

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

ALAINA HILL ROGERS

APPELLANT

VS.

CAUSE NO. 2018-CA-008000

CASEY AND CO., LLC

APPELLEE

MOTION FOR REHEARING

The Appellee files this Motion for Rehearing by authority of Mississippi Rules of Appellate Procedure to request the Court to reconsider its ruling whether the lawsuit before the Court is based on an “open account.” In support, the Appellee would show the following:

I INTRODUCTION

With due respect, the Court has applied an improper determination of the facts relating to whether the action was an “open account” or an “oral contract” as found by its opinion entered on December 10, 2019.

II THE OPINION APPLIED IMPROPERLY DENIED THE AWARD OF ATTORNEY FEE

On page 8 of the opinion, the Court stated that “. . . because we find that attorney’s fees were not provide[d] by contract or statute.” On page 12 of the opinion the Court says “. . . an attorney’s fee should be reversed and rendered.” On page 14 of the opinion, the Court states “In finding that the evidence herein establishes an oral contract but not an open account, we conclude that the trial court erred in awarding an attorney’s fee to Casey & Co. for an open account.”

The relevant part of § 11-53-81. Recovery of attorney’s fees in suit on open account says

“When any person fails to pay an open account within thirty (30) days after receipt of written demand therefor correctly setting the amount owed and an itemized statement of the account in support thereof, that person shall be liable for reasonable attorney’s fees to be set by the judge for the prosecution and collection of such claim

when judgment on the claim is rendered in favor of the plaintiff. Evidence of receipt of written demand by the spouse of the debtor when they are living together as husband and wife on behalf of the debtor may be introduced as evidence of written demand on the debtor. If that person sued on the open account shall prevail in the suit, he shall be entitled to reasonable attorney's fees to be set by the judge." (Emphasis added.)

The trial Court and this Court found that "When Casey tendered the final, itemized bill for her florist services and materials to Alaina, which reflected a credit for the sectional sofa, Alaina refused to pay the remaining balance in the amount of \$5,073.44." (See page 3 ¶ 6 of the opinion) Therefore, judgment on the claim was rendered in favor of the plaintiff as required by the statute.

The claim is based on classic "open account." The facts stated in the opinion beginning on the first page showing that the parties, Casey and Alaina agreed to two things in January 2017: Alaina was to be married in May, and Casey would provide service and materials for the wedding, and Alaina provided Casey with a furniture "sectional." These parties met at the wedding site in Kilmichael on separate occasions to develop the plan for the wedding. Cost of the wedding service was not discussed. However, each occasion produced Alaina's requirement for additional materials.

It is important to know that Alaina's wedding day was also "Mothers Day," which affected the cost of materials and flowers to Casey. Therefore, the price was not known at the inception of the planning of the wedding. Alaina had agreed that whatever the cost, she did not concern herself because her father was to pay for the wedding. Casey was hired by Alaina to provide her service for the wedding, and the testimony showed that the plan was to include the desired materials and services to be determined as time went on.

The plan included Casey crediting her charges with the value of the sectional. That was done and she made a demand for payment, waited thirty (30) days and then filed suit. She prevailed in

the suit for judgment of her exact accounting minus the value of the sectional, all in accord with the statute. Thus, the trial Court awarded judgment to include an attorney fee.

This Court's opinion determined that Casey should have judgment for the amount sued on. It is clear from the record that she would not be paid for her claim without filing suit, therefore she required the service of a lawyer. The opinion says that the parties made an "oral contract," therefore it is not an open account, and, therefore, no attorney fee is permitted.

The facts show that the parties agreed to a plan which included an account which started with a credit for the sectional, and progressed to the end with service that was provided by Casey and approved by Alaina.

In *Franklin Collection Service, Inc. v. Stewart, et al*, 863 So.2d 925 the Court quotes from prior cases to state

"Open account" has been defined several times by this Court. "[I]t is generally held to mean an account based on continuing transactions between the parties which has not been closed or settled but is kept open in anticipation of further transactions." *Westinghouse Credit Corp. V. Moore & McCalib, Inc.*, 361 So.2d 990, 992 (Miss. 1978)

"It is a "[t]ype of credit extended through an advance agreement by a seller to a buyer which permits the buyer to make purchases without a note of security and is based on an evaluation of the buyer's credit." *Allen v. Mac Tools, Inc.*, 671 So.2d 636, 644 (Miss. 1996)

"Essentially, an action on an open account is "an action to collect on a debt created by a series of credit transactions." *Allen*, 671, So.2d at 644

It is logical that if the debt owed is good for judgment, and that the debtor refuses to pay without court intervention, then an attorney fee results from that. The opinion in this case is determined as one of an oral contract and not an open account. The open account statute, § 11-53-81, provides for an attorney fee if judgment is rendered on the account. That statute has been

amended over the years to the present reading by adding clause after clause to expand the law to compensate for issues raised on common law reason for example: notice may be given to a spouse of a debtor; written demand may be excused in certain circumstance; and *if the judge in his discretion finds that sufficient evidence of due diligence in delivery of written demand has been made, he may make a conclusion of written demand for purposes of justice and find that there has been written demand on the debtor.* (Emphasis added.)

The point is the trial judge determined that the purpose of justice in this case was served by allowing an attorney fee to the plaintiff's judgment. In this opinion, the Court relies on *Douglas Parker Electric Inc. V. Mississippi Design & Development Corp.*, 949 So.2d 874 (Miss. Ct. App. 2007) to say that this is not an open account case, rather it is an oral contract. The trial Court determined that Casey had supplied good and satisfactory service, and that she had tendered unto Alaina an itemized statement for which Alaina did not respond. Alaina did not say what item was wrong or not received, she just said "it is too much."

Casey performed as Alaina had asked, and Casey followed the open account statute to judgment, and that judgment should allow for an attorney fee as awarded by the Circuit Court. The Court of Appeals is requested to reconsider its determination of whether attorney fee should be retained as reflected in the judgment from the trial Court.

Respectfully submitted,
/s/ Rex F. Sanderson
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CERTIFICATE OF SERVICE

I, Rex F. Sanderson, attorney for Appellee in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Motion for Rehearing** via the Court's MEC e-filing system.

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This the 23rd day of December, 2019.

Respectfully submitted,

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