

No. 39244-5-II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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Court of Appeals, Division II
of the State of Washington

Unifund CCR Assignee of GE Visa Gold/Conversion, Respondent

and

Paul B. Sunde, Appellant

BRIEF OF APPELLANT

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Assignments of Error

1. The trial court erred by entering the portion of the March 16, 2007. Order of Summary Judgment that granted Plaintiff-Appellee's motion for Summary Judgment for account "3776" and erred by entering a Judgment in favor of Plaintiff- Appellee Unifund.
2. The trial court erred in the March 16, 2009, Summary Judgment Order by determining that the assignment of account "3776" was proper and that Unifund was the real party in interest with standing to bring the claim for credit card account.
3. The trial court erred in the March 16, 2009, Summary Judgment Order by determining that the assignment of account "7346" was proper and that Unifund was the real party in interest with standing to bring the claim for credit card account.
4. The trial court erred by entering the portion of the Order on Summary Judgment dated April 27, 2009, that awarded attorney fees to Unifund without a demonstration or findings to support a loadstar determination contrary to the express requirements of *Mahler*.

5. The trial court erred by entering a judgment on account “3776”.
6. The Court erred in entering findings on the Summary Judgment Order of March 16, 2009, that the debts owed by Mr. Sunde on the Chase and US Bank credit cards were assigned to Unifund.

A. Standard of Review

The court reviews an order granting summary judgment de novo, engaging in the same inquiry as the trial court, considering all facts in the record and reasonable inferences in a light most favorable to the nonmoving party. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wilson*, 134 Wn.2d at 698.

Unifund, the party moving for summary judgment, has the burden of establishing its standing by proving its right to sue as a matter of law. *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Norm Adver., Inc. v. Monroe St. Lumber Co.*, 25 Wn.2d 391, 398, 171 P.2d 177 (1946).

Unifund, the party moving for summary judgment has the burden to prove that a contract was created, the terms of the contract, the balance due, the interest rate, the date of default and the absence of payments.

In reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court.” *Wingert v. Yellow Freight Sys., Inc.*, 146 Wash.2d 841, 847, 50 P.3d 256 (2002). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court will consider the facts and reasonable inferences in the light most favorable to the nonmoving party. *Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1*, 140 Wash.2d 403, 406, 997 P.2d 915 (2000). “Resolution of disputed factual issues can be sustained when reasonable minds could reach but one conclusion from the evidence accompanying a summary judgment motion.” *Sundquist*, 140 Wash.2d at 406-07, 997 P.2d 915. “To defeat summary judgment, [the nonmoving party's] evidence must set forth specific, detailed, and disputed facts; speculation, argumentative assertions, opinions, and conclusory statements will not suffice.” *Sanders v. Woods*, 121 Wash.App. 593, 600, 89 P.3d 312 (2004).

The court “review[s] the trial court's evidentiary rulings made for summary judgment de novo.” *Seybold v. Neu*, 105 Wn.App. 666, 678, 19 P.3d 1068 (2001).

B. Summary of Argument

Paul Sunde appeals from an order granting summary judgment against him for unpaid debt on a “US Bank” or account “3776” credit card. Appellant Sunde contested that the plaintiff, Unifund, was the real party in interest with standing to sue, i.e. that Unifund possessed a valid written assignment to collect the debt. To obtain summary judgment Unifund was required to show that it possessed a valid written assignment as a matter of law. Unifund failed to do so because it provided no proof of a written assignment as required by RCW 4.08.080. Accordingly, the appellant requests that the court reverse the order on summary judgment and remand for further proceedings.¹ See *MRC Receivables Corp. v. Zion*, ___P.3rd ___, 2009 WL 3418132, 1 (Wash.App. Div. 1).

Unifund was also required to prove that a debt was owed, the amount of the debt, the amount of principle, the amount of interest and/or late fees, the rate of interest, and the basis for attorney fees. Unifund did not offer admissible evidence to support its contract claims.

¹ Appellant also contested the assignment of a “Chase” or “7346” bank credit card account.

C. Statement of the Case
Factual Background and Trial Court Proceedings.

Unifund filed suit against Sunde alleging he was the obligor on two unrelated credit cards account (identified by the Unifund as:

1. **“7346” or “Chase”**; and
2. **“3776” or “US Bank”**).

Unifund filed three separate motions for Summary Judgment. CP 47-50; CP 88-91; CP 158-162. In an attempt to prove the existence of the debt, the amount of the debt, the interest rate, and the assignment or standing Unifund filed four different declarations of several different Unifund employees. CP 51-82; CP 92-123; CP 148-149. CP 227-285; CP 295-317. The declarations were filed at different times by different employees each claiming “personal knowledge” of the account and the business practices of Unifund and review of Unifunds’ records from “the original creditor”. The content of the declarations differed from one another even though they were produced on the same generic boilerplate form or template CP 51-82; CP 92-123; CP 148-149. CP 227-285; CP 295-317. (“He/She” declares...)

The appellant contested both the standing (real party in interest) of Unifund to bring the suit and the admissibility of the alleged proof of the debt that Unifund offered. A judgment was entered on April 27, 2009

only on account “3776” in the amount of \$18,926.34 as “principal on account 3776” and “\$11, 408.46 as interest to 04/03/2009”. CP 324.

There are no findings of fact or evidentiary support in the record for the entry of a judgment for either amount. Unifund’s claim for account 7346 was dismissed as barred by the statute of limitations.

1. The claim for account 7346- was dismissed as barred by the Delaware Statute of Limitations;

On March 16, 2009, Cowlitz County Superior Court Judge Johansen issued a letter ruling on Plaintiff’s Motion for Summary Judgment. CP 321. The court determined that the claim on account “7346” was barred by the statute of limitations. On April 27, 2009, the court entered a judgment determining that “Delaware’s three year statute of Limitations applies to the Chase and the statute of limitations is not tolled”, that “Plaintiff’s motion for Summary Judgment on the Chase account is denied”, and “the Court’s ruling is dispositive of all issues in this action and this Summary Judgment is a final judgment in this matter”. CP 325. Appellant does not appeal this portion of the ruling since it was a dismissal in appellant’s favor. However, the court also determined that Unifund had standing i.e. that it possessed a valid written assignment. Appellant does contest this determination to the

extent it is necessary to do so (In the event Unifund may raises the dismissal based on the statute of limitations in the cross appeal.)

2. Judgment was entered for account 7346

On September 5, 2006, Unifund filed suit in Cowlitz County Superior Court; Cause No. 06-2-01721-9 against Sunde alleging he was the obligor *only* on the “7346” (allegedly Chase) account. As noted above this claim was dismissed on April 27, 2009. CP 1-5; CP 325. In the initial complaint, Unifund identified itself as “Unifund CCR Assignee of GE Visa Gold/Conversion”. But later Unifund claimed the account was from “Chase” Bank not “GE Visa”. CP 1.

On March 21, 2007, Unifund filed an Amended Complaint. Unifund then used the caption “Unifund CCR *Partners*” (dropping any reference to the “GE account”). CP 6 and CP 8. Unifund added a claim for the “3776” (allegedly “US Bank”) account. CP 9. Unifund alleged that “defendant became indebted on [account 3776] for goods, services, and monies loaned in ... the unpaid balance \$26,435...together with interest.... CP 9, Lines 13-17.

On June 4, 2007, Defendant filed his Answer to Amended Complaint. CP 18.

June 8, 2007, Plaintiff filed a a Motion and Declaration for Default Judgment without any supporting declaration from Unifund or an alleged original creditor. CP 23.

On December 17, 2007, Unifund filed its first Motion and Declaration for Summary Judgment. CP 47, CP 51.

On April 18, 2008, Unifund filed a second Motion and Supplemental Declaration for Summary Judgment. CP 88, CP 92.

On May 5, 2008, Unifund filed a third Declaration in Support of it's Motion for Summary Judgment. CP 148. On June 5, 2008, Sunde filed his Opposition to Motion for Summary Judgment. CP 150.

On October 13, 2008, Unifund filed a third Amended Motion for Summary Judgment. CP 158.

On October 20, 2008, Unifund filed a fourth Declaration in Support of it's Motion for Summary Judgment. CP 227. On November 12, 2008, Sunde timely filed his Opposition to Motion for Summary Judgment. CP 286. On January 7, 2009, Sunde filed his Supplemental Brief in Opposition to Motion for Summary Judgment. CP 293.

On February 26, 2009, the hearing was held on Unifund's Motion for Summary Judgment. CP 320.

On March 16, 2009, Cowlitz County Superior Court Judge Johansen issued a letter ruling on Unifund's Motion for Summary

Judgment granting a judgment on the account identified by Unifund as “3776” and dismissing the claim of Unifund on the account identified by Unifund as “7346” based upon an expiration of the Delaware Statute of limitations which was applicable by a choice of law provision in the alleged terms & conditions of the credit card. CP 321.

On April 27, 2009, a hearing was held on Presentation of Judgment. CP 323. An Order of Summary Judgment and Judgment was entered. CP 324. The notice of appeal was timely filed.

D. Argument

The Unifund declarations did not unequivocally state that they were and based on personal knowledge. The documents attached to the declaration were not properly authenticated because declarants failed to make an affirmative *showing* of personal knowledge as required by CR 56(e) and ER 602.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

Washington Rules of Evidence, ER 602

In addition, “CR 56(e) is explicit in its requirements which serve the ultimate purpose of a summary judgment motion. Affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would

be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 359, 753 P.2d 517 (1988).

“Authentication is a threshold requirement designed to assure that evidence is what it purports to be.” *State v. Payne*, 117 Wash.App. 99, 106, 69 P.3d 889 (2003). CR 56(e)'s “requirement of authentication or identification is met if the proponent shows proof sufficient for a reasonable fact finder to find in favor of authenticity.” *Int'l Ultimate v. St. Paul Fire & Marine Ins. Co.*, 122 Wash.App 736, 746, 87 P.3d 774; ER 901(a) (authentication requirement “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”). If the challenged documents “are properly authenticated [under ER 901 or 902] and are not excluded because of hearsay, then an attorney may rely on them in a summary judgment motion regardless of any lack of personal knowledge.” *Int'l Ultimate*, 122 Wn.App. at 746, 87 P.3d 774.

Unifund did not properly authenticate any of the documents it filed to support its claim that it was the real party in interest with standing to sue or to support its claim regarding the existence or amount of the debt.

1. Personal knowledge

CR 56(e) provides that affidavits made in support of a motion for summary judgment must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. CR 56(e). Testimony must be based on the facts of the case and not on speculation or conjecture. *Seybold v. Neu*, 105 Wn.App. 666, 677, 19 P.3d 1068 (Div. 1, 2001).

“Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.” *Guile v. Ballard Community Hosp.*, 70 Wn.App. 18, 25, 851 P.2d 689 (Div. 1, 1993); *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 493, 183 P.3d 283, 288 (Wn.App. Div. 3, 2008). Likewise affidavits which do not show personal knowledge or the basis of the claim of personal knowledge can not support Summary Judgment.

Respondent Unifund has the burden² to show that:

1. that the debt is valid,
2. the amount of the debt
3. the amount of the debt remaining due and owing,
4. the interest rate applied to create the amount of the debt claimed,

² For their contract claim to succeed, the [Plaintiff] must demonstrate (1) the existence of a valid and enforceable contract, (2) the parties' rights and obligations under the contract, (3) violation of the contract, and (4) damages proximately caused by the breach. *Citoli v. City of Seattle*, 115 Wn.App. 459, 476, 61 P.3d 1165 (2002).

5. that Unifund is the real party in interest (i.e. that a debt was owed to US Bank and that Unifund is a successor in interest by a valid assignment of the debt),
6. that a payment hasn't been made since an identified date (i.e. that the account is delinquent),

Unifund attempted to meet its evidentiary burden with a series of hearsay declarations which do not even unequivocally allege personal knowledge. See CP 51, CP 92, CP 148, CP 295.

The Joseph Lutz declaration cited December 17, 2007 states that the declaration is based on “personal knowledge and/or review of Plaintiff’s business records”. CP 51, paragraph 1. Mr. Lutz does not say which corporation’s records he reviewed, not which part of his declaration is on personal knowledge, and which part is on review of some unnamed corporation’s records. Mr. Lutz is saying that the records are exempt from hearsay based on his review of the records. Statements that are not made on personal knowledge but rather on Unifund’s records would be hearsay or double (or more) hearsay. It is not conclusions from the review of business records that forms an exception to hearsay but rather the business records of the original creditor themselves. The problem with the declaration is that it is impossible to tell which of the statements made is the declarant’s interpretation of Unifund’s records and which are allegedly made on personal knowledge. Unifund was not

the original creditor. Unifund purchased the debt apparently through a debt broker, National Loan Exchange, Inc, a company that buys and sells portfolios of debt and arranges for purchase and transfers portfolios of debt. CP 313 (lower left corner), The declarants do not even mention that the records may have been in the possession and control of the debt broker.

2. 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). Hearsay is inadmissible unless it falls under one of the exceptions to the hearsay rule. ER 802; see *State v. Hines*, 87 Wn.App. 98, 101, 941 P.2d 9 (1997).

The business records exception to hearsay is codified in RCW 5.45.020 and provides that a record may be admissible, “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.”

3. Hearsay- Exception-Foundation

Testimony, whether live or in the form of an affidavit, to the effect that the witness has reviewed a loan file and that the loan file shows that the debtor is in default is hearsay and incompetent; rather, the records must be introduced after a proper foundation is provided. *New England Savings Bank v. Bedford Realty Corp.*, 238 Conn. 745, 680 A.2d 301, 308-09 (1996), later opinion, 246 Conn. 594, 717 A.2d 713 (1998); *Cole Taylor Bank v. Corrigan*, 595 N.E.2d 177, 181 (2d Dist. 1992). It is the business records that constitute the evidence, not the testimony of the witness referring to them. *In re A.B.*, 308 Ill.App. 3d 227, 719 N.E.2d 348 (2d Dist. 1999).

4. The Business Records Exception to the Hearsay Rule

Business records used to prove a collector's causes of action are hearsay, and must fit within the business records exception to the rules prohibiting hearsay evidence in order to be admitted into evidence.

One problem with the declarations from the Unifund employees is that the declaration are from Unifund employees rather than employees of the original creditor and/or anyone else who has possessed stored or modified the records. The hearsay exception for business records does not include information received from a third party (as opposed to information generated by, and about, the business) unless the

declarant has personal knowledge of the reliability of the creation and storage of information of the original creditor. 5C WAPRAC § 803.39. Here, the Unifund declarant claim that they have supervision and control of records received from the original creditor, But the business records exception must show the reliability of those records before they were received by Unifund. It is unlikely that Unifund employees' have knowledge of the business practices of every creditor that they have purchased debt from (through a debt broker)

The classic example is correspondence received by a business and placed in a file folder. There is no assurance that the information reflected in the correspondence is reliable, and the correspondence obviously does not gain additional reliability simply because it is placed in a file folder and stored by a business. *State v. Weeks*, 70 Wash.2d 951, 953, 425 P.2d 885, 886 - 887 (WASH 1967). In weeks the court noted that:

The unauthenticated record of the Arkansas hospital was not competent evidence because it did not meet the requirements of the cited statutory provisions. There was no evidence by the custodian of the records of the Arkansas hospital or by any other qualified person that the document in question was a business record, as that term is defined in the Uniform Business Records as Evidence Act, RCW 5.45. The appellant cites *State v. Rutherford*, 66 Wash.2d 851, 405 P.2d 719 (1965), in support of his contention that the court erred in refusing to admit the unauthenticated record in evidence. In the *Rutherford* case, the document was admitted in evidence because the witness had personal knowledge

regarding the identity of the record and the mode of its preparation. The cited case is therefore not apropos.

[2] The appellant further contends that since the unauthenticated record was in the file of Dr. Riley, it constituted a part of His business records. Appellant contended that the doctor considered it, together with other evidence in arriving at his conclusion that Lloyd Allen Weeks was sane at all times herein material. Assuming, arguendo, that the doctor considered an unauthenticated record in arriving at his conclusion, that fact goes only to the weight of his testimony as an expert. The unauthenticated record in the file of the doctor is not a business record of the doctor as that term is defined by RCW 5.45.020, supra. In order for such business records to be introduced in evidence, in derogation of the hearsay rules, the record must be (1) made in the regular course of business, at or near the time in question, by the one performing the service or some other qualified person, and (2) identified by the custodian of the record or other qualified person as to its contents and its mode of preparation. The fact that an unauthenticated record was in the file of Dr. Riley does not make it admissible in evidence as a part of his business records. It was not a business record of Dr. Riley within the meaning of the statute because it was not a record of his treatment of the patient made by his office in the regular course of business.

State v. Weeks, 70 Wn.2d 951, 953, 425 P.2d 885, 886 - 887 (Wn. 1967).

Simply because a Unifund employee can testify that the records are maintained by Unifund does not meet the business records exception without showing the authenticity and reliability of the records that Unifund received. The declarant do not say when, where, from whom or in what format the records were received. The declarants do not even indicate that Unifund received the records directly from the creditor.

On December 17, 2007, Unifund's employee, Joseph Lutz, testified that the interest rate on account 3776 was 10%. CP 52. But the

alleged billing statement Unifund attached to account 3776 show interest rates of 7.75, 7.25, 6.75, 6.50, 4.50. CP 65-CP 83. Lutz declared that the amount due on account 3776 was 31,993.41. CP 52, Lines 10-11. The oldest alleged statement on account 3776, dated January 9, 2002, indicates a balance of \$22,390.43. CP 65. The most recent alleged statement on account 3776 dated April 9, 2003, indicates a balance of \$18,736.27. CP 83. On CP 46 and 56, the alleged terms and conditions the "interest rate" is blank since the following paragraphs make the rate variable based on an index published in the Wall Street journal. CP 46, paragraph 10; CP 56, paragraph 10. These terms and conditions are indicated as the terms and conditions by Lutz and Carnes. Id. The terms and conditions do not bear the signature of Sunde or any indication they were mailed to him or included in a credit card agreement with hi. Indeed, Unifund Declarant Ballman indicates a different set of terms and conditions applied. with a different statement as to the interest rate. CP 258-258 , paragraph 10. Mr. Ballman claims the terms and conditions require an interest rate as "shown on the card" but the card was not produced.

On May 5, 2008, Unifund's employee, Bobby Carnes, did not testify as to an amount due or interest rate on account 3776. Mr. Carnes

testified that he attached a “CreditLine Cardholder Agreement”, but nothing was attached to his Declaration.

On October 20, 2008, Unifund’s declarant Ballman, indicated that the interest rate on account 3776 was 12%. CP 229, Lines 1-3. Mr. Ballman attached the same alleged Billing Statements on account 3776 as those attached to the Declaration of Unifund’s employee, Joseph Lutz showing statement rates of between 4.5 to 7.75 percent variable rate. CP 266-CP 281. Unifund’s employee, Steve Ballman, testified that the amount due on account 3776 was \$18,926.34. CP 228, Line 1.

On February 9, 2009, Unifund’s employee Bobby Carnes attached to his Declaration the Exhibit referenced in the Exhibit B, entitled “Bill of Sale and Assignment of Assets”. CP 296. The Exhibit does not list account number 3776. CP 314.

The bill of sale is not an assignment. The Bill of sale by its terms negates the reliability of the records the alleged creditor is providing stating that any account are transferred “on an ‘AS IS’ and ‘WITH ALL FAULTS’ basis”. CP 255. The bill of sale is on a form created by National Legal Exchange (NLEX), a well known nationally recognized broker that buys and sells debt portfolios as an intermediary between buyers and sellers downstream from the original creditor. The sale is made “without recourse and without representations or warranties of any

type, character, kind,, character, or nature, express or implied...”. The fourth declaration (Carnes filed February 9, 2009) for the first time (the other three declarations did not) attaches any account information. CP 314-317. But the account number does not match the alleged Sunde account. CP 314. There is no account number “3776” in the computer printout. CP 314. The “total charges” have been blocked out by someone, with no indication as to who changed the record, when, or why, or how they were able to do so. CP 316. Similarly, the “current balance” field is x’d out by some unknown person at some unknown time without explanation. Perhaps these field contradicted the prior declaration file din the case and demonstrate that Unifund is able to manipulate the so-called records. CP 317

On December 17, 2007, Unifund’s employee Joseph Lutz attached Terms and Conditions (“Terms”) alleged to govern the credit agreement on account number ending 3776. CP 55 – CP 63. A duplicate set of those Terms was attached to the April 18, 2008 Declaration of Bobby Carnes. CP 95 – CP 103. On October 20, 2008, Unifund’s employee Steve Ballman attached a different set of Terms to his Declaration. CP 256 – CP 265.

The first set of Terms is entitled “U.S. Bank Secured, Classic, Gold or Platinum Credit Cardmember Agreement” and is “Effective

10/04/2007". CP 55 and CP95. The most recent set of Terms filed October 20, 2008, has a U.S. Bank logo on it beneath which it states "Cardholder Agreements Reference", is entitled "CreditLine Cardholder Agreement", and is "Effective 04/08/02". CP 256.

Paragraph 1 of the first set of Terms on Account number ending 3776 pertains to "Personal Use" limiting the use of the account to "personal, family or household purposes". CP 55. Whereas, paragraph 1 of the most recent Terms entitled "Using the Account" does not limit the use of the card and pertains to the Bank's agreement "to make loans to you from time to time". CP 256.

Paragraph 3 of the first set of Terms is entitled "Account Advances". CP 55. Paragraph 3 of the most recent Terms is entitled "U.S. Bank Overdraft Protection Privileges" and is missing a portion of the text at the bottom of the page. CP 256. The internet address stated at the bottom of each page of the most recent Terms is also cut off, but appears to be dated 2/20/03. CP 256.

It is impossible to tell what terms actually apply, since the sets presented are so different. None of the Unifund employees indicated that any of the terms and conditions or billing statements were sent to or received by Appellant Sunde or how they were created, maintained, or obtained or stored by Unifund.

Federal Rule of Evidence 801(c) provides that: “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.” Most state rules of evidence are similar to Federal Rule of Evidence 803(6), which establishes that a business record is exempt from the hearsay rule if it is:

[M]ade at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the ... record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with [federal requirements as to such certification] unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. *See also Citibank S.D. v. Cramer*, 139 Wn. App. 1089 (2007); *Great Seneca Fin. Corp. v. Felty*, 869 N.E.2d 30 (Ohio Ct. App. 2006).

One requirement is that the record be contemporaneous, that is, that the record was created at the same time as the event the record is documenting occurred. The record is not admissible if it was create years later, by either the original creditor or by a debt buyer.

The document must be kept in the regular course of a business activity, as part of a regular practice of conducting that activity. Thus the collector can not create the record for use in litigation. *Rae v. State*, 638 So. 2d 597 (Fla. Dist. Ct. App. 1994); *Reach Out, Inc. v. Capital Associates, Inc.*, 336 S.E.2d 847 (Ga. Ct. App. 1985). It must have been created as part of the creditor's regular business of extending credit and receiving payments.

The record also can not lack trustworthiness. Inconsistencies between the record and collector affidavits, pleadings, or other documents can suggest a lack of trustworthiness in the records themselves. If the documents are introduced as true copies of what was sent to the consumer, they should not contain handwritten notes that were added after the document was sent to the consumer.

5. Requirements for Affidavits Certifying Business Records

When business records are introduced at trial, they are introduced by the testimony of the custodian of those records or some other qualified witness. Fed. R. Evid. 803(6). When they are utilized as attachments to a summary judgment motion, they must be certified by an affidavit. *Id.* The witness or affiant must be familiar with how the business records were prepared. The federal rule concerning the certification states that the business record should be:

[A]ccompanied by a written declaration of its custodian or other qualified person... certifying that the record –

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the same course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

Fed. R. Evid 902(11).

Documents must be accompanied by an affidavit that is made on personal knowledge, sets forth facts as would be admissible in evidence, and shows that the affiant is competent to testify to the matters stated in the affidavit. *See Great Seneca Fin. Corp. v. Felty*, 869 N.E.2d 30 (Ohio Ct. App. 2006).

Business records can not be the basis for the collector's summary judgment motion if they are unaccompanied by any affidavit swearing to or certifying the records. *Suggs v. Sherman Acquisition Ltd. P'ship.*, 13 Fla. L. Weekly Supp. 301a (Fla. Cir. Ct. Sept 28, 2005). A debt buyer can not merely file documents received from the original creditor, even if they are retained in the debt buyer's regular course of business.

Palisades Collection L.L.C. v. Haque, 2006 N.Y. Misc. LEXIS 4036 (N.Y. Civ. Ct. Apr. 13, 2006). They must have been kept in the original creditor's regular course of business, and an affidavit must authenticate that fact.

An employee of a debt buyer typically will be unable to certify records created by the original creditor. *Rushmore Recoveries X, L.L.C. v. Skolnick*, 841 N.Y.S.2d 823 (Dist. Ct. 2007); *PRA III, L.L.C. v. MacDowell*, 841 N.Y.S.2d 822 (Civ. Ct. 2007) (table) (text available at 2007 WL 14290261); *Palisades Collection, L.L.C. v. Gonzalez*, 809 N.Y.S.2d 482 (Civ. Ct. 2005) (table) (text available at 2005 WL 3372971); *Martinez v. Midland Credit Mgmt., Inc.*, 2008 WL 704206 (Tex. App. Mar. 13, 2008. *But cf. Wamco XXVIII Ltd. V. Integrated Elec. Environments, Inc.*, 903 So. 2d 230 (Fla. Dist. Ct. App. 2005); *Great Seneca Fin. Corp. v. Felty*, 869 N.E.2d 30 (Ohio Ct. App. 2006) (finding, in the circumstances, that the original creditor's records were trustworthy). To certify business records the affiant must be familiar with the original creditor's record keeping practices. *C & W Asset Acquisition, L.L.C. v. Somogyi*, 136 S.W.3d 134 (Mo. Ct. App. 2004); *Rushmore Recoveries X, L.L.C. v. Skolnick*, 841 N.Y.S.2d 823 (Dist. Ct. 2007); *Palisades Collection, L.L.C. v. Gonzalez*, 809 N.Y.S.2d 482 (Civ. Ct. 2005) (table) (text available at 2005 WL 3372971); *Martinez v.*

Midland Credit Mgmt., Inc., 2008 WL 704206 (Tex. App. Mar. 13, 2008); *see also Dan Med., Prof'l Corp. v. N.Y. Cent. Mut. Fire Ins. Co.*, 14 Misc. 3d 44, 829 N.Y.S.2d 404 (App. Div. 2006). The affiant must be able to state from personal knowledge that the records were created at or near the time of the occurrence. A debt buyer's affidavit has no probative value when the affiant's claimed familiarity with the assignor's business records, is derived solely from the affiant's review of those records after they came into the debt buyer's possession. *C & W Asset Acquisition, L.L.C. v. Somogyi*, 136 S.W.3d 134 (Mo. Ct. App. 2004); *Rushmore Recoveries X, L.L.C. v. Skolnick*, 841 N.Y.S.2d 823 (Dist. Ct. 2007).

The affiant instead must be familiar with the habits and customary practices and procedures utilized in making the documents. The affiant must be able to certify that the documents were made in the original creditor's regular course of business, that is was the original creditor's regular practice the make the documents, and that the original creditor created the documents contemporaneously with the facts that were recorded. *C & W Asset Acquisition, L.L.C. v. Somogyi*, 136 S.W.3d 134 (Mo. Ct. App. 2004); *Rushmore Recoveries X, L.L.C. v. Skolnick*, 841 N.Y.S.2d 823 (Dist. Ct. 2007); *Banc One Asset Solution Corp. v. Thomas*, 2001 WL 259140 (Tex. App. Mar. 16, 2001). Otherwise, courts

will not allow business records into evidence. See, e.g. . *C & W Asset Acquisition, L.L.C. v. Somogyi*, 136 S.W.3d 134 (Mo. Ct. App. 2004); *Palisades Collection, L.L.C. v. Gonzalez*, 809 N.Y.S.2d 482 (Civ. Ct. 2005) (table) (text available at 2005 WL 3372971); *Banc One Asset Solution Corp. v. Thomas*, 2001 WL 259140 (Tex. App. Mar. 16, 2001). *But cf. Bozeman v. CACV of Colorado*, 638 S.E.2d 387 (Ga. Ct. App. 2006) (affirming summary judgment for creditor and rejecting consumer's hearsay argument because consumer failed to present evidence contradicting creditor's affidavit); *Cockrell v. Republic Mortgage Ins. Co.*, 817 S.E.2d 106 (Tex. App. 1991) (assignee's affidavit comprised business records of the assignor if the assignee verifies the accuracy of the information generated by the assignee; receipt of records in the regular course of business sufficed to show the accuracy and trustworthiness of the loan histories).

Similarly, an affidavit can not certify documents if the substance of the affidavit conflicts with the documents themselves. *Palisades Collection, L.L.C. v. Gonzalez*, 809 N.Y.S.2d 482 (Civ. Ct. 2005) (table) (text available at 2005 WL 3372971). For example, an affidavit may state a total dollar amount owed, while component numbers in the attached business records may add up to a different number.

6. Electronic Records

Business records must also be authentic. Ordinarily, the same proof as required to qualify for the exception from the hearsay rule is sufficient to show authenticity. 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Fed. Evidence § 900.06.[2][a] (Joseph M. McLaughlin ed., 2d ed. 2005). But electronic records create special authentication issues. Has the record been preserved during the time it was in the electronic file so as to assure that the document being proffered is the same as the document that was originally created? This issue raises questions not only about the computer equipment and programs used, but policies for use of the equipment, database and programs, how access is controlled, how changes are recorded, what the audit system is, and the like. *Id.* Thus the affiant must have special knowledge of the computer system, database, access and related issues before electronic records can be admitted. *See, e.g., id.*

Courts have viewed with favor an eleven-step foundation for computer records suggested by E. Imwinkelried, Evidentiary

Foundations:

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.

4. The procedure has built-in safeguards to ensure accuracy and identify errors. One court has elaborated on this element by mentioning details regarding computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging changes, backup practices, and audit procedures to assure the continuing integrity of the records. See *Am. Express Travel Related Services Co. v. Vinhnee*, 336 B.R. 437 (B.A.P. 9th Cir. 2005).

5. The business keeps the computer in a good state of repair.

6. The witness had the computer readout certain data.

7. The witness used the proper procedures to obtain the readout.

8. The computer was in working order at the time the witness obtained the readout.

9. The witness recognizes the exhibit as the readout.

10. The witness explains how he or she recognizes the readout.

11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact. E. Imwinkelried, *Evidentiary Foundations* § 4.03[1] (5th ed. 2002).

In Am. Express Travel Related Services Co. v. Vinhnee, 336 B.R. 437 (B.A.P. 9th Cir. 2005), the court sua sponte rejected the application of a business records exception to hearsay since American Express could not produce a witness to demonstrate that the electronic blips stored by American Express met the business records exception. A computer is not a “magic box”. The information stored or retrieved is only as good as the procedures, policies, control, equipment, standards applied to the use of the computer. It is far too easy to change or distort even accidentally information stored electronically especially without a

demonstration of strict control of the accounts. Here, the debt is sold with the warning and disclaimer that nothing is guaranteed to be reliable.

Another way of looking at electronic records is as if they are a foreign language. The records are stored in a computer language consisting solely of an algorithm “0’s ” and “1’s ”. The interpretation of the computer language requires at least someone familiar with the equipment and protocols used to preserve the reliability of the electronic data being to paper. The heart of the ruling of the court in AMEX case is that a witness must verify the reliability of the data. The court applied a modified version of the Imwinkelried test to reject sua sponte the proffer information from American express since no witness was provided to meet the burden of a business records exception to the hearsay rule.

The alleged credit cards statements are marked without explanation “facsimile”.

The rules of evidence and the exclusion of hearsay as well as strict application of the business records exception have served the legal process well for hundreds of years. The problem with the debt buyers is their business model. They obtain electronic blips of portions of information about thousands of accounts that are purchased in a portfolio as a securitized investment. The problem is one of documentation of the

accounts. To fill that void Unifund employees a teal of affiants who simply swear to business records they have no actual knowledge of.

Courts around the country have begun to recognize this problem with the large debt buyers. For example, *Midland Funding LLC v. Brent*, a federal judge condemned the form affidavits of another similar professional affiant “this Court finds that the affidavit as a whole is both false and misleading for the aforementioned reasons and notwithstanding the fact that some of the data in it are correct. It is unclear to this Court why such a patently false affidavit would be the standard form used at a business that specialized in the legal ramifications of debt collection.”

Midland Funding LLC v. Brent, ___ F. Supp. 2d ____, 2009 WL 2437243, 7 (N.D. Ohio, 2009)

In *Unifund CCR Partners Assignee of Palisades Collection, L.L.C. v. Hemm*, 2009 WL 2106289, 3, 2009-Ohio-3522 (Ohio App. 2 Dist., 2009), the Ohio court of appeals reversed an entry of summary judgment since the proof of assignment was lacking, proof of the debt was not made, and the interest rate was not shown. The affidavits Unifund attempted to use to create an exception to the hearsay rule were the same as presented failed to “prove the assignment” and show that it was the real party in interest.

In *Natl. Check Bur., Inc. v. Ruth*, 2009 WL 2516123, 3 (Ohio App. 9 Dist.) (Ohio App. 9 Dist., 2009) another case involving Unifund claims of assignment of the debt, the court rejected the affidavits as inadequate.

7. Assignment- Standing real Party in Interest

When “the fact of assignment is put in issue by the pleadings ... proof of the assignment is essential to a recovery” and “[t]he burden of proof of the assignment is on the one claiming to be the assignee.” *Smith v. Rowe*, 3 Wn.2d 320, 323, 100 P.2d 401 (1940). Appellant Sunde contested the Plaintiff’s claim of assignment.

“RCW 4.08.080 permits an assignee of a chose in action ‘by assignment in writing³’ to sue on the cause in the assignee's own name.” *Zimmerman v. Kyte*, 53 Wn.App. 11, 17-18, 765 P.2d 905, 909 (Wash.App., 1988). This statute is in derogation of the common law rule against assignment of a chose, and should ordinarily be strictly construed. *Id.* The reason for the common-law rule is to prevent the debtor from being harassed by multiple suits on the same claim, or being subjected to multiple liability on it. *Id.; Ingle v. Ingle*, 183 Wash. 234, 238, 48 P.2d 576 (1935).

³ An oral assignment satisfies the statute only if *the assignor* takes the witness stand and testifies that the assignment occurred. *Ingle v. Ingle*, 183 Wash. 234, 237-38, 48 P.2d 576 (1935).

In Washington, RCW 4.08.080 authorizes an assignee of a chose in action to file suit in its own name, but requires such an assignment to be “in writing ... signed by the person authorized to make the same...” RCW 4.08.080.

Unifund contends that it met this requirement because various employees testified in their declarations that Unifund purchased the account from US Bank and is now the assignee of all rights and interests in the account. The appellant disagrees.

In *MRC Receivables Corp. v. Zion*, ___ P. 3rd ___, 2009 WL 3418132, 2 (Wash.App. Div. 1) (Wash.App. Div. 1,2009) the court reversed and vacated a judgment based on Summary Judgment because the affidavit of the debt buyers employee was insufficient to establish and assignment of the debt. Although not the basis of the holding the court also noted that the affidavit did not indicate that Midland (the debt buyer) had received the account directly from the original bank “leaving open the possibility of any number of intervening owners of the debt”. *Zion* at p. ___ fn. 7. The court also noted deficiencies in the evidentiary value of the affidavit “...problems...include [affiant’s] failure to reference the alleged Providian Account number, the lack of foundation for the entry of bills as a business record, the failure of those records to match the total amount claimed owing, the lack of an explanation of how

[affiant's] status as a Midland employee provides her with personal knowledge of her assertions regarding MRC, Zion's account with Providian, and how MRC came to own it." *Zion*, at p.____, fn. 9.

Unifund attached what is purported to be a portion of the attachment to the alleged assignment but the account number does not match the declaration. He declaration identifies the

8. Award of attorney fee to Unifund

No Findings of Fact or supporting information were offered to allow an attorney fee as required by *Mahler v. Szucs*, 135 Wash.2d 398, 957 P.2d 632, 966 P.2d 305 (1998); *Bentzen v. Demmons*, 68 Wash.App. 339, 842 P.2d 1015 (1993); *Deep Water Brewing, LLC v. Fairway Resources Ltd.* 215 P.3d 990, 1017 (Wn..App. Div. 3,2009)

The court should be guided by the lodestar method in determining an award of attorney fees as costs. *Mahler*, 135 Wash.2d at 433, 957 P.2d 632. The trial court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. This necessarily requires that the court exclude any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims and make a record of this:

In the past, we have expressed more than modest concern regarding the need of litigants and courts to rigorously adhere to the lodestar methodology.... Courts must take an active role in

assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.

Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 744, 733 P.2d 208 (1987).

Consistent with such an admonition is the need for an adequate record on fee award decisions. Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record.... Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.

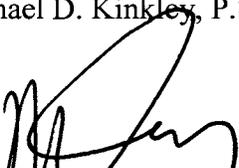
Deep Water Brewing, LLC v. Fairway Resources Ltd., 215 P.3d 990, 1018 (Wn.App. Div. 3, 2009).

9. RAP 18.1

The appellant request that this court award attorney fees and costs for this appeal based on the attorney fee provision in the credit card terms and conditions alleged by Unifund and to the extent that they are deemed unilateral pursuant to RCW 4.84.330.

Respectfully Submitted,

Michael D. Kinkley, P.S.



Michael D. Kinkley, WSBA #11624
Attorney for Appellant



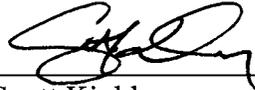
Deanna Johnson, WSBA # 38926
Attorney for Appellant

PROOF OF SERVICE

I certify that on the 6th day of November, 2009, I caused a true and correct copy of the foregoing to be served by USPS mailing, to the following:

Patrick J. Layman
Suttell & Associates PS
1450 114th Ave SE Ste 240
Bellevue, WA 98004-6934

Dated this 6th day of November, 2009, at Spokane, Washington.



Scott Kinkley
Legal Intern

09 NOV -09 PM 8:27
STATE OF WASHINGTON
BY _____
DEPUTY
COUNTY OF SPOKANE
JULIA R. HARRIS