

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

---

Civil Action No. 2016-CP-32-00474  
Appellate Case No. 2016-002272

---

Palmetto Wastewater Reclamation, LLC  
d/b/a Alpine Utilities..... Plaintiff/Respondent,

v.

RBF Enterprises, LLC d/b/a McDonald's ..... Defendant/Appellant.

---

**INITIAL BRIEF OF APPELLANT**

---

CALLISON, TIGHE & ROBINSON, LLC  
D. Reece Williams, III (S.C. Bar 6120)  
Kathleen McDaniel (S.C. Bar 74826)  
Post Office Box 1390  
Columbia, SC 29202-1390  
Telephone: (803) 404-6900  
Fax: (803) 404-6901  
[ReeceWilliams@CallisonTighe.com](mailto:ReeceWilliams@CallisonTighe.com)  
[KathleenMcDaniel@CallisonTighe.com](mailto:KathleenMcDaniel@CallisonTighe.com)

**ATTORNEYS FOR APPELLANT**

Columbia, South Carolina

March 23, 2017

**RECEIVED**

MAR 27 2017

SC Court of Appeals

Other Counsel of Record:

John M.S. Hoefler, Esq.

Andrew J.D'Antoni, Esq.

WILLOUGHBY & HOEFER, P.A.

PO Box 8416

Columbia SC 29202-8416

**ATTORNEYS FOR RESPONDENT**

**TABLE OF CONTENTS**

Table of Authorities ..... ii

Statement of Issues on Appeal .....1

Statement of the Case.....2

Statement of Facts.....3

Standard of Review.....3

Argument .....4

Conclusion .....7

**TABLE OF AUTHORITIES**

**Cases**

Baughman v. American Tel. and Tel. Co., 306 S.C. 101,  
410 S.E.2d 537 (1991) .....4

Board of Trustees for Fairfield County School Dist. V. State,  
409 S.C. 119, 761 S.E.2d 241, 307 (2014) .....4

Companion Property and Cas. Ins. Co. v. Airborne  
Exp., Inc., 369 S.C. 388, 631 S.E.2d 915 (2006).....4

Estes v. Roper Temporary Services, Inc., 304 S.C. 120, 403  
S.E.2d 157 (1991) .....4

Hancock v. Mid-South Management Co., Inc., 381 S.C.  
326, 673 S.E.2d 801 (2009) .....4

Huggins v. Commercial & Sav. Bank,  
141 S.C. 480, 140 S.E.2d 177, 181 (1927)..... 6, 7

Lord v. D & J Enterprises, Inc., 407 S.C. 544,  
757 S.E.2d 695 (2014) .....4

Montgomery v. CSX Transp., Inc., 379 S.C. 37,  
656 S.E.2d 20 (2008) .....5

Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611  
S.E.2d 922, 925 (2005.).....4

**STATEMENT OF ISSUES ON APPEAL**

- 1. Whether the trial court erred in excluding documentary evidence solely because RBF did not submit such evidence by way of an affidavit.**
  
- 2. Whether the trial court erred in finding FRB did not timely object to Alpine's increased sewer bills such that an account stated exists?**

## STATEMENT OF THE CASE

This matter arises out of a dispute between RBF Enterprises, LLC d/b/a McDonald's ("RBF") and Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities ("Alpine") over a 1,000% increase in monthly fees for sewer services following a rate increase approved by the South Carolina Public Service Commission ("PSC") in January 2013. At issue are sewer services charges for January, February, March, April, May, and June 2013. RBF objected to the increased fees and sought relief from the PSC. Such relief was denied, and in February 2016, Alpine filed a lawsuit to collect sewer fees. On September 30, 2016, the trial court granted summary judgment in favor of Alpine, awarding Alpine judgment in the amount of \$32,601.62. RBF contends the trial court erred in excluding evidence proffered by RBF, which evidence would have created a genuine question of material fact precluding summary judgment. RBF noticed this appeal on November 9, 2016.

## STATEMENT OF THE FACTS

RBF owned and operated a McDonald's restaurant franchise at 600 Saint Andrews Road. Alpine provides sewer services to residential and commercial customers in portions of Lexington County, including to RBF during the time it operated the St. Andrews Road McDonald's.

On January 11, 2013, the PSC issued Order No. 2013-3(A), approving a rate increase for Alpine. The effect of Order No. 2013-3(A) was to raise RBF's monthly sewer rate for the St. Andrews Road McDonald's from about \$370.00 to about \$3,800.00, an increase of more than 1,000%. (Answer ¶ 2.)

Because of the extraordinary rate increase, RBF filed a Complaint with the PSC on April 1, 2013. (Complaint Form.) The PSC dismissed RBF's Complaint on December 2, 2014. (PSC Order No. 2014-964.) RBF filed a Petition for Rehearing and Reconsideration, which was denied by the PSC by Order No. 2016-34 on January 8, 2016. (PSC Order No. 2016-34.)

Alpine filed this action with the Court of Common Pleas, Eleventh Judicial Circuit, on February 11, 2016. (Compl.) On June 13, 2016, Alpine filed a Motion for Summary Judgment. (Mtn. for Summary Judgment.) On September 21, 2016, the trial court heard this motion. At the hearing, RBF proffered certain documents, which the trial court did not admit into evidence. (Tr. 12:7-13.) The trial court's basis for excluding the proffered documents was that the proffered documents were not submitted by the use of an affidavit. (Tr. 12:14-18.) The trial court filed its Order granting Plaintiff's Motion for Summary Judgment on September 30, 2016. This appeal followed.

## STANDARD OF REVIEW

"In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRPC: summary judgment is proper when

there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Bd. Of Trustees. For the Fairfield Cnty. Sch. Dist. V. State, 409 S.C. 119, 126, 761 S.E.2d 241, 244 (2014) (citing Pittman v. Grand Strand Entm’t, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005).)

“[The Court’s] standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom.” Companion Property and Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C. 388, 390-391, 631 S.E.2d 915, 916 (Ct. App. 2006) (quoting Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991)).

“[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Lord v. D & J Enters. Inc., 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (quoting Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

### ARGUMENT

1. **Whether the trial court erred in excluding documentary evidence solely because RBF did not submit such evidence by way of an affidavit.**

At the summary judgment hearing, RBF proffered a copy of its bill from Alpine for January 2013 as well as a copy of an e-mail from Rick Melcher, the public relation manager for Alpine’s parent company, Ni America. (RBF’s proffered exhibits pp. 2 and 5.) The trial court refused to admit these documents into evidence, stating that Rule 56 “provides that an affidavit would have to have been prepared and submitted” with these items for them to have been admitted into evidence. Tr. 17:22 – 18:2. RBF contends that the scant South Carolina case law

interpreting Rule 56 on this question permits the submission of evidence to rebut a motion for summary judgment in a form other than by affidavit.

When a moving party properly moves for summary judgment in accordance with Rule 56(c), “the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit *or otherwise*, set forth specific facts to show that there is a general issue for trial.” Lord, at 553, 757 S.E.2d at 699 (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (emphasis added); see also Fairfield County School Dist., 409 S.C. at 126, 761 S.E.2d at 245 (“It is well settled that the non-movant party . . . must present some evidence in the form of affidavits *or otherwise* in support of its proposition.”) (emphasis added). In addition, South Carolina appellate courts “have interpreted Rule 56(c) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence.” Montgomery v. CSX Transp. Inc., 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004). Thus, a non-movant must present evidence by either affidavit *or otherwise*, which would be admissible in evidence, setting forth specific facts exhibiting a genuine issue for trial. Thus, admissible evidence can come in to rebut a motion for summary judgment in a form other than affidavit.

In this case, two particular documents excluded by the trial court would have created a genuine issue of material fact. These are RBF’s January 2013 sewer bill and Rick Melcher’s subsequent February 12, 2013 email. This is because the amounts given for the monthly sewer rate to be charged to RBF are different on the two items, thereby creating a genuine issue of material fact regarding any actual amount owed by RBF to Alpine. Specifically, the January 2013 sewer bill indicates a monthly sewer service rate of \$3,882.04. (RBF’s proffered exhibits p. 2.) Rick Melcher’s email, dated February 12, 2013, provides a different monthly sewer

service rate of \$3,948.35. (RBF's proffered exhibits p. 5.) Both the bill and the e-mail originated from Alpine.

No calculation based on one or the other of these monthly sewer service rates (or some combination of the two) results in the total amount payable for sewer services of \$23,312.95 shown on Alpine's Affidavit of Verified Statement of Account. (Compl., Ex. A, Affidavit of Verified Statement of Account.) This calls into question the validity of the amount of \$23,312.95. There is nothing in the record documenting specifically how Alpine arrived at that number. The trial court relied upon Alpine's Affidavit of Verified Statement of Account in determining that summary judgment was appropriate and in calculating the judgment amount to award. Had the trial court considered RBF's proffered exhibits, a genuine issue of material fact would have been created, precluding summary judgment on all of Alpine's causes of action.

**2. Whether the trial court erred in finding RBF did not timely object to Alpine's increased sewer bills such that an account stated exists?**

The trial court also erred in finding that RBF did not timely object to Alpine's increased sewer bills and that such failure to object resulted in an account stated. In its Order, the trial court relied upon Huggins v. Commercial & Sav. Bank, 141 S.C. 480, 140 S.E.2d 177, 181 (1927), for the proposition that "an account rendered and not objected to within a reasonable time becomes an account stated." In fact, Huggins does not stand for this proposition; rather, Huggins rejects this proposition specifically in the case of a bank account. Huggins, 140 S.E.2d at 182.

More importantly, however, the trial court rejects the notion that RBF objected to the amount of its sewer bills. To the contrary, throughout the record before the PSC, RBF made clear its objection. The earliest time was in its Complaint filed with the PSC on April 2, 2013. (Alpine's Mtn. for Summary Judgment, Ex. A, Complaint Form filed by Robert B. Farmer on

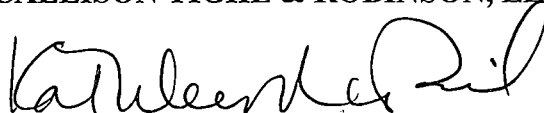
April 2, 2013.) In that Complaint Form, RBF objects to the formula and the amount of sewer bills.

The trial court draws a distinction between objecting to the actual amount billed for services and an objection to the “underlying rate methodology.” Or. p. 6. This is an artificial distinction for which there is no support in South Carolina case law. To the extent an account stated must be objected to, Huggins provides no support for the requirement that the objection be to any particular aspect of the account. An objection is an objection. In this case, the evidence in the record—RBF’s filed Complaint Form—creates a genuine issue of material fact as to RBF’s objection to the sewer bills, precluding summary judgment on Alpine’s cause of action for account stated.

#### **CONCLUSION**

Based upon the foregoing, RBF respectfully request that this Court reverse the grant of summary judgment and award of judgment by the trial court.

**CALLISON TIGHE & ROBINSON, LLC**



D. Reece Williams, III (SC Bar 6120)  
Kathleen McDaniel (S.C. Bar 74826)  
1812 Lincoln St., Ste. 200  
PO Box 1390  
Columbia SC 29202-1390  
Telephone: (803) 404-6900  
Fax: (803) 404-6901  
E-mail: [ReeceWilliams@CallisonTighe.com](mailto:ReeceWilliams@CallisonTighe.com)  
E-mail: [KathleenMcDaniel@CallisonTighe.com](mailto:KathleenMcDaniel@CallisonTighe.com)

**ATTORNEYS FOR APPELLANT**

March \_\_\_, 2017

Columbia, South Carolina