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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

NO. 39209-7-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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DISCOVER BANK, ISSUER OF THE DISCOVER CARD,

Respondent,

v.

JOHN S. BRIDGES and JULIE A. BRIDGES, husband and wife,

Appellants.

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BRIEF OF RESPONDENT

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APPEAL FROM COWLITZ COUNTY SUPERIOR COURT  
Honorable James E. Warme

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**A. RESTATEMENT OF ISSUES**

1. Did the Trial Court Correctly Grant Discover Bank's Motion for Summary Judgment?

2. Did the Trial Court Correctly Rely On Discover Bank's Affidavits and Declarations in Support of its Motion for Summary Judgment?

3. Did the Trial Court abuse its discretion in denying the Bridges' Motion for Reconsideration?

4. Should Discover Bank be awarded its attorney fees and costs on appeal pursuant to RAP 18.1 and the cardmember agreement?

**B. RESTATEMENT OF THE CASE**

**1. Statement of Facts**

The facts in this case are relatively straightforward.

The Bridges opened a credit card account with Discover Bank on July 2, 1987. CP 95. After the Bridges defaulted on their account, Discover Bank began legal proceedings to collect on the debt. CP 42.

**2. Procedural History**

Discover Bank filed its summons, complaint and proof of service on October 27, 2008. In response, the Bridges each filed nearly identical affidavits along with an Answer and Affirmative Defenses on November 14, 2008. CP 1-7. Discover Bank filed a motion for summary judgment

with the trial court on November 21, 2008, along with an Affidavit of Ashlea Kiser in support of summary judgment. CP 8-42. Attached to the Kiser Affidavit was a copy of the cardmember agreement and account statements from June 16, 2006, to June 22, 2008. CP 15-42.

On December 17, 2008, the Bridges filed a response in opposition to Discover Bank's motion. CP 43-64. On December 23, 2008, Discover Bank filed their reply to Bridges' response. CP 88-93. Discover Bank also filed the Declaration of Robert Adkins that same day. CP 94-111. Attached to the Adkins Declaration was a copy of the cardmember agreement in effect when the Bridges' account was opened and a copy of the cardmember agreement in effect when the Bridges defaulted. CP 98-111.

The motion was initially denied. CP 114. On March 2, 2009, Discover Bank filed a supplemental Affidavit of Denise Brooks which explained the relationship between Discover Bank and DFS Services LLC and re-noted its motion for summary judgment. CP 115-118. On March 10, 2009, the Bridges filed another response in opposition to Discover Bank's motion. CP 119-141. On March 13, 2009, Discover Bank filed with the court a reply to Bridges' response as well as the Declaration of Laurie K. Friedl. CP 163-169. The sole substantive information contained in Ms. Friedl's declaration was a notice to the trial court that

Ms. Friedl's office received the Bridges' response in opposition to summary judgment via facsimile on March 9, 2009. CP 168.

On March 16, 2009, the court granted Discover Bank's motion for summary judgment, awarding Discover a judgment in principal amount of \$11,957.97, plus \$285.00 in costs and \$850.00 in attorney fees. CP 170-172.

On March 25, 2009, the Bridges filed a Motion for Reconsideration with the trial court. CP 183-194. On April 2, 2009, Discover Bank filed a Response in Opposition to the Bridges' motion. CP 207-213. The trial court denied the Bridges' motion on April 6, 2009. CP 219.

The Bridges' Notice of Appeal was filed on April 22, 2009. The Bridges declined to file a Report of Proceedings. Statement of Arrangements.

### **C. ARGUMENT**

#### **1. THE TRIAL COURT PROPERLY GRANTED DISCOVER BANK'S MOTION FOR SUMMARY JUDGMENT.**

Under CR 56(c), summary judgment is appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The Court should affirm the grant of summary judgment if, from all the evidence, it is clear

that reasonable persons could reach but one conclusion. *In the Matter of the Parentage of J.M.K.*, 155 Wn.2d 374, 386, 119 P.3d 840 (2005).

The standard of review on appeal from an order on summary judgment is de novo. *Id.* The appellate court engages in the same inquiry as the trial court. *Id.* The Court will only consider the evidence and issues considered by the trial court. *Ambach v. French*, 141 Wn. App. 782, 791, 173 P.3d 941 (2007).

- A. The Bridges failed to raise a genuine issue of material fact in response to Discover Bank's motion for summary judgment and Discover was entitled to judgment as a matter of law.

At summary judgment, Discover sought a monetary judgment on its claim for sums due and owing on the consumer account. CP 8-9. In support of its motion for summary judgment, Discover Bank filed sworn statements from three representatives of DFS Services, LLC, the servicing agent of Discover Bank: the affidavit of Ashlea Kiser, the declaration of Robert Adkins, and the affidavit of Denise Brooks. CP 13-42, CP 94-111, CP 115-116. As stated previously, attached to the Kiser Affidavit were a copy of the cardmember agreement and account statements from June 16, 2006, to June 22, 2008. CP 15-42. Attached to the Adkins Declaration were a copy of the cardmember agreement in effect when the Bridges' account was opened and a copy of the cardmember agreement in effect

when the Bridges defaulted. CP 98-111. The Brooks Affidavit explained that DFS Services LLC is the servicing agent for Discover Bank. CP 116.

In response to Discover Bank's motion for summary judgment, the Bridges never provided any evidence that they did not owe money to Discover Bank. They simply raised a number of unsupported assertions. The Bridges incorrectly claimed that there was no personal jurisdiction; erroneously argued that Ashlea Kiser lacked personal knowledge of the account at issue; claimed, without any legal justification, that they never agreed to the terms of the cardmember agreement; and claimed that Discover Bank was not entitled to attorney fees despite the fact that Discover Bank had the right to recover attorney fees under the terms of the cardmember agreement. CP 43-60.

John and Julie Bridges' affidavits (which were filed prior to Discover's filing of its motion for summary judgment) contained nearly identical, nonsensical and conclusory assertions (i.e. "that Plaintiff is not providing any consideration to me, nor providing any performance for which I am indebted . . ."). CP 5, 7. The trial court properly found that the Bridges' assertions failed to raise any issue of fact. Summary judgment was proper in all respects.

1. The trial court had personal jurisdiction.

The Bridges alleged in response to Discover's motion for summary judgment that the trial court had no personal jurisdiction because Discover Bank is registered in Delaware. This assertion was baseless. The state where Discover Bank is registered is irrelevant. It is the residence of the Bridges, not Discover Bank, which controls personal jurisdiction. RCW 4.12.025. If the Bridges' argument were followed, no out of state plaintiff could ever sue a resident of the State of Washington.

In addition, because the Bridges reside in the state of Washington, the matter was properly heard before the Superior Court. RCW 2.08.010. Furthermore, venue was proper in Cowlitz County Superior Court because under RCW 4.12.025(1), "[a]n action may be brought in any county in which the defendant resides, or, if there be more than one defendant, where some one of the defendants resides at the time of the commencement of the action." Jurisdiction and venue in this matter were clearly proper.

2. The Bridges agreed to the terms of the cardmember agreement.

As with most credit cards, here the terms and conditions of the cardmember agreement were accepted when the individual used the credit card or failed to cancel the account within the given time. The

cardmember agreement states in pertinent part, “Your Acceptance of this Agreement. The use of your Account or a Card by you or an Authorized User, or your failure to cancel your Account within 30 days after receiving a Card, means you accept this Agreement....” CP 103.

Here, the Bridges accepted the terms of the cardmember agreement when they did not cancel the Account and used the Discover Card after the effective date of the proposed amendments. CP 95.

3. The Bridges never denied using the Discover credit card.

Most significantly, the Bridges never denied that they used the Discover card. The Bridges’ affidavits (which were improperly filed prior to Discover filing its motion for summary judgment) merely make conclusory assertions that that they do not owe Discover any money. Their bare assertions were not supported by any evidence whatsoever. As the Court is well aware, "conclusory allegations, speculative statements or argumentative assertions that unresolved factual matters remain are not sufficient to preclude an order of summary judgment." *Turngren v. King County*, 104 Wn.2d 293, 314, 705 P.2d 258 (1985). Here, the trial court properly found that the Bridges’ conclusory and argumentative assertions did not raise an issue of fact, especially in light of the overwhelming evidence filed by Discover in support of its claim.

In support of its motion for summary judgment, Discover filed three affidavits from employees of Discover's servicing agent, along with years of account statements and copies of the first and current cardmember agreements. The evidence before the trial court showed that the Bridges' account was opened in 1987; that the account was in default; that the balance of \$11,957.97 was due and owing and that the Bridges were liable for costs and attorney fees under the cardmember agreement. CP 13 - 42; CP 94 - 110. The Bridges received over twenty years of benefits from the use of their Discover card and then defaulted on their obligation to pay Discover. The trial court could reach only one conclusion: that the Bridges were liable to Discover Bank.

2. THE TRIAL COURT PROPERLY CONSIDERED AND ADMITTED INTO EVIDENCE DISCOVER BANK'S AFFIDAVITS AND DECLARATIONS UNDER CR 56(A) AND CR 56(E).

This Court reviews a trial court's decision on the admissibility of evidence in a summary judgment proceeding de novo. *State v. Lee*, 144 Wn. App. 462, 466, 182 P.3d 1008 (2008). In the present case, the trial court properly considered Discover Bank's Affidavits under the requirements of CR 56(a) and CR 56(e).

A. The trial court properly considered the affidavits and declarations under CR 56(a) and (e).

Under CR 56(a), a party seeking summary judgment may move, “with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.” CR 56(a). In the present case, Discover Bank filed with the court the Affidavit of Ashlea Kiser, the Declaration of Robert Adkins, the Affidavit of Denise Brooks, and the Declaration of Laurie K. Friedl. CP 13-42, CP 94-111, CP 115-116, CP 168-169.

The Bridges argue that the trial court erred in allowing into evidence the affidavits and declarations of Discover Bank. BA 3-4. The Bridges go on to argue that the affidavit of Ashlea Kiser, the declaration of Robert Adkins, and the affidavit of Denise Brooks are inadmissible because they are “not sworn testimony by a competent fact witness with testimony.” BA 3.

The Bridges’ arguments are without merit. Discover Bank’s affidavits and declarations clearly meet the requirements of CR 56(e). CR 56(e) provides in part that,

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmative that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof

referred to in an affidavit shall be attached thereto or served therewith.

Here, Ashlea Kiser and Robert Adkins both stated that their sworn statements were made “on the basis of [their] personal knowledge” and review of DFS’s records. CP 14, CP 94. Likewise, Denise Brooks, in her sworn affidavit, stated that was personally familiar with the account and the relationship between Discover Bank and DFS Services LLC. CP 115.

To the extent that the Kiser affidavit and Adkins declaration identified business records of DFS Services, LLC, these declarations also complied with RCW 5.45.020, which states:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Ms. Kiser stated in her affidavit that she is a Legal Placement Account Manager for DFS Services LLC, the servicing agent for Discover Bank; that her affidavit is made on the basis of personal knowledge; that, in her capacity as a Legal Placement Account Manager she has control over and access to records regarding the account at issue; that she has inspected said account and statements regarding the balance due; and that such records are maintained in the ordinary course of business. CP 14.

Similarly, the Adkins declaration states that his certification is made on the basis of his “personal knowledge and a review of the records maintained by Discover with respect to the account at issue. All such records are maintained in the regular course of business at or near the time of the events recorded.” CP 94. The business records identified in these declarations were clearly admissible.

The Bridges further argue that Ashlea Kiser and Robert Adkins lacked personal knowledge because they are employees of DFS Services LLC and not Discover Bank. BA 3-4. This argument is also without merit. Both Ashlea Kiser and Robert Adkins clearly state that DFS Services LLC is the servicing agent of Discover Bank. CP 14, CP 94. Furthermore, in the affidavit of Denise Brooks, she again affirms that DFS Services LLC is a servicing agent for Discover Bank. CP 116. As such, Ms. Brooks further states that DFS Services LLC performs a variety of exclusive services for Discover Bank. CP 116. These services include application approval, customer service, billing and the collection of delinquent account such as the Bridges.’ CP 116. As employees of the servicing agent for Discover Bank, Kiser and Adkins clearly had the requisite knowledge to testify about the Bridges’ delinquent accounts.

The Bridges also argue that under CR 56(e), Exhibits A and B attached to the declaration of Robert Adkins were inadmissible because they were not “certified copy’s [sic] nor sworn to and are not signed by the defendants.” BA 4.

The Bridges’ argument is baseless. As referenced above, the portion of CR 56(e) relating to such exhibits states that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. CR 56(e). The declaration of Robert Adkins clearly complied with this rule. Here, as required by CR 56(e), Exhibits A and B were attached to the declaration of Robert Adkins. Moreover, in his declaration, Mr. Adkins certified under penalty of perjury that Exhibits A and B were true and correct copies of the papers referred to in his declaration. CP 94-96.

Finally, the Bridges argue that the declaration of Laurie K. Friedl, attorney for Discover Bank, was inadmissible because “a party cannot be both witness and counsel in the same cause.” BA 4. The Bridges’ argument fails for the glaring reason that Ms. Friedl’s declaration was filed for the limited purpose to inform the trial court that on March 9, 2009, Ms. Friedl’s office received via facsimile the Bridges’ untimely response to Discover Bank’s motion for summary judgment. CP 168.

B. The affidavits and declarations were not hearsay.

The Bridges make the conclusory argument that Discover Bank's affidavits were hearsay. BA 3. The Bridges offer no evidence, case law, or court rule to support their assertion. To the extent that the Court considers this assertion, the affidavits and declarations in support of summary judgment clearly were not hearsay.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). A trial judge is presumed to know the rules of evidence and is presumed to have considered only admissible evidence. *In re Harbert*, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975).

Here, the Bridges fail to articulate why any of the statements in the declarations and affidavits submitted on behalf of Discover Bank would constitute hearsay, besides the bare allegation that the statements must be hearsay because they are made by employees of DFS Services LLC and not Discover Bank. AB 3-4. The declarations and affidavits do not contain any hearsay statements and the trial court properly considered them in granting Discover Bank's motion for summary judgment.

The affidavits and declarations submitted by Discover do not constitute hearsay. In her affidavit, Ms. Kiser states that in her capacity as a Legal Placement Account Manager, she has control over and access to

records regarding the Bridges' account. CP 14. Ms. Kiser also states that she has access to the records regarding the Bridges' account and that the records were maintained in the ordinary course of business. CP 14.

In his declaration, Mr. Adkins explains that as an Account Manager in the Attorney Placement Department, he is responsible for Discover accounts that have resulted in contested litigation. CP 94. Mr. Adkins states that he makes his certification on the basis of his personal knowledge and a review of the Bridges' account records. CP 94. Mr. Adkins further declares that such records are maintained in the regular course of business at or near the time of the events recorded. CP 94.

In her sworn affidavit, Ms. Brooks states that she is personally familiar with the Bridges' account as well as the relationship between Discover Bank and DFS Services LLC. CP 115-116. Discover's affidavits and declarations do not contain any assertions made by anyone other than the speakers themselves and therefore do not constitute hearsay. The fact that these individuals work for DFS Services LLC and not Discover Bank does not make the statements therein hearsay.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE BRIDGES' MOTION FOR RECONSIDERATION.

Motion for reconsideration are reviewed under the abuse of discretion standard. *Wilcox v. Lexington Eve Institute*, 130 Wn.App. 234,

241, 122 P.3d 729 (2005). A trial court abuses its discretion “when its decision is based on untenable grounds or reasons” *Id.* at 241. Here, as explained in detail above, the trial court had tenable grounds for denying the Bridges’ motion for reconsideration since the Bridges failed to raise any issues of fact. Therefore, to the extent the Bridges are also requesting the Court reverse the trial court’s denial of their motion for reconsideration, this request should also be denied.

4. DISCOVER SHOULD BE AWARDED ATTORNEY FEES AND COSTS ON APPEAL PURSUANT TO RAP 18.1 AND THE CARDMEMBER AGREEMENT.

The Cardmember Agreement provides that Discover is entitled to its attorney fees and costs on appeal:

If we refer the collection for your Account to an attorney or employ an attorney to represent us with regard to recovery of money that you owe us, we may charge you reasonable attorneys’ fees and court or other collection costs as permitted by law and as actually incurred by us, including fees and costs in connection with any appeal (emphasis added).

CP 105 (under subheading “Default and Cancellation”).

Therefore, pursuant to RAP 18.1 and the Cardmember Agreement, Discover should be awarded its attorney fees and costs incurred in connection with the Bridges’ appeal.

**D. CONCLUSION**

For the reasons set out above, Discover Bank respectfully requests that the Court affirm the trial court's grant of judgment. The Bridges never disputed that they incurred charges on their Discover card. The Bridges' conclusory affidavits failed to raise a genuine issue of material fact. As such, summary judgment was entirely appropriate and the Court should affirm the trial court's ruling. To the extent the Bridges are also requesting the Court reverse the trial court's denial of their motion for reconsideration, this request should also be denied since there is no evidence that the trial court abused its discretion. Finally, Discover should be awarded its attorney fees and costs pursuant to RAP 18.1 and the Cardmember Agreement.

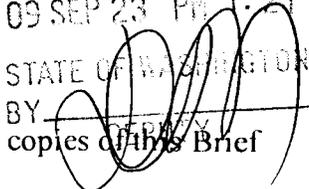
RESPECTFULLY SUBMITTED, this <sup>23<sup>rd</sup></sup> day of September, 2009.



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**CERTIFICATE OF SERVICE**

I certify that on September 23, 2009, I mailed to the appellant two copies of this Brief of Respondent via Express Mail to:

John & Julie Bridges  
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**CERTIFICATE OF SERVICE**

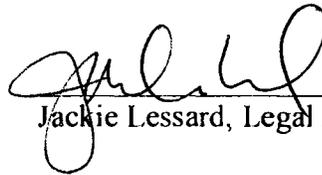
I certify that on September 23, 2009, I sent to the appellant two copies of this Brief of Respondent via Federal Express Overnight Delivery to:

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**CERTIFICATE OF FILING**

I certify that on September 23, 2009, I filed via ABC Messenger the original and one copy of this Brief of Respondent with the Court of Appeals, Division II, at the following address:

Court of Appeals, Division II  
950 Broadway Ste 300  
Tacoma, Washington 98402



Jackie Lessard, Legal Assistant