THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis, Master-In-Equity

Appellate Case No. 2020-001127

1st Franklin Financial Corporation .... Respondent,

v.

Roby A. Adams .... Appellant.

RESPONDENT'S MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF LAW

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INTRODUCTION

Pursuant to Rule 240 of the South Carolina Appellate Court Rules (SCACR), Respondent 1st Franklin Financial Corporation ("1st Franklin") hereby moves this Court for an order dismissing the appeal of Appellant Roby A. Adams ("Adams"). Adams's appeal should be dismissed because the Amended Order on Plaintiff's Motion for Partial Summary Judgment, which he purports to appeal, is not immediately appealable. Additionally, Adams and his counsel have failed to order a transcript of the underlying proceeding as required by Rule 207(a), SCACR, and have stated that they will not order a copy of the transcript despite 1st Franklin's objection. For these reasons, and as set forth more fully below, 1st Franklin respectfully requests that this Court dismiss Adams's appeal and remand the case to the Master-in-Equity of Dorchester County for further proceedings.

FACTUAL BACKGROUND

A. Claims and Procedural History

On October 23, 2015, Adams entered into a Loan Agreement with 1st Financial wherein 1st Financial agreed to loan money to Adams, and Adams agreed to repay the loan in installments. (Amended Order on Plaintiff's Motion for Partial Summary Judgment at *1 – 2 attached hereto as **Exhibit A**) (hereinafter the "Order"). Adams admits that he signed the Loan Agreement agreeing to be bound by its terms. (*Id*. at *2). Adams has never disputed that he failed to pay 1st Franklin in accordance with the Loan Agreement or that he owed some amount of money to 1st Franklin. (*Id*.).

On September 22, 2016, 1st Franklin filed this action in the Magistrate's Court for Dorchester County alleging that Adams defaulted under the Loan Agreement and owed $4,342.16. (*Id*.). On December 5, 2016, Adams filed an Answer and Counterclaims denying liability and asserting counterclaims against 1st Franklin for violations of the South Carolina Consumer

Protection Code ("SCCPC"), violations of the South Carolina Unfair Trade Practices Act ("SCUTPA") and negligence *per se*. (*Id*.).

The counterclaims, relying on S.C. Code Ann. § 37-5-108 of the SCCPC, which prohibits unconscionable conduct in the collection of a debt, made three principle allegations in support of Adams claims. (*Id*. at *2 -3). First, Adams alleged that 1st Franklin falsely represented the amount of the debt owed by Adams in violation of S.C. Code Ann. §37-5-108(5)(c)(i). (*Id*.). The basis for this allegation is that 1st Franklin filed two separate lawsuits four months apart, which alleged different amounts were owed by Adams. (*Id*. at *3). The first lawsuit filed in April 2016 alleged $4,351.24 was owed.[1] (*Id*.). The subject lawsuit, which was filed in September 2016 following the dismissal of the first, alleged $4,342.16 was owed. (*Id*.). Thus, the subject action claimed $9.08 less was owed than the first lawsuit. (*Id*.). Adams alleges the differing amounts are "false representations" of the amount of the debt in violation of the SCCPC and SCUTPA and also support Adams claims for negligence *per se*. (*Id*.). Second, Adams alleges that 1st Franklin is liable to Adams because the Dorchester County Sheriff's Office mistakenly served Adams's neighbor with the previously filed and subsequently dismissed lawsuit. (*Id*.). Adams claims the Sheriff's Office serving his neighbor act constitutes a violation of S.C. Code Ann. § 37-5-108(5)(b)(4) of the SCCPC, which prohibits a debt collector from communicating with anyone except the debtor or limited other persons regarding a debt. (*Id*.). Acknowledging that 1st Franklin did not directly communicate with the neighbor regarding the debt, Adams alleged that the Dorchester County Sheriff's Office was acting as 1st Franklin's agent. (*Id*.). Third, Adams alleged that 1st Franklin engaged in the unauthorized practice of law by failing to file a form evidencing

[1] Prior to the subject action, on April 19, 2016, 1st Franklin filed suit against Defendant in the Magistrate's Court for Dorchester County based upon the same Loan Agreement, *1st Franklin Financial Corporation v. Roby A. Adams*, Civil Action 2016-CV-18-10302148. That action was dismissed *without prejudice* following Adams's objection to 1st Franklin's failing to file documentation relating to non-lawyer representation of a corporation in Magistrate's Court pursuant to S.C. Code Ann. § 33-1-103.

the company's intent to proceed in Magistrate's Court without representation by an attorney, and is, therefore, liable to Adams for damages. (*Id.*).

On April 26, 2017, Adams filed his First Amended Answer and Counterclaims making the same allegations but claiming damages in excess of the Magistrate's Court jurisdictional limit. (*Id.* at *2). As a result, in May 2017, the case was transferred to the Court of Common Pleas for Dorchester County.

On August 29, 2019, Adams filed his Second Amended Answer and Counterclaims. Adams again made the same allegations as the prior counterclaims but also alleges that 1st Franklin sent a letter and called Adams on one occasion after 1st Franklin learned that Adams was represented by counsel. (*Id.* at *2 - 3). Adams alleges the communications further support his counterclaims for violations of the SCCPC, SCUTPA and negligence *per se*. Adams seeks an unspecified amount of monetary damages from 1st Franklin.

B. 1st Franklin's Motion for Partial Summary Judgment

On May 16, 2019, 1st Franklin filed a motion for summary judgment which was heard before the Honorable James E. Chellis, Master-in-Equity for Dorchester County, on March 5, 2020.[2] (*Id.* at *1). 1st Franklin moved for summary judgment, as to liability only, on its affirmative claim for breach of the Loan Agreement. (*Id.*). In addition and subject of this appeal, 1st Franklin moved for summary judgment, arguing that certain conduct alleged in Adams counterclaims is not, as a matter of law "unconscionable conduct" under the SCCPC or otherwise actionable. (*Id.*). More specifically, 1st Franklin argued that (1) the different amounts alleged in the two complaints, (2) the Dorchester County Sheriff's Office serving Adams' neighbor, and (3) the allegations regarding the 1st Franklin's alleged unauthorized practice of law do not, as a matter

[2] 1st Franklin's Motion for Summary Judgment was previously scheduled to be heard on July 16, 2019. However, prior to hearing 1st Franklin's motion, the court heard and granted Defendant's motion to file a Second Amended Complaint. As a result, the court continued 1st Franklin's Motion for Summary Judgment.

of law, constitute “unconscionable conduct in the collection of a debt” in violation of the SCCPC or otherwise support Adams’s counterclaims for violation of the SCUTPA and/or negligence per *se.* (*Id*. at *5-6). Significantly, 1st Franklin did not move for summary judgment as to Adams’s allegations relating to communications following Adams’s retention of an attorney because Adams claimed discovery into those allegations was still ongoing. (*Id*. at *3 n.4).

On April 21, 2020, Judge Chellis entered an Amended Order on Plaintiff’s Motion for Partial Summary Judgment.[3] The Order granted 1st Franklin summary judgment, as to liability only, on 1st Franklin’s claim for breach of contract against Adams. The court declined to enter judgment against Adams, noting that it would “address the issue of damages at subsequent proceedings in this matter.” (*Id.* at *5). The court also granted 1st Franklin’s motion for partial summary judgment as to Adams’s allegations relating to the different amounts alleged in the two complaints, the Dorchester County Sheriff’s Office serving Adams’ neighbor, and the allegations regarding the alleged unauthorized practice of law. The court did not address Adams’ claims relating to correspondence and communication from 1st Franklin to Adams following Adams’ retention of counsel and acknowledged additional proceedings were needed to address those claims. Adams filed a motion to reconsider pursuant to Rule 59(e), SCRCP which was denied on July 16, 2020.

On April 17, 2020, Adams offered judgment to be taken against him in the amount $4,343.00 pursuant to Rule 68, SCRCP.[4] 1st Franklin accepted the offer. Judgment was entered against Adams on May 21, 2020.

On August 14, 2020, Adams filed a Notice of Appeal indicating his intent to appeal the Amended Order on Plaintiff’s Motion for Partial Summary Judgment. On August 28, 2020,

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[3] The Amended Order corrected a clerical mistake from the previously entered order granting 1st Franklin’s Motion for Partial Summary Judgment. (*See* Order at *1).
[4] Adams’s Offer of Judgment came after Judge Chellis granted summary judgment as to liability on 1st Franklin’s breach of contract claim.

counsel for Adams sent correspondence to the Court indicating that he had unilaterally decided not to order a transcript of the hearing on 1st Franklin's motion for summary judgment. Counsel contends that Adams "will rely on other evidence in support of the appeal instead." (*See* August 28, 2020 Correspondence from Cantrell Legal, PC attached hereto as **Exhibit B**).

ARGUMENT

I. THE ORDER GRANTING 1ST FRANKLIN'S MOTION FOR PARTIAL SUMMARY JUDGMENT IS NOT IMMEDIATELY APPEALABLE.

A. *Legal Standard Governing Appellate Review of Trial Court Orders*

"The right of appeal arises from and is controlled by statutory law. *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006) (citing *N.C. Fed. Sav. and Loan Assn. v. Twin States Dev. Corp.,* 289 S.C. 480, 347 S.E.2d 97 (1986)). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Id*. (citing *Mid–State Distributors, Inc. v. Century Importers, Inc.,* 310 S.C. 330, 335, 426 S.E.2d 777, 780–81 (1993)); *see also* S.C. Code Ann. § 14–3–330(1) (1976); Rule 201(a), SCACR. A final judgment is an order that " disposes of the cause, reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined." *Kriti Ripley, LLC v. Emerald Investments, LLC*, 404 S.C. 367, 379, 746 S.E.2d 26, 32 (2013) (internal citations omitted).

S.C. Code Ann. § 14–3–330 sets forth certain, limited circumstances in which an appeal may be taken prior to final judgment. Under section 14–3–330(1) an interlocutory order is immediately appealable if the order involves the merits of the case. Section 14–3–330(2) allows for an appeal of an interlocutory order if the order affects a substantial right. [5] "Section 14–3–

[5] Sections 14-3-330(3) – (4) set forth additional circumstances in which a party can appeal an interlocutory order which are clearly inapplicable to this case and will not be addressed in this motion.

330…[has] been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." *Hagood v. Sommerville,* 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005); *see also Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017) ("To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly, eyeing the nature and effect of the order, not merely its label."). "Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial." *Hagood,* 362 S.C. at 196, 607 S.E.2d at 709.

B. The Order is Not a "Final Judgment"

If a judgment leaves some further act to be done by the court before the rights of the parties are determined, the judgment is not final." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.,* 351 S.C. 459, 467, 570 S.E.2d 197, 201 (Ct. App. 2002); *see also Tillman*, 420 S.C. at 249, 801 S.E.2d at 759 ("A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution."). Here, the order granting 1st Franklin's motion for partial summary judgment, in an effort to streamline the issues for further proceedings, only held that certain facts alleged in support of Defendant's causes of action for violation of the SCCPC the SCUPTA and negligence *per se* are not actionable. (*See* Order Granting Motion for Partial Summary Judgment at *11-12). Significantly, however, all three of Defendant's counterclaims remain. (*Id.*). The order did not grant 1st Franklin summary judgment as to any of Defendant's counterclaims. (*Id.*). Instead, the Order specifically referenced Adams's allegations regarding alleged communications from 1st Franklin to Adams after Adams was represented by counsel and stated that those allegations were not ruled upon in the order. (*See* Order Granting Motion for Partial Summary Judgment at * 3, n.4). Final judgment has not been entered on *any* of Adams's counterclaims. The order is clearly interlocutory and is not immediately appealable.

C. The Order Does Not "Involve the Merits" or "Affect a Substantial Right"

"It is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right." *Brown v. Cty. of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005). "To involve the merits,… the order must finally determine some substantial matter forming the whole or part of some cause of action or defense." *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) (quoting *Peterkin v. Brigman,* 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995)). "To affect a substantial right, the order must determine the action and prevent a judgment from which an appeal might be taken or discontinue the action." *Brown v. Cty. of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005). "[A]n order which does not put a final end to the case, nor establish any principle which will finally effect the merits of the case, nor deprive the party of any benefit which he may have at a final hearing, ought to be considered an interlocutory order, from which no appeal ought to be allowed." *Id*. (quoting *Robertson v. Bingley,* 6 S.C. Eq. (1 McCord Eq.) 333, 351 (Ct.App.1826)). Orders granting motions for partial summary judgment are not automatically appealable. *See Thornton v. S.C. Elec. & Gas Corp.,* 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011).

The Order does not involve the merits or affect a substantial right. There has been no determination of liability on any of the three counterclaims asserted by Adams against 1st Franklin. Adams's claims for violations of the SCCPC and SCUTPA and for negligence *per se* all remain. The Order does not finally determine or discontinue the action nor does it prevent Adams from later appealing any final judgment on his counterclaims. *See Brown*, 366 S.C. at 361, 622 S.E.2d at 537.

Adams will not be prejudiced by his inability to appeal the Order at this time. As to interlocutory orders, section 14–3–330(1) provides "that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or

decree necessarily affecting the judgment not before appealed from." Clearly, Adams retains the ability to appeal the Order following final judgment. Section 14–3–330(1) discourages multiple appeals and piecemeal litigation. Adams may still pursue his counterclaims against 1st Franklin, and depending on outcome of future proceedings, potentially eliminate the need for an appeal. Conversely, if after further proceedings, Adams believes appellate issues remain, he may still appeal the Order along with any other issues that may arise in future proceedings.

Regardless of the outcome of this appeal, future proceedings at the lower court are necessary. Dismissing this appeal eliminates the possibility of litigating this appeal only to return to this Court once again following a final judgment on Adams's counterclaims. A single appeal following final judgment, if at all necessary, best serves judicial economy, "avoid[s] circuitous litigation and needless appeals", and therefore, comports with the intent of section 14-3-330. *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. For these reasons, 1st Franklin requests that Adams's appeal be dismissed or stayed and the case be remanded for further proceedings before the Master-in-Equity.[6]

II. ADAMS CANNOT PRESENT AN ADEQUATE RECORD ON APPEAL WITHOUT THE TRANSCRIPT FROM THE HEARING ON 1ST FRANKLIN'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

On August 28, 2020, counsel for Adams sent correspondence indicating that he and his client "had decided not to order a transcript in this appeal, but will rely on other evidence in support of the appeal instead." (*See* August 28, 2020 Correspondence from Cantrell Legal, PC attached hereto as **Exhibit B**). Adams's decision to forego ordering a transcript of the hearing is fatal to the appeal and requires dismissal. Rule 207(a) clearly provides that "[u]nless the parties otherwise agree in writing, appellant ***must*** order a transcript of the entire proceedings below." *See* Rule 207(a), SCACR (emphasis added); *see also Solley v. Navy Fed. Credit Union, Inc.,* 397 S.C. 192,

[6] If remanded, 1st Franklin intends to promptly move for summary judgment on Adams's counterclaims now that discovery into the alleged correspondence and calls from 1st Franklin to Adams is complete.

214, 723 S.E.2d 597, 608 (Ct. App. 2012) ("[T]he appellant has the burden of providing an adequate record on appeal."). The South Carolina Appellate Court rules do not allow an appellant to unilaterally decide to omit the transcript of lower court proceedings. *See id.*

1st Franklin does not agree to proceeding without a transcript of the hearing because the transcript is necessary for a complete record on appeal. Without a transcript of the hearing, Adams cannot present this Court with an adequate record. *See Harkins v. Greenville Cty.,* 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (stating the appellant has the burden of presenting the appellate court with an adequate record and affirming the lower court decision based upon the appellant's failure to do so). Here, Adams failed to file a substantive memorandum in opposition to 1st Franklin's motion for summary judgment. Without a transcript of the hearing, it is impossible for this Court to determine what issues were raised before the lower court, and therefore, what issues are preserved for appellate review. To the extent Adams argues that his motion under Rule 59, SCRCP sets forth the arguments made to the lower court, it is well established that an issued raised for the first time in a Rule 59(e), SCRCP is not preserved for appeal. *See Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating an issue raised for the first time in a motion to reconsider is not preserved if the issue could have been raised prior to judgment). Allowing the appeal to proceed without the transcript would effectively preclude 1st Franklin from arguing that certain issues are not preserved for appeal. Additionally, 1st Franklin anticipates Adams will argue that the Master-in-Equity erred in expanding the ruling in his written order beyond the ruling from the bench at the hearing. That being the case, the transcript from the hearing must be a part of the record on appeal. Finally, Adams has argued that he was denied the opportunity to fully present his arguments in opposition summary judgment at

the hearing.[7] Once again, the transcript from the hearing is necessary to allow this Court to address this issue.

The South Carolina Appellate Court Rules require that a transcript be a part of the record on appeal, places the burden of ordering and paying for the transcript on the appellant, and sets forth specific timelines for ordering the transcript.[8] *See* Rule 207, SCACR. Adams has failed to order the transcript within ten (10) days following the filing of the notice of appeal as required by Rule 207, SCACR. Further, Adams attempts to blatantly disregard this Court's rules by unilaterally deciding not to order the transcript from the hearing. Rule 260(a), SCACR mandates dismissal of an appeal when a party fails to comply with this Court's rules. Accordingly, 1st Franklin requests that this appeal be dismissed and the case remanded to the lower court.

CONCLUSION

Based on the foregoing, 1st Franklin respectfully requests that Adams's appeal be dismissed.

s/ Robert C. Osborne_III

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September 11, 2020
Charleston, South Carolina

[7] It should be noted that Adams's counsel argued for more than two (2) hours at the hearing. *See* S.C. Code Ann. § 40-5-330 ("No attorney, solicitor or counsellor shall be allowed to occupy more than two hours of the time of the court in the argument of any cause, unless he shall first obtain the special permission of the court to do so.").

[8] Adams will argue that Rule 208(a), SCACR, which contemplates appeals where "no transcript is ordered", demonstrates that a transcript is not necessary in this case. Adam's argument ignores the plain language of Rule 207(a) stating that the "appellant must order a transcript of the entire proceedings below", and fails to account for cases where either no transcript exists or the parties agree that a transcript is not necessary for the record on appeal.

EXHIBIT A

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FOR THE FIRST JUDICIAL CIRCUIT
1st Franklin Financial Corporation,	)	CASE NO.: 2017-CP-18-00819
Plaintiff,	)	**AMENDED ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
vs.	)	
Roby A. Adams,	)	
Defendant.	)	

THIS MATTER came before this Court upon the motion of Plaintiff, 1st Franklin Financial Corporation ("1st Franklin" or "Plaintiff") for partial summary judgment. A hearing before the undersigned was held on March 5, 2020. This Amended Order supersedes this Court's prior Order on Plaintiff's Motion for Partial Summary Judgment entered on April 13, 2020.[1]

In its motion, 1st Franklin moves for summary judgment, as to liability only, on its affirmative claim for breach of the Loan Agreement entered into between 1st Franklin and Defendant Roby A. Adams ("Adams" or "Defendant"). In addition, 1st Franklin requests that this Court find that certain conduct of Plaintiff alleged in Defendant's counterclaims is not "unconscionable conduct" under S.C. Code § 37-5-108(2) or otherwise actionable conduct that support Defendant's counterclaims. For the reasons set forth below, 1st Franklin's motion is granted.

FACTUAL BACKGROUND

On October 23, 2015, Defendant entered into a Loan Agreement with 1st Financial wherein 1st Financial agreed to loan money to Defendant, and Defendant agreed to repay the loan in

[1] On April 2020, 1st Franklin filed a motion pursuant to Rule 60(a) of the South Carolina Rules of Civil Procedure to correct a clerical mistake in the order entered on April 13, 2020. The court hereby grants the motion and enters this Amended Order.

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installments. (*See* Compl., Exhibit A). During his deposition, the Defendant testified that he signed the Loan Agreement. (*See* Roby Adams Depo. Jan. 17, 2019 at 14:23-15:1) (hereinafter "Adams Depo."). Defendant does not dispute that he failed to pay 1st Franklin in accordance with the Loan Agreement, and he does not dispute that he owes some amount to 1st Franklin. (*Id*. at 17:23-25). Defendant testified that he cannot recall whether he made any payments towards the loan, and that he is unsure of the exact amount that he owes 1st Franklin. (*Id*. at 15:21-16:7).

On September 22, 2016, 1st Franklin filed suit against Defendant in the Magistrate's Court for Dorchester County alleging that Defendant defaulted under the Loan Agreement and owed, at that time, $4,342.16.[2] On December 5, 2016, Defendant filed an Answer and Counterclaims denying liability and asserting counterclaims against 1st Franklin for violations of the South Carolina Consumer Protection Code ("SCCPC"), violations of the South Carolina Unfair Trade Practices Act ("SCUTPA") and negligence *per se.*

On April 26, 2017, Defendant filed his First Amended Answer and Counterclaims wherein he claimed damages in excess of the Magistrate's Court jurisdictional limit. As a result, in May 2017, this case was transferred to the Court of Common Pleas for Dorchester County. On August 29, 2019, Defendant filed his Second Amended Answer and Counterclaims.[3] Defendant asserts counterclaims against 1st Franklin for (1) violation of the South Carolina Consumer Protection Code ("SCCPC"), (2) violation of the South Carolina Unfair Trade Practices Act ("SCUPTA"), and (3) negligence *per se*. Defendant's counterclaims rely heavily on section 37-5-108(2) of SCCPC which prohibits "unconscionable conduct in collecting a debt." Relevant to the subject

[2] Prior to the subject action, on April 19, 2016, 1st Franklin filed suit against Defendant in the Magistrate's Court for Dorchester County based upon the same Loan Agreement, *1st Franklin Financial Corporation v. Roby A. Adams*, Civil Action 2016-CV-18-10302148. That action was dismissed *without prejudice* based upon 1st Franklin's failure to file documentation relating to non-lawyer representation of a corporation in Magistrate's Court pursuant to S.C. Code Ann. § 33-1-103.

[3] 1st Franklin's Motion for Summary Judgment was previously scheduled to be heard on July 16, 2019. However, prior to hearing 1st Franklin's motion, the court heard and granted Defendant's motion to file a Second Amended Complaint. As a result, the court continued 1st Franklin's Motion for Summary Judgment.

ELECTRONICALLY FILED - 2020 Apr 21 10:37 AM - DORCHESTER - COMMON PLEAS - CASE#2017CP1800819

motion, Defendant claims that 1st Franklin is liable to Defendant because it filed two separate lawsuits, filed four months apart, which alleged different amounts were owed by Defendant. (*See* Second Amended Answer and Counterclaims ¶ 12). The first lawsuit alleged $4,351.24 was owed. (*Id.*). The subject lawsuit, filed following dismissal of the first, alleges $4,342.16 is owed. (*Id.*). Thus, the subject action claims $9.08 less than the first lawsuit. (*Id.*). Additionally, Defendant claims 1st Franklin is liable to Defendant because the Dorchester County Sheriff's Office served Defendant's neighbor with the previously filed and subsequently dismissed lawsuit. Finally, Defendant claims that 1st Franklin is liable to Defendant because 1st Franklin engaged in the unauthorized practice of law when it failed to file a form evidencing the corporation's intent to proceed in Magistrate's Court without representation by an attorney.[4] In addition to giving rise to liability under the SCCPC, Defendant asserts these actions, in addition to allegedly violating of the SCCPC, also support his causes of action for violation of the SCUTPA and negligence *per se.*

LEGAL STANDARD

Rule 56, SCRCP, requires the entry of summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by 'showing' – that is, pointing out to the trial court – that there is an absence of evidence to support the nonmoving party's case." *Baughman v. Am. Tel. & Tel. Co.,* 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Once the moving party makes this demonstration, the opposing party "must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that

[4] Defendant also claims that alleged communications from 1st Franklin to Defendant after Defendant was represented by counsel give rise to liability. 1st Franklin did not move for summary judgment on those allegations. As such, those allegations are not addressed in this Order.

there is a *genuine issue for trial*." *Id.* (emphasis in original); *Midland Mut. Life Ins. Co. v. Harrell*, 331 S.C. 394, 397, 503 S.E.2d 189, 190 (Ct. App. 1998). The nonmoving party must specifically set forth such facts, "as would be admissible in evidence," to show that a true jury issue exists. *See* S.C. R. Civ. P. 56(e).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001). Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The Court Grants 1st Franklin Motion for Summary Judgment on its Claim for Breach of the Loan Agreement.

1st Franklin moves for summary judgment, as to liability only, on its affirmative claim for breach of the Loan Agreement. An action under a note is an action for breach of contract. *See Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 780 S.E.2d 263 (Ct. App. 2015). "The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *S. Glass & Plastics Co. v. Kemper,* 399 S.C. 483, 491–92, 732 S.E.2d 205, 209 (Ct.App.2012). The court finds there is no genuine issue of material fact as to the three required elements.

It is uncontested that the Loan Agreement created an enforceable contractual relationship between 1st Franklin and Defendant. Defendant admits that he entered into the Loan Agreement and agreed to be bound by the terms therein. (*See* Roby Adams Depo., Jan. 17, 2019, 14:23-15:1) (hereinafter "Adams Depo."). Defendant also admits that he breached the Loan Agreement by failing to make payments when due, and he further admits that he owes some amount to 1st

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Franklin. (*Id*. at 16:5-8; 17:23-25; 36:11-13). Hence, no genuine issue of material fact exists that 1st Franklin and Defendant entered into a contract, Defendant breached the contract, and that 1st Franklin has been damaged. The only question remaining on Plaintiff's contract action is the amount of the contractual damage sustained by the Plaintiff.

The court considered the arguments made by Defendant's counsel at the hearing but finds them to be without merit. The court finds that the deposition testimony attached to Plaintiff's memorandum is properly before the court despite Defendant's argument that it has not been authenticated. Rule 56(c), SCRCP specifically contemplates that the court will consider deposition testimony at the summary judgment stage. *See* Rule 56(c), SCRCP. Additionally, as to the argument that the Loan Agreement has not been properly authenticated, the court finds that it is self-authenticating under Rule 902(9), SCRE as a commercial paper or related document. Finally, Defendant's deposition testimony acknowledging the Loan Agreement negates counsel's argument under the best evidence rule, Rule 1002, SCRE. Again, during his deposition, Defendant acknowledged signing the Loan Agreement and his agreement to be bounds by its terms. (*See* Adams Depo., 14:23-15:1).

1st Franklin is entitled to summary judgment on the issue of Defendant's liability under the Loan Agreement. The court declines to enter judgment at this time and will address the issue of damages at subsequent proceedings in this matter.

II. 1st Franklin's Motion for Judgment as to Defendant's Counterclaims is Granted.

Defendant's Second Amended Answer and Counterclaims asserts causes of action against 1st Franklin for (1) violation of the South Carolina Consumer Protection Code ("SCCPC"), (2) violation of the South Carolina Unfair Trade Practices Act ("SCUPTA"), and (3) negligence *per se*. Defendant's counterclaims rely heavily on S.C. Code Ann. § 37-5-108(2) of the SCCPC. Section 37-5-108(2) provides a private cause of action "if the court *as a matter of law* finds that a

person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt." (emphasis added). S.C. Code Ann. § 37-5-108(5) sets forth "factors" to be given "consideration" when a court analyzes whether a debt collector has engaged in "unconscionable conduct in collecting a debt" under section 37-5-108(2). Defendant, relying on certain factors under section 37-5-108(5), alleges that 1st Franklin engaged in "unconscionable conduct in collecting a debt".

Relevant to this motion, 1st Franklin asserts that (1) the different amounts alleged in the two complaints, (2) the Dorchester County Sheriff's Office serving Defendant's neighbor, and (3) the allegations regarding the unauthorized practice of law do not, as a matter of law, constitute "unconscionable conduct in the collection of a debt." *See* S.C. Code Ann. § 37-5-108(2). 1st Franklin seeks an order barring Plaintiff from introducing testimony or evidence at trial relating to these allegations.

A. 1st Franklin is Entitled to Summary Judgment on Defendant's Claim that it Falsely Represented the Amount Owed by Defendant.

In April 2016, 1st Franklin filed an action in Magistrate's Court seeking damages in the amount of $4,351.24. *See 1st Franklin Financial Corporation v. Roby A. Adams*, Civil Action 2016-CV-18-10302148. That action was subsequently dismissed without prejudice. *See id.* In June 2016, 1st Franklin filed this action seeking $4,342.16 in damages, $9.08 less than the prior lawsuit. Based on the differing amount in the two complaints, Defendant alleges that 1st Franklin violated the SCCPC because it "falsely represented" the amount owed by Defendant. (*See* Second Amended Answer and Counterclaims ¶ 12). Defendant relies on S.C. Code § 37-5-108(5)(c)(1) which prohibits "using fraudulent, deceptive, or misleading representations in connection with the collection of a consumer credit transaction", including false representations of the "character, amount, or legal status of any debt". *See* S.C. Code §§ 37-5-108(2) and 37-5-108(5)(c)(1).

ELECTRONICALLY FILED - 2020 Apr 21 10:37 AM - DORCHESTER - COMMON PLEAS - CASE#2017CP1800819

1st Franklin's argues the $9.08 discrepancy between the amounts claimed to be owed, cannot, as a matter of law, be characterized as "fraudulent, deceptive, or misleading" or "unconscionable." *See* S.C. Code § 37-5-108(2). 1st Franklin claims it voluntarily corrected and reduced the amount it claimed from Defendant without any request or insistence from Defendant when it filed the second action. 1st Franklin further argues that Defendant's deposition testimony makes clear that he is wholly unaware of the amount actually owed to 1st Franklin and merely relies on the fact that the two complaints contained different amounts. (*See* Adams Depo. 17:17-18).

Defendant argues that the deposition testimony of Theresa Scherwin, 1st Franklin's branch manager, precludes the grant of summary judgment in favor of 1st Franklin. More specifically, Defendant contends that because Ms. Schwerin was unable to adequately explain why the amounts differing amount set forth in the two complaints, factual issues remain that prevent the entry of summary judgment. Defendant also argues that 1st Franklin's admission that the first collection lawsuit's demand for $9.08 more than was actually due from Defendant on this debt was a "scrivener's error" constitutes an admission by 1st Franklin that this unintentional overcharge was a false representation of the amount of the debt due to them.

After considering the hearing the arguments of counsel and the filings, including the deposition testimony submitted by Defendant's counsel, the court holds that 1st Franklin is entitled to summary judgment on Defendant's claim that Plaintiff falsely represented the amount owed by Defendant. A complaint consists of allegations that must be proven by a ponderance of the evidence before a plaintiff is entitled to recover. Pleadings are privileged. *See Pond Place Partners, Inc. v. Poole,* 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002). Accepting Defendant's argument would lead to a finding of liability any time an amount alleged in a complaint by a creditor is, for whatever reason, found to be incorrect. Such a rule would have a

ELECTRONICALLY FILED - 2020 Apr 21 10:37 AM - DORCHESTER - COMMON PLEAS - CASE#2017CP1800819

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chilling effect on creditors pursuing debts they are rightfully owed and likely lead to a significant increase in claims by debtors seeking to avoid debts on technicalities. The proper response to the incorrect allegation is simply to deny it and demand strict proof.

This action has been pending for over three years. In three years of litigation Defendant has provided no evidence in the record upon which the court could find that 1st Franklin falsely represented the amount owed in a manner that could, even viewed in the light most favorable to defendant, be characterized as "fraudulent, deceptive, or misleading" or "unconscionable." *See* S.C. Code § 37-5-108(2). At the summary judgment stage, the opposing party "must, under Rule 56(e), do more than simply show some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Baughman,* 306 S.C. at 115, 410 S.E.2d at 545.

B. The Court Finds, as a Matter of Law, that the Alleged Service of the Summons and Complaint on Defendant's Neighbor is Not Unconscionable Conduct

Defendant also alleges that 1st Franklin is liable for damages due to the Dorchester County Sheriff's Office serving Defendant's neighbor with the previously filed and subsequently dismissed lawsuit. Defendant alleges this act constitutes a violation of S.C. Code Ann. § 37-5-108(5)(b)(4), which prohibits a debt collector from communicating "with anyone other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the attorney of the creditor or debt collector, unless the consumer or a court of competent jurisdiction has given prior direct permission" regarding the debt. Acknowledging that 1st Franklin did not directly communication with any other person regarding the debt, Defendant seeks to impose liability by claiming that the Dorchester County Sheriff's Office was 1st Franklin's agent. (*See* Second Amended Answer and Counterclaims ¶ 16).

The Dorchester County Sheriff's Office was not acting as 1st Franklin's agent when it served the complaint. Rather, it was carrying out its statutory mandate to carry out service of

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process for the courts of this state. S.C. Code Ann. § 23-15-40 provides that "[t]he sheriff or his regular deputy, on the delivery thereof to him, shall serve, execute and return every process, rule, order or notice issued by any court of record in this State or by other competent authority." No agency relationship existed. Even assuming that an agency relationship existed, 1st Franklin still would not be liable because the Sheriff's Office acted outside of the scope of its authority in serving Defendant's neighbor. 1st Franklin correctly named Defendant in the pleadings. The Sheriff's Office, pursuant to its statutory authority, was instructed by the court to carry out service upon Defendant, not Defendant's neighbor. A principal is not liable for the acts of an agent which are outside the agent's scope of authority. *See* 2A C.J.S. Agency § 457. Thus, even assuming *arguendo* that the Sheriff's Office was acting as 1st Franklin's agent, it clearly acted outside the scope of its authority.

Furthermore, regardless of the agency issue, the court holds that the Dorchester County Sheriff's Office mistakenly serving Defendant's neighbor cannot, as a matter of law, be reasonably construed as 1st Franklin engaging "unconscionable conduct in collecting a debt". Code Ann. § 37-5-108(5) sets forth "factors" to be given "consideration" when determining whether a debt collector has engaged in unconscionable conduct. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Halsey v. Simmons*, --S.E.2d -- No. 2017-001459, 2020 WL 593950, at *5 (S.C. Ct. App. Jan. 22, 2020). The court finds that the legislature did not intend to impose strict liability for the factors set forth in section 37-5-108(5). Rather, the legislature intended to provide the courts deference to determine, as a matter of law, whether certain actions constituted unconscionable conduct. Defendant's proposed interpretation of the statute whereby any violation of the factors set forth in section 37-5-108(5) gives rise to liability is in direct conflict with the actual language of the statute. The statute is clear that a court must find, as a matter of law, that a debt collector acted unconscionably. *See* S.C. Code Ann. § 37-5-

ELECTRONICALLY FILED - 2020 Apr 21 10:37 AM - DORCHESTER - COMMON PLEAS - CASE#2017CP1800819

108(2). There is no evidence upon which this Court could find that 1st Franklin engaged in unconscionable conduct by virtue of the Dorchester County Sheriff's Office mistakenly serving Defendant's neighbor.

C. The Court Finds, as a Matter of Law, that the Alleged Unauthorized Practice of Law Does Not Support a Private Cause of Action

Defendant also alleges that 1st Franklin engaged in the unauthorized practice of law; and therefore, is liable to Defendant. Defendant claims 1st Franklin engaged in the unauthorized practice of law by failing to file a form evidencing the corporation's intent to proceed in Magistrate's Court without representation by an attorney

As an initial matter, there has been no finding that 1st Franklin engaged in the unauthorized practice of law, and such a finding rests within the exclusive jurisdiction of the Supreme Court of South Carolina. The South Carolina Supreme Court has the duty to regulate the practice of law in this state and, accordingly, has the authority to define what constitutes the unauthorized practice of law. The South Carolina Constitution provides "[t]he Supreme Court shall have jurisdiction over the admission to the practice of law...." S.C. Const. art. V. § 4; *see also* S.C. Code Ann. § 40–5–10 (2001) ("The inherent power of the Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbarring attorneys at law is hereby recognized and declared."). An action to determine whether an individual or entity has engaged in the unauthorized practice of law must be a request for declaratory relief brought in the original jurisdiction of the Supreme Court. *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006). There has been no adjudication by the Supreme Court that 1st Franklin engaged in the unauthorized practice of law.

Additionally, even if there was an explicit finding that 1st Franklin engaged in the unauthorized practice of law, it could not support Defendant's counterclaims because the Supreme Court of South Carolina has plainly held that "there is no private right of action for the

unauthorized practice of law." *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 497, 560 S.E.2d 612, 623 (2002). In *Linder*, although it acknowledged the statute prohibiting the unauthorized practice of law, S.C. Code Ann. §40-5-310, the Supreme Court held that the statute did not "sanction a private cause of action." *Id.* Therefore, it held that South Carolina law precludes private citizens from suing for money damages based on an allegation of the unauthorized practice of law. *Id.*; *see also Hambrick,* 370 S.C. at 121, 634 S.E.2d at 7.[5]

Furthermore, in *Hambrick*, the Court of Appeals, relying on *Linder's* prohibition against a private cause of action, held that the allegation that a party engaged in the unauthorized practice of law cannot be used to support or prove another cause of action. *Hambrick*, 370 S.C. at 124, 634 S.E.2d at 8. In *Hambrick*, the court explicitly rejected the plaintiffs' attempt "[t]o get around *Linder*" by alleging the unauthorized practice of law to support various other causes of action. *Id.* Plaintiff's claim concerning 1st Franklin's alleged unauthorized practice of law fails.

Additionally, our Supreme Court

CONCLUSION

After carefully considering the pleadings, memoranda, applicable law and arguments of counsel, the court finds and so holds that 1st Franklin is entitled to summary judgment as to Defendant's liability under the Loan Agreement. The court will determine the damages to be awarded to 1st Franklin, if any, following trial.

Plaintiff's motion for summary judgment as to Defendant's counterclaims alleging that Plaintiff falsely represented the amount of the debt, relating to the Dorchester County Sheriff's Office serving Defendant's neighbor and alleging that 1st Franklin engaged in the unauthorized practice of law is also granted. Defendant is barred from presenting testimony or evidence at any

[5] See, Ex Parte: Edward J. Westbrook, Petitioner, In Re: The Murkin Group, LLC, Respondent. Appellate Case No. 2018-002263. The question of unauthorized practice of law is within exclusive jurisdiction of the South Carolina Supreme Court. Mr. Westbrook, lawyer for the debtor, raised the unauthorized practice of law of a collection agency in a direct petition to the Supreme Court.

ELECTRONICALLY FILED - 2020 Apr 21 10:37 AM - DORCHESTER - COMMON PLEAS - CASE#2017CP1800819

future proceedings in this matter relating to the alleged false representation of the amount of the debt, service by the Dorchester County Sheriff's Office, or the alleged unauthorized practice of law.

AND IT IS SO ORDERED!

-Electronic Signature Page Follows-

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Dorchester Common Pleas

Case Caption: 1st Franklin Financial VS Roby A Adams

Case Number: 2017CP1800819

Type: Order/Other

So Ordered

s/James E. Chellis, Master in Equity, SCJD#3078

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EXHIBIT B

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August 28, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: 1st Franklin Financial Corporation v. Roby A. Adams
Case No. 2020-001127

Dear Miss Kitchings:

The Appellant has now located the private court reporter that attended the motion hearing that is the subject of this appeal, and they have provided us with a quote for the cost of the transcript. However, due to that cost being much more than it would have cost my client for a state court reporter to transcribe the hearing, it is more than he can afford. Therefore, my client has decided not to order a transcript in this appeal, but will rely on other evidence in support of the appeal instead. Under these circumstances, please advise as to when the initial brief of the Appellant will be due.

/s/ John R. Cantrell, Jr.
John R. Cantrell, Jr.
Cantrell Legal, PC
PO Box 1276
Goose Creek, South Carolina 29445-1276
(843) 797-2454
Attorney for Appellant

cc : Robert C. Osborne III and Robert H. Jordan via email only

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Sep 11 2020
SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable James E. Chellis, Master-In-Equity

Appellate Case No. 2020-001127

1st Franklin Financial Corporation ....Respondent,

v.

Roby A. Adams..Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on September 11, 2020, s/he has caused a copy of RESPONDENT'S MOTION TO DISMISS AND SUPPORTING MEMORANDUM OF LAW to be served upon all parties of record via e-mail addressed as follows:

John R. Cantrell, Jr., Esq.
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s/ Robert C. Osborne_III
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Washington, D.C.

September 11, 2020

Via E-mail [ctappfilings@sccourts.org] and U.S. Mail

RECEIVED
Sep 11 2020
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: **1st Franklin Financial Corporation v. Roby A. Adams**
Appellate Case No. 2020-001127

Dear Mrs. Kitchings,

Enclosed for filing please find Respondent 1st Franklin Financial Corporation's Motion to Dismiss and Supporting Memorandum of Law in the above referenced matter. Also enclosed are a Proof of Service and this firm's check in the amount of $50.00 in satisfaction of the Court of Appeals' filing fee.

By copy of this correspondence, we are serving counsel of record with a copy of the motion. Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

s/ *Robert C. Osborne III*

Robert C. Osborne III

RCO:kxl
Enclosures

cc (w/enc.): John R. Cantrell, Jr., Esq. (lawyer@comcast.net)
LaToyla Burns (lburns@sccourts.org)

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