

RECEIVED
May 19 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Hon. James E. Chellis, Master-In-Equity

Appellate Case No. 2020-001127

1st Franklin Financial
Corporation

Respondent,

v.

Roby A. Adams

Appellant.

FINAL REPLY BRIEF OF APPELLANT

John R. Cantrell, Jr., SC Bar # 10309
Cantrell Legal, PC
108 Phillips Ct.
St. Matthews, SC 29135-8582
(843) 797-2454
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities	2
Statement of Issues on Appeal	3
Arguments	3
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.	3
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.	7
III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S RULE 59 MOTION IN REGARDS TO THE TWO OTHER ISSUES STATED ABOVE.	11
Conclusion	13
Certificate of Counsel	14

TABLE OF AUTHORITIES

CASES

<i>A.O. Smith Corp. v. S.C. Dep't of Health & Env'tl. Control</i> , 428 S.C. 189, 833 S.E.2d 451 (Ct. App. 2019)	6
<i>In the Matter of Sean Bannon Zenner</i> , 348 S.C. 499, 560 S.E.2d 406 at FN3 (S.C. 2002)	4,5
<i>Lollis v. Dutton</i> , 421 S.C. 467, 487, 807 S.E.2d 723 (Ct. App. 2017)	11,12
<i>Pond Place Partners, Inc. v. Poole</i> , 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002)	9

STATUTES AND RULES

15 U.S.C. § 1671 (Federal Consumer Credit Protection Act)	4,6
15 U.S.C. § 1692 (FDCPA)	4,5,6,7
S.C. Code § 37-1-102 (SCCPC purposes)	6
S.C. Code § 37-5-108 (SCCPC remedies)	3,4,5,6,7,8,9,10
Rule 59, SCRCP	3,11,12

STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR 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?**

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?**

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.

Respondent argues that the plain language of the statute in question supports its contention that S.C. Code Sec. 37-5-108 does not impose strict liability for any violation of that statute (Resp. Brief, p.7). It rests its argument on two words “factors” and “consideration.” These words do not bear the weight of Respondent's argument. The words that Respondent needed to find in this statute are “judicial discretion,” but they are absent from it. When read in order, the plain language of this statute, as is relevant to the facts of this case, reads as follows:

“SECTION 37-5-108. Unconscionability; inducement by unconscionable conduct.

- (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.

(5) In applying subsection (2), **consideration shall be given to each of the following factors, among others, as applicable:**

(c) **using fraudulent, deceptive, or misleading representations** in connection with the collection of a consumer credit transaction. **Such false representations shall include:**

(i) the character, **amount**, or legal status of any debt;”

(bold type added by Appellant for emphasis)

As Appellant reads this statute, the plain language gives a consumer the right to recover a statutory penalty, plus actual damages, if a creditor engages in unconscionable conduct when collecting a consumer debt. In determining whether the creditor's conduct was unconscionable, the court shall consider a list of “factors.” These “factors” constitute prohibited violations of that statute based on the language of our Supreme Court in the 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 Supreme Court stated that both Sec. 37-5-108 and 15 U.S.C. §§ 1671 *et seq.* (which is a reference to the FDCPA included as Title VIII of that Act) “prohibit” debt collectors from “engaging in the conduct listed above,” which conduct included violations of five of the “factors” listed in Sec. 37-5-108. The statute then goes on to state, under subsection (c) that one of the “factors” that the statute prohibits is using “fraudulent, deceptive, or misleading representations” when collecting a debt. Those representations are then collectively called “false representations,” which the

statute states “shall include” a false representation about the amount of any debt. Neither the plain language of the statute itself, nor our Supreme Court when interpreting that statute, indicated that a trial judge had any discretion to find that a violation of any of these prohibited types of creditor conduct was not unconscionable. Interestingly, Respondent concedes that the FDCPA is a strict liability statute, not subject to a subjective judicial determination of unconscionability (Resp. Brief, p.10), but claims that Sec. 37-5-108 is different, due to differences in the language of the statutes, although our Supreme Court found that both of them “prohibited” the same violations, without any deference to subjective judicial discretion. If there was any room for misunderstanding the plain language of this statute, our Supreme Court removed that confusion when interpreting the statute in the *Zenner* case. (*Ibid.*)

Consider the consequences if this court were to find that trial judges do have judicial discretion to find that a violation of one of the prohibited “factors” was not a violation of this statute. As this court might well imagine, how many consumer defense attorneys would be willing to take consumer protection violation cases against debt collectors who have appeared to commit clear violations of Sec. 37-5-108 if they knew that their clients would be unable to recover both statutory damages and their reasonable attorney fees unless the judge hearing the case found those violations to be unconscionable? Interpreting this statute in the manner requested by the creditor in this case would effectively **gut** the statute, by removing both objective standards to determine violations of the statute and any incentive for consumer attorneys to take these cases on a contingency basis, thereby resulting in

lack of access to justice to persons like the plaintiff in this case with few resources for hiring an attorney on an hourly basis. While such an interpretation would clearly serve Respondent's interests in this case, it would not serve the purposes and policies of the South Carolina Consumer Protection Code, since it would not “simplify” or “clarify” consumer credit law as is required by S.C. Code Sec. 37-1-102(2)(a). It also would not “protect” consumer borrowers from “unfair” creditor practices. S.C. Code Sec. 37-1-102(2)(d). It would not “make uniform the law” “among the various jurisdictions,” S.C. Code Sec.37-1-102(2)(g), since the unconscionability of any alleged violation would be up to each trial judge's subjective determination, although it might serve to increase the number of appeals of those subjective decisions, for those few who could afford them. Most importantly, it would not “conform the regulation of consumer credit transactions to the policies of the Federal Consumer Credit Protection Act,” S.C. Code Sec. 37-1-102(2)(f), which includes the FDCPA, which Respondent concedes is a strict liability statute. (Resp. Brief, p. 10). As cited by Respondent, “The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.” *A.O. Smith Corp. v. S.C. Dep't of Health & Env'tl. Control*, 428 S.C. 189, 202, 833 S.E.2d 451, 458 (Ct. App. 2019) (quoting *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (Resp. Brief, p. 7)). Only Appellant's interpretation of the statute furthers the policies expressed by the legislature in the introduction section of this statute. Therefore, due both to the actual plain language of the South Carolina Consumer Protection Code, and our Supreme Court's interpretation of it, this court should find that S.C. Code Sec. 37-

5-108 is a strict liability statute that does not allow for subjective judicial discretion when determining whether or not a violation of that statute has occurred.

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.

In order for this court to find that the trial court's grant of partial summary judgment to Respondent on the issue of Appellant's false representation counterclaim was an abuse of discretion, as agreed by the parties in regards to the standard of review, this court need only find that there is a genuine issue as to any material fact. That genuine issue can be found by this court in at least two ways. First, if the court agrees that Sec. 37-5-108 is a strict liability statute, then the fact that the first lawsuit alleged that more was due on the loan than was actually due on the loan creates a genuine issue of material fact as to whether the incorrect representation of the amount alleged due was a false representation of the amount of the debt in violation of S.C. Code Sec. 37-5-108(5)(c)(i). Remember that Respondent has already admitted that amount alleged due on the debt in the first lawsuit was a "discrepancy," "scrivener's error," or "minor accounting error," (R. p. 41), and therefore obviously false. As agreed by Respondent, strict liability statutes, like the FDCPA, impose liability without proof of an intentional violation (Resp. Brief, p.10, FN 6). Therefore, it doesn't matter what the reasons were for alleging that the incorrect amount was due from Appellant. Regardless, Appellant still had to expend time and money to successfully defend the first lawsuit, which

was dismissed without prejudice by the magistrate court. Note that although Respondent argues that the amount alleged in the first lawsuit is not “unconscionable,” Respondent never argues that the first amount was not false, nor can it, having admitted repeatedly that the amount was an error. Respondent argues that the “reduction” in the amount alleged owed in the second lawsuit is evidence of good faith, but this distracts from the proper focus, which is that the amount alleged in the first lawsuit was false, as Respondent has effectively admitted. Of course, good faith is not relevant to a strict liability statute, since it is evidence of intent, which the parties agree doesn't matter when interpreting a strict liability statute. However, Appellant has disputed Respondent's alleged “good faith” regarding the amount that was alleged due in the first lawsuit, as was noted in Appellant's prior Brief at page 9. Actually, the amount alleged owed was “reduced” since they realized after the fact that the first amount alleged was in error, which was their duty under South Carolina law, which duty they failed in the first lawsuit. If this court were to find that Sec. 37-5-108 is a strict liability statute, then given Respondent's effective admission that the amount alleged due on the debt in the first lawsuit was a false representation of the amount of that debt, it seems to Appellant that this court could simply reverse the trial court's grant of partial summary judgment, and render judgment in favor of the Appellant on that issue, since the fact of the false representation is undisputed. The only dispute is about how the law should be interpreted.

However, in the alternative, even if this court were to find that Sec. 37-5-108 is not a strict liability statute, the court should still find that there is a genuine

issue of material fact that makes it necessary to reverse the trial court's grant of partial summary judgment on Appellant's false representation counterclaim. That is because, as the trial judge himself recognized, if he has subjective discretion to determine if an apparent violation of Sec. 37-5-108 is unconscionable, then it creates a question of fact that can't be determined on summary judgment, since he would have to wait until trial when all of the facts were presented before making a decision (R. p. 277, l. 17 – p. 278, l. 15). This is why Appellant questions whether this appeal can be determined as a matter of law, assuming that Sec. 37-5-108 is a strict liability statute to be applied to an undisputed false representation of the amount of the debt, or whether Sec. 37-5-108 is not a strict liability statute, but liability is, instead, a subjective decision by the judge that can't be determined until trial, as the lower court reasoned. Either way, the lower court's grant of partial summary judgment to Respondent on Appellant's false representation counterclaim should be reversed, preferably by this court as a matter of law.

Remember that the trial court based its ruling on Appellant's false representation counterclaim in Respondent's favor based on the lower court's belief, as a matter of law, that Respondent's Complaint was protected by litigation privilege from violating Sec. 37-5-108 (R. p. 9 and 101). Interestingly, in its Brief, Respondent does not attempt to counter Appellant's arguments that the trial court's ruling regarding litigation privilege was incorrect as a matter of law. Respondent also does not attempt to prove why the trial court's reliance upon the case cited by the trial court, *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002) was correct. Therefore, Respondent appears to concede that

the litigation privilege ruling by the court, which was the basis for its ruling that Appellant's false representation counterclaim was not an actionable violation of Sec. 37-5-108, was incorrect as a matter of law. If the trial court's litigation privilege ruling was incorrect, as was argued by Appellant in his Brief (pp. 10-12), then the order granting partial summary judgment to Respondent on this issue is also incorrect, since the trial judge himself, as is noted above, reasoned at the hearing (before later relying upon his litigation privilege ruling) that his belief that he had subjective discretion to determine whether an alleged violation of Sec. 37-5-108 was unconscionable meant that it was a question for trial, not summary judgment. Remember also that the trial court's concerns about litigation privilege only applied to allegedly false representations that were made in "pleadings," such as the Complaint in this case (R. p. 9). However, the court's overly broad Order also prevents Appellant from raising at trial any arguments regarding false representations that were made outside the Complaint (R. pp. 13-14). Even if this court were to agree with the trial court's ruling on the litigation privilege issue, which it shouldn't since none of the parties have found any legal authority to support it, this court should find that the trial court's ruling preventing Appellant from arguing that other false representations made outside the pleadings are actionable is incorrect as a matter of law, and this ruling should be reversed. Of course, Appellant believes, as already argued in his Brief, that the litigation privilege argument is incorrect as a matter of law, for which reason this court should allow Appellant to make any argument at trial regarding his false representation counterclaim, including alleged false representations that were made

in the pleadings, including the Complaint.

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

In response to Respondent's argument on this issue in its Brief, Appellant is not arguing that the mere fact that the lower court used a Form 4 Order to issue its ruling means that the Rule 59 Order violates the abuse of discretion holding of *Lollis v. Dutton*, [421 S.C. 467, 487, 807 S.E.2d 723 \(Ct. App. 2017\)](#), which was cited in Appellant's Brief. Appellant is arguing that the conclusory one sentence ruling by the court in the Rule 59 Order stating “[d]efendant's Motion to Reconsider under SCRCP 59 is denied” (R. p.93) violates the abuse of discretion standards set forth in the *Lollis* case. (*Ibid.*) Respondent argues that this case is distinguishable from *Lollis*, since in *Lollis* both the initial court decision and the decision on the Rule 59 motion did not address the attorney fees issue, whereas in this case, the initial ruling was made after briefing by both parties and included detailed reasons for the initial decision, even though the Rule 59 Order did not include any reasons for its decision. However, Appellant believes that *Lollis* stands for the proposition that even if there is only one Rule 59 order that doesn't provide reasons for the ruling in that order, that such a decision is still an arbitrary order amounting to an abuse of discretion. Respondent contends on p. 14 of its Brief, that the Court of Appeals “held that the lower court erred because neither its first order nor the order denying the Rule 59(e) motion specifically addressed the merits of the request for attorneys’ fees. *Id.* at 487, 807 S.E.2d at 733. This Court held that the orders did not demonstrate that

the court exercised its discretion in evaluating the request for attorneys' fees. *Id.*"

However, this is incorrect. Appellant respectfully requests that the court refer to the text itself of the paragraph cited from *Lollis* on pages 15-16 of Appellant's Brief instead of the summary provided by Respondent, or to the language of the case itself. The court's language does not address the cumulative effect of two orders. Instead, the paragraph cited by both parties refers only to "the circuit court's summary order denying all post-trial motions." (*Lollis* at 487, 733) The appellate court's focus was only on the deficiencies of the trial court's summary Rule 59(e) order denying the post-trial motions, not on both of the orders as Respondent claims in its Brief. Note also the court's citations to supporting authority in this paragraph where the court refers to "a failure to exercise discretion," "its ruling," and "a decision." (emphasis added) Indeed, the last case cited by the court states "A decision lacking a discernible reason is arbitrary and constitutes an abuse of discretion." (*Ibid.*) It is apparent from the court's ruling in *Lollis* that even one Rule 59(e) decision that is issued without a discernible reason supporting it is an arbitrary abuse of discretion, and it really isn't possible for a court to issue an order any shorter or with less of a discernible reason than the conclusory language of the Rule 59 Order in this case (R. p. 93).

Respondent also argues that Appellant has not requested specific relief, but this is incorrect. Reference to the Conclusion section of Appellant's Brief (p. 17) will show that Appellant has requested specific relief, which Appellant requests again.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this court provide Appellant with the relief requested in the Conclusion section of his prior Brief.

Dated this May 19, 2021

/s/ John R. Cantrell, Jr.
John R. Cantrell, Jr.
Cantrell Legal, PC
108 Phillips Ct.
St. Matthews, SC 29135-8582
(843) 797-2454
Attorney for Appellant

RECEIVED

May 19 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Hon. James E. Chellis, Master-In-Equity

Appellate Case No. 2020-001127

1st Franklin Financial
Corporation

Respondent,

v.

Roby A. Adams

Appellant.

CERTIFICATE OF COUNSEL

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

May 19, 2021

/s/ John R. Cantrell, Jr.
Cantrell Legal, PC
108 Phillips Ct.
St. Matthews, SC 29135
(843) 797-2454
Attorney for Appellant