IN THE SUPREME COURT OF MISSOURI

SC90902

ROYAL FINANCIAL GROUP, LLC
RESPONDENT
VS.
MARGARET A. GEORGE
APPELLANT

Appeal from the Circuit Court
Twenty-First Judicial Circuit
St. Louis County, Missouri
The Honorable Sandra Ferragut-Hemphill
Case No. 08SL-AC29780
Appeal No. ED-92972

APPELLANT'S SUBSTITUTE BRIEF

ORAL ARGUMENT REQUESTED

THE PERRON LAW FIRM, P.C.

MARTIN L. PERRON, MOBAR #26783
MARIA V. PERRON, MOBAR #31739
mlp@perronlaw.com
mvp@perronlaw.com
275 N. LINDBERGH BOULEVARD
ST. LOUIS, MO 63141-7809
(314) 993-4261
(314) 993-3367 (FAX)
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from a final judgment entered after a bench trial. The counterclaim of Defendant Margaret A. George was tried in the Associate Circuit Division of the Circuit Court of St. Louis County, Missouri before the Honorable Sandra Ferragut-Hemphill. Plaintiff Royal Financial Group, LLC had voluntarily dismissed its Petition a few days before. The appeal does not involve: (1) the validity of a treaty or statute of the United States or of a Missouri Constitutional provision or statute; (2) the construction of a Missouri revenue law; (3) the title to any state office; or (4) the death penalty. Therefore, this appeal is and was within the general appellate jurisdiction conferred upon the Court of Appeals by Article V, §3 of the Missouri Constitution and the territorial jurisdiction conferred upon Court of Appeals, Eastern District by R.S.Mo. §477.050. After the Court of Appeals issued its opinion and Respondent Royal Financial's Application for Transfer filed with the Court of Appeals under Rule 83.02 Mo.R.Civ.P. was denied, Respondent Royal Financial filed an Application for Transfer pursuant to Rule 83.04, which was granted by this Court June 29, 2010.

INTRODUCTION

The Plaintiff in this lawsuit is Royal Financial Group, LLC, which filed a lawsuit against Defendant Margaret George seeking to collect an old credit card debt she allegedly owed to another, the assignee/original lender Chase Manhattan Bank. Margaret George raised the statute of limitations and asserted that Royal Financial Group, LLC was not the

real party in interest and had no authority to bring the lawsuit. In addition to those affirmative defenses, she alleged in her counterclaim that Royal Financial had violated the *Fair Debt Collection Practices Act*, 15 U.S.C.A., Section 1692 *et seq.* (FDCPA) in its efforts to collect that old credit card debt. Plaintiff refused to reveal the details of the debt allegedly owed by Margaret George despite a Court Order compelling Royal Financial Group to respond to discovery requests. When Margaret George filed a Motion to have Plaintiff's lawsuit dismissed with prejudice for failure to comply with that Court Order, Royal Financial dismissed its lawsuit without prejudice. The Counterclaim of Defendant was tried to the Court April 29, 2009. Defendant Margaret George testified that she was subjected to harassing telephone calls before the lawsuit was filed; however, on the day of trial she could not recall the name of the law firm making those calls. Defendant does not appeal from the ruling that her testimony was insufficient to show that the phone calls were from Royal Financial Group or its attorney. Defendant Margaret George does, however, appeal from the other rulings of the Court finding that there was no evidence, or not sufficient evidence, to support Defendant's claim that Plaintiff violated the FDCPA by filing and continuing to prosecute a lawsuit falsely stating she was liable on an alleged credit card debt which was, in any event, barred by the five-year statute of limitations.

Introduction on Transfer to the Supreme Court

This Substitute Brief is essentially Appellant's Brief filed in the Eastern District with the addition of : a summary of the points made by the parties, and the admissions made by Royal Financial, during oral argument; a discussion of an opinion handed down by the U.S.

Supreme Court after the Eastern District's March 30, 2010 opinion; a new Point III not presented to the Eastern District; and a new section explaining why no remand is necessary.

STATEMENT OF FACTS

Procedural History Prior to Trial

Plaintiff Royal Financial filed its *Petition for Breach of Contract* against Defendant Margaret George July 30, 2008 (LF 5; Exh. A.)[1] According to the caption of that Petition, Royal Financial was acting as the "Assignee of Chase Manhattan Bank U.S.A., N.A. (Visa/MasterCard)." The prayer was for a judgment against "Defendant(s)" for an alleged unpaid principal amount of $2,209.24, plus $727.77 in interest, attorney fees in the amount of $331.38, additional interest up to and after judgment, and costs. (*Id.*) Stapled to the Petition were four photocopy pages which appear to be a portion of a MasterCard or Visa Cardmember Agreement (LF 5-9; Exh. A.). This agreement does not mention Margaret George. (*Id.*) The words "Chase Manhattan Bank" are written by hand on the first page. (*Id.*) The only date on the agreement is "9/98" printed on the bottom of the first page. (*Id.*)

The Summons and Petition were served on Margaret George September 18, 2008 (LF 1; Exh. A), who was then in her eighth decade and in poor health. (TR pp. 10, 16.) In due course The Perron Law Firm, P.C. was retained to represent Margaret George and

[1] References to "TR" are to pages of the Transcript on Appeal; References to "LF" are to pages of the Legal File; Exhibits are identified by their numbers.

Defendant's Answer, Affirmative Defense and Counterclaim was filed September 26, 2008. (LF 10-14.) A copy was sent to Plaintiff's attorney with a letter (Exhibit B) stating:

> Dear Mr. Whealen:
>
> Enclosed are copies of Defendant's Answer, Affirmative Defense and Counterclaim and our Entry of Appearance which are, I hope, self-explanatory. If you are going to be in Division 42 on Monday, can you continue the matter to the next call docket?
>
> Ms. George thinks she had a MasterCard in 1999 or 2000 but can find no documentation. She seems certain she has not used any credit card since that time. Her recollection is consistent with the few pages of the card members' agreement attached to your Petition. There was no affidavit or other paperwork with the Petition which was served on Ms. George. We will submit discovery requests in a day or so asking for information to show when the last transaction took place and so forth. If you have that information at your fingertips now, I would appreciate it if you sent it along.

Defendant Margaret George denied owing anything to Plaintiff or its stated assignor, and raised two affirmative defenses; that the lawsuit was barred by the five-year statute of limitations set out in Section 516.120(1) R.S. Mo. and that Plaintiff was not the real party in interest and/or lacked standing to sue. (LF 10-11) In her *Counterclaim* Margaret George alleged that Royal Financial Group, LLC violated the Fair Debt Collection Practices Act, 15 U.S.C.A., Section 1692 *et seq*. in several specific respects. (LF 11-12) The gravamen of the

Counterclaim was the same as the denial of her Answer and the affirmative defenses: That she did not owe Royal Financial or Chase Manhattan anything and that any suit against her on any credit card account was barred by the statute of limitations. In her Counterclaim, Margaret George alleged several alternative allegations of violations of the FDCPA using the exact language from Sections 1692e and 1692f. (LF 11-12) The most relevant allegations of paragraph 6 of her Counterclaim, followed by references to the section of the FDCPA tracked by that particular allegation in brackets, are these:

A. Made a false representation of the character, amount or legal status of a debt [1692e(2)(A)];

B. Used false representations or deceptive means to collect or attempt to collect a debt [1692e(10)];

C. Attempted to collect amounts of money not expressly authorized by any agreement[1692f(1)];

D. Attempted to collect an amount not permitted by law [§1692f(1)];

Margaret George alleged that as a result of those violations of the FDCPA she experienced mental and emotional distress, and/or was required to hire an attorney to represent her and defend the lawsuit. She prayed for these actual damages, nominal or statutory damages, and her reasonable attorneys' fees. (LF 13)

In October, 2008 Margaret George submitted the interrogatories and production requests mentioned in the above letter giving Plaintiff Royal Financial Group, LLC an opportunity to support the allegations in its Petition. (LF 1, 17-18) In addition to asking for

such details as when the alleged debt was incurred and how the amounts claimed were calculated, Margaret George specifically requested that Royal Financial identify the original creditor and explain how it acquired the right to file the lawsuit on a Chase Manhattan credit card. (LF 19-26) Royal Financial objected to Interrogatory Number 5 which inquired about its interest in the original debt, and refused to state when, from whom, and for how much it secured an assignment, if there was one, and also refused to produce documents, arguing that those details were irrelevant and proprietary. (LF 28-29) There was no response at all to any of the other discovery requests. (LF 15-16)

Defendant Margaret George filed a motion to compel Royal Financial to answer the interrogatories and respond to the production requests, and on February 2, 2009 Royal Financial was ordered to respond to discovery in twenty (20) days. (LF 15-30, 31) When there was no response Margaret George filed a motion to dismiss Royal Financial's lawsuit for failing to comply with the Court's Order. (LF 32-33) That motion to dismiss was denied on March 30, 2009. (LF 34)

Defendant Margaret George filed her *Second Motion to Dismiss and for a Protective Order* on April 8, 2009 because Plaintiff Royal Financial still had not complied with the Order of February 2, 2009. (LF 35-36) In that Motion Defendant prayed for dismissal of Royal Financial's lawsuit with prejudice and a protective order prohibiting Royal Financial from using any evidence which would have been responsive to those interrogatories and production requests. (LF 35-36) When that Motion was presented to the Court on April 27, 2009 Plaintiff Royal Financial voluntarily dismissed its Petition without prejudice and the

Court denied the Motion as "moot." (LF 37) The case already was set for a bench trial April 29, 2009. (*Id.*)

Proceedings at Trial

The Counterclaim of Margaret George against Royal Financial Group, LLC was tried to the Court April 29, 2009. The Summons and Petition served upon Margaret George, showing that she was sued by Royal Financial Group, LLC, acting as the Assignee of another creditor seeking to collect a debt allegedly owed to that other creditor by Margaret George, was marked as Exhibit A and received into evidence without objection. (TR 11, 32; Exh. A) Royal Financial admitted that it initiated the lawsuit against Margaret George. (TR 40, line 19) It was one of a number of such cases on a bulk collection docket. (TR 40, line 5) Margaret George explained that although she did not currently use a credit card she had one in the past. (TR 12-13) She could not recall what kind of credit card it was. *(Id.)* She only had one credit card and had not used that credit card or made any payments on it during the nine years prior to trial. (TR 13) She also explained that, except for being sued by Royal Financial Group, LLC, she never had any business dealings with Plaintiff Royal Financial and had no idea why she would owe Royal Financial any money. (TR 16-17) On cross-examination, Margaret George was asked ten questions by the attorney for Royal Financial. (TR 18) In her responses to the first three questions, she repeated that she only had one credit card ever, and emphasized that she had not made any payments on that credit card account for at least nine years prior to the day of trial. *(Id.)* In response to the remaining

questions Margaret George repeated that she could not recall the names of persons who called her before the lawsuit was filed. (*Id.*)

Margaret George's daughter Karen testified; she also identified Exhibit A, the Summons and Petition, which she had received from her mother and explained how she helped her mother find an attorney. (TR 19-20) Karen described how her mother seemed to be emotionally upset because of telephone calls she had received, apparently from someone at a law office, demanding that a debt be paid. (TR 20-26) When Margaret George was served with the Summons and Petition (Exhibit A) she called her daughter and told her "Karen, look at those people that were calling me, gave me this." (TR 19) Margaret George was crying and shaking and concerned someone would be yelling at her again. (TR 20-22) Even after she was served with the suit papers, Margaret George was afraid to answer the telephone because a debt collector might be calling. (TR 25-26) Karen and her siblings found an attorney to represent her mother and paid a retainer. (TR 23-24) The cross-examination of Karen consisted of approximately ten questions and Karen agreed she did not know, or could not remember, the identity of the persons who had called her mother or the name of the law firm trying to collect the debt. (TR 26-27)

A motion for attorney's fees was made. (See Supplemental Legal File, 55-56) The attorney for Margaret George also testified regarding the work done by The Perron Law Firm, P.C. on the case, and he submitted documents detailing the time invested in the lawsuit and the reasonable value of an attorney's time in such a case. (TR 27-30) Two of these documents, a table summarizing the hours worked accomplishing various tasks and an

attestation of Martin L. Perron were received into evidence. (Exh. A-4 and A-5; TR 34, 35) Affidavits of other attorneys and a photocopy of an Order and Judgment awarding attorney fees of approximately $265/hr. in a FDCPA case in St. Louis County were offered into evidence but were refused. (Exh. A-1, A-2 and A-3; TR 30)

Plaintiff Royal Financial argued, at the conclusion of the evidence, that Margaret George could not remember the names of the lawyers who had made the harassing telephone calls or who they represented so there was no evidence, or insufficient evidence, that Royal Financial was responsible for those phone calls as alleged in subparagraph G of paragraph 6 of the Counterclaim. (TR 38, lines 8-25) Royal Financial's other arguments did not challenge Defendant's evidence as to its credibility or accuracy; rather, the Plaintiff tried to persuade the Trial Court that there was no "evidence" of the FDCPA standards, since the statutes themselves had not been admitted into evidence.[2] (TR 37, lines 22-25 through 38, lines 1-7) The prayer for damages for emotional distress was not proven, according to Royal Financial, because there was no medical evidence. (TR 45) Royal Financial attacked the claim for attorney's fees, although it recognized that Ms. George's attorney could testify about his hourly rate. (TR 42, lines 1-2) A claim of 1.2 hours for travel to and from court to appear for a call docket September 29, 2009, the Monday mentioned in the September 26, letter, was challenged; Royal Financial reminded the Trial Court that this was on the "bulk

[2] Much of the Plaintiff's argument concerned a malicious prosecution claim which was not part of the Counterclaim. (TR 39-40)

collection docket" so no individual case would receive more than 30 seconds' attention. (TR 42, line 4-12). Royal Financial also understood that ". . . the point of the FDCPA and the point of the attorney's fees provision of the FDCPA is so that creditors who are debt collectors who do take advantage of the system don't have an unfair advantage because they have money." (TR 42, lines 12-15). After considering the evidence and the arguments of the attorneys, the Trial Court made her ruling:

> THE COURT: Okay. With respect to Plaintiff's Motion for Judgment at the close of the defendant's case, the Court, in reviewing the counterclaim filed by the defendant in this cause, and after hearing the testimony of Ms. George with respect to her counterclaim filed, would grant the plaintiff's Motion for Judgment at the close of defendant's case and rule in the plaintiff's favor for the following reasons.
>
> One, the Court does not have any evidence in the record with respect to the plaintiff making a false representation of the character, amount, or legal status of the debt. The Court does not have any evidence that the plaintiff used false representations or deceptive means to collect or attempt to collect the debt. The Court does not have any evidence that the plaintiff attempted to collect amounts of money not expressly authorized by any agreement. The Court does not have any evidence that the plaintiff attempted to collect an amount not permitted by law. The Court does not have any evidence that -- or sufficient -- I'm saying any, but I should say sufficient

evidence. So I'll correct my ruling with respect to my previous statements in that way. That there is insufficient evidence to show that the plaintiff communicated credit information, which was known or which should have been known to be false. That there is insufficient evidence to show that the plaintiff instigated and continued to prosecute the lawsuit against the defendant maliciously and without reasonable grounds in one or more of the following respects, as outlined in paragraph F of the counterclaim filed by the defendant.

The evidence presented that the Court has before it is that the defendant received some phone calls. She is unable to identify any information regarding those phone calls which can be specifically attributed to the plaintiff in this action, Royal Financial Group, LLC. Based on the testimony that the Court has before it, the Court finds that that testimony is insufficient to infer that -- those phone calls were, in fact, received from Royal Financial Group.

So for -- let me make sure I've covered everything else. Oh, further, that there was insufficient evidence to show, as pled, that during the preceding 12 months that the plaintiff had regularly and repeatedly contacted the defendant by making -- by telephone, by making threats and demands for payment, oftentimes at least two or three times a week -- a day, I'm sorry. That there was insufficient evidence to show that the plaintiff told her that it was too late for her to receive documentation to show that the claimed debt was valid.

There is insufficient evidence in the record to show that anything could be attributable to the plaintiff which showed that they acted maliciously and without reasonable grounds as set forth in the counterclaim.

So, for all of those reasons, the Court hereby enters judgment in favor of the plaintiff. Costs on the counterclaim will be assessed against the defendant. (TR 47)

Proceedings before the Court of Appeals

Margaret George filed a timely appeal from the above judgment of the Trial Court. She was allowed to file a Supplemental Legal File consisting of her Trial Memorandum and her Motion for Attorney's Fees which were presented to the Court and discussed during the trial, but were not filed. In due course Briefs were filed. The parties argued March 16, 2010 and the audio CD of that oral argument is part of the record before this Court.[3] Margaret George argued that her case could be summarized by two exhibits and a few lines from the transcript of her testimony at Trial. Exhibit A, which was admitted into evidence without objection from the Respondent Royal Financial, was the Summons and Petition which had been served upon Margaret George. (1:30) Stapled to the Petition were copies of a few pages of a cardmember agreement dated "9/98." (2:35) Exhibit B,

[3] The argument on audio CD is 26 minutes and 31 seconds long (26:31). References in this Brief to portions of the argument such as "15:50" indicate the approximate time during the argument when a statement was made.

likewise received into evidence by the Trial Court without objection from Respondent Royal Financial, was a letter from Margaret George's lawyer to the attorney.

During its oral argument, Respondent Royal Financial primarily maintained that it was not necessary to consider the Fair Debt Collection Practices Act since the Trial Court had "discretion" to basically do whatever it wished. (19:45) Respondent's attorney was nonetheless questioned extensively about the Fair Debt Collection Practices Act and the details of its case against Margaret George.

During oral argument Royal Financial admitted that it and its lawyer dismissed the case against Margaret George a few days before trial because they "did not have sufficient paperwork to prove our case." (15:50). Royal Financial explained that it did not dismiss the lawsuit earlier because claiming a violation of the FDCPA had become a "cottage industry." (17:20) Royal Financial also candidly admitted that a fundamental problem, from its perspective, with "purchased debt cases" like this one was that even if Royal Financial or its attorneys could have come up with some paperwork to support the claims in its Petition, they still could not have proven their case when challenged because of recent judicial opinions. (17:50-18:30) Royal Financial confessed during its oral argument that the FDCPA was a "strict liability" statute. (19:15) The only FDCPA authority mentioned by Royal Financial during its oral argument was an unnamed opinion from the 6th Circuit holding that a law firm and its client do not violate the FDCPA by filing a lawsuit when the necessary proof is not then in hand. (20:40) Royal Financial agreed, in response to a series of questions from the bench, that filing a lawsuit on a claim

which was barred by the statute of limitations could be a violation of the FDCPA; but asserted that Margaret George had not proven her case on this point since a copy of the applicable statute never was introduced into evidence. (21:30-22:10) Respondent concluded by once again urging that this was not an FDCPA case; rather, it was a "burden of proof" case. (22:20)

Approximately two weeks later, on March 30, 2010, the Court of Appeals issued its opinion in this matter. Initially, although the opinion stated in the text that Margaret George was entitled to attorney's fees of $5,986.00, in its Conclusion the Eastern District directed the Trial Court to award fees in the amount of $5,581.50. On April 13 a substitute page was handed down which corrected the clerical error. The substituted page is included with the opinion which is attached to this Brief as part of the Appendix.

POINTS RELIED ON

I.

The Trial Court erred when it found that there was no evidence, or no substantial evidence, that Plaintiff

a. Made a false representation of the character, amount or legal status of the debt in violation of the FDCPA;

b. Used false representations or deceptive means to collect or attempt to collect a debt in violation of the FDCPA;

c. Attempted to collect an amount not expressly authorized by an agreement in violation of the FDCPA; and/or

d. Attempted to collect an amount not permitted by law in violation of the FDCPA;

Because those rulings are not supported by substantial evidence, are against the weight of the evidence and/or erroneously apply the law, in that the only evidence was that Margaret George never had the credit card debt with Royal Financial as alleged in the Petition, by assignment or otherwise, or if she did, any action on that account was barred by the five year statute of limitations.

Clark v. Capital Credit & Collection Serv., Inc., 460 F.3d 1162, 1176 (9th Cir. 2006)

Kimber v. Fed. Fin. Corp., 668 F.Supp. 1480 (M.D. Ala. 1987)

Freymouth v. Credit Bureau Services, Inc., 248 F. 3d 767, 771 (8th Cir. 2001)

Capital One v. Creed, 220 S.W.3d 874 (Mo. App. S.D. 2007)

15 U.S.C.A. Section 1692 et. seq.

II

The Trial Court erred when it refused Exhibits A1, A2, and A3 , which where copies of an unpublished Order and Judgment from March 2008 awarding Margaret George's attorney fees of a certain amount in the prosecution of an FDCPA case in St. Louis County against the assignor of a credit card account, and two affidavits submitted in that case, because Margaret George was entitled to reasonable attorney's

fees as actual damages in her FDCPA case and under the statute itself in that those exhibits were proper indicators of the amounts reasonably recovered in similar cases.

Hensley v. Eckerhart, 461 U.S. 424, 443-446 (1983)

Hennessy v. Daniels Law Office, 270 F.3d 551 (8th Cir. 2001).

Alhalabai v. Missouri Dept. of Natural Resources, 300 S.W.3d 518. (Mo. App. E.D. 2009).

*15 U.S.C.A. Section 1692*k

POINT III

The Trial Court erred when it denied Margaret George's Motion for Sanctions seeking an order prohibiting Royal Financial from using information not produced at trial as moot in that the requested discovery may have been relevant to the pending Counterclaim and the failure to prohibit the use of any evidence which should have been disclosed in discovery was inconsistent with the previous Order of the Court, would have rewarded Plaintiff/Respondent Royal Financial for its failure to produce documents and answer interrogatories despite the Order of the Court compelling it to do so, and would be an occasion of surprise and prejudice for Defendant/Appellant Margaret George so that the Court's failure to sustain the Motion in that regard was an abuse of discretion.

State ex rel Delmar Gardens North Operating, LLC. v. Gaertner, 239 S.W.3d 608, 610 (Mo. 2007)

Ferguson v. Strutton, 302 S.W.3d 239, 243 (Mo.App. S.D. 2009).

Rule 61.01 (Mo.R.Civ.P.)

ARGUMENT

Standard of Review

Point I: Submissibility

Under the rule announced in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976), the judgment should be reversed if it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. If, as in this case, the facts are not contested, then the issue is legal and the rulings of the trial court are entitled to no special deference. *Bd. Educ. St. Louis v. Missouri Bd. Educ.*, 271 S.W.3d 1,7 (Mo. banc 2008). That is, a trial court sometimes has the right to disbelieve any evidence, even if uncontradicted, but it does not have the right to disregard uncontroverted competent evidence without an express finding of incredibility; when the evidence at a bench trial is uncontroverted and the trial court has not specifically found the witness incredible, appellate courts will not presume that the trial judge found a lack of credibility and will not affirm on that basis. *Rugg v. Dir. Rev.*, 271 S.W.3d 613, 617 (Mo App E.D. 2008); *Little v. Vincent*, 248 S.W.2d 714 (Mo. App. S.D. 2008). Whether or not the Trial Court was correct when it stated there was not sufficient evidence to prove a violation of the FDCPA is a question of law for this Court to review *de novo*. *Alhalabai v. Missouri Dept. of Natural Resources*, 300 S.W.3d 518, (Mo.App. E.D. 2009)

If this had been a motion for summary judgment based upon an affidavit of Margaret George which said (1) she was served with a Summons and Petition, Exhibit A; (2) the credit

card account with Chase Manhattan Bank mentioned in the caption of the Petition was not hers; and (3) in any case if she did have a credit card with Chase Manhattan Bank, she had not used it or made any payments on it for nine years or more; and Royal Financial did nothing to rebut those statements, then the unrebutted, uncontradicted affidavit would be accepted as true and Margaret George would be entitled to summary judgment for the reasons set out below. This is essentially what happened at trial. Ms. George's unchallenged, uncontradicted sworn statements are not entitled to less weight or respect when delivered orally in open court than they would have been if presented in the form of a written affidavit; at least not without a specific finding that her testimony was incredible. The Trial Court found Ms. George to be a credible witness. The Trial Court specifically noted, for example, that she believed Margaret George received the harassing phone calls from someone, but ruled against her because she was unable to say who made those calls:

> The evidence presented that the Court has before it is that the defendant received some phone calls. She is unable to identify any information regarding those phone calls which can be specifically attributed to the plaintiff in this action. (TR 47)

This can only mean that the Trial Court found Margaret George credible as to the facts to which she *could* testify: i.e., that she received phone calls, and that she had not used her credit card or made any payments on it in at least nine years, that she had been served with suit papers. This obviously is a case where the Court misapplied the law to the uncontested facts.

Point II: Exclusion of Evidence

Point III: Ruling on Pre-Trial Motion

This court's review of the exclusion of evidence is limited to an abuse of discretion standard. *Oldaker v. Peters*, 817 S.W.2d 2245, 250 (Mo. banc 1991). The focus is not on whether the evidence was admissible, but on whether the court abused its discretion in excluding the evidence. *Lohmann v. Norfolk & W. Ry.*, S.W.2d 659, 671 (Mo. App. 1997). Evidentiary rulings are presumed to be correct; but are reversed when an abuse of discretion is shown *Anglim v. Missouri Pac. R.*, 832 S.W.2d 298, 303 (Mo. banc 1992). Abuse of discretion exists when, in excluding evidence, the materiality and probative value of the evidence were sufficiently clear, and the risk of confusion and prejudice so minimal, that a reviewing court could say that it was an abuse of discretion to exclude it. See *Mead v. Grass*, 461 S.W.2d 708, 710 (Mo. 1971). *Still v. Ahnemann*, 984 S.W.2d 568, 572 (Mo.App. W.D. 1999). Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876, 881 (Mo. banc 1993). Similarly, this Court will only disturb the Trial Court's ruling on a motion to exclude evidence for failure to engage in discovery if there is an abuse of discretion. *Ferguson v. Strutton*, 302 S.W.3d 239, 243 (Mo.App.S.D. 2009).

Point I

The Trial Court erred when it found that there was no evidence, or no substantial evidence, that Plaintiff

a. Made a false representation of the character, amount or legal status of the debt in violation of the FDCPA;

b. Used false representations or deceptive means to collect or attempt to collect a debt in violation of the FDCPA;

c. Attempted to collect an amount not expressly authorized by an agreement in violation of the FDCPA; and/or

d. Attempted to collect an amount not permitted by law in violation of the FDCPA;

Because those rulings are not supported by substantial evidence, are against the weight of the evidence and/or erroneously apply the law, in that the only evidence was that Margaret George never had the credit card debt with Royal Financial as alleged in the Petition, by assignment or otherwise, or if she did, any action on that account was barred by the five year statute of limitations.

All of the evidence before the court supports the allegations of the Counterclaim. The Petition, Exhibit A, does not refer to Margaret George except where she is named in the

caption. (LF 1) There is no allegation of an assignment[4]. (LF 1) There are references to advancement of monies, charges which are said to be fair and reasonable and an unpaid principal balance of a certain amount is claimed; but there is no statement of when the monies were advanced, when the charges were made, how much they were and why they were fair and reasonable. An attached "Cardholder Agreement" was incorporated into the Petition; but it adds nothing to explain the allegations or which is otherwise helpful besides the date "9/98." (LF 6-9) There is no reference to Margaret George, her address in Florissant, or even the State of Missouri. *(Id.)* It does not mention Royal Financial at all. The "Cardmember Agreement" is not accompanied by any statement, demand, invoice or other paper identifying Margaret George, stating when a credit card was used, or a payment was made, or an unpaid

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[4] Missouri employs what is commonly referred to as fact pleading, *Luethans v. Wash. Univ.*, 894 S.W.2d 169, 171 (Mo. banc 1995). Fact pleading demands a relatively rigorous level of factual detail. See *State ex rel, Papin Builders, Inc. v. Litz,* 734 S.W.2d 853, 858 (Mo. App. E.D. 1987) (overturned on other grounds). Under the fact pleading regime, the petition must describe ultimate facts demonstrating entitlement to the relief sought. *Westphal v. Lake Lotawana Ass'n.*, 95 S.W.3d 144, 152 (Mo. App. W.D. 2003). A valid petition states " 'fact[s] in support of each essential element of the cause pleaded.'" *Brock v. Blackwood*, 143 S.W.3d 47, 57 (Mo. App. W.D. 2004) (emphasis added) *380 (quoting *Duvall v. Lawrence*, 86 S.W.3d 74, 80 (Mo. App. E.D. 2002) See also, *Green v. Penn America Ins. Co.*, 242 S.W.3d 374, 379-380 (Mo. App. W.D. 2007).

balance of a particular amount was due. (LF 9, Ex A) Such a petition is a communication within the meaning of the FDCPA. See e.g. the discussion and citations in *Eichman v. Mann Bracken, LLC*, 889 F.Supp. 2d 1094, 1099-1100 (W.D. Wis. 2010). Exhibit A itself can be evidence of a violation of the FDCPA. *(Id.)*

Exhibit B is a letter sent to the attorney for Royal Financial September 25, 2008 when Margaret George filed her Answer and Counterclaim. The letter points out that there were no statements, notices, affidavits or other information with the Petition and requests something to show that there were transactions involving Margaret George, details and documents and when they occurred. This letter was followed by interrogatories and production requests asking for details and documents which would show Margaret George actually owed any money to Royal Financial. (LF 17-26) Nothing was ever produced. (LF 15-16, 27-35)

Presumably there must have been something, a bit of data on a compact disk, which brought Margaret George's name to the attention of Royal Financial. The failure of Royal Financial to respond to the September 25, 2008 letter raises a presumption that the responsive information would show that Margaret George did not owe Royal Financial anything. The failure of a party like Royal Financial to provide documents evidencing an alleged debt authorizes a strong presumption that such documentation would not have been favorable to that party; that the alleged loan or debt does not exist. *Morris v. Holland*, 529 S.W.2d 948, 953 (Mo. App. S.D. 1975). The strong presumption became increasingly powerful as Royal Financial repeatedly failed to produce anything in response to interrogatories and production

requests despite a court order compelling it to provide answers and documents. (LF 32-33) This failure was emphasized again, and the presumption strengthened even further, when Royal Financial sent its attorney to trial without an assignment, without a witness to rebut the allegations of the Counterclaim or a single document to use to cross-examine Margaret George or her witnesses or cast doubt on the testimony that she owed nothing.

Margaret George testified that she received the Summons and Petition which are Exhibit A, at the address in Florissant where she had been living for nine years. (TR 12). The "PETITION FOR BREACH OF CONTRACT." recites that the Plaintiff Royal Financial Group, LLC advanced money to the Defendant, Margaret George, that there were certain charges which were fair and reasonable and that Margaret George owes Royal Financial a certain amount of money plus interest and attorneys' fees. (LF 5; Ex A) A reasonable person would have understood that Royal Financial was claiming that Margaret George owed it some money. Margaret George testified that she did not know or recognize Royal Financial Group, LLC, never had any dealings with that company, and could not think of any reason why she would owe it money. (TR 17) The allegations in the Petition are therefore false according to all the evidence presented at trial. There is no evidence or presumption or inference to support any other finding or ruling except that Margaret George did not owe Royal Financial any money based on any legal theory. Certainly the sparse, generic allegations in the Petition and the boilerplate "Cardholder Agreement" with the handwritten "Chase Manhattan Bank" at the top does not connect any loan, credit card or debt in any amount to Margaret George. As explained below, the FDCPA is a strict liability statute. Because Royal Financial filed a

lawsuit against Margaret George attempting to collect a debt and its Petition contained false representations about the existence or status of a debt and the amounts that were owed by her, Margaret George made a case that Royal Financial violated the FDCPA which was never rebutted. See e.g. the discussion in *Clark v. Capital Credit & Collections Servs., Inc.*, 460 F.3d 1162 (9th Cir., 2006).

Even if the trial court believed for whatever reason that there really was a MasterCard or Visa issued to Margaret George by Chase Manhattan Bank and that, despite the complete absence of any proof, or even a correctly stated allegation, of such an assignment, Royal Financial had a legitimate right to collect that debt, Margaret George established by her unrebutted testimony that such a credit card could not have been used, and no payments could have been made, during the nine years before the time of her testimony, or perhaps eight or nine years before the lawsuit was filed. (TR 13) That is, she had not had any credit card for the nine years she was at St. Patrick's Apartments, a retirement home in Florissant. (TR 10) This testimony of Margaret George, is supported by Royal Financial's Petition (Exh. A) since the credit card agreement, if it was at all related to Margaret George, was dated September, 1998. If Margaret George had been silent after she said she was served with the Summons and Petition, and that document, Exhibit A, was her only evidence, she still would have proven that she was sued in 2008 on a 1998 agreement somebody made with a lender. Certainly there is nothing to challenge her testimony or cast any doubt on its accuracy. So if she was ever in default on any credit card, it had to have been more than five years before she was sued.

The FDCPA is a strict liability statute. *Clark v. Capital Credit & Collections Servs., Inc.*, 460 F. 3d 1162, 1176 (9th Cir. 2006);[5] *Picht v. John R. Hawks, Ltd*, 236 F.3d 446, 451-452. (8th Cir. 2001). It is not necessary for Margaret George to show that Royal Financial acted with any particular intent or any certain degree of knowledge; whether its violation of the FDCPA was accidental or deliberate; or whether its conduct was innocuous or abusive. *Clark, supra at 1176.* These issues are only relevant to the amount of damages. *Id.*[6] Once

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[5] The Ninth Circuit in *Clark*, like other courts before and after, was persuaded that the FDCPA was a strict liability statute because of the remedial nature of the legislation, the clear intent to provide a remedy for abusive tactics, and the fact that Congress gave debt collectors an opportunity to avoid liability by affirmatively showing that the violation was not intentional, but was, rather, the result of a "bona fide error". Section 1692k(c). This narrow bona fide error defense must be affirmatively pled and proven by the debt collector. *Clark, supra.* See the discussion of the recent opinion from the U.S. Supreme Court, *Jerman v. Carlisle, infra*.

[6] Actual damages are available to any person injured by a violation of the FDCPA. 15 U.S.C. § 1692k(a)(1). Such actual damages encompass damages for emotional distress. *See Zhang v. American Gem Seafoods*, 339 F.3d 1020, 1040 (9th Cir.2003) (upholding emotional damages based only on testimony); *Johnson v. Hale*, 13 F.3d 1351, 1352 (9th Cir.1994) (stating that emotional damages may be awarded based only on testimony or appropriate inference from circumstances); *Smith v. Law Office of*

a debtor like Margaret George establishes a *prima facie* case liability attaches; even if she did not have any actual damages. See e.g. *Lemire v. Wolpoff & Abramson*, 256 F.R.D. 321, 326 (D. Conn. 2009); *Hepsen v. J. C. Christensen and Associates, Inc.*, 2009 WL 3064865 (M.D. Fla. September 22, 2009.) *Lemire* was a class action lawsuit where liability for violating the FDCPA was predicated upon the accuracy of letters sent by a debt collector and/or its law firm. The Court in *Lemire* explained that potential class members who never actually saw the

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Mitchell N. Kay, 762 F.Supp. 82 (D.Del.1991) (actual damages awarded pursuant to FDCPA include not only out-of-pocket expenses but also damages for personal humiliation, embarrassment, mental anguish, or emotional distress). Proof of physical injury is not necessary to obtain an award of emotional distress damages under the FDCPA. *See Bingham v. Collection Bureau, Inc.*, 505 F.Supp. 864 (D.N.D.1981) (awarding actual damages to consumer for loss of happiness, interest in housework, and sleep, and for nightmares, headaches, sensitive stomach and crying spells, but no permanent ill effects); see also *Nelson v. Equifax Information Services LLC*, 522 F.Supp.2d 1222 (C.D. Ca. 2007) (finding no manifest error in the jury's award of $85,000 in actual damages arising from Plaintiffs emotional distress after FDCPA violation); *Venes v. Professional Service Bureau, Inc.*, 353 N.W.2d 671 (Minn. App.1984) (actual damages include attorney fees for defending the collection suit and costs associated with travel to court.).

offending letter, because it had been sent to their attorneys, had suffered an "injury" nonetheless and so would be entitled to relief under the statue. Similarly, in *Hepsen*, a plaintiff who had received a letter which falsely stated or described a debt in violation of the FDCPA was still entitled to judgement in his favor even though he submitted no proof of inconvenience, worry, distress or other actual damages caused by the false statements or representations of that letter. In such a case, where there was a violation with no actual damages, the plaintiff is entitled to statutory damages, up to $1,000, plus his reasonable attorneys' fees and costs. *Jerman v. Carlisle, infra* at 1609; *Hepsen v. Christensen, supra*, at *7; *Lemire, supra,* at 326.

The above cases which hold the FDCPA applies to collection litigation are not unique or unusual. *See Jerman v. Carlisle, infra; Heintz v. Jenkins,* 514 U.S. 291 (1995) " [W]e agree with the Seventh Circuit that the Act applies to attorneys who "regularly" engage in consumer-debt-collection activity, even when that activity consists of litigation." *Heintz, supra* at 299 *See also, Sayyed v. Wolpoff & Abramson*, 485 F.3d 226 (4th Cir. 2007) (false and deceptive interrogatories are a violation of the FDCPA); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472 (7th Cir. . 2000) (false and deceptive complaint is a violation of the FDCPA); *Todd v. Weltman, Weinberg & Reis Co.*, 434 F.3d 432 (6th Cir. 2006) (false affidavit is a violation of the FDCPA); *Russo v. Puckett & Redford* , 2009 WL 3837529 (W.D. Wash. Nov. 17, 2009) (including the cost of an unauthorized process server in a default judgment as a violation of the FDCPA); *Eckert v. LVNV Funding*, 647 F.Supp.2d 1096 (E.D. Mo. 2009)(neither witness immunity nor litigation immunity protected bulk filer from

FDCPA liability for false statements in petition and affidavit.); *Anderson v. Gamache & Myers, P.C.*, 2007 WL 1577610 (E.D. Mo. May 31, 2007.) (false affidavit is violation of the FDCPA).

In *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D. Ala. 1987), the court held that filing a lawsuit on a claim barred by the statute of limitations violated the FDCPA in several respects. Specifically, prosecuting a time-barred debt violated Section 1692f, which prohibits unfair and unconscionable conduct; that is , an attempt to collect a debt which is not legally enforceable (Paragraphs 6D of the Counterclaim), and Section 1692e(2)(A), which prohibits debt collectors from taking any legal action that it cannot legally take (Counterclaim 6A), and Section 1692e(10) which prohibits collectors from using "any...deceptive means to collect or attempt to collect any debt"(Counterclaim 6B). Since *Kimber*, courts have recognized that actually filing and prosecuting a lawsuit on a time-barred debt, as Royal Financial did here, is a violation of the FDCPA. "[I]n the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt". *Freyermuth v. Credit Bureau Services, Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). To violate the FDCPA "a defendant's attempt to collect on a time-barred debt must be accompanied by actual litigation or a threat [...] of future litigation." *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D. 613, 616 (N.D. Ill. 2001). Certainly filing and continuing to prosecute a lawsuit where the named defendant, the party served and required to defend the case, never had the account or owed the debt alleged in the suit is a violation of Section 1692(e)(2)(A). <u>See</u> *Dutton v. Wolhar*, 809 F.Supp. 1130, 1137

(D. Del. 1992). The rulings of the Trial Court that Margaret George did not present sufficient evidence that the FDCPA was violated clearly are erroneous applications of the law to the evidence.

The Summons and Petition served on Margaret George, Exhibit A, by itself shows that she is a "consumer" under Section 1692a(3) since she is a natural person allegedly obligated to pay a debt, and that Royal Financial is a "debt collector" governed by the Act under 1692a(6) since it was attempting to collect a credit card debt originally due another. There is no evidence, nor any effort to produce evidence, that any of the statements in that Petition connecting Margaret George to a valid, enforceable obligation to pay a principal amount of $2,209.24, plus $727.77 in interest, attorney fees in the amount of $331.38, or any other sum, were true. The only evidence was that she owed Royal Financial nothing, that those allegations were false: Plaintiff sued the wrong person (or sued on the wrong account); and in any event the account, even if it was owned by Margaret George at some time, was so old that the lawsuit was time-barred.

Margaret George disputed the debt at all times, insisting from the outset that the wrong person had been sued and that in any event the five-year statute of limitations had run years before the lawsuit was filed . *See* Exhibit B. During the months of pre-trial litigation Royal Financial was unable to come forward with anything to connect the September, 1998 credit card debt to Margaret George. Her denial at trial that she owed Royal Financial any money was never challenged or contradicted. Her testimony that she did not have a credit card and had not used a credit card (or made any payments on an account) for many years, nine years

or more, before she was sued likewise is the only evidence. Any claim on such an old credit card debt was barred by the five year statute of limitations. *Capital One Bank v. Creed*, 220 S.W.3d 874 (Mo. App. S.D. 2007). The rulings of the Trial Court that Margaret George did not present evidence that the FDCPA was violated clearly are erroneous applications of the law to the evidence.

While the statement in the caption of the Petition is evidence that Royal Financial was acting as the assignee of Chase Manhattan Bank, the fact that there was no allegation of an assignment arguably meant that as a matter of law Royal Financial could not recover on any Chase credit card. *See Temple v. McCaughen & Burr, Inc.*, 839 S.W.2d 322, 327 (Mo. App. E.D. 1992) (failure to allege agency fatal to petition); *Strunk v. Hahn*, 797 S.W.2d 536 (Mo. App. S.D. 1990) (judgment in favor of defendants named in caption of petition but not otherwise mentioned in the petition affirmed).

Without an allegation or proof of an assignment, Royal Financial could not recover. *Midwestern Health Management, Inc. v. Walker*, 208 S.W.3d 295, 298 (Mo. App. W.D. 2006). Where a plaintiff sues on a debt originally owed to another, an assignment of the account is essential to recovery. *Id., citing Korte Constr. Co. v. Deaconess Manor Ass'n*, 927 S.W.2d 395, 404 (Mo. App. E.D. 1996); *see also C&W Asset Acquisition, LLC v. Somoqyi*, 136 S.W.3d 134, 140 (Mo. App. S.D. 2004) (petition of assignee of credit card company against cardholder to collect balance due on account was dismissed because records introduced by alleged assignee did not establish that they purchased cardholder's account and had right to enforce the credit agreement).

Strunk v. Hahn, supra, identifies another aspect of the Petition Royal Financial filed and had served upon Margaret George: although the name "Margaret George" appears in the caption, she is not identified in any of the sparse allegations of the Petition, is not named in the prayer for relief and certainly is not connected in any fashion, by name, title or description, to the cardmember agreement. See Exhibit A, the Summons and Petition. (LF 5-9) Therefore, there was no claim legally stated against Margaret George and she was entitled to judgment in her favor based upon the condition of the Petition alone. *Strunk v. Hahn, supra*. Once again, Exhibit A, the Summons and Petition, by itself, without the testimony of Margaret George, proves a violation of the FDCPA: it is a false representation of the character or legal status of a debt [1692e(2)(A)]; a deceptive means to attempt to collect or attempt to collect a debt [1692e(10)]; a attempt to collect money not authorized by any agreement [1692f(1)]; and/or an attempt to collect an amount not permitted by law [1692f(1)].

Appellant recognizes that in many cases a party which files a petition which is more general than specific in some respects or is lacking in certain detail, might eventually prevail if it is allowed to amend, or it engages in discovery, or if it possesses and is permitted to introduce evidence fleshing out its allegations. See *Rule 55.33(a) and (b), Mo.R.Civ.P.* In this particular case, however, where Royal Financial refused to comply with the Rules regarding interrogatories and production requests, ignored a Court Order, and then dismissed its Petition, all the while being confronted with the alleged debtor's denial of liability, her affirmative defenses and the challenge of her counterclaim, Margaret George established a

violation of the FDCPA simply by showing that she was served with Exhibit A, the document which was drafted by Royal Financial and admitted into evidence with no objection from Royal Financial.

The Court's ruling that there was no evidence, or not sufficient evidence, that Plaintiff made a false representation of the character, amount or legal status of a debt in violation of Section 1692e(2)(A) of the FDCPA is not supported by the evidence, against the weight of the evidence, and is a misapplication of the law to the facts. If Margaret George never had the particular credit card Royal Financial attempted to describe in its lawsuit, then the representation in the Petition that Margaret owed a certain unpaid balance as well as accumulated interest and attorneys' fees is a false representation of the character, amount or legal status of the debt. *See Dutton v. Wolhar*, 809 F.Supp. 1130, 1137 (D. Del. 1992). And even if the old card Margaret George had more than nine years before she was sued was one issued by Chase Manhattan Bank then the lawsuit was barred by the five-year statute of limitations; which alone constitutes a false representation of the legal status of a debt in violation of Section 1692e(2)(A). *Ehsanuddin v. Wolpoff & Abramson*, 2000 WL 543052 (WD Pa. 2007); *Kimber, supra*. Similarly, the ruling of the Trial Court that there was no evidence that the plaintiff used false representations or deceptive means to collect or attempt to collect a debt is not supported by substantial evidence, is against the weight of the evidence, and is a misapplication of the law. Filing and prosecuting this lawsuit against Margaret George under these circumstances is a false, deceptive means to collect a debt, a violation of Section 1692e(10) as well. *See Kimber, supra at 1489*. *Kimber* also recognizes

that filing such a time-barred lawsuit is a violation of Section 1692(f) since it constitutes an unfair or unconscionable attempt to collect on a debt. *Id.*

Jerman v. Carlisle

On April 21, 2010, three weeks after the Court of Appeals issued its opinion, the Supreme Court of the United States handed down *Jerman v. Carlisle, McNeelie, Rini, Kramer & Ulrich, LPA,* ___ U.S. _____, 130 S.Ct. 1605 (2010). The issue in that case was: is the bona fide error defense of Section 1692k(c) of the FDCPA available to protect a debt collector from liability based upon its "mistake of law" resulting in a violation of the FDCPA? The answer was "No." *Id.* at 1608.

Jerman v. Carlisle is significant here for a number or reasons. There is a striking fact similarity and the holding reinforces the decision of the Court of Appeals in this case both with respect to the judgment in favor of Margaret George and the decision not to remand the matter to the Trial Court.

The facts were that the defendant, the Carlisle law firm, sued plaintiff Jerman to foreclose on a mortgage on behalf of Countrywide Home Loans, Inc. *Id.* at 1609. The complaint prepared by the defendant included a "Notice" stating that the debt collector would assume the claimed debt was valid unless Jerman disputed it in writing. Just as Margaret George's attorney did here, plaintiff Jerman's lawyer sent a letter to the defendant denying any liability. *Id.* The defendant law firm checked with its client, Countrywide Home Loans, and learned that the debt indeed had been paid in full prior to suit. In contrast to the behavior of Royal Financial in this situation, however, Carlisle dismissed the lawsuit it had filed against

Jerman once it learned it could not prove the allegations in its complaint. *Id.* The debtor, Jerman, then sued the defendant law firm, alleging that the "Notice" portion of the complaint, which seemed to place a burden on the debtor to affirmatively deny the debt, was a violation of the FDCPA. The distinct court agreed it was a violation, but nonetheless entered summary judgment in favor of the debt collector because of the "bona fide error" defense.[7] The 6th Circuit affirmed, but noted that its decision was contrary to the view of a majority of courts which held that the bona fide error defense only applied to clerical or procedural errors. *Supra*, note 7, 538 F.3d at 473-474. The Supreme Court affirmed the majority view and held that the bona fide error defense of the FDCPA was not available to protect or excuse mistakes of law regarding what acts violate the FDCPA. *Jerman v. Carlisle, supra* at 1608.

The U.S. Supreme Court noted that a debt collector who fails to comply with the FDCPA is liable to the debtor it sued for actual damages, costs, statutory "additional damages" of $1,000 or less and reasonable attorney's fees. *Id.* at 1609. A debt collector who files suit with actual knowledge or knowledge fairly implied on the basis of objective circumstances that its action is prohibited by the FDCPA may be subject to additional penalties under the FTC Act, a fine as much as $16,000 per day. *Id.* A third point noted by the Court is that a debt collector can avoid liability under the FDCPA by pleading and proving both that the violation was not intentional and that the violation resulted from a bona fide error

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[7] *Jerman v. Carlisle,* 502 F.Supp.2d 686 (N.D. Ohio) *affirmed,* 538 F.3d 469 (6th Cir. 2008).

on its part which occurred notwithstanding the maintenance of procedures reasonably adapted to avoid such errors; this is the "bona fide error" affirmative defense of Section 1692k(c). *Id.* The Supreme Court was also influenced by the familiar maxim that "ignorance of the law is no excuse." *Id.* at 1611. The Supreme Court employed these pillars to support its holding that the "bona fide error" defense cannot be used to avoid liability based upon a mistake of law, or lack of understanding of what conduct the law allowed and what conduct was banned, with respect to the FDCPA. The significance of the liability under the FTC Act, which does require actual or implied knowledge on the part of the debt collector, is to contrast it with the liability under the FDCPA. *Id.* at 1607, 1615. The FDCPA is a strict liability statute in the sense that it is not necessary for an alleged debtor/plaintiff to show an "intentional" violation, it is enough to show an “intentional” act which results in a violation. *Id.* at 1611-1612.

Defendant Carlisle urged the Court to hold that the bona fide error defense applied to all types of errors or mistakes but the Court was not persuaded, in part because of the common maximum that ignorance of the law is no excuse. *Id.* at 1611. The Court further explained how the common law generally recognizes that an act may be "intentional' for purposes of civil liability even if the defendant lacks actual or presumed knowledge that its conduct may cause injury or violates the law. *Id.* at 1612. Thus, defendant Carlisle "intentionally" filed a lawsuit against Jerman attempting to collect a debt which Jerman did not owe and “intentionally” included a "notice" provision which was not allowed under the FDCPA, and even if Carlisle could prove it did not intend to harm Jerman and could show the mistake was

a good faith, bona fide error, it still would be liable to Ms. Jerman and bear responsibility for her actual damages, statutory damages up to $1,000 and her reasonable attorney's fees.

Jerman v. Carlisle gives direction to the correct result for the right reasons in this case. First, *Jerman v. Carlisle* shows Margaret George did not need to prove what Royal Financial "knew or reasonably should have known" and Royal Financial cannot put on evidence that it "exercised reasonable care" when it decided to sue Ms. George and continued to prosecute the case. Thus, Margaret George proved her case and is entitled to judgment in her favor. And further, even if Royal Financial had not waived its right to put on evidence explaining its conduct by not pleading a "bona fide error" defense, or by refusing to answer discovery requests despite a court order, or by admitting in oral argument before the Court of Appeals that it did not possess anything to support its claims against Ms. George, it still would not be allowed to present a bona fide error defense because such a defense only can come into play in the case of clerical errors.

The *Jerman* opinion also provides insight into the measure of statutory damages. *Jerman v. Carlisle* has been in litigation for years and Carlisle likely will be liable to Ms. Jerman even though it dismissed the lawsuit against her upon investigating the statements in the letter it received from Ms. Jerman's lawyer. Here Royal Financial stubbornly refused to dismiss its lawsuit against Margaret George even though it admittedly knew it could not prove its case. This unjustified persistence is to be considered when assessing the amount of

statutory damages. *Id.* at 1609. This Court can and should award Ms. George the maximum statutory damages of $1,000.[8]

The Supreme Court in *Jerman* mentioned that its holding did not reach the question of whether or not the bona fide error defense would apply to a mistake regarding state law, rather than the requirements of the FDCPA. *Id.* at 1610, Fn4. It seems clear, however, that the bona fide error defense would not apply to mistakes about state law, such as the statute of limitations. If the debt collector knew his Missouri debt was in default for more than five years but filed the lawsuit because it thought the statute of limitations was 10 years, this is an obvious mistake of law. The rationale employed by the Supreme Court in *Jerman* would apply as forcefully to mistakes regarding state law as it would to the requirements of the federal statute: "ignorance of the law" is not a defense. Similarly, if a debt collector files a lawsuit in a jurisdiction like Missouri with a 5 year statute of limitations with no clue as to when the alleged cause of action occurred, or as in this case, with no date mentioned in its suit papers other than one 10 years before its Petition is filed, there is a defect in the understanding of what the law requires to successfully state and prosecute a claim, not a clerical error.

In its discussion, the Supreme Court described the bona fide error defense as an "affirmative" defense. *Id.* at 1621. Other courts have likewise noted that it is an affirmative

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[8] The Eastern District incorrectly stated in its opinion that Margaret George requested no statutory damages: in the "conclusion" section of her brief she prayed for $1,000 in statutory damages.

defense. See e.g. *Copeland v. Kramer &Frank, P.C.*, 2010 WL 2232712 (E.D. MO. June 1, 2010) *citing Wilhem v. Credico, Inc.*, 519 F.3d 416, 420 (8th Cir. 2008). Since Royal Financial did not plead any affirmative defense, it should not be allowed to put on any exculpatory evidence if this case is remanded.

A Remand For New Evidence Is Not Required

Royal Financial stated in its Application for Transfer that the decision of the Eastern District did not follow the law because it ignored its right to offer evidence in its defense on remand. (See Page 2 of the Application for Transfer.) It should be noted that nowhere in Royal Financial Group's brief does it ask for this relief. It did not ask for remand until after the Eastern District ruled against it. On Page 5 of its Application for Transfer Royal Financial indicates what evidence it might have included. It is clear, however, that Royal Financial has no evidence to offer. Its admission during oral argument before the Court of Appeals to the effect that it dismissed the lawsuit because it had no documents to support its claim is a judicial admission. See *Evans v. Evans*, 67 S.W.3d 609 (Mo.App. W.D. 2001); *Royston v. Watts*, 842 S.W.2d 876, 878 (Mo.App. W.D. 1992); see also *McPherson v. U.S. Physicians Mut. Risk Retention Group*, 99 S.W.3d 462 (Mo.App. W.D. 2003); (the statements made during oral argument become the "law of the case"). Furthermore, the types of documentary evidence mentioned by Royal Financial in its Application for Transfer are exactly the sort of documents which should have been produced in response to the interrogatories and production requests, especially since the Trial Court ordered the Plaintiff Royal Financial to comply with those discovery requests. The evidence mentioned by Royal Financial in its Application for

Transfer could only be relevant to the counterclaim as an affirmative defense under Section 1602k(c), and since no such affirmative defense was pled, it cannot be proven. And finally, the Supreme Court in *Jerman v. Carlisle, supra,* holds that no bona fide error or affirmative defense would be available to the Defendants under these circumstances even if the issue had been raised by the pleadings and the Respondent Royal Financial had not admitted that it has no evidence to offer.

Royal Financial essentially offers two reasons in support of its Application for Transfer. One reason offered is the assertion that the question of what specific conduct is sufficient to violate certain sections of the FDCPA is an issue of first impression in Missouri. (See Reasons for Transfer #3, Page 1 of its Application for Transfer). The U.S. Supreme Court's opinion in *Jerman v. Carlisle, supra* is controlling as it affirms that the FDCPA is a strict liability statute; liability does not depend on the debt collector's lack of care, malice or intention to do harm: if a defendant which claims to own a particular credit card debt sues the wrong person, i.e., someone other than the actual owner of the credit card account, the debt collector obviously made a statement which is not true (Margaret George owes a certain unpaid balance, plus interest plus costs and fees) and has taken action to collect the debt which the law does not allow. Likewise, if the debt collector sues anyone on a credit card account which must have been in default for more five years, if it was ever at default, and so is outside the statute of limitations, there is a violation of the FDCPA. Once a violation is proven, the debt collector is liable to the person sued for actual damages, statutory damages of $1,000 or less and reasonable attorney's fees. *Jerman v. Carlisle, supra* at 16.09. Margaret

George proved that by accusing her in its Petition of being liable on any credit card account, Royal Financial violated the statute of limitations since she had nothing to do with any credit card for more than 9 years prior to the day she was sued.

Royal Financial also complains that it was not allowed to introduce evidence in its defense. It is clear that (1) because it did not plead the "bona fide error" defense of Section 1692k(c) it cannot offer such proof; and (2) by ignoring interrogatories, production requests and a Court Order commanding it to produce such documents as an assignment of the debt, notices to Ms. George and records of payments by Ms. George, it has both created an inference that such information does not exist and established a reason why such evidence should be barred if it did exist; and (3) it has admitted during oral argument that it possessed nothing which could be considered evidence to support the claims in its Petition against Margaret George or rebut her testimony, and so it dismissed its Petition. Finally, the contention that remand was necessary so Royal Financial could introduce evidence regarding the award of attorney's fees or its liability under the FDCPA or any other issue was not in Royal Financial's brief to the Court of Appeals and was not advanced during oral argument and so it should not be considered by the Court. *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. 2009)

Margaret George did not appeal from that portion of the Trial Court's judgment regarding its harassing phone calls before the lawsuit was filed. She did not, however, abandon her claim for damages. Her attorneys' fees are actual damages and she can recover for the emotional distress and general aggravation caused by service of summons and petition

and ongoing legal proceedings. See the cases at Footnote 6 on page 26 of this Brief. The testimony of her daughter, also unrebutted, regarding Margaret George's discomfort even speaking with an attorney on the phone is evidence which must be considered. Also, the persistent refusal of Royal Financial to respond to the letter from Margaret George's attorney, Exhibit B, answer interrogatories or comply with the Court's Order compelling it to respond to discovery requests must be considered when statutory damages are assessed. See *Jerman v. Carlisle, supra* at 1609. Royal Financial admitted during its oral argument that it did not dismiss the lawsuit sooner because of some concern about a "cottage industry" being supported by such counterclaims.[9] The Supreme Court of the United States considered and rejected the "cottage industry" argument advanced by Royal Financial during the course of its oral argument. *Jerman v. Carlisle, supra,* at 1620-1621. This intentional conduct also can be considered to justify statutory damages of $1,000, the maximum allowed. *Jerman, supra*.

There is no need to remand this case for new evidence. This Court can direct the Trial Court to enter a judgment in favor of Margaret George and against Royal Financial for

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[9] The "cottage industry" argument is mysterious; but if it is intended to suggest that Royal Financial and other debt buyers who file cases in bulk require protection from the people they sue such as Margaret George, the argument has been crippled, if not totally destroyed, by the July, 2010 Report of the Federal Trade Commission *Repairing a Broken System, Protecting Consumers in Debt Collection Litigation and Arbitration* which can be viewed online at http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf.

Margaret George's actual damages from the time she was served with the Summons and Petition, for her statutory damages, and for her reasonable attorneys' fees. There is no need for any new evidence if this case is remanded for further proceedings except perhaps for that mentioned in Point II, below.

Point II

The Trial Court erred when it refused Exhibits A1, A2, and A3 , which where copies of an unpublished Order and Judgment from March 2008 awarding Margaret George's attorney fees of a certain amount in the prosecution of an FDCPA case in St. Louis County against the assignor of a credit card account, and two affidavits submitted in that case, because Margaret George was entitled to reasonable attorney's fees as actual damages in her FDCPA case and under the statute itself in that those exhibits were proper indicators of the amounts reasonably recovered in similar cases.

Defendant Margaret George's actual damages include the reasonable attorneys' fees for the successful defense of Plaintiff's lawsuit. *Venes v. Professional Service Bureau, Inc.*, 353 N.W.2d 671 (Minn. App. 1984) And the FDCPA provides that when an injured party prevails on her FDCPA claim, costs and reasonable attorney's fees for the prosecution of that

claim shall be awarded. 15 U.S.C. §1692k(a)(3). This award is mandatory, and courts have held that it is an abuse of discretion to refuse attorney's fees to those who have brought a successful claim under the FDCPA. *Zagorski v. Midwest Billing Services, Inc.*, 128 F.3d 1164, (7th Cir. Wis. 1997); *Hennessy v. Daniels Law Office*, 270 F.3d 551 (8th Cir. 2001). Affidavits of two attorneys who had worked for years litigating cases under federal statutes which allow for the recovery of attorney fees as an incentive, and a photocopy of a March 2008 Order and Judgment awarding attorney fees of approximately $265/hr. in a FDCPA case in St. Louis County were offered into evidence but were refused. (Exh. A-1, A-2 and A-3; TR 30.)

The fact that the Margaret George hired an attorney to defend her against Plaintiff's lawsuit and prosecute her related claims against Plaintiff Royal Financial is relevant evidence, but not the amount of money paid to the attorney. *Fust v. Francois*, 913 S.W.2d 38, 46-47 (Mo. App. E.D. 1995). The determination of the proper amount of attorneys' fees depends upon the number of hours reasonably spent by the Defendants' attorney and the determination, made by the Court, regarding the reasonable hourly rate charged for similar work by attorneys with comparable skills and expertise. See *Hensley v. Eckerhart*, 461 U.S. 424, 443-446 (1983); *Alhalabai v. Missouri Dept. of Natural Resources*, 300 S.W.3d 518 (Mo. App. E.D. 2009). The award is determined by the market rate for such services at the time of the award, not the market rate at the time the services were performed or the amount, if any promised or actually paid. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989). In Missouri, the Court is considered to be an expert in such matters. *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175,

184-87 (Mo.App. W.D. 2002); *Buchanan v. Mitchell*, 873 S.W.2d 945, 947 (Mo. App. E.D. 1994). It is nonetheless desirable for the Court to consider affidavits and other information provided by the parties, such as awards in similar cases, to inform and support its opinion of the proper hourly rate. *Hensley v. Eckerhat, supra*. The Exhibits which were offered and refused were affidavits of other attorneys which would have provided guidance to the Court regarding the "going rate" for attorneys engaged the prosecution of claims under remedial statutes enacted for the protection of consumers or workers.

Appellant recognizes that attorney's fees awarded under Section 1692k(a) generally are not proven at trial, but are requested and litigated in a post-trial proceeding. *Hennessy v. Daniels, supra at* 553. Margaret George, however was entitled to her reasonable attorney's fees as part of actual damages necessary for the defense of Royal Financial's lawsuit as well. Since the defense of the Petition Royal Financial brought against Margaret George and the prosecution of the her counterclaim against Royal Financial were based on a common set of fundamental facts and shared related , if not identical, legal theories (Margaret George did not owe Royal Financial or Chase Manhattan Bank anything, and could not be liable on any credit card account due to the statute of limitations) counsel's time prior to the dismissal of Royal Financial's suit a few days before trial logically cannot be, and legally should not be, separated into distinct events or separate claims. <u>*See*</u> *Williams v. Finance Plaza, Inc., supra, citing Hensley v. Eckerhart, supra*.

It was against the logic of the circumstances for the Court to refuse the evidence of reasonable attorney's fees. Ms. George had proved her FDCPA claim, and was entitled to

fees. The Trial Court's action was arbitrary and capricious and showed a lack of careful consideration, and therefor constituted an abuse of discretion. If a remand for the Trial Court to determine the proper award of fees is required, the Trial Court should be directed to admit and consider Exhibits A-1, A-2 and A-3.

POINT III

The Trial Court erred when it denied Margaret George's Motion for Sanctions seeking an order prohibiting Royal Financial from using information not produced at trial as moot in that the requested discovery may have been relevant to the pending Counterclaim and the failure to prohibit the use of any evidence which should have been disclosed in discovery was inconsistent with the previous Order of the Court, would have rewarded Plaintiff/Respondent Royal Financial for its failure to produce documents and answer interrogatories despite the Order of the Court compelling it to do so, and would be an occasion of surprise and prejudice for Defendant/Appellant Margaret George so that the Court's failure to sustain the Motion in that regard was an abuse of discretion.

This Point III was not in the Appellant Brief before the Eastern District. At that time, the issue did not seem to be significant since Royal Financial had no evidence, no witness or

document, at the time of the trial of Margaret George's Counterclaim. In fact, as mentioned several times above, Royal Financial admitted before the Eastern District that it dismissed its Petition against Margaret George at that time because it did not have any proof that Margaret George owned the credit card account or that it was first in default during the five years before its lawsuit was filed. In its Application for Transfer however, Royal Financial hinted that it might now have records or some other exculpatory evidence.

Margaret George filed her *Second Motion to Dismiss and for a Protective Order* on April 8, 2009 asking for both dismissal of Royal Financial's lawsuit and a protective order prohibiting Royal Financial from using any evidence which would have been responsive to the unanswered interrogatories and production requests. (LF 35-36.) The day that Motion was presented to the Court, April 27, 2009, Plaintiff Royal Financial voluntarily dismissed its Petition (LF 37.) , but that action did not make the entire motion moot: the case was to be tried the next week.

This Court will only disturb the Trial Court's control of pre-trial discovery if there is an abuse of discretion. *State ex rel Delmar Gardens North Operating, LLC v. Gaertner*, 239 S.W.3d 608, 610 (Mo. 2007). The decision whether or not to impose sanctions will not be changed unless the Trial Court's ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice. See *Ferguson v. Strutton*, 302 S.W.3d 239, 243 (Mo.App. S.D. 2009). It was an abuse of discretion in this case to deny the relief requested, a protective order against the use of evidence which should have been disclosed in discovery.

SUMMARY

"The . . . point of the FDCPA and the point of the attorney's fees provision in the FDCPA is so that creditors who are debt collectors who do take advantage of the system don't have an unfair advantage because they have money . . . . The attorney's fees provisions are to level the playing field." (Attorney for Royal Financial, TR 42, lines 12 - 17)

Margaret George did not file this lawsuit; she is not part of any "cottage industry." She has asserted her defenses and prosecuted her counterclaim in accordance with the Rules. She has proven that Royal Financial violated the FDCPA using all she had: the only documents ever produced by Royal Financial, the Summons and Petition served on her, and her sworn testimony. Royal Financial has waived any right to put on evidence by failing to plead an affirmative defense, by repeatedly refusing to provide anything to supplement or support its skimpy, generic allegations in defiance of the Rules of Civil Procedure and a Court Order, and by admitting it continued to press its suit knowing that it did not possess the documents and other information necessary to prevail. If Royal Financial had reacted as the defendant in *Jerman v. Carlisle, supra*, and dismissed its case after receiving the letter, Exhibit B, Margaret George's emotional distress likely would have ended and her attorneys certainly would have worked less. If the judgment of the Trial Court is not reversed, then the FDCPA has not provided a level playing field, at least not in Missouri.

CONCLUSION

Defendant/Appellant Margaret George requests that the Court reverse the judgment of the Trial Court and remand the matter to the Trial Court for entry of judgment in favor of Defendant Margaret George and against Plaintiff Royal Financial Group, LLC on Defendant's Counterclaim for her actual damages, statutory damages in the amount of $1,000 and for her reasonable attorneys' fees.

CERTIFICATION PURSUANT TO RULE 84.06(c)

COMES NOW Defendant/Appellant Margaret George and certifies that the number of words in this Brief does not exceed 31,000 (13,291 words) and that the number lines of text do not exceed 2,200 (1,065 lines).

NOTICE OF ELECTRONIC FILING

NOTICE that, in addition to filing her briefs as required by Rule 84.05(a), Defendant/Appellant Margaret George has prepared and filed a CD or floppy disk containing a copy of this Brief in Word and WordPerfect format with the Appendix in PDF format; and further, certifies that the electronic copy has been scanned for viruses and is virus free.

Respectfully submitted,

_____
MARTIN L. PERRON, #26783
MARIA V. PERRON, #31739
THE PERRON LAW FIRM, P.C.
275 North Lindbergh Blvd.
St. Louis, MO 63141-7809
(314) 993-4261

(314) 993-3367 FAX
mlp@perronlaw.com
ATTORNEYS FOR DEFENDANT/APPELLANT

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

ROYAL FINANCIAL GROUP, LLC,	)	
	)	
Respondent,	)	
	)	
v.	)	**No.: SC90902**
	)	
MARGARET A. GEORGE,	)	
	)	
Appellant.	)	

CERTIFICATE OF SERVICE

COMES NOW Appellant and certifies that copies of the following were sent via 1st Class, U. S. Mail, postage pre-paid and by electronic mail on or before this 2d day of August, 2010 to the attorney for Respondent Royal Financial Group, LLC, William F. Whealen, Jr., Stephen J. Barber, Miller and Steeno, P.C., 11970 Borman Drive - Suite 250, St. Louis, Missouri 63146:

Appellant's Substitute Brief

THE PERRON LAW FIRM, P.C.

MARTIN L. PERRON, #26783
MARIA V. PERRON, #31739
275 North Lindbergh Boulevard
St. Louis, MO 63141-7809
(314) 993-4261
(314) 993-3367 FAX
mlp@perronlaw.com
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_____

MARTIN L. PERRON, #26783