IN THE COURT OF APPEALS
STATE OF GEORGIA

CASE NO. A26A1879

JASON CERBONE,

Appellant,

vs.

BANK OF AMERICA, N.A.

Appellee

BRIEF OF APPELLANT JASON CERBONE

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PART ONE

STATEMENT OF THE PROCEEDINGS BELOW

Appellee Bank of America, N.A. (the "Bank") filed a Complaint on March 17, 2023, alleging Appellant Jason Cerbone ("Cerbone") defaulted on a credit card and owed an outstanding balance of $74,471.69. (R. V2-9). Cerbone filed an Answer on June 1, 2023. (R.V2-36). In his Answer, Cerbone admitted applying for and receiving a credit account with the Bank but denied failing to make periodic payments and responsibility for the alleged account balance of $74,471.69. (R.V2-36).

On June 30, 2023, the Bank filed a Motion for Summary Judgment based solely on the pleadings and affidavits of record. (R.V2-129). The Bank simultaneously filed a Rule 6.5 Statement of Undisputed Material Facts. (R.V2-130-31). Cerbone filed a Response on July 31, 2023. (R. V2-150-51). In his response, Cerbone admitted the Bank's undisputed facts 1-3, but disputed the allegedly undisputed facts 4-7. (R. V2-150). Cerbone did not dispute there was a credit card agreement but rather denied liability to the Bank due to fraudulent charges totaling at least $37,037.31 without interest. In support, Defendant submitted multiple exhibits demonstrating his reports of fraudulent charges dating back to November 21, 2019. (R. V2-155-267).

On the same day the Bank filed its Motion for Summary Judgment, it served Requests for Admissions on Cerbone. (R. V2-137). Cerbone served his Response to the Bank's Request for Admissions on July 31, 2023. (R.V2-147). In his Response, Cerbone denied the following Requests for Admission:

` RFA 3. Admit that you incurred the charges that form the basis of the debt sued upon.

> RFA 4. Admit that you never filed a written dispute of the charges that appeared on a billing statement of your credit account.
>
> RFA 5. Admit that you failed to make payment(s) when due towards the credit account sued upon.
>
> RFA 6. Admit that the Plaintiff has standing to bring this lawsuit.
>
> RFA 7. Admit that you owe the Plaintiff the amount sued for in the Complaint.
>
> (R. V2-137; 147).

On September 13, 2024, Cerbone, a licensed Georgia attorney, entered his appearance on behalf of himself as counsel of record. (R. V2-269).

On January 6, 2025, Cerbone filed an Amendment Demanding Jury Trial, where he demanded a jury trial for all issues in the case that are subject to trial by jury. (R. V2-269). That same day, Cerbone filed an Amendment Motion for Leave of Court to Allow Omitted Counterclaim under O.C.G.A. § 9-11-13(f) so he could seek damages against the Bank for attempting to collect a demonstrably incorrect debt. (R. V2-271-287). Cerbone's proposed counterclaims included allegations that the Bank violated the Agreement, breached the implied duty of good faith and fair dealing, and violated the Fair Debt Collection Practices Act and Regulation Z of the Truth in Lending Act. (R. V2-279). In his Affidavit and Verification of Amendment Motion for Leave of Court to Allow Omitted Counterclaim, Cerbone explained that although he was aware of his damages at the time he filed an Answer to the Bank's Complaint, he was not certain the damages were the result of the Bank's failures. (R. V2-290-292). He further stated that his prior attorney, his father, Adam Cerbone, did not understand the issues in the case. (R. V2-291). At the time of filing the Motion, 18 months had passed since the Bank filed its Motion for Summary Judgment, but the trial court had not yet ruled. (R. V2-291). In fact, no other filings or discovery was conducted in the interim. (R. V2-291). On January 6, 2025, Cerbone filed a Request for Oral Argument on Plaintiff's Motion for Summary Judgment. (R. V2-

314). In that filing, Cerbone asserted that the Bank must prove the use of the credit card was authorized pursuant to 15 U.S.C. § 1643(b) in order for Cerbone to be found liable. (R. V2-314). The Trial Court set a hearing on the Bank's Motion for Summary Judgment for April 15, 2025. (R. V2-316).

At the hearing on the Bank's Motion for Summary Judgment, Cerbone argued that the Bank failed to conduct a reasonable investigation into the fraudulent charges and had not produced any evidence that Cerbone was responsible for the outstanding balance. (R. V4-5-8). He also argued that the Bank violated the Truth in Lending Act. (R. V4-8). The only thing Cerbone conceded was that he had a credit card with the Bank (R.V4-7). He did not concede liability for the amounts owed.

The Bank did not file an Opposition to Defendant's Motion for Leave to File a Counterclaim until December 3, 2025, nearly 11 months after Cerbone filed the Motion. (R. V2-30-333). Judge Cooley denied Cerbone's Motion for Leave to File a Counterclaim on February 19, 2026, without hearing. (R. V2-336).

On March 9, 2026, nearly two years after its filing, Judge Coolidge granted, in part, the Bank's Motion for Summary Judgment. (R. V2-338-339). In her ruling, Judge Coolidge held, "it appearing that there are no issues of material fact within the record regarding defendant's liability for the claims asserted against him in

Plaintiff's Complaint; and it further appearing that a hearing is necessary to ascertain the amount of damages owed to Plaintiff by the Defendant regarding such claims; Plaintiff's Motion for Summary Judgment is hereby GRANTED, in part, as to Defendant's liability for all claims asserted against him in Plaintiff's Complaint." (R. V2-338-339). Judge Coolidge then set a hearing to ascertain the amount of the Bank's damages. (R. V2-339). This appeal ensued, and the parties did not participate in a damages hearing. (R. V2-372-373).

STATEMENT OF MATERIAL FACTS

Cerbone entered into a credit card agreement with the Bank in 2003 for a University of Georgia credit card (the "UGA card"). (R. V2-280). The UGA card had a credit line of $70,900 in November 2019. (R. V2-280). On November 21, 2019, Cerbone called the Bank to report unauthorized fraud charges on his UGA card. (R. V2-280). When examining his statements, Cerbone discovered $26,008.09 in unauthorized charges (exclusive of interest and penalties) dating back to January 2018. (R. V2-280). The majority of the charges were from Amazon Marketplace, Amazon Digital Services, Audible, and Kindle. (R. V2-280). Cerbone informed the Bank that he had never used Amazon Marketplace, Amazon Digital Services, or Audible. (R. V2-280). In addition, there were unauthorized charges for QuickBooks

Online, QuickBooks Payroll, and Xero. (R. V2-280). After an hour and forty-five minutes, the Bank's representative instructed Cerbone to call back the next day because the Bank's system would not permit the representative to add more charges to the claim. (R. V2-281). At the end of the call, the Bank gave Cerbone a temporary credit of $10,377.89. (R. V2-281). Cerbone called the Bank three additional times on November 21, 2019, attempting to complete his claim. (R. V2-281). The Bank's representatives did not permit him to complete the process over the phone. (R. V2-281).

On December 6, 2019, the Bank sent Cerbone a letter reversing a temporary credit of $1,164.49 because Amazon issued a credit for those charges. (R. V2-281). As a result, Amazon closed Cerbone's account, resulting in Cerbone losing thousands of dollars of books he had purchased. (R. V2-281).

On December 10, 2019, Cerbone sent the Bank a letter that listed the additional fraudulent charges he was unable to report over the phone. (R. V2-281). On December 20, 2019, Cerbone placed a security freeze on his credit reports with the three credit reporting bureaus: Equifax, TransUnion, and Experian. (R. V2-281).

On December 22, 2019, Cerbone sent the Bank a second letter that listed additional fraudulent charges. (R. V2-282). The Bank responded on December 23, 2019, with a letter advising Cerbone that the Bank would not approve his fraud claim, alleging the charges were consistent with previous charges from the merchant. (R. V2-282). The letter did not identify which charges or merchant(s). (R. V2-282). Confusingly, the Bank sent another letter dated December 23, 2019, stating that Cerbone's claim had been resolved and that credits had been applied to the account, along with interest charges and fees. (R. V2-282). However, there were no credits applied to Cerbone's account at that time. (R. V2-282).

On December 31, 2019, Cerbone filed a police report with the Savannah Police Department alleging identity theft in the amount of $26,088.09. (R. V2-282). On January 1, 2020, Cerbone filed an Identity Theft Report with the Federal Trade Commission. (R. V2-282). The same day, Cerbone sent the Bank a third letter disputing additional unauthorized charges. (R. V2-282).

On January 3, 2020, Cerbone went to the Bank's branch on Bull Street and spoke to a manager named Dominique Fell ("Fell"). (R. V2-283). Fell called the Bank's fraud department and was told Cerbone needed to send another copy of the credit card statements highlighting the fraudulent charges. (R. V2-283). On January 4, 2020, Cerbone sent the Bank a fourth letter with 60 pages of highlighted fraudulent charges, along with copies of the Savannah police report and FTC Identity Theft Report. (R. V2-283).

On January 8, 2020, Cerbone filed a complaint with the Consumer Financial Protection Bureau regarding the fraudulent charges on the UGA card. (R. V2-283). On January 11, 2020, Cerbone sent letters to TransUnion, Experian, Equifax requesting them to block the UGA card due to identity theft. Experian and TransUnion blocked the account, but Equifax did not. (R. V2-283).

On January 24, 2020, Cerbone called the Bank's fraud department. (R. V2-283). Cerbone was instructed by the Bank's representative to fax "Benito" a letter that listed the fraud charges. (R. V2-283). Cerbone did as instructed. (R. V2-283). On February 26, 2020, the Bank sent Cerbone a letter advising that it had not changed its decision to decline the fraud claim. (R. V2-283). The letter contained the same statement as the prior letter, alleging the "charge is consistent with previous charges with the merchant." (R. V2-283). Again, Cerbone had disputed multiple charges and merchants, and the Bank's letter did not specify which charges and merchants it was referring to. (R. V2-283).

Throughout 2021 and 2022, Cerbone disputed multiple charges with the Bank for new fraudulent charges. (R. V2-284-285). The Bank denied those claims. (R. V2-

284-285). In total, Cerbone has identified unauthorized fraud charges on the UGA card totaling $41,994.03, without interest and penalties. (R. V2-286).

PART TWO

ENUMERATION OF ERRORS

Enumeration of Error No.1: The Trial Court committed reversible error in denying Appellant's Motion for Leave of Court to Allow Omitted Counterclaim.

Enumeration of Error No. 2: The Trial Court committed reversible error in granting, in part, the Bank's Motion for Summary Judgment and setting a damages hearing.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Ga. Const. Art. VI, § V, para. III, in that the issues presented are not reserved for the Georgia Supreme Court. The trial court's Order Granting, In Part, Plaintiff's Motion for Summary Judgment and Setting This Matter for a Damages Hearing, filed on March 9, 2026, is appealable pursuant to O.C.G.A. § 9-11-56(h). Cerbone filed a timely Notice of Appeal on April 3, 2026.

PART THREE

ARGUMENT AND CITATION OF AUTHORITIES

A. **Standard of Review**

All questions of law shall be reviewed de novo, with the Court applying the plain legal error standard of review. Southland Propane, Inc. v. McWhorter, 312 Ga. App. 812, 813, 720 S.E.2d 270, 272-273 (2011); Payne v. Harbin, 254 Ga. App. 402, 562 S.E. 2d 772 (2002). A de novo standard of review applies to an appeal from a grant of summary judgment, and the reviewing court must review the evidence and all reasonable conclusions and inferences drawn from it in the light most favorable to the nonmovant. Matjoulis v. Integon Gen. Ins. Corp., 226 Ga. App. 459 (1), 486 S.E. 2d 684, 685 (1997). The remaining issues discussed herein shall be reviewed for abuse of discretion, including Error No. 1. Premier Pediatric Providers, LLC v. Kennesaw Pediatrics, P.C., 318 Ga. 350, 898 S.E.2d 481 (2024). Under that standard, the trial court's findings must be "in conformity with the governing legal principles," based on "correct facts" that are "relevant to determining whether [any] legal requirements [are] satisfied," and within the "range" of possible outcomes "in which there could be room for reasonable and experienced minds to differ." Id. at 354-55, 486 (citations omitted).

B. **Enumeration of Error No.1:**
(1) **Court Abused its Discretion and Committed Reversible Error when it Denied Cerbone's Motion for Leave of Court to Allow Omitted Counterclaim Under O.C.G.A. § 9-11-13(f).**

Judge Collidge abused her discretion when she denied Cerbone's Motion for Leave of Court to Allow Omitted Counterclaim despite Georgia law requiring the amendment of Cerbone's pleadings to include his compulsory counterclaim.

O.C.G.A § 81A-115 (a) provides, in part: "A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pre-trial order. Thereafter, the party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Georgia Courts have liberally construed that provision in favor of allowing amendments, especially when the party opposing the amendment would not be prejudiced. MCG Dev. Corp. v. Bick Realty Co., 140 Ga. App. 41, 43, 230 S.E.2d 26, 28 (Ct. App. 1976). "Mere delay in seeking leave to amend is not a sufficient reason for its denial." Id. In MGM Dev. Corp., the Georgia Court of Appeals held the trial court abused its discretion when it refused the defendants leave to amend their answers to cure a verification defect. Id. at 43-44, 28. In reaching that conclusion, the Court of Appeals stated, "[t]he Court does not take the position that the defendant should be penalized because of an apparent oversight on behalf of its counsel. The sporting element of pleading is no longer with us." Id. citing Shwartz v. American Stores Co., 22 FRD 38 (E.D. Pa. 1958).

Similarly, the Georgia Court of Appeals in Talbot Construction, Inc. v. Triad Drywall, LLC found that the trial court abused its discretion by failing to allow a party to amend its pleadings to add a counterclaim. Talbot Construction, Inc. v. Triad Drywall, LLC, 333 Ga. App. 815, 820, 777 S.E.2d 503, 507 (2015). In that case, the defendant sought leave to assert an omitted compulsory counterclaim by amendment. Id. at 815, 504. The trial court denied the motion, but the Court of Appeals vacated the ruling and remanded, holding that the trial court failed to consider all the grounds for amendment under O.C.G.A. § 9-11-13(f), particularly the "when justice requires" provision. Id. at 820, 507. The appellate court emphasized that Georgia law is "very liberal in allowing amendments to include compulsory counterclaims" and that leave to amend should generally be granted unless the opposing party shows prejudice. Id. at 817, 505. The court concluded that, absent a particularized showing of prejudice, the trial court abused its discretion by not allowing the amendment and by not considering all relevant factors under the statute before denying the motion. Id. at 820, 507.

The Supreme Court of Georgia in SRM Group, Inc. v. Travelers Property Casualty Company of America explained that a compulsory counterclaim is "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction," SRM Grp., Inc. v. Travelers Prop. Cas. Co. of Am., 308 Ga. 404, 411, 841 S.E.2d 729, 735 n. 3 (2020) citing O.C.G.A. § 9-11-13(a).

Here, Cerbone's proposed counterclaim was compulsory because his claim for damages as a result of the Bank's acts in failing to properly investigate Cerbone's claims of unauthorized purchases arises from the same transaction or occurrence of the Bank's claim for payment of the unpaid balance on the UGA card. Further, the Bank would not have been prejudiced by the proposed amendment. Indeed, the Bank did not argue prejudice in its Opposition to Cerbone's Motion. (R. V2-330-333). Cerbone filed his Motion for Leave of Court to Allow Omitted Counterclaim prior to the hearing on the Bank's Motion for Summary Judgment and while the case was still in the infancy of discovery. In her ruling, Judge Coolidge denied Cerbone's Motion without any findings of fact or explanation for her denial. (R. V2-336). Judge Coolidge could not have found prejudice, a necessary component to deny Cerbone's compulsory counterclaim. Therefore, Judge Collidge abused her discretion when she denied Cerbone's Motion for Leave of Court to Allow Omitted Counterclaim.

C. **Enumeration of Error No. 2:**

(1) **The Trial Court Committed Reversible Error when it Granted the Bank's Motion for Summary Judgment Related to Liability.**

The trial court committed reversible error when it granted the Bank's Motion for Summary Judgment on the issue of Cerbone's liability because Cerbone raised genuine issues of material fact regarding whether he was liable at all to the Bank for the outstanding balance on the UGA card under applicable law.

Regulation Z of the Truth in Lending Act, 12 CFR §1026, contains numerous provisions relevant to whether Cerbone is liable to the Bank, including caps on liability for unauthorized use:

> The liability of a cardholder for unauthorized use of a credit card shall not exceed the lesser of $50 or the amount of money, property, labor, or services obtained by the unauthorized use before notification to the card issuer under paragraph (b)(3) of this section.

In addition, the official interpretation of 12 CFR §1026.12(b)(2)(iii) contains the following limitations on a cardholder's liability for transactions where the physical card is not presented:

> The cardholder may not be held liable under § 1026.12(b) when the card itself (or some other sufficient means of identification of the cardholder) is not presented. Since the issuer has not provided a means to identify the user under these circumstances, the issuer has not fulfilled one of the conditions for imposing liability. For example, when merchandise is ordered by telephone or the Internet by a person without authority to do so, using a credit card account number by itself or with other information that appears on the card (for example, the card expiration date and a 3- or 4-digit cardholder identification number), no liability may be imposed on the cardholder.

12 CFR §1026, Supp. I, Comment 1026.12(b)(2)(iii)-3.

Further, the official comments to 12 CFR §1026.12(b) required the Bank to conduct a reasonable investigation into Cerbone's claims of fraudulent charges on the UGA card:

> If a card issuer seeks to impose liability when a claim of unauthorized use is made by a cardholder, the card issuer must conduct a reasonable investigation of the claim. In conducting its investigation, the card issuer may reasonably request the cardholder's cooperation. The card issuer may not automatically deny a claim based solely on the cardholder's failure or refusal to comply with a particular request, including providing an affidavit or filing a police report; however, if the card issuer otherwise has no knowledge of facts confirming the unauthorized use, the lack of information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation. The procedures involved in investigating claims may differ, but actions such as the following represent

steps that a card issuer may take, as appropriate, in conducting a reasonable investigation:

i. Reviewing the types or amounts of purchases made in relation to the cardholder's previous purchasing pattern.
ii. Reviewing where the purchases were delivered in relation to the cardholder's residence or place of business.
iii. Reviewing where the purchases were made in relation to where the cardholder resides or has normally shopped.
iv. Comparing any signature on credit slips for the purchases to the signature of the cardholder or an authorized user in the card issuer's records, including other credit slips.
v. Requesting documentation to assist in the verification of the claim.
vi. Requiring a written, signed statement from the cardholder or authorized user. For example, the creditor may include a signature line on a billing rights form that the cardholder may send in to provide notice of the claim. However, a creditor may not require the cardholder to provide an affidavit or signed statement under penalty of perjury as part of a reasonable investigation.
vii. Requesting a copy of a police report, if one was filed.
viii. Requesting information regarding the cardholder's knowledge of the person who allegedly used the card or of that person's authority to do so."

12 CFR §1026, Supp. I, Comment 1026.12(b)-3.

The above-referenced provisions demonstrate that Cerbone may not be liable to the Bank for fraudulent charges. Here, Cerbone presented substantial evidence that he reported multiple instances of unauthorized charges on the UGA credit card beginning in 2019. Those charges could not have been incurred by the user presenting Cerbone's physical credit card because Cerbone remained in possession of the card. In addition, the bank provided no evidence of a reasonable investigation.

Cerbone asserted the Bank never contacted him to obtain additional information or documentation.

Finally, because Cerbone reported unauthorized charges to the Bank, Regulation Z permits Cerbone to assert claims against the Bank and withhold payment for the fraudulent charges:

> When a person who honors a credit card fails to resolve satisfactorily a dispute as to property or services purchased with the credit card in a consumer credit transaction, the cardholder may assert against the card issuer all claims (other than tort claims) and defenses arising out of the transaction and relating to the failure to resolve the dispute. The cardholder may withhold payment up to the amount of credit outstanding for the property or services that gave rise to the dispute and any finance or other charges imposed on that amount.

12 CFR §1026.12(c)(1).

The Bank produced no evidence regarding whether the outstanding balance it claimed included any authorized charges. Cerbone continued to make payments on the UGA card for authorized transactions and Regulation Z permits Cerbone to withhold payment for the disputed charges, in addition to interest on that amount. Cerbone's liability to the Bank for <u>any</u> amount depends on whether the Bank's alleged outstanding balance included authorized charges when accounting for Cerbone's payments. Thus, the trial court erred when it granted the Bank's Motion for Summary Judgment on the issue of Cerbone's liability. There were genuine issues of material fact regarding whether Cerbone was liable to the Bank that should have been decided by a jury. In addition, the relevant statutes and regulations do not support a finding that the Bank was entitled to judgment as a matter of law.

(2) **Georgia law guarantees Appellant a right to a jury trial on damages.**

Even if this Court determines Judge Coolidge did not err in granting partial summary judgment in favor of the Bank on the issue of liability, her decision to set the issue of damages for a hearing rather than a jury trial is reversible error. A court may grant summary judgment on liability alone but must leave the issue of damages for trial if there is a genuine issue as to the amount of damages. O.C.G.A. § 9-11-56(c).

The Georgia Constitution provides: "The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party." Ga. Const. Art. I, Sec. I, Par. XI (a). In addition, O.C.G.A. § 9-11-56(c)) makes clear that nothing in the summary judgment procedure denies any party the right to a jury trial where there are substantial issues of fact to be determined, including the amount of damages. In Atlanta Oculoplastic Surgery, P.C.

v. Nestlehutt, the Georgia Supreme Court confirmed a litigant's right to a jury trial, stating that the "determination of damages rests peculiarly within the province of the jury." Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 734, 691 S.E.2d 218, 222 (2010).

Georgia courts have determined that a right to a jury trial applies to any case in which Georgia juries determined damages in 1798 when the Georgia Constitution was enacted. Nestlehutt at 733, 221. The Eleventh Circuit, applying Georgia law, has held that the Seventh Amendment and the Georgia Constitution require a jury trial in actions for damages to collect a debt, as such actions are at law and traditionally tried by jury. Sibley v. Fulton DeKalb Collection Serv., 677 F.2d 830, 834 (11th Cir. 1982).

Pursuant to the foregoing, the trial court erred in denying Cerbone his Constitutional right to a jury trial on the issue of damages.

CONCLUSION

For the reasons outlined above, Appellant respectfully requests this Court correct the Trial Court's errors as identified herein, reverse the trial court's Order Granting, In Part, Plaintiff's Motion for Summary Judgment and Setting This Matter for a Damages Hearing, filed on March 9, 2026, reverse the trial court's Order

Denying Defendant's Motion for Leave to File a Counterclaim dated February 19, 2026, and remand this matter to the trial court for a jury trial. This submission does not exceed the word count limit imposed by Rule 24. Word Count: 4195

Respectfully submitted this 18th day of May, 2026.

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Respectfully submitted on May 18, 2026,

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