage has been sustained.” Stevens v. Allen, 342 S.C. 47, 53, 536 S.E.2d 663, 665, n. 5 (2000).

For this/these reason(s), along with the reasoning set forth in the circuit court’s orders relating to the accrual of the applicable statute (or the accrual of the only potentially-applicable statute(s)) of limitations (as well as relating to the characterization of the nature of the relief Delaney seeks as a statutory penalty), which, for the sake of brevity and efficiency, is incorporated herein by reference, the circuit court did not err in ruling that Delaney’s cause of action was subject to a statute of limitations not longer than three years and that it accrued in May of 2008 when the alleged noncompliance with Part 6 of Article 9 occurred; consequently, the circuit court did not err in ruling that Delaney’s cause of action was time-barred,

because he did not commence this action within three years of the accrual of his cause of action.

II. If the Court finds that Delaney did not properly appeal from the circuit court's order denying his motion to reconsider, and that this impropriety was more than mere clerical error, affirmance of the circuit court's dismissal is required.

While Delaney referenced the circuit court's order denying his motion to reconsider in his notice of appeal, as a technical matter, Delaney did not actually purport to appeal that order in his notice of appeal, nor did he attach a copy of that order to his notice of appeal, nor did he refer to that order in his statement of the case. To the extent that the Court views Delaney's failure to notice an appeal of the circuit court's order denying his motion to reconsider—which was a detailed, formal order reaffirming the dismissal—to rise above the level of mere clerical error, First Financial submits that affirmance of the dismissal is required. *See* Rule 203(b) and (e), SCACR (addressing both the time for service of and required form and content of a notice of appeal); Rule 208(b)(1)(C), SCACR, (providing that any matters stated or alleged in appellant's statement of the case shall be binding on appellant); Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (“Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice

of intent to appeal must be served.”); and First Union Nat’l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an “unchallenged ruling, right or wrong, is the law of the case and requires affirmance”); cf. Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (“Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.”).

CONCLUSION

For the foregoing reasons, along with any other reason that may be evident upon the record, First Financial asks the Court to affirm the circuit court’s dismissal of Delaney’s case.

Respectfully submitted,

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Charleston, South Carolina

Dated: 11/18/14

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

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

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SC Court of Appeals

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

Otha Delaney,

Appellant,

v.

First Financial of Charleston, Inc.,

Respondent.

**CERTIFICATE OF COMPLIANCE
REGARDING FINAL BRIEF OF RESPONDENT**

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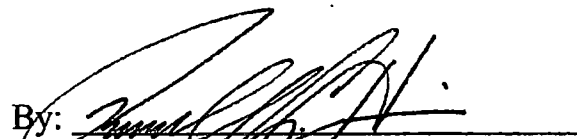
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SC Court of Appeals

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The undersigned, an attorney in this matter for Respondent First Financial of Charleston, Inc., hereby certifies that the **Final Brief of Respondent** complies with the provisions of Rule 211(b), SCACR, and that it also complies with the Order Re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued by the Supreme Court of South Carolina on April 15, 2014.

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Charleston, South Carolina

Dated: 11/18/14

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

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

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

Otha Delaney,

Appellant,

v.

First Financial of Charleston, Inc.,

Respondent.

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SC Court of Appeals

000182

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent above named, do hereby certify that I have served the **Final Brief of Respondent** on the above-named Appellant by depositing a copy of the same in the United States Mail, postage prepaid, on November 18, 2014, addressed as follows to Appellant's counsel of record:

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By: 
Russell G. Hines (SC Bar No. 72100)
ATTORNEYS FOR RESPONDENT

Charleston, South Carolina

Dated: 11/18/14

**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

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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.

Appellate Case No. 2014-000824

RECEIVED

OCT 20 2016

SC Court of Appeals

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.

000200

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.

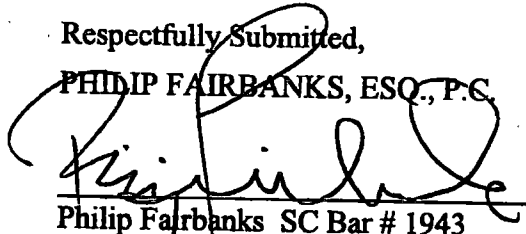
6. Although Appellant's counsel has endeavored to complete Appellant's motion for rehearing in a timely fashion, the lack of basic resources has made doing so impossible. As a result, counsel seeks a fifteen (15) day extension to file and serve the motion.

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.

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

RECEIVED
OCT 20 2016
SC Court of Appeals

000202



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
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,

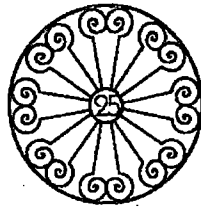
V. Claire Allen, Deputy

CLERK

Enclosure

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

000203



YCR LAW
Young Clement Rivers, LLP

Russell G. Hines
Partner

Direct Dial: (843) 720-5488
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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)

000205



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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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

000206

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

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The South Carolina Court of Appeals

Otha Delaney, Appellant,

v.

First Financial of Charleston, Inc., Respondent.

Appellate Case No. 2014-000824

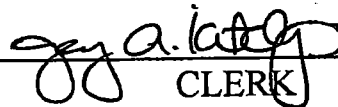
The Honorable Stephanie P. McDonald
Charleston County
Trial Court Case No. 2011CP0707166

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

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

RECEIVED

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

000209

PETITION FOR REHEARING

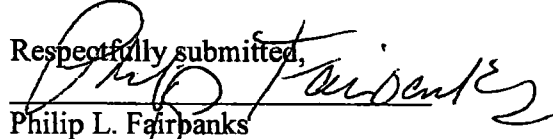
Pursuant to Rule 221, SCACR, and this Court's Order of November 3, 2016,¹ Appellant Otha Delaney ("Delaney") hereby Petitions this Court for Rehearing and modification of its Opinion No. 5442; dated September 18, 2016.

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.

000210

**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

000211

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

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).

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

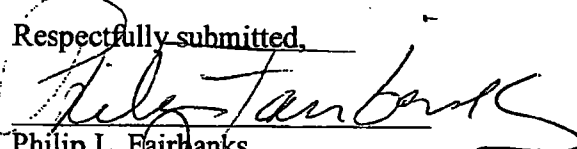
⁶ Article 9 contains a provision that is sometimes called the “consumer penalty.” If a secured party fails to comply with Article 9 in disposing of consumer goods, the Code permits the debtor or secondary obligor to recover an amount not less than the credit service charge plus 10 percent of the cash 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.)

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November 18, 2016

original

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appellate Case No. 2014-000824

RECEIVED

NOV 18 2016

SC Court of Appeals

OTHA DELANEY,

Appellant,

vs.

FIRST FINANCIAL OF CHARLESTON, INC.,

Respondent.

Certificate of Service

I hereby certify that I caused to be deposited this day, November 18, 2016, into the United States Mail a true and accurate copy of Appellant Otha Delaney's Petition for Rehearing, Appellant's Memorandum in Support of Petition for Rehearing, with Certificate of Service of the same attached, and with adequate first class postage affixed and addressed to:

Stephan L. Brown, Esq.
Young Clement Rivers, LLP.
25 Calhoun St. Suite 400
Charleston, SC 29401

Russell G. Hines, Esq.
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November 18, 2016

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NOV 18 2016

SC Court of Appeals

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

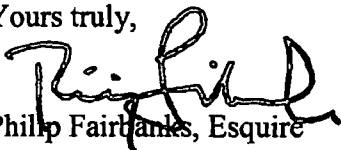
Hand Delivery

Re: Otha Delaney v. First Financial of Charleston, Inc.
Appellate Case No. 2014-000824

Dear Ms. Kitchings

Enclosed please find for filing an original and six copies of Appellant's Petition for Rehearing and Memorandum in Support, with Certificate of Service, along with my firm's check in the amount of \$25.00 for the filing fee. By copy of this letter I am serving opposing counsel with a copy of the same.

Yours truly,


Philip Fairbanks, Esquire

cc: Stephan Lynwood Brown, Esq. (w/ attachments)
Perry McPherson Buckner, IV, Esq. (w/ attachments)
Russell Grainger Hines, Esq. (w/ attachments)

000224

**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)
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*Counsel for Respondent
First Financial of Charleston, Inc.*

000225

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.

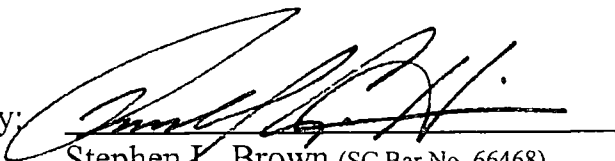
Having not "actually received" a petition for rehearing by Mr. Delaney, the Court remitted the case to the trial court on Wednesday, October 19, 2016. On October 20, 2016, the Court received from Mr. Delaney a Motion for Extension of Time to File Motion for Rehearing, which had been mailed on October 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)

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(843) 720-5488

***Counsel for Respondent
First Financial of Charleston, Inc.***

Charleston, South Carolina

Dated: 1/9/17

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.

PROOF OF SERVICE

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First Financial of Charleston, Inc.

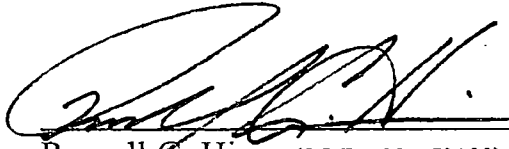
000233

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent First Financial of Charleston, Inc., hereby certify that the **RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on January 9, 2017, properly posted for delivery to the following addressees:

Philip L. Fairbanks, Esquire
1214 King Street
Beaufort, SC 29902

Counsel for Appellant Otha Delaney

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: 

Russell G. Hines (SC Bar No. 72100)

*Counsel for Respondent
First Financial of Charleston, Inc.*

Charleston, South Carolina

Dated: 1/9/17

The South Carolina Court of Appeals

Otha Delaney, Appellant,

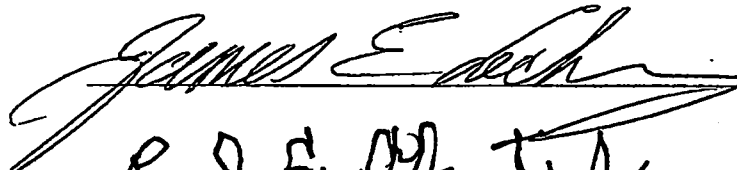
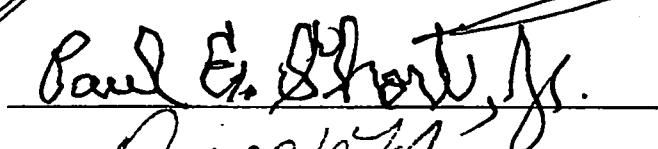
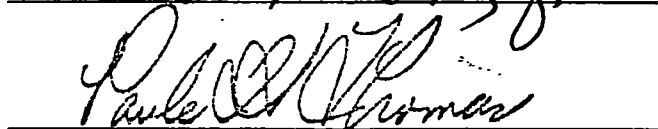
v.

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

000235