

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 3, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2009AP2144**

**Cir. Ct. No. 2007CV227**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**CITIBANK (SOUTH DAKOTA) N.A.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RUTH M. SMITH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Jackson County:  
THOMAS E. LISTER, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. This appeal arises out of a dispute over a credit card account between Ruth M. Smith and Citibank (South Dakota) N.A. It is undisputed that Citibank issued a charge account to Smith. Citibank brought the present suit alleging breach of contract and an account stated to collect an amount it contends Smith owes on this account. Smith denies owing any money on the

account and also contends that the Fair Credit Billing Act, 15 U.S.C. § 1666, prevents Citibank from taking action against her to collect on the account because Citibank has not investigated a billing dispute notice she sent to Citibank. The circuit court granted summary judgment in favor of Citibank on its account stated claim, and Smith appeals. We affirm.

¶2 In support of its motion for summary judgment, Citibank submitted an affidavit of a Citibank employee and billing statements that the employee avers were sent to Smith. The statements provide the following information. The most recent statement identifying any new activity on the account, other than finance charges or other fees, is dated June 16, 2006. The new activity identified on the statement is a balance transfer of \$13,200.00 and a payment to “WT/Tax Vantage” for \$199.00. The account statements also reflect that a payment in excess of the minimum payment due was made each month until January 2007. The most recent statement, which is dated October 17, 2007, identifies a balance of \$13,280.11, which is the amount Citibank seeks in this action.

¶3 It is undisputed that Smith sent a letter to Citibank dated February 22, 2007. The letter provided that Smith was disputing “the amount of \$12,433.86 allegedly owed” as identified by her January 16, 2007, credit card statement.<sup>1</sup> The only activity listed on the January 16, 2007, statement that Citibank submitted was a credit on the account in the amount of \$190.00 and a finance charge of \$31.84. The letter from Smith stated she believed that:

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<sup>1</sup> The amount owed as listed on the January 16, 2007, statement submitted by Citibank was \$12,070.86. The amount owed as reflected in Smith’s letter, \$12,433.86, is the same as the amount owed as listed on the February 15, 2007, statement submitted by Citibank. The only activity listed on the February 15, 2007, statement is a late fee of \$39.00 because the January payment was past due, and a finance charge of \$324.00.

the billing error can be found in one or more of the following areas: 1) transactional, i.e., credit(s) or payment(s) are missing or are misapplied; 2) error in arithmetic; 3) unauthorized charge, i.e., one or more charges are not legitimate or 4) disclosure, i.e., extra fees, costs and/or interest has been added that were not disclosed.

The letter also requested that Citibank provide Smith with authenticated copies of the Cardholder Agreement, sales receipts, and billing statements. Citibank did not respond to this letter.

¶4 When we review a summary judgment, we apply the same methodology as the circuit court, and we consider the issues de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). The remedy is appropriate in cases where there is no genuine issue of material fact and the moving party has established his or her entitlement to judgment as a matter of law. *Germanotta v. Nat'l Indem. Co.*, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). A factual issue is “genuine” if the evidence is such that reasonable jurors could return a verdict for the nonmoving party. *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (citation omitted).

¶5 Smith makes three main arguments on appeal in support of her contention that the circuit court erred when it granted summary judgment in favor of Citibank. For the following reasons, we reject each argument.

¶6 First, Smith contends that Citibank’s complaint failed to comply with WIS. STAT. § 425.109 because it did not include the figures necessary to compute the amount Citibank alleged was due. However, Smith failed to raise this argument in the circuit court. The general rule is that “issues not raised in the circuit court are deemed waived.” *State v. Polashek*, 2002 WI 74, ¶25, 253 Wis. 2d 527, 646 N.W.2d 330. Although this court engages in summary judgment

review de novo, we nonetheless may apply waiver to issues or arguments presented for the first time on appeal. *Gruber v. Village of North Fond du Lac*, 2003 WI App 217, ¶27, 267 Wis.2d 368, 671 N.W.2d 692. Application of the waiver rule is appropriate where the other party is disadvantaged by the failure to first raise an issue in the circuit court. *See id.* (applying waiver because the other party could have rebutted with additional/actual submissions in the circuit court). We conclude application of the waiver rule is appropriate here because, even if Citibank's complaint was insufficient as Smith asserts, this deficiency could have easily been corrected in the circuit court with an amended complaint.

¶7 Second, Smith asserts that her February letter complies with the requirements of the Fair Credit Billing Act, 15 U.S.C. § 1666. Thus, Smith contends, Citibank is precluded from bringing this action until it complies with the Act. In response Citibank contends that the letter fails to comply with the requirements of the Act. We agree that the letter did not comply with the Act.

¶8 15 U.S.C. § 1666(a) requires that an obligor provide a creditor notice of a billing error "within sixty days after having transmitted to an obligor a statement of obligor's account in connection with an extension of consumer credit." The statute also identifies three pieces of information that the notice must include: (1) "the name and account number (if any) of the obligor"; (2) "the obligor's belief that the statement contains a billing error and the amount of such billing error"; and (3) "the reasons for the obligor's belief (to the extent applicable) that the statement contains a billing error." *Id.*

¶9 Smith's letter does not comply with the Fair Credit Billing Act because it fails to include the third piece of information required by the Act: it does not identify the reasons for Smith's belief that the January 16, 2007,

statement contained a billing error. The statute requires that the obligor provide the “*reasons for the obligor’s belief ... that the statement contains a billing error.*” *Id.* (emphasis added). This is different than requiring the obligor to identify how an error could have been made. For example, in the letter Smith notes that credits or payments may be missing or were misapplied. The January statement submitted by Citibank identifies one payment of \$190.00. However, Smith does not identify any additional payments she allegedly made that were not included in this payment amount. In short, Smith’s letter does not identify the reasons for her belief that a payment may be missing or misapplied.

¶10 In addition, Smith’s letter provides that there may be an error in arithmetic, but Smith does not explain where she believes the error lies or the reason she raises this concern. Smith’s letter also notes that there may be an unauthorized charge, apparently meaning a charge for a purchase. Smith does not explain her reason for believing an unauthorized charge was made. Furthermore, the January statement did not list any charges due to purchases; it identified only a finance charge of \$31.84. Finally, Smith’s letter states that extra fees, costs, or interest were added that were not previously disclosed to her. However, she does not state that she believes the finance charge listed on the statement was not previously disclosed to her, and she does not state that there is some other kind of fee, charge, or interest added that was not disclosed. Thus, she has not identified a single reason why she believes extra fees, costs, or interest were added that were not previously disclosed to her.

¶11 Smith’s letter also states that, in order to calculate the amount of the error, she needs to be sent a copy of the Cardholder Agreement as well as sales receipts and billing statements for the last year. However, Smith does not explain why she needs any of these items in order to identify the amount of error she

believes is reflected on the January statement nor does she provide citations to federal law clarifying why these items could be necessary. In addition, Smith does not explain why her inability to calculate the amount of error, as required by 15 U.S.C. § 1666(a)(2), prevents her from identifying the reasons she believes the statement contains an error, as required by 15 U.S.C. § 1666(a)(3). For these reasons, we conclude that Smith's letter did not comply with the Fair Credit Billing Act, and Citibank is not precluded from bringing this action.

¶12 Smith's third argument is that there are genuine issues of fact as to whether Citibank established the elements of an account stated and thus Citibank is not entitled to summary judgment. Specifically, Smith contends there are factual disputes about whether she received the statements used in this case.

¶13 The elements of an account stated are as follows: (1) "one party holds an account against another"; (2) "a statement of the account is made showing the amount due"; (3) "the statement is admitted by the other party to be correct"; and (4) "there is a promise, either actual or implied, to pay the same." *Onalaska Elec. Heating, Inc. v. Schaller*, 94 Wis. 2d 493, 501-02, 288 N.W.2d 829 (1980).

¶14 The parties do not dispute the first element—that Citibank issued a charge account to Smith. As to the three remaining elements, Citibank's submissions make a prima facie case and Smith's submissions are insufficient to create a genuine issue of material fact.

¶15 Regarding the second element, which requires that a statement of the account was made showing the amount due, Citibank's employee avers that Citibank sent the attached statements of the account to Smith. Smith's submissions on this element are conclusory and conflicting. For example, in her

affidavit Smith denies “receiving the alleged billing statements used as exhibits in this action/contest.”<sup>2</sup> But in the February letter Smith submitted with her answer, Smith discusses the January 16, 2007, statement. In addition, in her February letter Smith states that the amount she allegedly owed on her credit card was \$12,433.86, which was actually the amount owed as listed on the February statement submitted by Citibank. The only reasonable inference is that Smith received both the January and February statements. If she did not receive statements before those, it was incumbent on her to set forth specific facts in her affidavit identifying the statements she did not receive. *See* WIS. STAT. § 802.08(3) (“When a motion for summary judgment is made and supported [by affidavits or otherwise], an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party’s response, by affidavits or [otherwise], must set forth *specific facts* showing that there is a genuine issue for trial.” (emphasis added)).

¶16 Regarding the third element—that the statement is admitted by the other party to be correct—it is undisputed that Smith did not contest any of the charges last made on the account, which were listed on the June 16, 2006, statement. Smith did not raise any objections to the account until she sent her February letter. “[T]he retention of a statement of an account by a party without making an objection thereto within a reasonable time is evidence of acquiescence in or assent to the correctness of the account.” *Onalaska Elec. Heating*, 94 Wis. 2d at 503 (citations omitted). Furthermore, the statements submitted by Citibank show that payments in excess of the minimum payment due were made

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<sup>2</sup> Many of Smith’s averments are arguments that Citibank cannot prove Smith’s liability rather than factual statements showing why she does not owe the amounts claimed.

until January 2007. *See Stan’s Lumber, Inc. v. Fleming*, 196 Wis. 2d 554, 566, 538 N.W.2d 849 (Ct. App. 1995) (“[A]n account stated may arise where a debtor makes partial payment on an account ...” (citation omitted)). In her affidavit Smith denies making any payments on the account, with no specific facts that might explain why the statements show otherwise.<sup>3</sup> This conclusory averment is insufficient to raise a genuine issue of fact. *See* WIS. STAT. § 802.08(3).

¶17 Regarding the fourth element—that there was a promise, either actual or implied, to pay the amount—Smith’s retention of the statements without objection constitute an implied promise to pay the account. *See Stan’s Lumber*, 196 Wis. 2d at 566 (noting that an implied agreement to pay the amount stated may be presumed from the retention of account statements). We have already explained why Smith’s denial that she received any of the statements submitted by Citibank is insufficient to create a genuine issue of fact.

¶18 In summary, the circuit court properly granted summary judgment in favor of Citibank. Accordingly, we affirm the judgment of the circuit court.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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<sup>3</sup> In the request for admissions Smith sent to Citibank, Smith requested that Citibank admit that Smith was entitled to all credits that were made on the account and that Smith had paid the account.



