THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

James E. Chellis, Master-In-Equity

Appellate Case No. 2020-001127

1st Franklin Financial Corporation

Respondent,

v.

Roby A. Adams

Appellant.

AMENDED INITIAL BRIEF OF APPELLANT

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2. **DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENT ON APPELLANT'S COUNTERCLAIMS THAT RESPONDENT FALSELY REPRESENTED THE AMOUNT OF THE DEBT THAT WAS DUE TO RESPONDENT FROM APPELLANT?**

3. **DID THE TRIAL COURT ERR IN DENYING APPELLANT'S RULE 59 MOTION IN REGARDS TO THE TWO OTHER ISSUES STATED ABOVE?**

STATEMENT OF THE CASE

This is an appeal from a grant of summary judgment to Respondent in regards to a portion of Appellant's counterclaims and the lower court's failure to make any changes to that Order in response to Appellant's filing of a Rule 59 motion to alter or amend that Order. Appellant is a South Carolina consumer who obtained a personal loan from Respondent, which is a finance company whose business involves making small personal loans to South Carolina consumers.

Most of the history of this case is not relevant to the issues on appeal, so Appellant will try to briefly recite so much of the case history as is necessary for the appeal. Also, hyperlinks are included below to authorities cited as often as possible, to make it easier for the court to locate those authorities.

Respondent/Plaintiff initially filed a debt collection case against Appellant/Defendant in Dorchester County magistrate court on April 19, 2016 (first Complaint). However, this first case was dismissed due to Respondent's failure to file the required Authorization for Non-lawyer Representation form (SCCA761)

with the first Complaint. Respondent filed the current debt collection complaint against Appellant on September 22, 2016, also in magistrate court (second Complaint). However, the case was transferred to circuit court on May 15, 2017 as a result of Appellant having filed an amended answer with consumer protection counterclaims that exceeded the magistrate court's jurisdictional limits. The second Complaint also alleged that $9.08 less was owed on the personal loan than the first Complaint alleged, although no payments had been made by Appellant on the account. Those counterclaims included alleged violations of the South Carolina Consumer Protection Code (SCCPC), the South Carolina Unfair Trade Practices Act (SCUTPA), and negligence per se. The current version of Appellant's answer is the Second Amended Answer & Counterclaims filed on August 27, 2019, which retains those same counterclaims, and adds some facts regarding alleged post-petition consumer protection violations, which are not involved in this appeal.

On May 16, 2019, Respondent filed the partial summary judgment motion ("MSJ") which is the subject of this appeal, and then filed a Memorandum in support of its MSJ on July 15, 2019 (Respondent's Memorandum), and a Supplemental Memorandum on March 2, 2020 (Respondent's Supplemental Memorandum). Appellant filed an Affidavit in support of his objection to the MSJ on March 2, 2020 (Appellant Affidavit). The MSJ came before the trial court for hearing on March 5, 2020. On April 21, 2020, the trial court issued the Amended Order granting Respondent summary judgment on all issues requested by Respondent ("Amended Order" or "MSJ Order"). In that Amended Order, the court ruled in favor of Respondent as to Appellant's liability to Respondent on the

personal loan, and ruled against Appellant on his counterclaims for false representation of the amount alleged due on the personal loan, unauthorized practice of law, and improper service of the first Complaint on Appellant's neighbor instead of on Appellant. The court also ruled that our legislature did not intend to impose strict liability for any violations of the SCCPC, S.C. Code § 37-5-108(5). Appellant filed a timely Rule 59 Motion to alter or amend the MSJ Order on May 1, 2020 (Rule 59 Motion), and a brief in support on June 19, 2020 (Rule 59 Brief), which the court denied summarily without a hearing by a Form 4 Order filed July 16, 2020 (Rule 59 Order). Respondent also filed a Response in Opposition to the Rule 59 Motion on June 26, 2020. Appellant then filed a timely Notice of Appeal with this court on August 14, 2020, which Notice appealed both the Amended Order granting partial summary judgment to Respondent and the Rule 59 Order. Respondent thereafter filed a Motion to Dismiss the appeal on September 11, 2020 (MTD), which was denied by this court on October 14, 2020 (MTD Order).

STANDARD OF REVIEW

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c), SCRCP, states that summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably

drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

ARGUMENTS

I. THE TRIAL COURT ERRED IN RULING AS A MATTER OF LAW THAT THE SOUTH CAROLINA LEGISLATURE DID NOT INTEND TO IMPOSE STRICT LIABILITY FOR A VIOLATION OF S.C. CODE § 37-5-108.

At the bottom of page 9 of the MSJ Order, the trial court holds that the South Carolina legislature did not intend to impose strict liability for violations of the factors set forth in S.C. Code § 37-5-108(5), but the court cites no authority for this conclusion, except for a cite to the language of S.C. Code § 37-5-108(2). That section provides, in pertinent part as follows: "(2) With respect to a consumer credit transaction, 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 arising from that transaction, the court may grant an injunction. In addition, the consumer has a cause of action to recover actual damages and, in an action other than a class action, a right to recover from the person violating this section a penalty in the amount determined by the court of not less than one hundred dollars nor more than one thousand dollars." The court appears to be focusing on the language from the statute which says "if the court finds as a matter of law" in support of its conclusion that the legislature intended to grant discretion to the court to determine if a violation of the factors in S.C. Code § 37-5-108(5) constitutes

unconscionable debt collection conduct, but the language of the statute does not support this conclusion. First, notice that the language in Sec. 37-5-108(2) uses both the phrase "if the court finds as a matter of law" and then later in that section "a penalty in the amount determined by the court." It appears to the Defendant that all this language is intended to accomplish is to indicate that it is the court, and not a jury, that makes the determination whether the law has been violated and, if so, how much of a penalty is appropriate for that violation. Indeed, our Court of Appeals reached that very same conclusion in the case of Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 497-98, 730 S.E.2d 328 (Ct. App. 2012); however, our Supreme Court ordered that the case be depublished and have no precedential effect in 2014, so we don't know if this holding is still good law or not.

The trial court's interpretation that a violation of the factors set forth in Sec. 37-5-108(5) does not give rise to a violation of that section unless the court determines, in its subjective discretion, that the conduct was unconscionable is contrary to the holding of our state Supreme Court in the disciplinary case of In the Matter of Sean Bannon Zenner, 348 S.C. 499, 560 S.E.2d 406 at FN3 (S.C. 2002) where the court says as follows:

> "Two statutes govern debt collectors' conduct when contacting debtors. S.C. Code Ann. § 37-5-108 (Supp. 2000) prohibits a debt collector from: (1) threatening to use criminal prosecution against the consumer; (2) communicating with the consumer at frequent intervals during a twenty-four hour period or at unusual hours so that it is a reasonable inference the primary purpose of the communication was to harass the consumer; (3)

> communicating with a consumer at any unusual time or place known or which should be known to be inconvenient to the consumer, with convenient time being between 8 a.m. and 9 p.m.; (4) contacting a consumer at his place of employment after the consumer or his employer has requested in writing that no contacts be made; (5) using obscene or profane language or language the natural consequence of which is to abuse the hearer or reader. The Federal Consumer Protection Act, 15 U.S.C. §§ 1671, et. seq., also prohibits the debt collector from engaging in the conduct listed above."

Note that the Supreme Court simply says that this statute "prohibits" a debt collector from engaging in any of these types of debt collection conduct, without any deference to a court's subjective discretion to determine whether or not such conduct is unconscionable. This interpretation of the statute is in accord with Appellant's view that a violation of any of the "factors" listed in Sec. 37-5-108(5) creates strict liability for the violation. Defendant's approach is further supported by the Supreme Court's citation to the Federal Consumer Protection Act, which includes the Fair Debt Collection Practices Act ("FDCPA") as Title VIII of that Act, since the FDCPA is a strict liability statute. Allen v. LaSalle Bank, NA, 629 F. 3d 364 at FN7 (3rd Cir. 2011)(citing cases). Note also that the definition section of the South Carolina Consumer Protection Code ("SCCPC"), in Sec. 37-1-102(2)(f), indicates that one of the underlying purposes of the SCCPC is to "conform the regulation of consumer credit transactions to the policies of the Federal Consumer Credit Protection Act," which means that the strict liability standard of the FDCPA should be applied when interpreting the SCCPC as well.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT ON APPELLANT'S COUNTERCLAIMS THAT RESPONDENT FALSELY REPRESENTED THE AMOUNT OF THE DEBT THAT WAS DUE TO RESPONDENT FROM APPELLANT.

First, there is currently no dispute by Respondent that the $9.08 higher amount alleged due from Appellant in the first collection lawsuit was not false. Plaintiff now characterizes it as a "discrepancy," "scrivener's error," or "minor accounting error" (Respondent's Supplemental Memorandum, p. 8) thereby admitting that it was incorrect. The dispute is over whether the $9.08 overcharge claimed due in the first lawsuit creates a material issue of fact that precludes granting summary judgment to Respondent on Appellant's SCCPC counterclaim.

Also, although intent is irrelevant in regards to a strict liability statute like the SCCPC, Respondent claims that the lower amount alleged due in the second collection lawsuit was evidence that Respondent "voluntarily corrected" the amount alleged due from Appellant without any assistance from Appellant *(Ibid.)* However, the deposition testimony of Respondent's branch manager Theresa Schwerin, which was taken on January 17, 2019 well after the filing of the second collection lawsuit on September 22, 2016, indicates Respondent's belief at that time that the amount claimed due in the first suit was the correct amount due on the account, and that Plaintiff made no error in alleging that two different amounts were due in the two collection lawsuits. (See Appellant's Affidavit filed March 2, 2020, Exhibit Depo Excerpts Theresa Schwerin, p. 23, ll. 17-25 through p.24, 1-2). So Respondent's current position that the amount alleged due in the first lawsuit

was actually incorrect is a recent change of position for Respondent.

Originally, at the hearing on Respondent's Summary Judgment Motion, the court indicated that it was going to deny Respondent's Motion in regards to Appellant's SCCPC counterclaim (Trans. p. 98, ll. 5-8). Therefore, Respondent's counsel prepared a proposed order denying the MSJ as to Appellant's counterclaims (Proposed Order); however, in the email from the court to the parties attached as an exhibit to Appellant's Rule 59 Motion (Court Email), the court indicated that it had changed its mind and was now asking Respondent's counsel to amend his proposed order to include those changes. The court's email said that the trial judge was basing this decision on the legal doctrine of litigation privilege for pleadings filed in a lawsuit and on the fact that it would create a "chilling effect" on creditors who are owed a debt. The court also instructed Respondent's counsel to cite case law in support of the court's conclusion that the allegations of the Complaint are protected by litigation privilege, although the court itself provided no authority for that conclusion. On pages 7-8 of the April 21, 2020 MSJ Order, the court deals with the false representation counterclaim. The final MSJ incorporates the changes requested by the court, and cites a case that purports to stand for the proposition that "pleadings are privileged." That case is Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002). However, this case does not support the court's conclusion. *Pond Place* was a slander of title suit for the filing of a *lis pendens* in connection with a declaratory judgment action involving real estate. The Court of Appeals ruled that the *lis pendens* was filed in connection with the litigation, and as such was absolutely privileged and could not form the basis

for a slander of title action. *Id* at 32. Of course, Appellant hasn't alleged any action against Respondent for slander of title, or for any other defamation action. Therefore, litigation privilege is not at issue and *Pond Place* does not apply.

However, even if common law litigation privilege did apply to the SCCPC allegations of Appellant's counterclaims, Respondent could not prevail as a matter of law in its attempt to defeat the false representation counterclaim. That is because any common law privilege that might apply would have been abrogated by the creation of the SCCPC, since that statute would replace any contrary common law that might have existed prior to its creation. Indeed, although Appellant is not aware of a South Carolina state court case that has addressed this issue, there is a 4th Circuit Court of Appeals case directly on point in regards to the very similar FDCPA provisions.15 U.S.C. Sec.1692e(2) makes any false, deceptive, or misleading representation about the amount of an alleged debt a violation of federal law. In an FDCPA case brought by a consumer ("Sayyed") against a debt collector ("W&A") for false allegations allegedly made by W&A in a summary judgment motion filed in the case, including an allegedly false allegation about the amount of the debt owed by Sayyed, W&A argued that the allegations in its summary judgment motion were subject to common law litigation immunity and therefore not actionable as an FDCPA violation. Sayyed v. Wolpoff & Abramson, 485 F. 3d 226 (4th Cir. 2007). However, the 4th Circuit ruled that there was no common law litigation immunity exception in the text of the FDCPA. *Sayyed* at 230. In support of this decision, the 4th Circuit also cited the United States Supreme Court decision in *Heintz v. Jenkins*, 514 U.S. 291, 293, 115 S.Ct. 1489, 131 L.Ed.2d 395

(1995), which was another FDCPA suit alleging a false statement regarding the amount of a debt, which statement appeared in a settlement letter sent by the creditor's attorney to the consumer's attorney. In *Heintz*, the Supreme Court ruled that the FDCPA does apply to lawyers engaged in litigation, and noted that a former version of the FDCPA, prior to its amendment, had included an exemption from the definition of debt collectors for lawyers, but that exemption had been repealed. Similarly, as noted earlier, in South Carolina our state Supreme Court did not note any exemption from the SCCPC for lawyers engaged in collection activity in the *Zenner* disciplinary matter previously referenced above. Remember also that the SCCPC states that it should be construed in such a way as to conform to the policies expressed in the FDCPA. *See* S.C. Code § 37-1-102(2)(f). Appellant therefore believes that there should be no common law litigation privilege for violations of the SCCPC either.

In the MSJ Order, the court further claims that the $9.08 overcharge in the first collection suit cannot be characterized as fraudulent, deceptive, misleading, or unconscionable (MSJ Order, p. 7, 1st par.). However, we must allow the statute to define its own terms, and not attempt to define those terms in a vacuum. It is clear that the $9.08 overcharge in the first lawsuit was a false representation of the amount of Appellant's debt. That alone is sufficient to make it "fraudulent, deceptive or misleading" under S.C. Code Sec. 37-5-108(5)(c)(1), which then makes it "unconscionable" debt collection conduct under S.C. Code Sec. 37-5-108(2). Under the Supreme Court *Zenner* case mentioned above, such conduct is considered to be "prohibited," and there is no reason why creditor collection

conduct prohibited by our Supreme Court should be tolerated in any court in this state.

Although the trial court's concerns about possible litigation privilege preventing the false representation in Respondent's Complaint about the amount of Appellant's debt being actionable under the SCCPC seem to be restricted solely to the false representation contained in the Complaint (Court Email), in the Conclusion paragraph of the court's MSJ Order, the court bars Appellant from presenting any testimony or evidence at any future proceeding in this matter regarding Respondent's false representation of the amount of the debt. This provision goes beyond any false representation that was contained solely in the first Complaint. At the hearing on Plaintiff's MSJ the trial court had initially ruled that Appellant's SCCPC counterclaim regarding the false representation would survive, and that it was therefore unnecessary for Appellant to present all of his evidence regarding his counterclaims at that time (Trans. p. 97, ll. 15-20, p. 98, ll.3-21). In addition to the false representation about the amount of the debt contained in the first Complaint, Appellant alleges that Respondent has made other false representations regarding the amount of the debt, including representations in both Appellant's branch manager's deposition testimony (Appellant's Affidavit, Schwerin depo excerpts p. 23, ll. 17-25 through p.24, ll. 1-2; p. 24, ll. 13-25 through p. 25, ll. 1-8), and in a Notice of Acceleration letter that was sent to Appellant prior to the filing of Respondent's Complaint *(Id* at p. 27, ll. 15-25 through p. 28, ll. 1-25). Therefore, the language in the Conclusion paragraph is overly broad. Even if this court were to find that the grant of summary judgment to Respondent on the false

representation of the amount of the debt in Respondent's first Complaint was proper, Appellant asks this court to find that this ruling should be restricted to the false representation contained in the first Complaint, so that Appellant will not be prejudiced by his reliance upon the court's oral ruling at the MSJ hearing in this matter, and so that Appellant will be allowed to present evidence of other false representations regarding the amount of the debt at any future hearing or trial in this case, since Appellant's evidence on this issue creates a material issue of fact as to whether Respondent has made false representations about the amount of the debt aside from the ones that appear in the first Complaint.

Notice also that the trial court told Respondent at the MSJ hearing that one of the reasons that the court intended to rule in favor of Appellant on the false representation counterclaim was based on Respondent's argument that a violation of the factors listed in S.C. Code § 37-5-108(5) was not automatically unconscionable, since the court had subjective discretion to determine whether an apparent violation of that section was actually unconscionable or not. As the court notes, this means that it is not a question of law, but a question of fact based on the evidence presented at trial, which precludes the grant of summary judgment on that issue. (Tran. p. 98, ll. 17-25 through p. 99, ll.1-15). Somehow, in spite of the trial court's own reasoning at the MSJ hearing, which would prevent the grant of summary judgment on the false representation counterclaim, the trial judge changed his mind in the Court Email (Appellant's Affidavit, Court Email exhibit) on this issue, and disregarded this reasoning, which should still apply to prevent summary judgment on this issue.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S RULE 59 MOTION IN REGARDS TO THE TWO OTHER ISSUES STATED ABOVE.

Appellant filed a timely Rule 59 Motion to alter or amend the trial court's MSJ Order, and a Rule 59 Brief in support of that motion, which Appellant incorporates herein by reference in regards to the arguments in the Rule 59 Motion and the Rule 59 Brief, except as to any issues raised in those documents, but not raised in this appeal. Combined, those documents were about 15 pages long, and were supported with many citations to appellate authority from this state, and persuasive authority from other jurisdictions, including the United States Supreme Court. However, the trial court summarily denied the Rule 59 Motion without a hearing, with a one sentence order which read as follows: "Defendant's Motion to Reconsider under SCRCP 59 is denied." (Rule 59 Order). Based on the language of that order, there is no way to know if the trial judge even read Appellant's Rule 59 Motion or his Rule 59 Brief. Appellant believes that the Rule 59 Order violates the principle established by this court in the case of *Lollis v. Dutton*, 421 S.C. 467, 487, 807 S.E.2d 723 (Ct. App. 2017), where this court said

> As to the merits, the circuit court's summary order denying all post-trial motions did not specifically address the above three grounds or the standards set forth in the corresponding statute or rule. We acknowledge that findings of fact and conclusions of law are generally not required for decisions on motions. *See* Rule 52(a), SCRCP ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 *or any other motion* except as provided in Rule 41(b)."[13]

(emphasis added)); *Woodson v. DLI Props., LLC*, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014) (citing Rule 52, SCRCP, for the proposition that findings of facts and conclusions of law on motions are not required for appellate review). However, the circuit court's order indicates it did not exercise any discretion to evaluate the Duttons' request for fees and costs under Rule 37(c), SCRCP or the UDJA. *See Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) ("A failure to exercise discretion amounts to an abuse of that discretion."); *see also Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the [circuit court] is vested with discretion, but [its] ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *Johnson v. Johnson*, 296 S.C. 289, 304, 372 S.E.2d 107, 115 (Ct. App. 1988) ("A decision lacking a discernible reason is arbitrary and constitutes an abuse of discretion.").

The Rule 59 Order in this case seems to be just the type of order that is called an abuse of discretion by the *Lollis* case cited above, since there is no evidence that the trial court exercised any discretion when issuing the Rule 59 Order, since no discernible reason was given for that decision. This makes that order arbitrary and constitutes an abuse of discretion. Appellant is uncertain what proper action this court should take in regards to the Rule 59 Order, but perhaps it should be vacated, or this court should take such other action in regards to the Rule 59 Order as may be appropriate, including finding that it was an abuse of discretion for the trial court to issue such an order.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this court

take the following actions:

1. Find that the trial court erred as a matter of law when finding that the South Carolina legislature did not intend to impose strict liability for a violation of S.C. Code § 37-5-108;

2. Find that the trial court erred when granting summary judgment to Respondent on Appellant's counterclaims alleging that Respondent falsely represented the amount of the debt that was due to Respondent from Appellant, including the overly broad application of that ruling to false representations that may have occurred other than the false representations in the first Complaint;

3. Find that the trial court abused its discretion when issuing the Rule 59 Order;

4. Either vacate the portions of the MSJ Order indicated above or take such other actions as may be appropriate in regards to those portions of that Order, and allow Appellant to present testimony and evidence in regards to his false representation counterclaims at any future hearing or trial in this matter.

Dated this December 17, 2020

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PROOF OF SERVICE

All counsel of record have been served with this Appellant's Designation of Matter to be Included in Record on Appeal by simultaneous email service to their

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