THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2009-CP-10-2433

Floyd E. Jernigan and Suzanne Boone Katz

Respondent,

v.

Bank of America, N.A.

Appellant.

FINAL BRIEF OF RESPONDENT KATZ

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STATEMENT OF THE CASE

Floyd E. Jernigan ("Jernigan") filed this complaint on April 17, 2009, against Appellant Bank of America ("Bank" or "Bank of America") and Respondent Suzanne Boone Katz ("Katz"). The complaint arose out of some online bill payments and access issues involving the Respondents' separately held accounts with the Bank.

Jernigan asserted claims against the Bank and Katz for negligence, slander, and malicious prosecution and additional claims against Katz only for false arrest and intentional infliction of emotional distress. Respondent Katz denied the allegations against her, counterclaimed against Respondent Jernigan and made cross claims against the Bank for Negligence and Breach of Contract. In response to the allegations made by Katz, the Bank denied the allegations and put forth the defense that Katz could not recover for emotional injuries in the absence of outrageous conduct and that no evidence of outrageous conduct had been presented.

A bench trial commenced on September 13, 2011. On December 12, 2011, the court awarded Katz $100,000 in actual damages. On March 22, 2012, the court denied the Bank's motion to alter or amend the judgments.

In its written order, the court reiterated that Katz had presented sufficient evidence of physical harm to support an award of emotional harm under her negligence theory and further articulated that the evidence supported damages under her negligence theory for her loss of enjoyment of life. In response to the defense put forth by the Bank at trial and again in its motion to alter or amend that Katz could not recover for emotional injuries in the absence of outrageous conduct and that no evidence of outrageous conduct had been presented, the court also concluded that the evidence presented evidence sufficient to support recovery under a theory

of intentional infliction of emotional distress and breach of fiduciary duty. The Bank served its notice of appeal on April 3, 2012.

STATEMENT OF FACTS

Jernigan and Katz were previously husband and wife. Among the issues in their marriage and divorce were financial mistrust between the two, allegations of unauthorized transactions, and other financial issues. (R. p. 409, lines 1-8; p. 412, lines18-25; p. 413, line 11) During this time, on or about the 5th day of January, 2004, Jernigan and Katz met with Bank employee Michael Boyle at a local branch to sign the documents to remove Jernigan from the account ending in 8854. Id; (R. p. 409, lines 1-p. 414, line 10) Jernigan executed a document entitled "Customer Removal Authorization/Modification Agreement" acknowledging that Jernigan had no interest in the funds in the bank account ending in 8854 and that sole ownership and access to the account, including online access, was to be held by Katz. Katz simultaneously executed a signature card for the 8854 account to obtain sole ownership of the account. During this meeting, Boyle was informed by Katz of many of the financial issues that existed between Jernigan and Katz and the negative damaging effect these things had upon her mental and emotional well being. Id.

After discussing the financial issues and their damaging effects upon Katz regarding her soon to be ex-husband, Katz was assured by Boyle that Bank of America would take the appropriate steps to prevent Jernigan from accessing or otherwise viewing the account ending in 8854. Id. In fact, it was Bank policy for all access to be removed, including online access, when a customer is removed from a joint account. (R. p. 341, line 5-p.343, line 5)

Upon receipt of the Customer Removal Authorization/Modification Agreement, the Bank removed Jernigan's name from the 8854 account title, but inexplicably failed to remove Jernigan

as co-owner of the account for online and bill-pay purposes, thereby permitting Jernigan to remain able to access and view Katz' accounts electronically.

On or about January 19, 2007, Katz discovered funds missing from the 8854 account. She immediately called the Bank to inquire about the missing funds. After many hours of discussions, phone conversations, the Bank ultimately informed Katz that Jernigan had made online bill payments from the 8854 account, and acknowledged the fact that the Bank erred in failing to remove him from such access in 2004. The Bank further informed Katz that in order to make the online bill payments from the 8854 account, Jernigan had to have knowingly and deliberately accessed her account to make the payments at issue. (R. p. 131, lines 10-17; p. 163, line 14-p. 164, line 13; p. 175, lines 6-15, 178, lines 16-20; p. 183, line 13-p. 184, line 1; p. 209, lines 18-24; p. 420, line 1-p. 421, line 25; p. 427, line 7-p., 428, line 9, p. 458, line 19-p. 459, line 10)

At this point, the Bank, against its own policy, refused to reimburse Katz, or to conduct an investigation, and informed her that if she wanted reimbursement, the only way for her to do so would be to file a criminal report and a fraud report. (R. p. 157, line 14-p. 158, line 7; p. 160, lines 2-6; p. 160, line 24-p. 161, line 2; p. 297, line 23-p. 298, line 5; p. 420, lines 1-7; p. 469, lines 5-6) The Bank further informed Katz that she was not to contact Jernigan under any circumstances about this matter. (R. p. 160, lines 7-12; p. 168, lines 5-6) Katz, relying upon the bank, and in compliance with the bank's instructions, reported the incidents to the Charleston Police Department on or about January 20, 2007, who opened a file and began investigating the matter, and did not discuss the matter with Jernigan. Id; (R. p. 160, lines 7-12; p. 168, lines 5-6; p. 217, lines13-p. 218, line 9) Later, on or about January 22, 2007, Katz, seeking further information from Bank authorities on how such an egregious error had been committed on behalf

of the Bank, met with Bank personnel with her then fiancé, and now husband, Al Katz, in the hopes of getting to the bottom of the situation. (R. p. 161, line1-p. 165, line 17; p. 333, lines 5-14; p. 334, line 15-p. 339, line 10) During the meeting, the Bank employee contacted Jernigan via telephone and Plaintiff agreed to replace the funds that had been withdrawn from her account. However, Katz was given no new information regarding the disputed Bill Pays and was advised to conduct a further investigation on her own if she desired additional information. (R. p. 359, line 18-p. 361, line 12; p. 396, line 22-p. 399, line 6)

Thereafter, while the criminal investigation remained pending, Katz continued to seek information from the Bank on the specifics on how her account was accessed and how such an egregious error could be committed. Katz was repeatedly informed that, although the Bank permitted him to retain access, Jernigan had to have acted intentionally, deliberately, and knowingly in effectuating the bill payments. (R. p. 131, lines 10-17; 163, line 14-p. 164, line 13; p. 175, lines 6-15, p. 178, lines 16-20; p.183, line 13-p. 184, line 1; p. 209, lines 18-24; p. 420, line 1-p. 421, line 25; p. 427, line 7-p. 428, line 9; p. 458, line 19-p. 459, line 10)

At some point during this time, Katz learned that Jernigan (who is not conversant in bank lingo) had disclosed to one of her sons that the bill payments resulted from some form of "overdraft protection." (R. p. 310, lines 13-25; p. 311, lines 20-25; p. 314, lines 8-11) The Bank assured Katz that checking accounts could not be linked for overdraft protection and thus Jernigan's assertions were not true. (R. p. 427, line 7-p. 428, line 9) This caused Katz a considerable amount of additional, unnecessary and undue mental distress, anxiety, and depression and created independent and exacerbated the harm to the relationship between Katz and her ex-husband Jernigan as well as her sons in addition to the harm that was already

resulting from the criminal investigation. (R. p. 428, line 10-p. 429, line 23; p. 445, lines 10-22; pp. 1174-1206)

The Police department, having conducted an initial investigation of the matter, including interviews with Bank employees who indicated Jernigan must have acted knowingly, concluded there was probable cause to bring charges against Jernigan. Shortly thereafter, Plaintiff was arrested and charged with obtaining goods under false pretenses by the Charleston Police Department. Unbeknownst to Katz or the Charleston Police Department, however, at about the same time as the disputed bill payments, Plaintiffs own account had been frozen or restricted and that it was possible that the restricted/frozen status of the Plaintiff's own account may have been the cause of the bill payments at issue. (R. p. 375, line 11-p. 376, line 4; p. 420, line 23-p. 421, line 18; p. 443, lines 15-23; p. 455, line 10-p. 456, line 3) Had the Bank revealed this information in a timely manner to Katz, she would not have filed a police report. (R. p. 420, line 8-p. 421, line 25; p. 458, line 19-p. 459, line 10)

Katz thereafter continued her effort to obtain full and complete information from the Bank as to how this could have occurred, and was repeatedly told the Jernigan could not have effectuated the bill payments accidentally and that he had to have acted deliberately. (R. p. 131, lines 10-17; p. 163, line 14-p. 164, line 13; p. 175, lines 6-15; p. 178, lines 16-20; p. 183, line 13-p. 184, line 1; p. 209, lines 18-24; p. 420, line 1-p. 421, line 25; p. 427, line 7-p. 428, line 9; p. 458, line 19-p. 459, line 10) She met with Bank employees, spoke with Bank personnel over the phone, and wrote letters to the CEO of the Bank requesting a complete investigation and investigation of the matter. (R. p. 333, lines 5-14; p. 334, line 15-p. 339, line 10; p. 375, line 11-p. 376, line 4; p. 395, line 9-p. 399, line 6; p. 430, line 21-p. 431, line 24; p. 455, line 10-p. 456, line 3; pp. 849-850; pp. 851-855; pp. 862-863; pp. 864-865)

The Bank acknowledged and knew that the situation was causing her undue distress and other damage, yet refused to conduct a complete investigation and further refused to examine the precise mechanics of how the Bill Pays at issue were made, despite the ability to do so. (R. p. 266, lines 5-14; p. 268, lines 1-10; p. 275, line 15-p. 276, line 6; p. 282, lines19-25; p. 290, line 12-p. 291, line 12; p. 335, line 3-p. 336, line 8; p. 346, line 19-p. 347, line 1; p. 397, line 1-p. 399, line 6) Further, the Bank never disclosed to Katz, the Charleston Police Department, or the Charleston County Solicitor's office, that there was any problem whatsoever with Jernigan's own account. At this same time, the Charleston Police Department as well as counsel for Jernigan also sought information from the Bank as to how these events occurred. The precise mechanics of the Bill Pay process were never fully disclosed by the Bank, and the solicitor eventually declined to prosecute the matter.

Thereafter, this civil litigation ensued and only then did the Bank reveal that Jernigan's account ending in 4502 had been frozen or restricted at or near the time of the disputed Bill Pay transactions, that Jernigan's account status may have contributed to or caused the disputed Bill Pay transactions, and that the Bank had the ability to examine the precise mechanics of how the Bill Pays were made. (R. p. 375, line 11-p. 376, line 21; p. 397, line 1-p. 399, line 6; p. 581, lines 5-23; p. 585, lines 5-11; p. 587, line 13-p. 588, line 1; p. 590, line 15-p. 597, line 6)

Bank of America never fully explained to Katz the Charleston Police Department or Plaintiff Jernigan how the money was removed from Katz's account. (R. pp. 5) Bank of America never fully investigated whether the money was or could have been removed from Katz's account due to any computer glitch or other technical issue between Bank of America and the third-party vendor, Check-Free Corp. (Fiserv) used to complete Bank of America's bill pay transactions, despite repeated requests to do so by Katz, Jernigan, and others, despite the ability and

wherewithal to do so, and despite the knowledge that refusing to do so was causing Katz damage. Id; (R. p. 375, line 11-p. 376, line 21; 397, line 1-p. 399, line 6; p. 581, lines 5-23; p. 585, line 5-11; p. 587, line 13-p. 588, line 1; p. 590, line 15-p. 591, line 6) Bank of America neither preserved nor attempted to preserve any electronic information regarding the bill pay transaction associated with the accounts of the customers involved in this suit. Moreover, Bank of America did not request any information from Check-Free Corp. (Fiserv) regarding the bill pay transaction, which is the subject of this suit. Id.

The trial court found Bank of America's explanation that Katz was fully informed about the bank's error is not believable and that its failure to fully explain what they knew or should have known and their failure to cooperate with investigating officer, Sergeant Daquigan of the Charleston Police Department was both absurd and ridiculous. (R. pp. 5-6.)

The trial court also found Katz very believable and that she believed Plaintiff Jernigan acted deliberately to remove money from her account despite the fact that Bank of America informed Katz that they had failed to remove Plaintiff Jernigan from her account. (R. pp. 6.)

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND KATZ STATED A CLAIM FOR NEGLIGENCE AND PRESENTED SUFFICIENT EVIDENCE TO SUPPORT AN AWARD OF DAMAGES.

Questions of negligence and proximate cause are ordinarily questions of fact which are not to be disturbed. Davenport v. Walker, 280 S.C. 588, 591 (S.C. Ct. App. 1984). Bank of America argues that the trial court erred in finding that it owed a duty of care to Katz in tort.

In order to establish a claim for negligence the plaintiff must prove the following elements: 1) a duty of care owed by the to the plaintiff; 2) a breach of that duty by the defendant's negligent

act or omission; 3) the plaintiff was damaged; and 4) the damages proximately resulted from the breach of the duty. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002).

Duty is generally defined as "the obligation to conform to a particular standard of conduct toward another." Shipes v. Piggly Wiggly St. Andrews 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977). An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance. Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997).

The case of Murray v. Bank of Am., N.A., 354 S.C. 337 (Ct. App. 2003), is particularly instructive on this issue. In Murray, the Court of Appeals found a relationship between the Bank and Murray arose sufficient to impose upon the Bank a duty of care when Murray went to the Bank seeking closure of her account. The Bank failed to follow its own procedures, did not timely close the account, and the account was thereafter fraudulently accessed. Murray, 354 S.C. 337, 343. The Court of Appeals found that this was sufficient evidence to establish the existence of a duty and a breach thereof. Id at 343-44.

Here, the court correctly found that a relationship between the Bank and Katz arose sufficient to impose upon the Bank a duty of care when Katz went to the Bank seeking closure of her and Jernigan's joint account. After discussing the financial issues and their damaging effects upon Katz regarding her soon to be ex-husband, Katz was assured the Bank would take the appropriate steps to prevent Jernigan from accessing or otherwise viewing the account ending in 8854. (R. p. 409, line 1-p. 414, line 10) In fact, it was Bank policy for all access to be removed, including online access, when a customer is removed from a joint account. (R. p. 255, lines 2-16; p. 317, line 15-p. 319, line 5; p. 320, line 20-p. 321, line 4) The Bank failed to follow its own

procedures, did not timely close the account, and did not notify Katz that the account remained open.

The court further found a relationship between the Bank and Katz arose sufficient to impose upon the Bank a duty of care when Katz discovered the unauthorized Bill pay transfers and contacted the Bank seeking assistance and investigation into the matter. The Bank again failed to follow its own procedures regarding fraudulent activity, requiring that she file a police report, refusing to reimburse Katz, and the Bank did not investigate or disclose the mechanics of the Bill pay process during the police investigation despite specific requests to do so and, did not investigate or disclose the restriction on Jernigan's account at or around the same time as the Bill pay transfers at issue.

The Bank was in a superior position to Katz with respect to knowledge and information regarding the circumstances with which the Bill pay transfers were made. This enabled the Bank to exercise influence over Katz with respect to her actions after the discovery that her account had been accessed. The record indicates Katz placed her confidence and trust in the Bank in this regard, and Katz had a reasonable foundation to believe the Bank was acting in her interest, rather than its own, when the Bank led her to believe Jernigan deliberately accessed her account and induced her to file a police report against him in order to be reimbursed. (R. p. 413, lines 21-24; p. 455, lines 23-25) This duty of care was breached when the Bank failed to investigate or disclose the mechanics of the Bill pay process during the police investigation despite specific requests to do so and when the Bank failed investigate or disclose the restriction on Jernigan's account at or around the same time as the Bill pay transfers at issue. See Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41 (S.C. 1986).

The court correctly found all of the above to be sufficient evidence to establish a duty of care and determined the Bank breached its duty to Katz after these duties arose, proximately causing Katz's damage. Clearly a duty arose in tort under the circumstances presented in this case. Murray, 354 S.C. 337. The determinations of whether the duty was breached and proximate causation are questions of fact which are supported by the record and must not be disturbed.

a. Evidence of physical injury was presented.

Katz and her husband both testified that she suffered physical pain and suffering as a result of her emotional distress. (R. p. 393, lines 10-11; p. 401, lines 7-21; p. 403, lines 11-15; p. 422, line 21-p. 423, line 2; p. 433, line 20-p. 434, line 2; pp. 1134-1173; pp. 1174-1206) Katz further testified that she watched closely over her finances and, when she discovered the Bill pays, she was overcome with fear that her identity had been stolen or her account fraudulently accessed. Id. (R. p. 393, lines 21-22; 416, lines 22-24; p. 418, line 12-p. 419, line 3; p. 422 line 17-p. 423, line 2) As articulated in the judgment, the court found Katz to be very believable and the Bank's explanation of events to be not believable. Judging the credibility of testimony of witnesses is a function of the fact finder as is determining the weight to be given that testimony. Tisdale v. Kerr McGee Chemical Corporation, 266 S.C. 64, 221 S.E. (2d) 531 (1976).

In order to receive bodily injury, it was not necessary that Katz lose a limb, receive a broken bone, or have wounds inflicted on her body. Being made sick, nauseous, and otherwise experiencing physical manifestations of pain and discomfort in the manner she testified and as a consequence of her emotional upset constitutes bodily injury for which Katz is entitled to recover damages. See Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 605-607 (S.C. 1958); See also Murray v. Bank of Am., N.A., 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003);

Doe v. Greenville Hosp. Sys., 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994); ("the fact that...[plaintiff] may have received no physical injury at the time of the assault is not determinative").

The court correctly found the evidence sufficiently established physical injuries that proximately caused Katz damage. This question of fact is supported by the record and must not be disturbed.

b. Evidence of emotional injury was presented.

"In personal injury actions, great latitude is allowed in the introduction of evidence to aid in determining the extent of damages...any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of defendant's acts is admissible." Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139 (Ct. App. 2011). Katz was not required to submit expert testimony as to her medical expenses and the court made no error in admitting her personal testimony as to her injuries and bills. Wilder, 396 S.C. 139.

The deposition testimony of Katz's treating psychiatrist, Dr. Lucy Preyer, M.D., including treatment and billing records, was admitted without objection. Dr. Preyer's deposition testimony indicates that Katz suffered setbacks and exacerbation of her depression and anxiety as a result of the events that transpired. (R. p. 384, line 23-p. 386, line, 22; pp. 1134-1173) Katz's medication was modified and Katz's treating physician's medical records reflecting these modifications were also admitted into evidence without objection and support the nature and extent of Katz's injuries. Id; (R. p. 441, lines 2-7; p. 446, lines 13-14; p. 447, lines 1-24; pp. 1174-1206)

Much of the damages Katz suffered were intangible. One cannot easily or with any mathematical certainty place a value on the amount of a person's emotional and mental well

being. Murray v. Bank of Am., N.A., 354 S.C. 337, 345 (Ct. App. 2003); Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000).

The court correctly found the evidence sufficiently established emotional injuries that proximately caused Katz damage. This question of fact is supported by the record and must not be disturbed.

c. Evidence of loss of enjoyment of life was presented.

The court further found that the record supports the conclusion that Katz, as a result of the Bank's negligence, suffered limitations on her ability to participate in, and derive pleasure from, the normal activities of her daily life. (R. pp. 19) The court was correct, as the record indicates that Katz's ability and inclination to pursue her talents, recreational interests, hobbies, and avocations was also negatively impacted. (R. p. 390, line 14-p. 394, line 3; p. 423, lines 1-18)

This supports a recovery of damages, separate and apart from pain and suffering and emotional distress, for loss of enjoyment of life. Boan v. Blackwell, 343 S.C. 498, 502 (S.C. 2001). Accordingly, the court correctly found the evidence sufficiently established loss of enjoyment of life damages proximately caused by the Bank. This question of fact is supported by the record and must not be disturbed.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE EVIDENCE SUPPORTED AN AWARD OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The court noted in its order denying the Bank's motion to alter or amend that the evidence of the existence of physical injury caused by the emotional distress is sufficient to support damages for such mental trauma. (R. pp. 17-19)

It is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and where

reasonable persons may differ is the question an issue of fact. RESTATEMENT (SECOND) OF TORTS SECTION 46, comment h; Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 167 (Ct. App. 1984)

In Todd v. South Carolina Farm Bureau Mut. Ins. Co., the Court of Appeals articulated that with conduct which has been deemed "outrageous" and thus liability found, the common thread has been the existence of three factors, 1) a pre-existing legal relationship, 2) excessive self-help in asserting a legal right or avoiding a legal obligation flowing out of the relationship, and 3) contemptuous disregard for the plaintiff's emotional suffering either to force the plaintiff to accede to the defendant's wishes or to punish the plaintiff for failure to comply. 283 S.C 169-07.

Here, Katz satisfies these three factors by and through her pre-existing banking relationship with the Bank, the Bank's excessive self-help in avoiding disclosure of the Bill pay process despite repeated demands to do so by the police, Jernigan, and Katz, and the disregard shown by the Bank with regard to Katz's emotional suffering after the Bank refused to reimburse her account, required Katz file a police report, and refused to even investigate, much less disclose, other material information relating to the Bill pay transfers and accounts at issue. The written evidence indicates the Bank knowingly refused to provide further information or investigation regarding the Bill pays at issue, the status of Jernigan's account, and the precise mechanics of the Bill pay system. (R. p. 375, line 11-p. 376, line 21; p. 397, line 1-p. 399, line 6; p. 581, lines 5-23; p. 585, lines 5-11; p. 587, line 13-p. 588, line 1; p. 590, line 15-p. 591, line 6) The Bank engaged in this conduct after requiring Katz file a police report, refusing to reimburse her account, and with actual knowledge that Katz was being harmed as a result. (R. p. 266, lines 5-14; p. 268, lines 1-10; 275, line 15-p. 276, line 6; p. 282, lines 19-25; p. 290, line 12-p. 291, line 12; p. 335, line 3-p. 336, line 8; p. 346, line 19-p. 347, line 1; p. 397, line 1-p. 399, line 6)

With this guidance, the court found the evidence supported the conclusion that the Bank's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery for Katz.

Moreover, the thrust of the Bank's defense at trial and in its motion to alter or amend was that there was insufficient evidence of outrageous conduct to support a recovery. However, the Bank did not object to any of the evidence presented which supported the conclusion of the court. Nor would the Bank's defense have changed any, as it would have continued to assert that its conduct was proper and not so extreme as to support recovery for intentional infliction of emotional distress. Accordingly, the Bank suffered no surprise or prejudice in the alternative finding of the court in its order denying the Bank's motion to alter or amend.

Under Todd v. South Carolina Farm Bureau Mut. Ins. Co., the Bank's conduct can reasonably be regarded as outrageous, and the trial court correctly concluded that it was. The extent and severity of Katz's injuries are questions of fact that are not to be disturbed.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the trial court and award Katz interest on the judgment and costs as provided by law.

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