THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge
Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-000935

Portfolio Recovery Associates, LLC
Assignee of Synchrony Bank/HH Gregg

Respondent,

v.

Jennifer Campney

Appellant.

and

Jennifer Campney

Third-party Plaintiff

v.

Cooling & Winter, LLC

Third-party Defendant,

Of whom Jennifer Campney is the Appellant

FINAL BRIEF OF APPELLANT

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

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STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR WHEN RULING THAT APPELLANT WAS LIABLE TO RESPONDENT IN THE AMOUNT OF $4,236.78, PLUS COSTS, UNDER AN ACCOUNT STATED CAUSE OF ACTION?**

2. **DID THE TRIAL COURT ERR WHEN RULING THAT BOTH RESPONDENT AND THIRD-PARTY DEFENDANT WERE NOT LIABLE TO APPELLANT ON APPELLANT'S COUNTERCLAIMS?**

3. **DID THE TRIAL COURT ERR IN DENYING APPELLANT'S RULE 52 AND RULE 59(E) MOTION?**

STATEMENT OF THE CASE

This is an appeal from two circuit court orders, one ruling against Appellant both on Respondent's debt collection Complaint and on Appellant's consumer protection claims against both Respondent and Third-party Defendant, and one denying Appellant's Rule 52 and 59(e), SCRCP Motion. Appellant is a consumer whom Respondent, a debt buyer, claims is indebted to it for a defaulted consumer credit card debt. Third-party Defendant is the debt collection law firm that pursued the collection action on behalf of Respondent. Novel issues that will be raised in this appeal include (1) whether or not a business is allowed to allege an account stated cause of action when suing to collect a consumer debt, and (2) whether or not the South Carolina Consumer Protection Code regulates the collection of consumer credit card accounts in this state.

Respondent filed a debt collection Complaint against Appellant in Dorchester County magistrate court on January 4, 2017 seeking to collect $4,236.78, plus costs, from Appellant with its sole cause of action being Account Stated (R. pp. 84-103). (Also attached to this Complaint was an Affidavit and Itemization of Account, which was signed by Mr. Joseph E. Brown, Respondent's attorney in the lower courts, but the ruling of the trial court on this issue is not

being appealed, so this document is not relevant to this appeal.) After the Appellant's Answer to the Complaint was amended and filed with the magistrate court on March 13, 2018 (R. pp. 105-115), which Amended Answer alleged claims against Respondent and Third-party Defendant in an amount in excess of the jurisdictional limit of the magistrate court, the case was transferred to Dorchester County Common Pleas. After the parties had engaged in discovery, Appellant filed a Motion to Compel Discovery Responses ("MTC") on May 28, 2019, which was heard by Judge Maite Murphy on July 30, 2019, and an order entered on September 19, 2019 denying that motion. Although Appellant originally included this order in the Notice of Appeal as one of the orders being appealed, Appellant now abandons this part of his appeal in regards to that discovery order. In the lower courts, both parties filed either motions to dismiss or motions for summary judgment, none of which were granted, except for a summary judgment order in favor of Respondent issued by the magistrate court (R. pp. 6-8), which was reversed on appeal to circuit court prior to the time that the case was transferred to circuit court (R. pp. 1-5). Just prior to trial, Appellant filed a summary judgment motion on October 12, 2019, attempting to resolve some of the pending legal issues before trial (R. pp. 22-35). Appellant also filed a motion in limine as one of his pretrial motions for the same purpose on October 20, 2019 (R. pp. 36-45). Both of these motions were orally denied by the trial judge on October 22, 2019 (R. p. 129, ll. 14-16).

On October 23, 2019, the case was tried as a one day bench trial before Judge Diane S. Goodstein. The Respondent called Larry Andrews, an employee, as its witness. Appellant called Jennifer Campney, her husband Benjamin Campney, and Joseph E. Brown as witnesses. Respondent claimed that Appellant owed them $4,236.78 on a defaulted credit card debt that

they allegedly purchased from Synchrony Bank and alleged as their sole cause of action Account Stated. Appellant objected to all of their proffered evidentiary exhibits that were offered by their witness to establish the debt, which were admitted by the trial judge over objection (R. p. 117). In her Amended Answer, Appellant raised counterclaims against Respondent and claims against Third-party Defendant for violation of the South Carolina Consumer Protection Code ("SCCPC"), the federal Fair Debt Collection Practices Act ("FDCPA"), the South Carolina Unfair Trade Practices Act ("SCUTPA"), and negligence per se (R. pp. 105-115). Most of Appellant's evidentiary exhibits were admitted without objection, except for the ones noted in the argument section below (R. p. 117). At the conclusion of trial, the trial judge asked the parties to prepare competing proposed orders, and the court entered judgment against Appellant on December 11, 2019, both as to Respondent's debt collection Complaint and as to Appellant's counterclaims (R. pp. 11-21). A timely motion under Rule 52, SCRCP to request additional findings of fact and conclusions of law and also under Rule 59(e), SCRCP to alter or amend the bench trial order was filed by Appellant on December 23, 2019 (R. pp. 78-83). The trial court issued its order denying those post-trial motions on May 26, 2020 (R. pp. 76-77). A timely Notice of Appeal of that order was filed with this court on June 25, 2020.

STANDARD OF REVIEW

Respondent's claim in this case for an amount owed on an account stated is a question of law, as it is a type of contract action. *Anderson Memorial Hospital, Inc. v. Hagen*, 443 S.E.2d 399 (Ct. App. 1994). Appellant's claims for violation of the FDCPA, the SCCPC, the SCUTPA, and negligence per se are also questions of law. "An appellate court may decide questions of law with no particular deference to the trial court." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 SE 2d

771 (2010) (citation omitted). "The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Electro Lab of Aiken v. Sharp Const.*, 357 S.C. 363, 367, 593 SE 2d 170 (Ct. App. 2004) (citation omitted). "The admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion or the commission of legal error prejudicing the defendant. " *Wright v. Craft*, 372 S.C. 1, 33, 640 S.E.2d 486 (Ct. App. 2006) (citations omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell,* 339 S.C. 369, 389, 529 SE 2d 528 (2000) *(*citation omitted).

ARGUMENTS

1. THE TRIAL COURT ERRED WHEN RULING THAT APPELLANT WAS LIABLE TO RESPONDENT IN THE AMOUNT OF $4,236.78, PLUS COSTS, UNDER AN ACCOUNT STATED CAUSE OF ACTION

A. THE ACCOUNT STATED CAUSE OF ACTION IS INAPPLICABLE TO THE COLLECTION OF CONSUMER CREDIT CARD DEBT

The sole cause of action alleged by Respondent in its Complaint is an Account Stated cause of action (R. p. 85). As was argued to the court in Appellant's Motion for Summary Judgment filed October 12, 2019 ("Appellant's MSJ") (R. p. 22-35), which is hereby incorporated by reference, and denied by the trial judge orally on October 22, 2019 just prior to the bench trial the next day, an account stated cause of action does not apply to the collection of consumer debt. As is more fully explained on pages 5-6 of Appellant's MSJ (R. pp. 26-27), account stated is a very old cause of action. The seminal case in South Carolina was *Wakefield v. Spoon*, 100 S.C. 100, 84 S.E. 418 (1915). Originally, an account stated could only be created between merchants, not between a merchant and a consumer (R. pp. 26-27), and although some

other states have expanded the cause of action to cover debt collection actions between a merchant and a consumer, our state Supreme Court declined to do so when given the opportunity to expand it. *Huggins v. Commercial & Sav. Bank*, 140 S.E. 177, 181-82 (1927). It should also be noted that the bank account involved in the *Huggins* case appears to have been a business bank account *(Huggins* at 178, 182*),* not a consumer bank account, yet our Supreme Court still did not expand the cause of action beyond suits between merchants on business debts.

As also noted in Appellant's MSJ at page 6, an account stated cause of action is inapplicable to this case since Respondent's Complaint alleges that the account stated arose between the "parties" (i.e. Respondent and Appellant), not between Appellant and Respondent's alleged predecessor in interest, who is not a party to this action (R. p. 27). In South Carolina, "[a]n account stated implies some previous transaction or indebtedness between the parties." *Meredith v. Fretwell*, 128 S.C. 267, 122 S.E. 767, 767 (1924), but it is undisputed that Respondent, who is a debt buyer, never had any prior financial dealings on this account with Appellant, prior to Respondent's alleged purchase of this credit card debt. Although Respondent now argues that an account stated was created between Synchrony Bank and Appellant, and then assigned to Respondent, Respondent should be limited to the allegations of its Complaint, which has not been amended since it was originally filed. In its supplemental response to Appellant's first interrogatories, which was admitted into evidence at trial, Respondent admits that an account stated was not created between Respondent and Appellant. (Def. Ex. D-10, Interrogatory 19). Appellant attempted to prevent the introduction of any evidence regarding the existence of an account stated created between non-party Synchrony Bank and Appellant, but Appellant's Motion in Limine was denied by the trial court. (R. p. 38, pp. 124-125, p.129 ll. 14-16).

B. EVEN IF THE ACCOUNT STATED CAUSE OF ACTION APPLIES TO THIS CASE, RESPONDENT HAS FAILED TO PROVE ALL OF THE ELEMENTS OF THAT CAUSE OF ACTION

It is very rare for an account stated cause of action to be successful in South Carolina, as Appellant is only aware of one case where it was established, and that was a case involving two businessmen, and it was an express account stated. *Id.* In this case, Respondent has not proven an express account stated between the parties, so must be relying upon an implied account stated. The normal elements of an account stated, upon which the parties agree, require (1) that the account be actually stated (or presented) to the defendant, 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. *So. Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985). In addition, the only case addressing the creation of an implied account stated that Appellant is aware of, only allows an implied account stated to be created between merchants after presentment of the account statement and no objection to it by the defendant after a substantial lapse of time, which our Supreme Court found to be 2-3 years. *Gwathmey v. Burgiss*, 88 S.E. 816, 817 (1916).

Lack of presentment

As to presentment of the account statement, Respondent offered no evidence at trial of any account statement that was presented by Respondent to Appellant. Respondent did introduce into evidence, over Appellant's objection, account statements allegedly created by Synchrony Bank (R. pp. 324-372), but Respondent's Complaint alleged only that the account stated was created between the parties (R. p. 85, ¶ 5), and Respondent should be limited to the allegations of

its Complaint. Even if the court were to consider the Synchrony Bank account statements to be sufficient to serve as the basis for the creation of an account stated between Synchrony Bank and Appellant, there is still insufficient evidence of presentment to satisfy that necessary element. Although Respondent attached numerous alleged account statements to its P-3 exhibit, the only one that is actually relevant (if the court finds that account statements from non-parties are relevant) is the one dated April 23, 2015 that was attached to the Complaint showing a $4,236.78 balance due, since that is the amount Respondent claims is due under an account stated cause of action, and that is the only account statement produced by Respondent in that amount. At first, Respondent argued that the presence of Appellant's name and address on the account statements proved presentment of the statements, which argument the magistrate court agreed with when granting summary judgment to Respondent on the Complaint (R. p. 8). However, that magistrate decision was reversed and remanded after appeal to the circuit court, and the circuit court found, correctly in Appellant's opinion, that showing that information on the account statement did not constitute proof of mailing or presentment. (R. p. 4). (The court also found that there was no proof of an express account stated agreement between the parties as well.) At trial, Respondent relied upon the testimony of its witness, Larry Andrews, to establish presentment of the account statements, which were admitted over Appellant's objections based on relevance, hearsay, lack of personal knowledge under Rule 602, SCRE, lack of authentication, doctrine of completeness, and an improper summary under Rule 1006, SCRE. (R. p. 157, l. 23 – p. 160 l. 3). The trial judge really only commented on the authentication objection when admitting this document into evidence (R. p. 159, l. 21 – p. 160, l. 2), and ignored the other grounds for objection. Appellant believes that all of these grounds for objection have merit, and

asks this court to find that at least one of them is sufficient to make it an abuse of discretion for the trial court to have admitted this exhibit into evidence. As to the trial court's ruling that the document was properly authenticated by Mr. Andrews, Appellant respectfully disagrees, and asks this court to examine that ruling more closely. Appellant believes that Mr. Andrews was not competent to authenticate these Synchrony Bank account statements. Consider his background and experience. He testified at trial as an employee and document custodian for Respondent (R. p. 133, ll. 3-5, p, 134, ll. 18-25) where he has worked for 17 years (R. p. 133, ll. 12-13). He never actually worked for Synchrony Bank, but worked for GE Capital for about 4 years, and GE Capital eventually became Synchrony Bank. (R. p. 133, ll. 16-25). He worked for GE Capital between 1993-1996, and this credit card account wasn't even created until 2012, so it was over 16 years after he left GE Capital, which became Synchrony Bank around 2014 after this account was created, that this credit card account began. Also, during the time he worked for GE Capital, his only job responsibilities were debt collection and skip tracing. (R. p. 166, l. 4 – p. 169, l. 1). He did claim that he attended trainings while at GE Capital on the workings of some other departments there, but that would not give him personal knowledge of those departments. That would only give him hearsay knowledge of their practice and procedures. Also, even if the court were to find that his second-hand knowledge of the workings of other departments at GE Capital was sufficient to allow him to authenticate GE Capital documents, it should be noted that the account statements that he was trying to introduce were created by Synchrony Bank, not GE Capital, and also were created 16 years after he had any personal knowledge, if any, of how those other departments (such as the billing department that would have created the account statements) worked (R. p. 169, ll. 18-24). Even if the court were to find that Mr. Andrews was

able to authenticate the account statements, Appellant still believes that his testimony was insufficient to prove that they were mailed to Appellant. Mr. Andrews claimed (even though he never worked in the billing department) that GE Capital was required by law to mail out the account statements, but that he has no personal knowledge that those statements, including the April 23, 2015 statement that Respondent relies upon to create an account stated, were actually mailed to Appellant (R. p. 190, l. 2 – p. 191, l. 11). So even if this court finds that he was competent to authenticate the account statement that Respondent relies upon to create the account stated, Respondent has no admissible evidence that the account statement was actually presented to Appellant. Appellant therefore asks that this court overrule the trial court's admission of exhibit P-3 into evidence, and find that the account stated cause of action fails for lack of proof of presentment.

Lack of Agreement

However, even if this court finds that the April 23, 2015 account statement was actually presented to Appellant, Appellant believes that there is no proof of an agreement (1) that this alleged account statement was an accurate statement of the account that existed between them, and (2) that the $4,236.78 alleged due in the account statement was due to be paid either at the time of that agreement or at some other specified time, both of which are required to establish the second element of an account stated. Appellant incorporates by reference her arguments on this issue in Appellant's MSJ at pages 6-9 (R. pp. 27-30). As previously noted above, the circuit court in the magistrate court summary judgment appeal found that there was no proof of an express agreement between the parties (R. p. 4), so we must see if an implied agreement was created. The only method that has been recognized in South Carolina to create an implied

account stated agreement is between merchants after lack of objection to a presented account statement after 2-3 years. (*Gwathmey* at 817). That doesn't work for Respondent, both because Appellant is a consumer, and also because Respondent claims to have purchased this account on June 20, 2015 (R. p. 321) and then filed suit on it on January 4, 2017 (R. p. 85), which is less than 2-3 years. Even if you use the date of the April 23, 2015 statement, that time period is less than 2-3 years. Also, Respondent has never argued the creation of an implied agreement based on lapse of objection to the April 23, 2015 statement after 2-3 years. Instead, Respondent argues the creation of an implied account stated based on payment. This doesn't work either, since Appellant never made any payment to Respondent, and the last payment received on this account by Synchrony Bank was alleged to be October 15, 2014 (R. p. 154, l. 22 – p. 155, l. 1). Therefore, there was no payment by Appellant after the April 23, 2015 account statement was allegedly created, even if it was presented, so there can be no implied agreement by payment. Furthermore, as can be seen by reference to Appellant's MSJ at pages 6-9 (R. pp. 27-30), there are at least two South Carolina appellate court cases that have found payments to have been made in account stated collection actions, but both of those cases found that no account stated agreement had been created, in spite of those payments. Appellant therefore believes that Respondent's theory that an account stated can be created by partial payment on an account, and the court's reliance on that theory in its ruling against Appellant (R. p. 12) is a mistake of law and should be reversed by this court. Note also that the law on account stated requires that there be an agreement between the parties about when the agreed balance due is to be paid, which either has to be at the time of the agreement (which didn't happen here in this credit card case) or at some other <u>specified</u> time. This is another reason why account stated theory doesn't work with

consumer credit card accounts, since consumers are never given any kind of amortization schedule from their credit card company to which they can impliedly agree to make payments according to that schedule, and in this case there is certainly nothing in the record that would support agreement to pay at a specified time. Appellant therefore believes that Respondent has failed, as a matter of law, to prove the creation of an account stated between the parties, and the trial court's ruling to the contrary should be reversed.

2. THE TRIAL COURT ERRED WHEN RULING THAT BOTH RESPONDENT AND THIRD-PARTY DEFENDANT WERE NOT LIABLE TO APPELLANT ON APPELLANT'S COUNTERCLAIMS

The trial court ruled against Appellant on all four of her claims as to both Respondent and Third-party Defendant. (Trial Order, p. 13). These claims included the FDCPA, the SCCPC, the SCUTPA, and negligence per se. As to the trial court's holding that Respondent's attorney signing the verified statement of account affidavit was proper, and not a violation of the applicable laws, Appellant does not wish to pursue this claim on appeal; however, Appellant wishes to argue that the trial court's rulings on her other claims were incorrect as a matter of law.

A. THE TRIAL COURT ERRED WHEN RULING THAT THE SCCPC DOES NOT APPLY TO CONSUMER CREDIT CARD ACCOUNTS

On pages 4-5 of the trial order (R. pp. 14-15), the court rules that the South Carolina Notice of Right to Cure statute was not violated when Respondent failed to send a Notice of Right to Cure to Appellant before filing suit, since the SCCPC does not apply to consumer credit card accounts. This ruling is based on a South Carolina United States District Court case named *Bracken v. Simmons First National Bank*, 2014 WL 2613175 (D.S.C. 2014), which the court cites

in its trial Order at page 5 (R. p. 15). Appellant incorporates his arguments on this issue as presented in Appellant's MSJ at pages 1-5 (R. pp. 22-26). Appellant believes that the non-binding *Bracken* case has no persuasive value, since it incorrectly decided a question of South Carolina state law, namely the interpretation of the SCCPC, which really only requires a careful analysis of the definition sections cited in Appellant's MSJ to determine that consumer credit card accounts are regulated by that law. In addition, in Appellant's Trial Exhibit D-8, which are Respondent's responses to Appellant's first discovery requests, Respondent admits in response to Appellant's Request for Admissions # 1 both that Appellant is a consumer and that this credit transaction is a consumer credit transaction within the meaning of S.C. Code Sec. 37-1-201, which is the definition section in question (R. p.402). Although Third-party Defendant did not make a similar admission in its response to the same interrogatory, as to Respondent, it is bound by that admission, which has not been amended since it was made. However, even as to Third-party Defendant, whose responses to Appellant's discovery requests were admitted as Appellant's Ex. D-9, this court should be able to find that the trial court's interpretation of this definition section was in error. This also means that the SCCPC applies to Appellant's other claims under that law, as were stated in Appellant's First Amended Answer and Counterclaims filed March 13, 2018 (R. pp. 108-109).

B. THE TRIAL COURT ERRED WHEN RULING AGAINST APPELLANT'S CLAIM THAT RESPONDENT AND THIRD-PARTY DEFENDANT MISREPRESENTED THE AMOUNT OWED ON THE ACCOUNT

On pages 5-7 of the Trial Order, the trial court ruled that both opposing parties were not liable for the different amounts alleged due on Appellant's credit card account (R. pp. 15-17).

Appellant incorporates by reference his arguments to the court on this issue as shown in the Transcript at pages 173-202 (R. pp. 208-317). First of all, if Appellant is correct that the SCCPC applies to this consumer credit card account, then Respondent's failure to comply with the Notice of Right to Cure statute means that Respondent sued for the wrong amount, since Respondent sued for the full accelerated balance alleged due on the account, and not the amount of any payments that would have become past due at the time of suit. This means that the full accelerated amount claimed due would have been false, misleading or deceptive under both the SCCPC and the FDCPA, but the court didn't analyze that as to the SCCPC, since the court ruled that it did not apply to a consumer credit card collection case. As to the FDCPA, the court correctly points out that the counterclaim was barred due to the one year FDCPA statute of limitation, but the court failed to accept Appellant's argument that the FDCPA could be used defensively as a setoff to any amount found to be due to Respondent on the credit card account even past the statute of limitations had expired (R. pp. 308-309), so this court should allow any FDCPA violations defensively to offset any amount that may be owed to Respondent, if any, on the credit card account.

C. THE TRIAL COURT ERRED IN DENYING APPELLANT'S RULE 52 AND RULE 59(E) MOTION

On December 23, 2019, Appellant filed her Motion to Alter or Amend and for Additional Findings of Fact and Conclusions of Law (Rule 59 Motion) (R. pp.78-83), which the court denied in an summary order filed May 26, 2020 (R. pp. 76-77). Appellant incorporates the arguments in that motion by reference. Appellant believes that the court's summary disposition of this motion violates the rule established by this court in the case of *Lollis v. Dutton*, 421 S.C.

467, 807 S.E.2d 723 (Ct. App. 2017) where the court stated that a decision lacking a discernible reason is an abuse of discretion (*Id* at 487). Appellant also incorporates by reference her proposed order, and its attached exhibits, which were incorporated by reference into this motion (R. pp.46-75). Included in those documents were arguments on evidentiary issues that Appellant believed that the court had incorrectly decided, but the court's summary order on the Rule 59 Motion gives no evidence that these particular issues were even thoughtfully considered by the court in spite of the length to which Appellant went to present those issues in both the Rule 59 Motion and the proposed order which was incorporated into that motion.

CONCLUSION

Appellant therefore requests that the appellate court take the following actions:

1. If appropriate, reverse the trial court's rulings on the contested issues raised above and render a decision on those issues, or
2. If appropriate, reverse the trial court's rulings on the contested issues raised above, and remand such issues as may be appropriate to the trial court for such further actions as may be necessary, and
3. For such other relief as may seem appropriate to the court.

Dated this March 30, 2021

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

THE STATE OF SOUTH CAROLINA
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Third-party Defendant,

Of whom Jennifer Campney is the Appellant

CERTIFICATE OF COUNSEL

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

March 30, 2021

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