THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No.: 2019-001941

Bank of America, N.A.....Respondent,

v.

Janie C. Southern..... Appellant.

FINAL BRIEF OF APPELLANT

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QUESTIONS PRESENTED

Did the trial court commit reversible error in ruling Appellant Janie C. Southern is liable to Respondent Bank of America, N.A. for "$8,417.49 plus court cost" where the trial court's order stated BOA was "seeking recovery under an 'account stated' theory," and:

I South Carolina law does not recognize "account stated" as a civil cause of action here, where a Bank creditor seeks to recover an alleged credit card balance from a consumer; or

II. Alternatively, if for the first time in South Carolina jurisprudence, this Court recognizes "account stated" as a valid cause of action in the context of a consumer credit card claim, the trial court erred in granting judgment where BOA failed to prove the elements of "account stated" as set forth in 1916 in a "merchant to merchant" context.

STATEMENT OF THE CASE

On January 8, 2018, Plaintiff Bank of America, N.A. (**BOA**)[1] filed a Summons and Complaint in the Greenville County Court of Common Pleas against Defendant Janie C. Southern (**Southern**). (**R. pp. 4-5**). In its attempt to collect an alleged credit card debt owed by Southern, BOA pleaded a single cause of action— "account stated." (**R. p. 4**).

Southern's *pro se* Answer, filed February 9, 2018, denied the essential elements of this antiquated cause of action. (**R. p. 23**). Thereafter, Susan Ingles electronically filed a Notice of Appearance on behalf of Southern on September 27, 2018.

The following year, the Greenville County Court of Common Pleas conducted a bench trial on August 19, 2019. (**R. p. 1**). The Court ruled in favor of BOA and awarded it a judgment against Southern in "the amount of $8,417.49 plus court cost." (**R. p. 2**). On November 20, 2019, Southern filed and served Notice of Appeal of the trial court's October 21, 2019 Final Order. (**NOA, Nov. 20, 2019**). This appeal followed.

[1] BOA is a wholly-owned subsidiary of Bank of America Corporation and the successor in interest to FIA Card Services, N.A. (FIA), formerly known as MBNA America Bank, N.A. FIA was merged into and under the charter and title of Plaintiff BOA effective October 1, 2014. (R. p. 5).

STATEMENT OF FACTS

This is the first attempt made by a bank in South Carolina to broaden the reach of "account stated" by pleading it as the sole cause of action in its attempt to collect an alleged consumer credit card debt. Accordingly, this presents the Court with a novel question of South Carolina law.[2]

BOA is the owner and administrator of a credit card account in Southern's name. **(R. p. 4).** Southern is an elderly widow who lives on a fixed Social Security income. **(R. p. 23; R. p. 404 lines 11-14).** Southern is not familiar with electronic methods of charges, payments or balance transfers on credit card accounts. **(R. p. 400 line 21-p. 401, line 14; 404 lines 7-10).** She makes her bill payments by paper check. **(R. p. 401, lines 15-17).**

In its Complaint for "account stated," BOA alleged: "[Southern] failed to make the required periodic payments and the Account was subsequently charged off." **(R. p. 5).** BOA also contended that "[t]he current Account balance is $12,778.85, which includes any applicable payments and credits." **(R. p. 5).** The Complaint fails to allege the existence of a contract

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[2] Michael G. Sullivan, et al, *Elements of Civil Causes of Action,* 5th Ed. (SC Bar 2015) excludes "account stated" as a civil cause of action recognized by South Carolina courts.

or any account terms; it asserts only that "monthly periodic statements for the Account have been provided to Southern." **(R. p. 5)**. Finally, the Complaint alleged "[t]he parties either expressly or impliedly agreed that the statement or statements were true and were to be paid then or at some other specified time." **(R. p. 5)**.

Southern testified she had never received an account statement that required her to agree to either a specific balance or a specific payment date. **(R. p. 399 lines 4-11)**. To the contrary, Southern disputed by telephone the last monthly periodic statement of $12,778.85 she received. **(R. pp. 398-99; R. p. 403 lines 7-24)**. After BOA charged off the account, no further monthly periodic statements were sent to Southern. **(R. p. 389 lines 8-14)**.

BOA called one witness, Katie Hickey. Hickey serves as an Assistant Vice President and a custodian of records for BOA. **(R. p. 331 , lines 15-16)**. She testified from a review of records only, and she admitted she had no personal knowledge other than what was contained in those records and a single call she had made to Discover Bank. **(R. pp. 366-67; R. pp. 369-72; R. p. 388)**. Hickey testified that her knowledge consisted of information contained in the account records she had reviewed for the purpose of

providing testimony at the trial. (**R. p. 331, lines 18-20**). She had never spoken to Southern. (**R. p. 367 line 8**).

Hickey testified that the "final bill" dated August 6, 2016 was a final statement of what Southern owed on the account. (**R. p. 387, line 18-p. 388, line 5**). Southern testified she did not agree to pay the statement and, in fact, she had notified BOA that she did not owe the amount indicated and would not pay it. (**R. p. 398, line 23-p. 399, line 11**).

BOA's complaint sought judgment for $12,778.85 against Southern. **(R. p. 5).** However, at trial BOA sought judgment only for $8,417.49. **(R. pp. 324, 354, 363, 365).** The amount claimed by BOA had been reduced as a result of Southern's dispute, which was based upon fraud. A subsequent review by BOA's fraud department led to a reduction in the amount BOA claimed it was owed by Southern. **(R. pp. 324, 360).**

There was no testimony from Hickey of any action taken by BOA that could be considered an account being "stated" by BOA to Southern. **(R. pp. 387-88).** Hickey testified that the "account stated" was a "final bill" in the amount of $12,778.85 dated August 6, 2016. This was not the amount sought by BOA at trial based on an "account stated." (**R. pp. 353-54**). There was no final statement of the account that Southern specifically

agreed was due and agreed to pay on a specific date as required by South Carolina law.

All payments Southern made on the account were in the form of paper checks. **(R. p. 369, lines 13-17, p. 370, line 2, p. 400, line 15, p. 401 lines 15-17)**. She never made any Automated Clearing House (ACH) payments, electronic payments, or balance transfers on the account; and she was unaware of the concept of ACH payments and electronic balance transfers. **(R. p. 400, line 21-p. 401, line 12; p. 402, line 22-24; p. 404, lines 7-10)**. Southern testified that she never agreed that the balance reflected on the alleged "final bill" (the last monthly periodic statement) was accurate, nor had she agreed to pay any specific amount. **(R. p. 398, line 23-p. 399, line 11)**. Southern's testimony was corroborated by BOA's witness, Hickey, who testified she had no personal knowledge of Southern's interactions with BOA. **(R. p. 388 line 6-9; p. 398, lines 23-25; p. 399; p. 401, lines 8-25; p. 402, line 22-p. 403 line 25)**.

STANDARD OF REVIEW

The trial court's ruling presents a novel question of South Carolina law: "In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court." *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 125, 638 S.E.2d 650, 652 (2006).

INTRODUCTION TO ARGUMENT

This case directly addresses the trend in consumer debt collection cases of adding a cause of action for "account stated" to an action for breach of contract (i.e., breach of a credit cardholder agreement). Here, BOA goes further by pursuing "account stated" as the sole cause of action. "Account stated" is pled by a debt buyer as an alternative to breach of contract when the debt buyer does not have the documentation necessary to prove a claim for breach of the cardholder agreement. Pursuing a breach of contract claim under the guise of "account stated" is a structural deficiency in the Complaint.

In today's environment that enables the electronic sale of debt, collectors and servicers of debt often attempt to collect on an account that they cannot prove. Here, BOA filed an action to collect an alleged consumer credit card debt under a single cause of action—"account stated"— an action never recognized by a South Carolina court in the context of an open credit card account. In fact, South Carolina courts have limited this cause of action to the settling of accounts between businesses (referred to as "merchants" in the relevant case law from the early 1900's).

The argument hereinafter sets forth that "account stated" is not an appropriate cause of action for the collection of an individual's alleged past

due credit card debt under South Carolina law. BOA's use of "account stated" as its sole cause of action against Southern is a bold attempt to collect an alleged debt under a structurally deficient claim.

At trial, Southern asserted that "account stated" was not a legitimate cause of action because it is not recognized by South Carolina case law in the context of a credit card collection case. **(R. p. 340)**. The trial court committed reversible error in awarding judgment to BOA on the basis of the sole cause of action pled, i.e., "account stated."

ARGUMENT

I. South Carolina does not recognize "account stated" as a civil cause of action where an institutional creditor seeks to recover an alleged past due credit card balance from a consumer.

A. In its final Order, the trial court relied on a single case in support of BOA's "account stated" action against Southern. This case, decided in 1916, was an action between two merchants.

The trial court relied on the "merchant to merchant" case of Gwathmey v. Burgiss, 104 SC 280, 88 SE 816 (1916) ("Gwathmey II") in support of its decision in granting judgment in favor of BOA, where BOA had alleged solely an action for "account stated" against Southern. **(R. p. 2)**. In Gwathmey II the court held: "Where a creditor sends to his debtor a statement of the account between them and the debtor assents to the balance stated, then the account between them ceases to be an open account and becomes an "**account stated.**" **(Emphasis added)**. (104 S.C. 280, 88 SE 816 (1916). The Court explained that "account stated" "was at first confined to accounts between merchants but the trend of modern decisions is to open the doors to persons other than merchants." *Id.* at 104 SC 280, 88 SE 816. The Court also stated that "assent might be expressed or implied from the circumstances." *Id.* at 104 SC 280, 88 SE 816. The Court further held: "A creditor cannot relieve himself of the

necessity of proving the items of an account by mailing a copy to the debtor showing a balance." *Id.* at 104 SC 280, 88 SE 816.

The trial court's reliance on *Gwathmey II* results in reversible error. The parties in *Gwathmey II* were cotton traders engaged in a "merchant to merchant" relationship. The South Carolina Supreme Court reversed the jury finding of an "account stated" and it explained:

> There is nothing in this case to show an express assent to the amount sued for, nor is there anything in the record to show an implied assent to the balance claimed, except the retention of the account without objection as to the balance claimed, and that was not within the minimum as set forth above,[3] even between merchants.

Gwathmey II.

Gwathmey II was the second in a trio of reported cases heard by the Supreme Court in the matter. The opinion of the Court in the first appeal, *Gwathmey v. Burgiss*, 98 SC 152, 82 SE 394 (1914) ("*Gwathmey I*"), [4] outlined precisely why the trial court here erred in granting judgment in favor of BOA. In *Gwathmey I,* the Plaintiffs brought an action against Burgiss to recover a balance allegedly due to them arising out of dealings in cotton

[3] The court was referring to the 2-3 years cited earlier in the opinion.

[4] *Gwathmey v. Burgiss* ("*Gwathmey III*") found its way to the S.C. Supreme Court three times. The third appeal, "*Gwathmey III*", *Gwathmey v. Burgiss* 93 SE 1 (1917) reversed the trial court on a faulty jury instruction. The case set forth two causes of action on breach of contract and a third on account stated.

futures on the New York Cotton Exchange. The case pled three causes of action, two for breach of contract and a third for "account stated."[5]

In *Gwathmey I* , the trial court found the Plaintiffs had sufficiently stated three claims and this was sustained on appeal, thus sending the case back for trial. *Gwathmey II* was an appeal of a jury verdict for the plaintiffs on all three causes of action. In that case, the Supreme Court reversed the lower court as to account stated finding nothing in that "merchant to merchant" case to show an express assent to the amount sued for, nor an implied assent to the balance claimed. Specifically, the court held that although the Defendant merchant retained the accounts without objection to the balance, it was not within the minimum of 2-3 years as cited therein. *Gwathmey v. Burgiss*, 104 S.C. 280, 88 S.E. 2d 816 (1916). Though a "merchant to merchant" case, the *Gwathmey II* court also held: "A creditor cannot relieve himself of the necessity of proving the items of an account by mailing a copy to the debtor showing a balance." *Id.* at 104 S.C. 280, 88 S.E. 816.

[5] In *Gwathmey I*, the Supreme Court explained the material differences between the rights of the parties in an action on an open account in contrast to an action on an account stated. The court held that in an open account, the Plaintiff must prove each item of the account. Conversely, in an account stated, the Plaintiff's case relies solely upon proof that Defendant had agreed to the account, as stated, and promised to pay it.

In its reliance on *Gwathmey II,* the court misapprehended the reasoning in *Gwathmey II* and thereby committed reversible error.

B. South Carolina law contains no case recognizing "account stated" as a cause of action in a credit card debt collection case, or in a case where the parties are a bank and a consumer.

"Account stated" is derived from the practices of English Equity courts and was incorporated into South Carolina law as part of the English common law. In South Carolina jurisprudence, this doctrine has never been applied to a bank's attempt to collect on a past due credit card account held by a consumer.

Wakefield v. Spoon, 100 S.C. 100, 102, 84 SE 418, 420 (1915) defines the elements of an "account stated" action: "(1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time".

The most recent use of "account stated" in a South Carolina case occurred in *S. Welding Works, Inc. v. K & S Const. Co.,* 286 S.C. 158, 160, 161, 332 S.E.2d 102, 104, 105 (Ct. App. 1985). Quoting *Wakefield, S. Welding Works, Inc.* states: "[t]he essential elements of an "account stated" are (1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid

then or at some other specified time." It should also be noted that "[a]n account stated implies some previous transaction or indebtedness between the parties." *Meredith v. Fretwell,* 128 S.C. 267, 122 S.E. 767 (1924).

Historically, the "account stated" cause of action developed through a series of transactions that occurred between merchants and concerned the accounting that was kept of those transactions. In South Carolina, the fact situations in which "account stated" was pled has ranged from partnership dissolutions to "merchant to merchant" open accounts involving rejection of goods, purchase of crops such as cotton, mortgages on land, produce contracts and the like. A recurring requirement was 1) that there must be an actual agreement and 2) a meeting of the minds.[6]

A review of the case law demonstrates that "account stated" developed before the advent of modern transactions such as credit cards, electronic and digital forms of charges, payments, cash advances and balance transfers. The court could not have anticipated the development of credit card transactions,

[6] *Rhodus v. Goins,* 129 SC 140, 123 S.E. 645 (1924) (where Respondent claimed "account stated" on a note as a defense to foreclosure, but court found Appellant was current, the court held an "account stated" is one that the debtor accepts as being correct and agrees to it); *Griggs-Paxton Shoe Co. v. A. Friedheim & Bro,* 133 S.C. 458; 131 S.E. 620 (1926) (where the court distinguished open account from account stated in the case of an action for payment on a shipment of shoes) are examples.

a relationship quite different from the mercantile relationships in which this cause of action traditionally arose.

"Account stated" has rarely been addressed at all by the South Carolina appellate courts since 1946.[7] There is no controlling authority explaining the application of "account stated" in the context of the current case – the relationship between a consumer and a credit-card issuing bank. That relationship is very different from the mercantile relationships that dominated the development of "account stated" as a claim in the early 1900's. Importantly, in the credit card relationship only one party is making charges and payments on the account.

The South Carolina Supreme Court has declined to extend the "account stated" to an action against a consumer. Because South Carolina law has not broadened the action of "account stated" to include credit card accounts, the trial court erred in granting judgment to Bank of America.

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[7] The only reported cases are *Ex Parte Gregory*, 378 S.C. 430, 663 S.E.2d 46, (2008) ; *Anderson Mem'l Hosp., Inc. v. Hagen*, 313 S.C. 497, 443 S.E.2d 399, (Ct. App. 1994) ; *Norell Forest Prods v. H & S Lumber Co.*, 308 S.C. 95, 417 S.E.2d 96 (Ct. App. 1992) ; *Darby v. Waterboggan of Myrtle Beach, Inc.*, 288 S.C. 579, 344 S.E.2d 153 (Ct. App. 1986) Fraud in a merchant to merchant contract case; S. *Welding Works, Inc. v. K & S Const. Co.*, 286 S.C. 158, 332 S.E.2d 102, (Ct. App. 1985); *Burnett Dubose Co., Inc. v. Starnes*, 284 S.C. 196, 324 S.E.2d 651, (Ct. App. 1984) ; *E & S Inv. Corp. v. Richland Bowl, Inc.*, 264 S.C. 582, 216 S.E.2d 522 (1975); *Miller Constr. Co. v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 791 S.E.2d 321 (Ct. App. 2016)

II. Even if this Court, for the first time in South Carolina jurisprudence, recognizes "account stated" in the credit card debt collection context, the trial court erred in granting judgment to BOA where it failed to prove even the "merchant to merchant" elements of "account stated" set forth in 1916 in *Wakefield*.

In the case herein, the trial court's order stated BOA's position as follows:

> Plaintiff would argue that an account stated cause of action was established by the Plaintiff mailing monthly billing statements with a specified due date and the Defendant making payments on the account and not disputing any charges found on the billing statement. The Plaintiff is not asking the court to find that the defendant expressly agreed but that the defendant **impliedly** agreed by her actions. This actions (sic) being monthly mailed to the defendant, payments being made, no dispute of the charges found on the statements and the retention of the account without question of the balance.

(R. p. 2) (emphasis added)

Here the trial court's reasoning was not based on an account being "stated" in the traditional "merchant to merchant" sense, but instead was based upon whether there was a contract implied by the ongoing conduct of the parties. Such a consideration falls within a breach of contract action, which was not pled by BOA.

In granting judgment in favor of BOA, the trial court focused on Southern's payments on BOA's billing statements and her alleged failure to dispute these statements without respect to whether she had agreed 1) to a particular statement as a correct balance and 2) agreed to pay it at a specific time as is required under the theory of "account stated." Ongoing payments on an open account do not establish a prima facie case of "account stated" as recognized between merchants in the early 20th century in South Carolina.

Traditionally, as credit cards became common vehicles of commerce, collection of the outstanding debt was handled through breach of contract claims. As third-party debt collectors and debt buyers began servicing and even buying past due credit card debt, they were often unable to prove the contract through an original cardholder agreement. As an attempt to skirt the requirements of proof in breach of contract, they began to include "account stated" as an alternative cause of action. Breach of contract is the appropriate action available to banks to enforce cardholder agreements.

Under current South Carolina law, "account stated" can only be based upon an agreement that a merchant has been extended credit and the merchant's agreement, either explicit or implicit, to pay the total amount presented to the merchant in a statement of a specific amount. In effect, the

cause of action states that the merchants have come to a new agreement that one merchant will pay a certain amount at a specific time. The action of "account stated" then seeks to enforce this later agreement and is not based upon an original contract or charges and payments, as in the case of a credit card. In this case, BOA merely sought relief under "account stated" and not breach of contract.

CONCLUSION

South Carolina case law does not recognize an action for "account stated" where a bank attempts to collect on a consumer credit card account. Southern respectfully asks this court to vacate the trial court's order with prejudice.

October 12, 2020

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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