

FILED
COURT OF APPEALS
DIVISION II

10 MAY 10 PM 1:36

Appeal No. 39244-5-II

STATE OF WASHINGTON
BY PK
IDENTITY

**IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON, DIVISION II**

UNIFUND CCR PARTNERS

Respondent

V.

PAUL B. SUNDE

Appellant

APPEAL FROM COWLITZ CASE NO. 06-2-01721-9

**RESPONDENT/CROSS APPELLANT'S
AMENDED BRIEF**

UNIFUND CCR PARTNERS

c/o Suttell & Hammer, P.S

1450-114th Ave SE, #240

Conifer Bldg.

Bellevue, WA 98004

425-455-8220

888-788-8355

425-454-7884 FAX

patrick@suttelllaw.com

TABLE OF CONTENTS

	Assignment of Errors on the Cross Appeal	Page 1
A.	Counter Statement of the Case	Page 1
B.	Argument	Page 7
	General Rules Regarding Appellate Review of a Summary Judgment Decision	Page 7
	Admission of Respondent's Evidence Was Not an Abuse of Discretion	Page 15
	Washington has Permitted the Introduction Of Computer Records by a Person Other Than the Person Who Entered the Information	Page 17
	Numerous States and Federal Circuits Have Permitted the Introduction of An Assignee's Business Records	Page 21
	Award of Attorney's Fees Was Proper	Page 37
	Any Award of Attorney's Fees to Appellant Should be Stayed Until the Underlying Case is Completed	Page 39
C.	Argument on Cross Appeal	Page 39
	Party Asserting Statute of Limitations Must Prove Every Element	Page 40
	The Chase Account is Not Barred by Delaware's 3-Year Statute of Limitations	Page 42
D.	Unifund is Entitled to Recover Its Attorney's Fees Pursuant to RAP 18.1	Page 50
E.	Conclusion	Page 50

TABLE OF AUTHORITIES

CASES	<u>Page(s)</u>
<u>AFD Fund v. United States</u> , 61 Fed. Cl. 540, 545 2004).....	25
<u>American Universal Ins. Co. v. Ranson</u> , 59 Wn. 2d 811, 370 P. 2d 867 (1962).....	8, 14
<u>Anderson v. Weslo, Inc.</u> , 79 Wn. App. 829, 833, 906 P.2d 336 (1995)...	7
<u>Ashcraft v. Wallingford</u> , 17 Wn. App. 853, 860, 565 P.2d 1224 (1977)...	8, 14
<u>Avery v. First Resolution Management Corp.</u> , 2007 WL 1560653 at *4-5 (D. OR) Opinion Amended and Superseded on Denial of Rehearing en banc 561 F. 3d 998, affirmed 568 F.3d 1018 (2009) Cert Denied 130 S. Ct 554, 78 USLW 3113, 78 USLW 3265, 78 USLW 3269 (2009).....	48, 49
<u>Beal Bank SSB v. Eurich</u> , 444 Mass. 813, 813 N.E.2d 909 (2005).....	22, 23
<u>Bell v. State</u> , 176 S.W.3d 90 (Tex. App. 2004).....	28
<u>Bellingham Securities Syndicate v. Bellingham Coal Mines</u> , 13 Wn. 2d 370, 125 P.2d 668 (1942).....	40
<u>Brossman v. Federal Deposit Insurance Corp.</u> , 510 A.2d 471 (1986).....	45, 47
<u>Cadle Co. V. Phillips</u> , 120 N.M. 748, 906 P.2d 739 (1995).....	29
<u>Cantrill v. American Mail Line</u> , 42 Wn. 2d 590, 257 P.2d 179 (1953)....	15, 18, 19, 20
<u>Chimelewski v. State</u> , 681 S.W.2d 166 (Tex. App. 1984).....	29
<u>Choate v. Robertson</u> , 31 Wn. 2d 118, 195 P.2d 630 (1948).....	15
<u>Concerned Coupeville Citizens v. Town of Coupeville</u> , 62 Wn. App. 408, 413, 814 P.2d 243 (1991).....	8, 14

<u>Donna Lee H. Williams, Insurance Commissioner of the State of Delaware v. Congregation Yetev Lev</u> , 2004 U.S. Dist. LEXIS 25432 (D.C.S.D.N.Y., 2004).....	44
<u>Federal Deposit Ins. Corp. v. Staudinger</u> , 797 F.2d 908 (10th Cir.1986)..	23
<u>Ferrin v. Donnellfeld</u> , 74 Wn. 2d 283, 285, 444 P.2d 701 (1968).....	8, 14
<u>Fruit and Vegetable Packers & Warehousemen Local 760 v. Morley</u> , 378 F.2d 738 (1967).....	40
<u>Garden State Bank v. Graef</u> , 341 N.J. Super. 241, 246 (2001).....	24
<u>Graen’s Mens Wear, Inc. v. Stille-Pierce Agency</u> , 329 N.W.2d 295 (Iowa 1983).....	30
<u>Great Seneca Fin. v. Felty</u> , 170 Ohio App. 3d 737, 869 N.E.2d 30 (2006).....	26
<u>Green v. Normandy Park</u> , 137 Wn. App. 665, 151 P. 3d 1038 (2007) amended on reconsideration, <u>review denied</u> , 163 Wn. 2d 1003, 180 P.3d 783 (2007).....	8, 14
<u>Gustav v. Seattle Urological Assocs.</u> , 90 Wn. App. 785, 954 P.2d 319, <u>review denied</u> , 136 Wn. 2d 1023 (1998).....	11
<u>Haslund v. City of Seattle</u> , 86 Wn. 2d 607, 547 P.2d 1221 (1976).....	40
<u>Henderson v. Pennwalt Corp</u> , 41 Wn. App. 547, 704 P.2d 1256 (1985)...	40
<u>Herberg v. Swartz</u> , 89 Wn. 2d 916, 925, 578 P.2d 17 (1978).....	9
<u>Hodge v. Raab</u> , 151 Wn. 2d 351, 88 P.3d 959 (2004).....	7
<u>Hurwitch v. Adams</u> , 52 Del. 13, 151 A.2d 286, <u>aff’d</u> , 52 Del. 247, 155 (1959).....	45, 47
<u>Hutchins v. 1001 Fourth Ave. Assocs.</u> , 116 Wn. 2d 217, 802 P.2d 1360 (1991).....	8

<u>In Re Sofa’s Estate</u> , 5 Wn. App. 49, 485 P.2d 465, <u>review denied</u> , 79 Wn. 2d 1007 (1971).....	11
<u>In Re The Marriage of Monaghan</u> , 78 Wn. App. 918, 899 P.2d 841 (1995).....	10
<u>In re: E.A.K.</u> , 192 S.W.3d 133 (Tex. App. 2006).....	28
<u>Krawczyk v. Centurion Capital Corp.</u> , 2009 WL 395458 (N.D. Ill. Feb. 18, 2009).....	22
<u>Lakeview Blvd. Condominium Assoc. v. Apartment Sales Corp.</u> , 101 Wn. App. 923, 6 P.3d 74, <u>review granted</u> , 143 Wn. 2d 1001, 20 P.3d 944, <u>aff’d</u> , 144 Wn. 2d 570, 29 P.3d 1249 (2000).....	8, 13
<u>Lamon v. McDonnell Douglas Corp.</u> , 91 Wn. 2d 345, 352, 588 P.2d 1346 (1979).....	11, 13
<u>McCorrison v. L.W.T., Inc.</u> , 536 F. Supp. 2d 1268 (M.D. Fla. 2008).....	47
<u>McDowell v. Commonwealth</u> , 273 Va. 431, 433, 641 S.E.2d 507 (2007).	31
<u>Medical Expertise, P.C. v Trumbell Ins.</u> , 196 Misc. 2d 389, 765 N.Y.S.2d 171 (Civ. Queens 2003).....	25
<u>Melendez v. State</u> , 194 S.W.3d 641 (Tex. App. 2006).....	28
<u>Miller v. Javitch</u> , 397 F. Supp. 2d 991, 997-98 (N.D. Ind. 2005).....	24
<u>Mitchell v. State</u> , 750 S.W.2d 378 (Tex. App. 1988).....	28
<u>National Tea Co. v. Tyler Refrigeration</u> , 339 N.W.2d 59 (Minn. 1983)...	29
<u>New England Savings Bank v. Bedford Realty Corp.</u> , 246 Conn. 594, 603, 717 A.2d 713 (1998).....	22, 23
<u>Nimmons v. State</u> , 814 So. 2d 1153 (Fla. Dist. Ct. App. 2002).....	31
<u>Parker v. Commonwealth</u> , 41 Va. App. 643, 587 S.E.2d 749 (2003).....	33
<u>Parkin v. Colocousis</u> , 53 Wn. App. 649, 769 P.2d 326 (1989).....	10, 13

<u>Redding v. Virginia Mason Medical Center</u> , 75 Wn. App. 424, 878 P.2d 483 (1994).....	11
<u>Resurgence Financial, LLC v. Chambers</u> , 173 Cal. App 4 th Supp 1, 92 Cal. Rptr. 3 rd 844 (2009).....	47
<u>Russo v. Abington Mem. Hosp. Healthcare Plan</u> , 1998 U.S. Dist. LEXIS 18595 (E.D. Pa. 1998).....	32
<u>Saks Int'l, Inc. v. M/V "Export Champion"</u> , 817 F.2d 1011, 1013 (2d Cir. 1987).....	27, 30, 32
<u>Saudi Basic Indus. Corp. v. Exxonmobil Corp.</u> 194 F. Supp. 2d 378, vacated in part and remanded on other grounds 364 F. 3d 102 (3 rd Cir. 2004)	46
<u>Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Company and Exxon Chemical Arabia, Inc.</u> , 866 A. 2d 1, 2005 Del LEXIS 41 (Del. Sup. Ct., 2005).....	44, 45, 47
<u>Seattle v. Heath</u> , 10 Wash.App. 949, 520 P.2d 1392 (1974).....	18, 19, 20, 21
<u>Smith v. Shannon</u> , 100 Wn. 2d 26, 37, 666 P.2d 351 (1983).....	9
<u>Smith v. Showalter</u> , 47 Wn. App. 245, 734 P.2d 928 (1987).....	10, 11, 13
<u>Southcenter View Condominiums Owners' Assoc. v. Condominium Builders, Inc.</u> , 47 Wn. App. 767, 736 P.2d 1075 (1986).....	8, 13
<u>State v. Ben-Neth</u> , 34 Wn. App. 600, 663 P. 2d 156 (1983).....	17
<u>State v. Emmanuel</u> , 42 Wn. 2d 799, 259 P. 845 (1953).....	15
<u>State v. Kane</u> , 23 Wash.App. 107, 594 P.2d 1357 (1979).....	19, 20, 21
<u>State v. Kreck</u> , 86 Wash.2d 112, 542 P.2d 782 (1975).....	18
<u>State v. Petzoldt</u> , 172 Ariz. 272, 275, 836 P. 2d 982, 985 (App., 1991)...	31

<u>State v. Riggs</u> , 186 Ariz. 573, 925 P.2d 714 (AZ 1996) vacated on other grounds, 189 Ariz. 327, 942 P.2d 1159 (1997).....	30
<u>State v. Rutherford</u> , 66 Wash.2d 851, 405 P.2d 719 (1965).....	19
<u>State v. Scott</u> , 110 Wn. 2d 682, 685, 757 P.2d 492 (1988).....	9
<u>State v. Smith</u> , 16 Wash.App. 425, 558 P.2d 265 (1976), review denied, 88 Wash.2d 1011 (1977).....	18, 19, 20, 21
<u>State v. Smith</u> , 55 Wash.2d 482, 348 P.2d 417 (1960).....	19
<u>Symes v. Teagle</u> , 67 Wn. 2d 867, 410 P.2d 594 (1966).....	9
<u>Teac Corp of America v. Bauer</u> , 678 P.2d 3 (Colo. Ct. App. 1984).....	29
<u>Truck Ins. Exchange v. Vanport Hoomes, Inc.</u> , 147 Wn. 2d 751, 58 P.3d 276 (2002).....	11
<u>United States v. Baker</u> , 224 U.S. App. D.C. 68, 693 F.2d 183, 187 (1982).....	25, 33
<u>United States v. Childs</u> , 5 F.3d 1328, 1333 (9th Cir.1993).....	27
<u>United States v. Jakobetz</u> , 955 F.2d 786, 801 (2d Cir. 1992).....	27
<u>United States v. Keplinger</u> , 776 F.2d 678, 693 (7th Cir. 1985).....	32
<u>United States v. Meienberg</u> , 263 F.3d 1177 (Colo. 2001).....	31, 32
<u>United States v. Parker</u> , 749 F. 2d 628 (11 th Cir., 1984)	33
<u>United States v. Samaniego</u> , 187 F.3d 1222 (10th Cir.1999).....	23
<u>United States v. Sokolow</u> , 91 F.3d 396, 403 (3rd Cir. 1996) <u>cert. denied</u> , 136 L. Ed. 2d 846, 117 S. Ct. 960 (1997).....	33
<u>Wesche v. Martin</u> , 64 Wn. App. 1, 822 P.2d 812 (1992).....	40
<u>Williams v. Alexander</u> , 309 N.Y. 283, 129 N.E.2d 417 (1955).....	26

<u>Wilson Court Limited Partnership v. Tony Maroni’s, Inc.</u> , 134 Wn. 2d 692, 698, 952 P. 2d 590 (1998).....	7
<u>Wilson v. Zapata Off-Shore Co.</u> , 939 F.2d 260 (5th Cir. 1991).....	32
<u>Wingate v. Emery Air Freight Corp.</u> , 385 Mass. 402, 432 N.E.2d 474.....	23

FEDERAL STATUTES

15 U.S.C. §§ 1666-1666j.....	15
28 U.S.C. §1602.....	46

FEDERAL RULES OF EVIDENCE

FRE 803(6).....	24, 25, 27, 27, 32
-----------------	--------------------

WASHINGTON RULES OF EVIDENCE

ER 602.....	21
ER 901.....	21

WASHINGTON STATUTES

RCW 4.08.080.....	33
RCW 4.16.040.....	49
RCW 4.18.020.....	42, 49
RCW 4.18.030.....	43, 49
RCW 4.18.040.....	42, 48, 49

RCW 5.45.020.....	15, 17, 18, 20
RCW Chapter 5.45.....	21

WASHINGTON COURT RULES

CR 56 (c).....	8
CR 56 (e).....	11, 37

WASHINGTON RULES ON APPEAL

RAP 2.5.....	8, 9, 13, 14
RAP 9.12.....	8, 13, 14
RAP 14.....	50
RAP 18.1.....	50

DELAWARE STATUTES

10 Del. C. § 3104.....	45
10 Del. C. § 8106.....	43, 45
10 Del. C. § 8117.....	45, 46

OTHER AUTHORITIES

Karl B. Tegland, 2A <u>Washington Practice</u> , Rules Practice RAP 2.5 (6 th Ed., 2004).....	10
Karl B. Tegland, 5A. <u>Washington Practice</u> , § 372, at 240 (2d ed. 1982).	18
7 A.L.R. 4th 8 (1981).....	20

Weinstein's, Evidence (1985) 23

ASSIGNMENTS OF ERROR ON THE CROSS APPEAL

1. The Trial Court erred by entering that portion of the April 27, 2009 Order on Summary Judgment finding as a matter of law that Delaware's 3-year statute of limitations applies to the Chase account.
2. The Trial Court erred by entering that portion of the April 27, 2009 Order on Summary Judgment finding as a matter of law that the 3-year Delaware statute of limitations on the Chase claim was not tolled.
3. The Trial Court erred by entering that portion of the April 27, 2009 Order on Summary Judgment, denying Plaintiff's Motion for Judgment on the Chase claim.
4. The Trial Court erred by entering that portion of the April 27, 2009 Order on Summary Judgment that the Court's ruling is dispositive of all issues in this action and this Summary Judgment is a final judgment in this action.

A. COUNTER STATEMENT OF THE CASE

Respondent/Cross Appellant Unifund CCR Partners ("Unifund") filed a collection action on September 5, 2006 in the Cowlitz Superior Court to collect the balance due on an obligation due and owing on the Appellant's Chase Credit Card and the Appellant's US Bank Line of Credit. CP 1-5. An Amended Summons and Complaint was filed in this action. CP 6-10. The name of the Plaintiff was changed in the Amended Complaint to Unifund CCR Partners.

Respondent/Cross Appellant Unifund is a company that purchases existing debt and then collects that debt. Here Respondent/Cross Appellant Unifund purchased both obligations. CP 92, 227, 296.

Because of problems in serving the Appellant CP 11, Unifund served the Amended Summons and Complaint by Publication. CP 16-17. Publication began on April 20, 2007. CP 22.

Appellant appeared through an attorney on May 11, 2007. After the answer period expired, Respondent/Cross Appellant Unifund filed a Motion for Default. CP 23-46. After preparing and sending the Motion for Default for filing, Respondent/Cross Appellant Unifund received the Answer of the Appellant that had been previously filed by the Appellant. CP 18. The hearing date for Motion for Default was stricken.

On December 17, 2007, Respondent/Cross Appellant Unifund filed a Motion for Summary Judgment. CP 47-83. A hearing date of January 14, 2008 was set for the hearing. After receiving the Appellant's January 3, 2008 Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on January 7, 2008 (CP 84-87), the Motion for Summary Judgment was voluntarily stricken by Respondent/Cross Appellant Unifund. Appellant filed no affidavits in response to this Summary Judgment Motion.

On April 18, 2008, Respondent/Cross Appellant Unifund renoted its Motion for Summary Judgment, setting a hearing date for the Motion on June 16, 2008. CP 88-147. The Motion for Summary Judgment included a Supplemental Declaration in Support of the Motion CP 148-149, in addition to the Motion and Declaration from the first Summary Judgment. On June 9, 2008, one week prior to the Summary Judgment hearing, Respondent/Cross Appellant Unifund received the Respondent's Memorandum dated June 5, 2008 in Opposition to the Summary Judgment Motion. CP 150-157. Respondent was contending that the Summary Judgment could not be granted in part because the edition of the US Bank agreement was from 2004 which was after the Appellant had defaulted on the line of credit account. The Appellant filed no Affidavits in response to this Summary Judgment Motion.

As a result of this issue on the account agreement and because there was not sufficient time to obtain an older edition of the agreement and obtain a signed Declaration prior to the June 16th hearing, Respondent/Cross Appellant Unifund voluntarily struck its Motion.

On October 13, 2008, Respondent/Cross Appellant Unifund filed its Amended Motion for Summary Judgment. CP 161-285. The hearing date for the Motion was November 17, 2008. The renewed Motion for Summary Judgment included a 2nd Supplemental Declaration in Support

of Plaintiff's Motion for Summary Judgment (CP 227-285) in addition to the Declarations that supported the earlier summary judgment motions. Attached as an Exhibit to this Second Supplemental Declaration was a copy of the US Bank Credit Line Cardholder Agreement with an effective date of 4/8/02. CP 256-265. Respondent/Cross Appellant Unifund also served and filed a Memorandum in Support of the Motion. CP 163-226.

On November 12, 2008, less than 7 days before the hearing, the Appellant filed his Memorandum dated November 10, 2008 in Opposition to the Motion for Summary Judgment. Appellant filed no affidavits in opposition. Prior to the hearing date, Appellant's counsel made a settlement proposal. Because of the pending settlement discussions, the parties agreed to strike the Summary Judgment hearing scheduled for November 17, 2008.

When the matter was not settled, Respondent/Cross Appellant Unifund again renoted its Motion for Summary Judgment ultimately scheduling a hearing date of February 26, 2009 for the Motion. On January 7th, the Appellant filed a Supplemental Brief dated January 6, 2009 in Opposition to the Motion for Summary Judgment, challenging the Bills of Sale on the grounds that they referred to Exhibits that were attached but the Bills of Sale previously submitted for the summary

Judgment did not have an Exhibits attached. CP 293-295. Appellant did not file any affidavits in response to the Motions.

In reply Respondent/Cross Appellant Unifund submitted the 3rd Supplemental Declaration in Support of the Plaintiff's Motion for Summary Judgment that had Bills of Sale with Exhibits that identified the subject accounts. CP 295-319. The Appellant filed nothing further in opposition to the Motion.

The matter was argued on February 26, 2009 before Judge Jill Johanson of the Cowlitz County Superior Court. After hearing oral argument, she took the case under advisement. On March 16th the Court issued a letter ruling on the case. The letter opinion CP 321-322 read in relevant part:

“ . . . The Court finds that there are no issues of material fact. Defendant did not file any declaration contradicting Plaintiff's assertions of fact.

The Court concludes as a matter of law that: 1) the debts owed by Mr. Sunde and US Bank credit cards were assigned to Unifund; 2) that the Statute of Frauds does not apply; 3) that a six-year statute of limitations applies to the U.S. Bank account collection efforts; 4) that Delaware's 3-year statute of limitation applies to the Chase account and is not tolled; and 5) laches is not an appropriate equitable remedy in this case . . .”

Appellant filed no Motion for Reconsideration. On April 3, 2009, a copy of Respondent/Cross Appellant Unifund proposed Summary Judgment was sent to Appellant's attorney for review and approval for entry with the Trial Court. On April 10th, Appellant's original trial counsel advised that Appellant was changing attorneys and he could do nothing further. Respondent/Cross Appellant Unifund contacted the Court for a date for Presentation of the Order and set the Presentation date for entry of the Summary Judgment for April 26th. The Notice of Presentation was sent out that same day to Appellant's trial counsel who was still attorney of record in the case.

On April 17, 2009 Respondent/Cross Appellant Unifund received Appellant counsel's Notice of Intent to Withdraw, effective April 24, 2009. That same day Respondent/Cross Appellant Unifund's counsel received a letter and a Notice of Appeal, appealing the Court's letter ruling. It was signed by Appellant's new counsel who signed it prior to the effective date of Appellant's original trial counsel's withdrawal and before Appellant's new counsel had served and filed a Notice of Appearance on Respondent/Cross Appellant Unifund's attorneys.

At the time of presentation of the Summary Judgment Order, even though the only matter pending before the Trial Court was the review of the form of the Summary Judgment and its entry, the Court still allowed

comments from Appellant's new counsel on her objections to the proposed Order. RP (April 27, 2009) pp 4-8, 9, 12-14. After hearing Appellant counsel's comments, the Court stated in part: "

In this case, I did note in my opinion, in my letter ruling, that the Defendant had not filed any declarations contradicting the Plaintiff's assertions of facts. This was all based on – this was all legal arguments, and there was no indication that he did not have the money to pay anything, the attorneys fees or the debt, so there is no factual basis from which the Court can consider that (Appellant's new Trial counsel's comments), even if I wanted to.

But, I believe that the Order presented by Mr. Layman accurately reflects the ruling that I made, . . . “

On April 29, 2009 Respondent/Cross Appellant Unifund filed its cross appeal, appealing that portion of the April 27, 2009 Order of Summary Judgment denying Plaintiff's Motion for Summary Judgment of the Chase claim.

B. ARGUMENT

GENERAL RULES REGARDING APPELLATE REVIEW OF A SUMMARY JUDGMENT DECISION

An Appellate Court normally engages in a de novo review of a ruling granting Summary Judgment Anderson v. Weslo, Inc. 79 Wn. App. 829, 833, 906 P. 2d 336 (1995) and engages in the same inquiry as the trial court. see Hodge v. Raab, 151 Wn. 2d 351, 88 P. 3d 959 (2004) Wilson Court Limited Partnership v. Tony Maroni's, Inc., 134 Wn. 2d 692, 698, 952 P. 2d 590 (1998). A summary judgment is properly granted when the

pleadings, affidavits, depositions and admissions on file demonstrate there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56 (c), Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn. 2d 217, 802 P. 2d 1360 (1991).

However, as part of this de novo review, an Appellate Court need not consider an error that has been raised for the first time on appeal, RAP 2.5(a) and that issues and contentions neither raised by the parties nor considered by the trial court when ruling on a Motion for Summary Judgment may not be considered for the first time on appeal. see, RAP 9.12; Lakeview Blvd. Condominium Association v. Apartment Sales Corp., 101 Wn. App. 923, 6 P.3d 74 review granted 143 Wn. 2d 1001, 20 P.3d 944, affirmed 144 Wn. 2d 570, 29 P. 3d 1249 (2000), Southcenter View Condominiums Owners' Association v. Condominium Builders, Inc., 47 Wn. App. 767, 736 P. 2d 1075 (1986); Green v. Normandy Park, 137 Wn. App. 665, 151 P. 3rd 1038 (2007) amended on reconsideration, review denied 163 Wn. 2d 1003, 180 P. 3d 783 (2007); Ferrin v. Donnellefeld, 74 Wn. 2d 283, 285, 444 P. 2d 701 (1968); American Universal Ins. Co. v. Ranson, 59 Wn. 2d 811, 370 P. 2d 867 (1962); Concerned Coupeville Citizens v. Town of Coupeville, 62 Wn. App. 408, 413, 814 P. 2d 243 (1991); Ashcraft v. Wallingford, 17 Wn. App. 853, 860, 565 P. 2d 1224 (1977).

In Herberg v. Swartz, 89 Wn. 2d 916, 925, 578 P. 2d 17 (1978) the Supreme Court summarized this general rule as follows: “An issue, theory or argument not presented at trial will not be considered on appeal.” In making its de novo review, the appellate court also will not consider objections to evidence unless the objections have been brought to the attention of the trial court and the trial court given an opportunity to rule thereon see, Symes v. Teagle, 67 Wn. 2d 867, 410 P. 2d 594 (1966).

In addressing these general rules the Supreme Court in State v. Scott, 110 Wn. 2d 682, 685, 757 P. 2d 492 (1988) stated “RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” The Court in Scott at page 685 explained the reason behind this general rule as follows:

The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate court will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

The Supreme Court in Smith v. Shannon, 100 Wn. 2d 26, 37, 666 P. 2d 351 (1983) stated that “[t]he reason for the rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.”

Commentator Karl B. Tegland, in 2A Washington Practice Rules Practice RAP 2.5 (6th Ed., 2004) suggests that the rule is also applied as a matter of fairness to the opposing party;

“[T]he opposing parties should have an opportunity at trial to respond to possible claims of error and to shape their cases to issues and theories, at the trial level, rather than facing newly asserted error or new theories and issues for the first time on appeal.”

To preserve an issue about the admissibility of evidence and the foundation for the introduction of that evidence, a timely and specific objection or motion to strike the objectionable material in affidavits submitted on summary judgment as well as to other forms of evidence must be made before the court’s entry of summary judgment. see, In Re The Marriage of Monaghan, 78 Wn. App. 918, 899 P.2d 841 (1995) where the Court cited Parkin v. Colocousis, 53 Wn. App. 649, 769 P. 2d 326 (1989) and stated at page 930 “failing to make appropriate objection to affidavit at the Trial Court generally waives the issue on appeal.” The Court in Parkin v. Colocousis, supra relied on the prior Court of Appeal’s decision of Smith v. Showalter, 47 Wn. App. 245, 734 P. 2d 928 (1987) and stated at page 652-654:

Generally in order to preserve for review a claim that an affidavit is defective, a party must register an objection which specifies the deficiency or must move to strike the affidavit before the trial court’s entry of summary judgment Smith v. Showalter, 47 Wn. App. 245, 248, 734 P.2d 928

(1987). This rule clearly applies to objections that the affidavits are not made on personal knowledge, do not set forth facts that would be admissible in evidence, or do not show affirmatively that the affiant is competent to testify to the matters stated therein CR 56(e); *Smith v. Showalter, supra*; *Lamon v. McDonnell Douglas Corp.*, 91 Wn. 2d 345, 352, 588 P. 2d 1346 (1979)”

The Court of Appeals in In Re Soffa's Estate, 5 Wn. App. 49, 485 P. 2d 465, review denied, 79 Wn. 2d 1007 (1971) refused to consider for the first time on appeal, the trial court's admission and consideration of evidence that the appellant argued was inadmissible under the dead man's statute because the evidence was not objected to at the trial level.

An Appellate Court may affirm an order granting Summary Judgment on any basis supported by the record. Truck Ins. Exchange v. Vanport Hoomes, Inc. 147 Wn. 2d 751, 58 P. 3d 276 (2002); Gustav v. Seattle Urological Associates, 90 Wn. App. 785, 954 P. 2d 319, review denied, 136 Wn. 2d 1023 (1998); Redding v. Virginia Mason Medical Center, 75 Wn. App. 424, 878 P. 2d 483 (1994).

Here the Appellant filed no affidavits in opposition to the Respondent's Motion for Summary Judgment even though the Motion was renoted three times over nearly a year's period of time before it was finally heard. The Appellant did not challenge or move to strike any of the affidavits that the Respondent submitted for consideration at the Summary Judgment Hearing on the grounds that the Affiants did not have personal

knowledge of the facts or statements made therein. The Appellant did not object to or move to strike any of the statements in those Affidavits about information contained in the business records of the original creditors on the grounds of hearsay. The Appellant also did not object to or move to strike any the exhibits that were attached to the Affidavits on the grounds that these records from the original creditor were hearsay and therefore not admissible in evidence. Finally, the Appellant never contested nor objected to the principal balance due on either of the two accounts, objecting only to the claim of interest based on an equitable defense of laches. The Appellant's failure to object to the affidavits and move to strike any objectionable portions prior to the Trial Court's decision on Summary Judgment is fatal to the Appellant's appeal.

At no time before the Trial Court or in the Appellant's brief has the Appellant ever denied that both accounts are his accounts or that the principal balance owing on both accounts is not correct. In fact in both of Appellant's Memoranda in Opposition to the Motion for Summary Judgment, one filed in June, 2008 and the other filed in November, 2008, Appellant's trial counsel admits that the Appellant was indebted on both accounts but should not be held liable on the accounts for various legal or equitable reasons. CP 151, 287. Appellant's attorney stated in the Memoranda:

“U.S. BANK

Some time prior to January 2002, Paul Sunde began using a U.S. Bank credit card. . . . Mr. Sunde used the card making periodic payments until March 4, 2003. Thereafter, payments stopped.

On September 19, 2005, two and one-half years after the last payment, U.S. Bank sold the debt to Unifund. . . .

CHASE BANK

The statements reflect that the Chase credit card was used between June 15, 2002 to July 31, 2003. On July 31, 2003, the account was charged off and closed. . . .” CP 151, 287

The Appellant now for the first time on appeal, after never having raised these issues or contentions to the Trial Court in opposition to the Motion for Summary Judgment, wants to simply ignore that the Affidavits and original creditor records were admitted and considered by the Court without objection and have the Appellate Court consider their new evidentiary issues. Their arguments never being raised by objection to the Trial Court is not grounds for an appeal see, Parkins v. Colocousis, supra, Smith v. Showalter, supra, Lamon v. McDonnell Douglas Corp, supra Furthermore, their issues now being raised for the first time on appeal should be rejected and not considered by the Appeals Court based on established Appellate law. RAP 2.5, see, RAP 9.12; Lakeview Blvd. Condominium Association v. Apartment Sales Corp., supra; Southcenter View Condominiums Owners’ Association v. Condominium Builders,

Inc., supra; Green v. Normandy Park, supra; Ferrin v. Donnellefeld, supra; American Universal Ins. Co. v. Ranson, supra; Concerned Coupeville Citizens v. Town of Coupeville, supra; Ashcraft v. Wallingford, supra.

Here the Appellant's have abandoned all of the legal issues raised at the Trial level except for the argument that the Exhibits attached to the various Assignments and Bills of Sale do not properly identify the subject account. Instead the Appellants are now raising new issues that were never raised to the Trial Court and are challenging Affidavits that were admitted without objection and considered by the Trial Court. The Appellant's never filed any Affidavits in opposition to the Summary Judgment Motion. The Appellant's never raised any objection to the admission of any of the affidavits or credit card agreements and statements that Respondent submitted in support of the Summary Judgment Motion. The Appellants also never objected to or moved to strike any of the Affidavits on the grounds that the Affidavits were not made on personal knowledge or contained hearsay. These are new issues that were never argued at the trial level that they now want the Court of Appeals to consider for the first time on appeal. Because these issues are being raised for the first time on appeal and were not argued to the Trial Court, they are not a proper basis for an appeal and the appeal should be denied. RAP 2.5(a), RAP 9.12.

**ADMISSION OF THE RESPONDENT'S EVIDENCE WAS NOT AN
ABUSE OF DISCRETION**

Trial Courts have considerable discretion in admitting and excluding evidence. Under the hearsay exception for business records, RCW 5.45.020 expressly states that the Trial Court may take into consideration: “. . . the sources of information, method and time of preparation were such as to justify its (the record') admission.”

If the Appellate Court does not reject the Appellant's challenges to the Affidavits and the creditor records, the Court must review the admission of the evidence and Affidavits under an abuse of discretion standard. see, Cantrill v. American Mail Line, 42 Wn. 2d 590, 257 P. 2d 179 (1953); State v. Emmanuel, 42 Wn. 2d 799, 259 P. 845 (1953); Choate v. Robertson, 31 Wn. 2d 118, 195 P. 2d 630 (1948).

Here even though all of the original creditor records were admitted without objection and Appellant's Trial Counsel admitted that the two accounts were the Appellant's accounts, the creditor records on their face were sufficiently trustworthy to justify admission. The records were prepared by National Banks which are extensively regulated by the Comptroller of Currency and Federal Law and Regulation that dictates the formatting appearance and information contained on the monthly statements. In addition the Federal Fair Credit Billing Act, 15 U.S.C. §§ 1666-1666j gives a consumer specific rights to dispute incorrect

information that appears on the monthly statement on accounts such as these helping to insure that the information on the account statements are accurate. Here both accounts had a history of statements that showed payments being made by the Appellant on the accounts. Here there was no factual objection to either of the account balances either at the Trial level and now at the Appellate level and the records on their face were sufficient to establish the reliability of the creditor's records. The Affidavits and the creditor's records establish an uncontroverted basis for the Court granting Judgment on the U.S. Bank Account and on the Chase Account.

The only evidence objected to by the Appellant at the trial level were the Exhibits that were attached to the Assignments and Bill of Sale on the grounds that they do not clearly show that the subject accounts were part of the corresponding Assignment or Bill of Sale. However, the Appellant never objected to their admission and never moved to strike the Exhibits. The Appellant never offered any Affidavits in opposition to them. The documents were properly admitted and the trial court could place whatever weight the Court deemed appropriate. Admitting the Affidavits was not an abuse of discretion.

**WASHINGTON HAS PERMITTED THE INTRODUCTION OF
COMPUTER RECORDS BY A PERSON OTHER THAN THE
PERSON WHO ENTERED THE INFORMATION**

There do not appear to be any Washington decisions that deal with the issue of the introduction of computer records and other documents that the purchaser of a contractual obligation received from the original creditor. However, Washington does permit the introduction of business records that were prepared by someone other than the witness who is testifying at trial. In State v. Ben-Neth, 34 Wn. App. 600, 663 P. 2d 156 (1983) Division I of the Court of Appeals upheld that introduction of bank computer records that were introduced through a bank supervisor who did not prepare the records. In affirming the Trial Court the Court of Appeals stated at pages 602-606 as follows:

Ben-Neth first contends that the trial court erred in admitting the bank's computer records of his account transactions. [FN2] Computer-generated evidence is ****159** hearsay but may be admitted as a business record provided a proper foundation is laid under RCW 5.45.020, which provides:

FN2. Ben-Neth does not contend that the computer records of his account are inaccurate. He argues in his brief that the bank officials who testified "did not supervise tellers who make the account records" ... or "supervise copying of the records [and] had no idea of the responsibilities of the persons who actually copied bank records at the computer center."

Whether business records are stored in a computer or in a traditional fashion the likelihood of and nature of possible error are the same. These include arithmetic error, incorrect posting of charges, credits, or debits, entry of

information onto the wrong account, and numerous other potential mistakes caused by human fallibility or by mechanical or electronic failure. Given the complexity of modern institutions one cannot expect routine record-keeping to be completely error-free. Where actual error is suspected the challenge should be to the accuracy of the business record, not to its admissibility.

Business records as evidence. 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.

*603 If the statutory requisites are met, computerized records are treated the same as any other business records. Seattle v. Heath, 10 Wash.App. 949, 520 P.2d 1392 (1974).

[4][5] Ben-Neth challenges the qualifications of the two bank officials as proper foundation witnesses. The statute does not require examination of the person who actually made the record. Cantrill v. American Mail Line, Ltd., 42 Wash.2d 590, 257 P.2d 179 (1953). Testimony by one who has custody of the record as a regular part of his work or has supervision of its creation ("other qualified witness" under the statute) will suffice. *Cantrill*. The rule is disjunctive, not conjunctive. Cf. State v. Smith, 16 Wash.App. 425, 558 P.2d 265 (1976), review denied, 88 Wash.2d 1011 (1977) (misinterpreting *Cantrill* as requiring testimony by both the custodian and supervisor). Admissibility hinges upon the opinion of the trial court that "the sources of information, method and time of preparation were such as to justify its admission." RCW 5.45.020; K. Tegland, 5A. *Wash.Prac.* § 372, at 240 (2d ed. 1982). A trial court's ruling admitting or excluding such records is given considerable weight and will not be reversed absent a manifest abuse of discretion. State v. Kreck, 86 Wash.2d 112, 542 P.2d 782 (1975); *Cantrill*.

Reviewing courts have broadly interpreted the statutory

terms "custodian" and "other qualified witness." In State v. Smith, 55 Wash.2d 482, 348 P.2d 417 (1960), the court held that the owner of a chain of clothing stores provided adequate foundation testimony for the introduction of business records of a branch store because, in a general sense, all the chain's business records were prepared under the owner's general supervision. In *Cantrill* the court ruled that a supervising physician and a medical records librarian were proper foundation witnesses for the introduction of the clinic's medical records. In both *Kreck* and State v. Rutherford, 66 Wash.2d 851, 405 P.2d 719 (1965), the supervisor of the person who conducted tests was allowed to produce the results as business records.

Washington courts have taken a similar approach to *604 foundation testimony in cases dealing with computer-generated business records. In *Heath* the trial court admitted teletype printed material from a teletype printer connected to a central computer as a business record. Foundation testimony was furnished by an assistant director of the Traffic Violations Bureau of the Seattle Municipal Court, although the computer was located in Olympia. The assistant director identified two exhibits as abstracts of driving records stored in the computer, described how the records are retrieved, and testified that a clerk under his supervision had obtained the records for him. He was custodian of the printouts after they came from the teletype but not the custodian for the entire department.

Two cases concerning computerized bank records are instructive. In State v. Smith, 16 Wash.App. 425, 558 P.2d 265 (1976), the trial court admitted an exhibit prepared by a bank employee from computer printouts. A bank vice-president and not the employee furnished the foundation testimony. The vice-president was considered to have supervised the preparation and recordation of all the bank's records, and therefore to be a qualified foundation witness. In State v. Kane, 23 Wash.App. 107, 594 P.2d 1357 (1979), a bank branch officer who had prepared a trial exhibit from computer printouts of account records was considered to be their custodian and therefore a qualified

foundation witness. *See also* 7 A.L.R. 4th 8 (1981) and cases cited therein.

Here the records of Ben-Neth's account were produced by the supervisor of the customer service department of that branch office and by its operations officer. The customer service supervisor had opened Ben-Neth's account, and testified to being familiar with the bank's record keeping procedures. He was not a records custodian or supervisor of record-keeping, but was able to describe the method for retrieving monthly account statements from the computer. Although the court found that the customer service supervisor was a qualified foundation witness, his superior also testified. As operations officer she supervised record-keeping at that branch but did not supervise and was not familiar with procedures at the bank's central computer center, located elsewhere. Neither she nor the customer service supervisor had been to the computer center.

Ben-Neth contends that neither of the bank officials was a proper foundation witness because neither created or supervised creation of the computer records, understood how the records were assembled at the computer center, or had ever been to the computer center. In *Smith and Kane*, however, bank officers were allowed to produce exhibits based on computerized records despite their lack of detailed understanding of the bank's computer system. Each was regarded as a supervisor of record-keeping or a custodian of the records, and therefore qualified to testify. In *Heath* a Seattle traffic violations bureau official who was responsible for teletype computer printouts was a proper foundation witness despite his distance from the computer center in Olympia.

Admissibility hinges on the trial court's discretionary determination that the computer records are reliable. RCW 5.45.020. They may be produced by one who either has custody of or has supervised the creation of the record. ***Cantrill***. Although additional foundation from an employee familiar with operations at the bank's computer center would have been helpful, the testimony of Paulson and

Landrum was sufficient under *Smith, Kane, and Heath*. The statutory elements were met and the trial court concluded that the evidence was reliable. We find no abuse of discretion to justify

Here the Unifund business records and the business records of U.S. Bank and Chase Bank, N.A. were introduced without objection by Appellant and the foundation information by the Unifund employees laid a proper foundation for their admission.

NUMEROUS STATES AND FEDERAL CIRCUITS HAVE PERMITTED THE INTRODUCTION OF AN ASSIGNEE'S BUSINESS RECORDS

Respondent contends, as outlined below in the subsequent sections, that these Affidavits and Exhibits that were admitted without objection satisfied the requirements of ER 602 and 901 and RCW Chapter 5.45 and the Trial Court did not abuse its discretion in admitting all the Affidavits and Exhibits.

In the Appellant's brief they have cited opinions in other jurisdictions where Courts have excluded evidence that originated from an original creditor. However, numerous State and Federal courts as outlined by the opinions below have recognized the inherent reliability of electronic records and have admitted records from an original creditor or some other third party and eliminated the need for authentication by the assignor entity. Like the federal court rulings, courts have explicitly held that the original preparer of the record is not required to authenticate.

A Federal District Court in Krawczyk .v Centurion Capital Corporation, 2009 WL 395458 at *3-7 (N.D. Ill. February 18, 2009) in its opinion on the Defendant's Summary Judgment Motion in a Federal Fair Debt Collection Practices Act against an Illinois law firm that had brought a suit on behalf of a debt buyer to collect a consumer debt, rejected the Plaintiff's motion to strike the Affidavits of the debt buyer on the grounds that the deponents did not have personal knowledge and the records of the original creditors were hearsay. The Court in its well reasoned opinion thoroughly analyzed the various arguments made by the Plaintiff in support of the Motion to Strike and found that the records were reliable and admissible as business records under the Federal Rules of Evidence Rule 803(6).

In Connecticut, New England Savings Bank v. Bedford Realty Corp, 246 Conn. 594, 603, 717 A. 2d 713 (1998) established that business records received from an assignor could be introduced by the assignee under the business records exception without bringing in a witness from the assignor entity.

In Massachusetts, Beal Bank SSB v. Eurich, 444 Mass. 813, 813 N.E. 2d 909 (2005) the court held that computer loan records received from an assignor qualified as business records of the assignee and allowed the assignee to use the electronic records and to authenticate those

electronic records. *Id.* The Court in Beal stated:

We recognize that “[t]he problem of proving a debt that has been assigned several times is of great importance to mortgage *819 lenders and financial institutions.” New England Sav. Bank v. Bedford Realty Corp., 246 Conn. 594, 607, 717 A.2d 713 (1998). Given the common practice of banks buying and selling loans, we conclude that it is normal business practice to maintain accurate business records regarding such loans and to provide them to those acquiring the loan. See Wingate v. Emery Air Freight Corp., *supra* at 406, 432 N.E.2d 474. See also United States v. Samaniego, 187 F.3d 1222, 1224 n. 1 (10th Cir.1999) (including bank records in “class of records commonly viewed as particularly trustworthy”); Federal Deposit Ins. Corp. v. Staudinger, 797 F.2d 908, 910 (10th Cir.1986), quoting Weinstein's Evidence at 803-178 (1985) (“foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records ... particularly in the case of bank and similar statements”). Therefore, the bank need not provide testimony from a witness with personal knowledge regarding the maintenance of the predecessors' business records. The bank's reliance on this type of record keeping by others renders the records the equivalent of the bank's own records. To hold otherwise would severely impair the ability of assignees of debt to collect the debt due because the assignee's business records of the debt are necessarily premised on the payment records of its predecessors.^{FN4}

FN4. As a matter of fairness, we also note that, in this type of collection action, the defendant debtor would ordinarily have records of any payments made, and thus would readily be able to demonstrate any error in prior credits or calculations. Here the defendant did not introduce any evidence that he had made any additional payments or provide any alternative calculation of the amount still owed. Moreover, the defendant has never denied that he owes the full amount of the debt; he merely stated in his answer to the complaint that he was without knowledge or sufficient information.

In Indiana, the courts recognized the support afforded such state court rulings by the Federal Rules of Evidence. In Miller v. Javitch, 397 F. Supp. 2d 991, 997-98 (N.D. Ind. 2005), the court stated Federal Rule of Evidence 803(6) relating to hearsay exceptions for records of regularly conducted activity has been interpreted to be applicable to the admission of account records initially generated by the original creditor, but later held by the debt buyer.

In New Jersey, in the case of loan records created by the assignor, the New Jersey Appellate Division in Garden State Bank v. Graef, 341 N.J. Super. 241, 246 (App.Div. 2001) held:

Even though the records do not itemize all payments made to [the Assignor] from the onset of the obligation, we are satisfied that they are sufficient to establish a prima facie case of what [the Assignee] claims is due on the outstanding loan. We understand the practicality of bank acquisitions, as a result of which older records may be lost or destroyed. We are satisfied that the records submitted by Summit are inherently trustworthy.

The court in Garden State Bank found the defendant's objections to admission of the loan records meritless because 1) defendants continued to make payments and never questioned the loan balance until payments stopped and suit was instituted; and 2) defendants failed to provide specific evidence of other payments allegedly not reflected in the loan

records, which was the basis for their attack on the loan records.

In New York, case law describes the federal support for authentication by an assignee. In United States v. Baker, 224 U.S. App. D.C. 68, 693 F. 2d 183, 187 (D.C. Cir. 1982), the court stated that if both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Fed. R. Evid. 803 (6). AFD Fund v. United States, 61 Fed. Cl. 540, 545 (Ct. Cl. 2004) states that business records that do not reflect the entire history are admissible. The crux of each of these holdings is that the reliability is key and the weight of the documents is ultimately to be decided by the finder of fact but not to be summarily excluded by evidence.

Case law in New York provides specific support for authentication by assignees. The court in Medical Expertise, P.C. v Trumbull Ins., 196 Misc.2d 389, 765 N.Y.S.2d 171 (Civ. Queens 2003) held “. . . inherent to understanding that the business of the litigants is not to provide testimony but to conduct business outside of the courtroom,” [a business record] is admissible “even though the person who prepared it is unavailable to testify to the acts or transactions.” The court in Trumbull goes a step further and lists its three criteria in order to further emphasize its main point that the preparer of the record is not required to authenticate: 1) that

the transaction at issue was made in regular course of business, 2) that the record of the transaction was made in the regular course of business, and 3) the record was made within a reasonable time of the transaction. Id. at 173. This is supported by an earlier holding that “These records are the customary reflections of the day-to -day operations of a business. These records must be truthful and accurate in order to conduct the business enterprise.” Williams v. Alexander, 309 N.Y. 283, 129 N.E. 2d 417 (1955). The Williams court goes further to state a presumption and “probability of trustworthiness which inheres in such records, by virtue of the fact, first, that they are the routine reflections of the day-to-day operations of a business.” Id. (emphasis added.) It is this trustworthiness which “justifies admission without calling all the persons who may have had a hand in preparing it.” Id.

In Ohio, the Ohio First District Court of Appeals found that the loan records acquired by a debt purchaser could be authenticated by the debt purchasers and were otherwise admissible. Great Seneca Fin. v. Felty, 170 Ohio App. 3d 737, 869 N.E. 2d 30 (Ohio Ct. App. 2006). The court determined that they were properly authenticated because the debt buyer plaintiff there, in support of the loan records, submitted the affidavit of its custodian of records who indicated that the records 1) had been acquired by the plaintiff and kept by it in its regular course of business; 2) were

made at or near the time of the transactions reflected therein; 3) “were made either by a party having personal knowledge of the information contained therein or based on information conveyed by a person having personal knowledge of the information contained therein;” and 4) plaintiff, as the assignee, had received the information from the original creditor. Id., at 743.

Aside from authentication, the Ohio court also addressed the other prong of admissibility, whether the records are reliable. In finding that they were, the court noted that Ohio’s business record exception is substantially similar to Fed.R.Evid 803(6). As we have previously noted, the Ohio court recognized that it is the general rule among several federal circuits that business records which were not made by the proponent can be admissible, “provided that the other requirements of Fed. R .Evid. 803(6) are met and the circumstances indicate that the records are trustworthy.” Id., citing United States v. Childs 5 F. 3d 1328, 1333 (9th Cir.1993); United States v. Jakobetz, 955 F. 2d 786, 801(2nd Cir. 1992) (“Even if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity”); Saks Int’l, Inc. v. M/V "Export Champion, 817 F.2d 1011 (2nd Cir. 1987) (documents may properly be admitted as business records even though they are the records of an entity

other than one of the parties, and even though the foundation for their receipt is laid by a witness who is not an employee of the entity that owned and prepared them, provided that there are sufficient indicia of the records' reliability and trustworthiness).

In Texas in the case of Bell v. State, 176 S.W. 3d 90 (TX. App. 2004), the Court held that a document prepared by a third party may be admissible under the business records exception to the hearsay rule if 1) it is incorporated and kept in the course of the testifying witnesses' business; 2) that the business typically relies on the accuracy of the contents of the such documents; and 3) the circumstances otherwise indicate the trustworthiness of the document.

In the case of In re: E.A.K., 192 S.W. 3d 133 (TX. App. 2006), the Court held that the foundation witness for business records need not be or have been an employee of the company that created the document..

In the case of Melendez v. State, 194 S.W. 3d 641 (TX. App. 2006), the Court held that an undercover officer was not required to be employed by the organization that made or maintained the record in order for him to be the foundation witness for the record under the business records exception to the hearsay rule.

In the case of Mitchell v. State, 750 S.W. 2d 378 (TX. App. 1988), the Court allowed the introduction of records under the business record

exception to the hearsay rule even though the person testifying was not a member of the same agency that prepared the original record.

In the case of Chimelewski v. State, 681 S.W. 2d 166 (TX. App 1984), the Court permitted an employee of a liquor importer to introduce a certificate that he had received from the exporter. Even though it was created by another entity, because it was created in the normal course of the business of the exporter and kept in the normal course of business of the importer, it was deemed trustworthy and admitted.

In Colorado in the case of Teac Corp of America v. Bauer, 678 P. 2d 3 (CO. App. 1984), the Court held that where business records prepared by another source are adopted and integrated into the Plaintiff's records in the regular course of their business, the records are admissible.

In New Mexico in the case of Cadle Co. V. Phillips, 120 N.M. 748, 906 P. 2d 739 (NM. App. 1995), the Court applied the Uniform Act to hold that the witness could present records originated by a bank, even though she had never been an employee of the bank.

In Minnesota, in the case of National Tea Co. v. Tyler Refrigeration, 339 N.W. 2d 59 (MN. 1983), the Court permitted the Defendant to introduce a certificate by an independent product certification organization concerning one of the Defendant's refrigeration

units under the business records exception to the hearsay rule, even though it was not a record of the refrigeration company.

In Iowa in the case of Graen's Mens Wear, Inc. v. Stille-Pierce Agency, 329 N.W. 2d 295 (IA. 1983), the Court allowed the introduction of incoming telephone logs to an insurance company under the business records exception, even though the logs were not from a party that was a party in the case.

A Court in Arizona has permitted the introduction of bank statements and note books from a drug business. In the case of State v. Riggs, 186 Ariz. 573, 925 P. 2d 714 (AZ. 1996) vacated on other grounds, 189 Ariz. 327, 942 P. 2d 1159 (AZ. 1997), the Court permitted bank statements to be introduced based upon the testimony of the successor bank. see also, State v. Petzoldt, 172 Ariz. 272, 275, 836 P. 2d 982, 985 (AZ. App., 1991). In State v. Petzoldt, the Court permitted notebooks that recorded drug transactions to be introduced based upon the testimony of a bookkeeper of the drug enterprise who had not entered the information in the note books. In reaching that decision the Court stated at page 272:

“The determination of whether, in all the circumstances, [business] records have sufficient reliability to warrant their receipt in evidence is left to the sound discretion of the trial judge.” Saks Int'l, Inc. v. M/V "Export Champion, 817 F. 2d 1011, 1013 (2nd Cir. 1987).

Where the Plaintiff has satisfied its prima facie basis for the business records exception to the hearsay rule, the burden shifts to the Defendant to submit competent admissible evidence that the evidence is not trustworthy. Nimmons v. State, 814 So. 2d 1153 (FL. App. 2002). The Defendant in this action introduced no such evidence at the trial of this matter.

The Virginia Supreme Court has followed the general rule that the foundation witness does not have to be the maker of the record and that the record can be admissible if made by a another entity, so long as it meets the criteria of a business record. McDowell v. Commonwealth, 273 Va. 431, 433, 641 S.E. 2d 507 (Va. 2007).

A Court in Virginia in Parker v. Commonwealth, 41 Va. App. 643, 587 S.E. 2d 749 (2003) not only expressly rejected the need to have the preparer of the record authenticate, the court cited to the cases in federal courts and in other states which have relied upon this rule. The impact of these cases is that there is nothing novel about authentication by witnesses unconnected to the originator of a business record.

Lastly, the 10th Circuit Court of Appeals provides useful guidance regarding business records from computerized storage. In United States v. Meienberg, 263 F. 3d 1177 (10th Cir., 2006) the defendant challenged on appeal the admission into evidence of printouts of computerized records of

the Colorado Bureau of Investigation, arguing that they had not been authenticated because the government had failed to introduce any evidence to demonstrate the accuracy of the records. Meienberg, supra at 1180-81. The Tenth Circuit disagreed, stating: Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility.

Numerous federal courts have also explicitly ruled that foundation testimony can be laid by a witness who is not the maker of the records. Saks Int'l, Inc. v. M/V "Export Champion", 817 F. 2d 1011, 1013 (2nd Cir. 1987) (Foundation can be laid by a witness who is not an employee of the owner of the records); Russo v. Abington Mem. Hosp. Healthcare Plan, 1998 U.S. Dist. LEXIS 18595 (E.D. Pa. 1998) ("If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6)." Citing, United States v. Baker, 224 U.S. App. D.C. 68, 693 F. 2d 183, 187 (D.C. Cir. 1982); Wilson v. Zapata Off-Shore Co., 939 F. 2d 260 (5th Cir. 1991); United States v. Keplinger, 776 F. 2d 678, 693 (7th Cir. 1985) (Foundation witness did not have to personally participate in the creation of the

document or know who actually recorded the information.); United States v. Parker, 749 F. 2d 628 (11th Cir. , 1984); United States v. Sokolow, 91 F. 3d 396, 403 (3rd Cir. 1996) cert. denied, 136 L. Ed. 2d 846, 117 S. Ct. 960 (1997).

Here the Affiants in the Declaration submitted by the Respondent have set out sufficient facts to establish their personal knowledge of the facts and information about both accounts and to authenticate the creditor's business records that are attached to the Declarations. Steve Ballman stated in the Second Supplemental Declaration in Support of the Motion for Summary Judgment (CP 227-229):

“1. I am an authorized agent of Plaintiff. Accordingly I am familiar with the facts set forth in this Declaration through personal knowledge and/or review of bank records.

... .

3. In my capacity of employment with Unifund CCR partners, I have under my supervision and control all of the books and records of the plaintiff Unifund CCR partners. To that end, I have personal knowledge specifically in regards to the two credit account numbers referred to above that said books are kept and maintained during Unifund CCR partners ordinary course of business. Through my experience, it is my knowledge that it is the original creditor's standard business practice to record all transactions on or about the time of occurrence.

4. Declarant has reviewed the books and records with regard to account number XXXXXXXXXXXXX7346. The credit card was issued to Defendant at Defendant's request. With respect to the indebtedness owed by the above-named defendant, the books and records of the creditor reflect that, as of the date of this Declaration, there remains due and owing to the creditor on the above referenced account, the principal sum of \$13,067.07 with interest accruing at the

rate of 12% per annum until Judgment. Accrued interest on this account through September 22, 2008 totals \$13,785.43 and continues to accrue at the rate of 12% per annum.

5. Attached hereto are true and correct copies of the following:

- a. Affidavit of Sale;
- b. Monthly Billing Statements; and
- c. Credit Card Agreement

6. Declarant has reviewed the books and records with regard to account number XXXXXXXXXXXXX3776. The credit line was entered into at Defendant's request. With respect to the indebtedness owed by the above-named Defendant, the books and records of the creditor reflect that, as of the date of this Declaration, there remains due and owing to the creditor on the above referenced account, the principal sum of \$18,926.34 with interest accruing at the rate of 12% per annum until Judgment. Accrued interest on this account through September 22, 2008 totals \$10,419.16 and continues to accrue at the rate of 12% per annum.

7. Attached hereto are true and correct copies of the following:

- a. Credit Line Cardholder Agreement; and
- b. Monthly Billing Statements. . . ."

Bobby Carnes stated in the Third Supplemental Declarations in Support of the Plaintiff's Motion for Summary Judgment (CP 295-296):

"1. I am an authorized agent of Plaintiff. Accordingly I am familiar with the facts set forth in this Declaration through personal knowledge and/or review of bank records.

2. In my capacity of employment with Unifund CCR Partners, I have under my supervision and control all of the books and records of the plaintiff Unifund CCR partners. To that end, I have personal knowledge specifically in regards to the two credit account numbers referred to above that said books are kept and maintained during Unifund CCR partners ordinary course of business. Through my experience, it is my knowledge that it is the original creditor's standard business practice to record all transactions on or about the time of occurrence.

3. Unifund is in the business of purchasing debt and collecting debt and has purchase the obligation due from Paul B Sunde to Chase Bank U.S.A. N.A. on account number XXXXXXXXXXXXX7346. Declarant has reviewed the books and records with regard to account number XXXXXXXXXXXXX7346. Attached hereto as Exhibit 1 is a true and correct copy of the Bill of Sale Assignment and Assumption Agreement with Exhibit attached with the subject account number listed executed by Citibank (South Dakota), N.A.. Because this purchase of accounts involved a large number of accounts, for privacy reasons Unifund has redacted all information about the other accounts that were purchased as part of this transaction. Also attached as Exhibit 2 is a true and correct copy of the Bill of Sale with Exhibit attached with the subject account number listed executed by Bank One Delaware, N.A. Because this purchase of accounts involved a large number of accounts, for privacy reasons Unifund has redacted all information about the other accounts that were purchased as part of this transaction.

4. In addition, Unifund has purchased the obligation due from Paul B Sunde to U.S. Bank National Association, N.D. under credit line account number XXXXXXXXXXXXX3776. Declarant has reviewed the books and records with regard to account number XXXXXXXXXXXXX3776. Attached hereto as Exhibit 3 is a true and correct copy of the Affidavit of Sale and Assignment of Assets with Exhibit attached with the subject account number listed executed by U.S. Bank National Association ND. Because this purchase of accounts involved a large number of accounts, for privacy reasons Unifund has redacted all information about the other accounts that were purchased as part of this transaction.

All of this information contained in these Declarations were submitted by the Respondent and considered by the Trial Court without objection by the Appellant. The Appellant made no motion to strike any of the Respondent's Declaration submitted in Support of the Summary Judgment

Motion.

The Second Declaration also contained an Affidavit of Sale signed by a representative of Chase Bank USA, N.A that stated in part that:

- “1. I am a Bank Officer of Chase Bank USA, N.A. and am authorized to make this affidavit on behalf of Chase Bank USA, N.A.
2. Paul B. Sunde had a credit card account with Chase Bank USA, N.A. account number (4366150003167346). The account was sold and transferred to Unifund CCR Partners, on or about April 28, 2004. . . .
5. Your deponent acknowledges that in making this affidavit that Unifund CCR Partners, is now the owner of said account, and authorized to collect, settled, adjust, compromise and satisfy the same and that Chase Bank USE, N.A. has no further interest in said account for any purpose. . . . CP 231

Even though Respondent believes that the Affidavit of Sale is sufficient to satisfy the requirements of RCW 4.08.080, to address the issues raised in the Appellant’s Supplemental Brief in Opposition to Motion for Summary Judgment dated January 6, 2009 CP 293-294, Respondent submitted a Third Declaration that contained Bills of Sale with Exhibits that contained identifying information identifying the subject accounts. This Third Declaration was mailed to Appellant’s trial counsel on February 2, 2009, over three weeks prior to the Summary Judgment hearing. Again the Appellant filed no affidavit in response to the Respondent’s Third Declaration and made no Motion to Strike the Third Declaration or any of the other Declaration or Affidavits.

No affidavits and no documentary evidence other than Appellant's Briefs in Opposition to the Motions for Summary Judgment were submitted by the Appellant in opposition to the Summary Judgment. As a result, the Respondent's evidence was uncontroverted and the Respondent's affidavits and documentary evidence were admitted into evidence and considered by the Trial Court without objection. Although Appellant's trial counsel argued in his Supplemental Memo and at the Summary Judgment hearing that the Respondent's evidence does not prove that Respondent owned the accounts, the Respondent's evidence was uncontroverted and as a result pursuant to CR 56(e) the Appellant did not raise a material issue of fact to defeat the Summary Judgment Motion. The decision of the Trial Court granting Summary Judgment and entering Judgment on the US Bank credit line claim should be affirmed on appeal.

AWARD OF ATTORNEY'S FEES WAS PROPER

The amount of attorney's fees awarded by the Trial Court was specifically requested in each of Respondent's Motions for Summary Judgment and is supported by a Certification of Respondent's counsel in each.

Respondent requested \$850.00 in attorney's fees in the January, 2008 Summary Judgment Motion. CP 48, 49. The Motion included an Affidavit of the attorney's time to date and the estimated amount of time

to finish the hearing on the Motion. In the Summary Judgment Motion filed in June, 2008 Respondent again requested \$850.00 in attorney's fees. CP 89, 90. The Motion included an affidavit of the attorney's time to date and the estimated amount of time to finish the hearing on the Motion.

In the Summary Judgment Motion filed in November, 2008, after Respondent had prepared and filed a Memorandum in Support of the Motion for Summary Judgment and in Reply to Defendant's Opposition to Summary Judgment (CP 163-226), Respondent requested \$1,150.00 in attorney's fees. CP 159, 161. The Motion included an affidavit of the attorney's time to date that included approximately 2.0 hours of legal services in the preparation and prosecution of the action, 3.0 hours in researching and preparing Plaintiff's Memorandum and an anticipated 1.8 hours for the Summary Judgment hearing. The Motion and Affidavit stated that the sum of \$1,150.00 was a reasonable sum and should be awarded.

Appellant never objected to the request for attorney's fees in response to any of the Summary Judgments or at the time the Summary Judgment was argued. The Appellant made no motion for reconsideration after the Trial Court awarded attorney's fees in its letter opinion. CP 321-322. The issue of attorney's fee was first mentioned by Appellant's new counsel at the time of presentation of the Summary Judgment. However,

Appellant's counsel filed nothing in opposition to the form of the Summary Order or any post trial motion and merely showed up at the presentation hearing nearly two months after oral argument and over one month after the Court's letter opinion was issued and attempted for the first time to try to raise new arguments on multiple issues that had never been raised before. The argument had no merit and was done without any prior notice to Respondent's counsel. It was not considered by the Trial Court because it was not properly before the Court when the only issue before the Court was the form of the Summary Judgment Order.

ANY AWARD OF ATTORNEY'S FEES TO APPELLANT SHOULD BE STAYED UNTIL THE UNDERLYING CASE IS COMPLETED

In the event that the Court of Appeals reverses the decision of the Trial Court and remands the case back to the Trial Court for further proceedings, any award of attorney's fees on Appeal should be reserved until there is a final determination of the underlying case.

C. ARGUMENT ON CROSS APPEAL

The Respondent cross appeals on the issue that the Delaware statute of limitations applied and the Delaware statute of limitations was not tolled. Respondent/cross appellant contends that based on the record before the Trial Court, there was not sufficient evidence to determine that the 3-year statute of limitation had run or to establish as a matter of fact

and law that the Delaware statute of limitation was not tolled due to the Defendant's absence from the state of Delaware at the time the cause of action arose.

**PARTY ASSERTING STATUTE OF LIMITATIONS MUST
PROVE EVERY ELEMENT**

The bar of a statute of limitations is an affirmative defense and the parties relying upon a statute of limitation must prove every element. Haslund v. City of Seattle, 86 Wn. 2d 607, 547 P. 2d 1221 (1976); Fruit and Vegetable Packers & Warehousemen Local 760 v. Morley, 378 F. 2d 738 (1967); Bellingham Securities Syndicate v. Bellingham Coal Mines, 13 Wn. 2d 370, 125 P.2d 668 (1942), Wesche v. Martin, 64 Wn. App. 1, 822 P. 2d 812 (1992); Henderson v. Pennwalt Corp, 41 Wn. App. 547, 704 P. 2d 1256 (1985). Here the Appellant did not file any affidavits in opposition to the Summary Judgment nor did the Appellant make his own Motion for Summary Judgment or Motion to Dismiss. Therefore any facts on this issue would be from the Respondent's evidence submitted in support of its Motion for Summary Judgment. Respondent's Declarations and the credit card statements on the Chase account only cover the limited period of time from 6/16/2002 through 7/31/2003. CP 238-251. Other than the Respondent's evidence of a few statements in 2002 & 2003 that show if payments were made or not made during the month that each statement covers and the contractual provision in the Chase credit card agreement that Delaware law was to apply to the Chase contract, there is no other

evidence in the record that established the date of the last payment on the Chase account or that the last payment on the Chase account had been made more than 3 years prior to the commencement of the action. Therefore the Appellant did not satisfy his evidentiary burden of establishing the necessary elements that the Delaware statute of limitation barred the prosecution of the Chase claim. Without any affidavit from the Appellant, there was no factual basis for the Trial Court to find as a matter of law that the Delaware 3-year statute of limitation applied and was not tolled or to support the Trial Court's ruling that the Order on Summary Judgment is dispositive of all issues in this action and this Summary Judgment is a final Judgment in this action.

Secondly if the Appellate Court agrees with Appellant's arguments and rejects the uncontroverted and unchallenged Unifund Declaration as not being based on personal knowledge or contains hearsay, then there is no record and no evidence upon which the Trial Court or the Appellate Court would be able hold as a matter of fact or law that the Chase claim is barred by the 3-year statute of limitations or that the statute was not tolled. If the Declarations are rejected, then Unifund's cross appeal must be granted and the decision of the Trial Court that Delaware's three-year statute of limitations applies to the Chase account and that the statute of limitations is not tolled and that the Court's ruling is dispositive of all issues in this action and that this Summary Judgment is a final Judgment

and those portions of the decision must be reversed and the case remanded back to the Trial Court for further consideration.

THE CHASE ACCOUNT IS NOT BARRED BY DELAWARE’S 3-YEAR STATUTE OF LIMITATIONS

The Appellant at the Summary Judgment hearing contended that Delaware’s 3-year statute of limitation should apply on the Chase account. The Trial Court granted Summary Judgment as a matter of law on this issue. However, if Delaware procedural law applies to this action filed in the State of Washington, the Respondent contends that as a matter of law that the Delaware Statute of Limitation, 10 Del. C. § 8106, does not bar the Respondent’s Chase claim.

First Washington has adopted the Uniform Conflicts of Laws-Limitations Act. It provides that if a claim is substantively based upon the laws of another state, the limitations period of that state applies. RCW 4.18.020(1)(a). RCW 4.18.020 provides:

RCW 4.18.020-Conflicts of Laws-Limitation Periods

(1) Except as provided by RCW 4.18.040, if a claim is substantively based:

(a) Upon the law of one other state, the limitation period of that state applies; or

(b) Upon the law of more than one state, the limitation period of one of those states, chosen by the law of conflict of laws of this state, applies. . . .

The Uniform Act also provides that if a statute of limitations of another state applies, then the other state's rules of law governing tolling and accrual apply in computing the statute:

RCW 4.18.030-Rules of Law Applicable to Computation of Limitation Period

If the statute of limitations of another state applies to the assertion of a claim in this state, the other state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply.

The Chase credit card agreement had a forum selection clause that stated that the agreement was governed by the laws of the United States and the State of Delaware law. Delaware has a three-year statute of limitations but Delaware also has a tolling provision that also must be applied in computing the statute of limitations. RCW 4.18.030.

Other than the credit card agreement and its forum selection, there was no other evidence that the Appellant had any contacts with the State of Delaware to confer personal jurisdiction on a Delaware Court to be able to bring a suit against the Appellant in Delaware at the time the cause of action arose. The Chase statements disclose that the statements were mailed to the Appellant at a P.O. Box in Longview, Washington, and the payments were to be made to a P.O. Box in Henderson, Nevada. There was no evidence of where the contract was entered into or where the

charges were made. There was no evidence that the Defendant was ever present in State of Delaware before, during or after the cause of action arose. Here Appellant lacked significant contacts with Delaware at the time the cause of action arose, and as a result the Delaware courts would have lacked personal jurisdiction over Appellant and suit could not have brought against the Appellant in Delaware to collect the Chase credit card balance unless he moved into the State of Delaware or did any acts that would subject him to personal jurisdiction under the Delaware Long Arm Statute 10 Del. C. § 3104.

Because there was no evidence that Defendant was a resident of the State of Delaware when the cause of action arose or any time thereafter, nor was there any evidence that he did any acts that would subject him to personal jurisdiction under the Delaware Long Arm Statute 10 Del. C. § 3104, he could not have been sued in Delaware when the cause of action arose and the three-year Delaware statute of limitation under 10 Del. C. § 8106 would have been tolled under 10 Del. C. § 8117, see, Saudi Basic Industries Corporation v. Mobil Yanbu Petrochemical Company and Exxon Chemical Arabia, Inc., 866 A. 2d 1, 2005 Del LEXIS 41 (Del. Supreme Ct., 2005) Donna Lee H. Williams, Insurance Commissioner of the State of Delaware v. Congregation Yetev Lev, 2004 U.S. Dist. LEXIS 25432 (D.C.S.D.N.Y., 2004).

Delaware's Tolling Statute, 10 Del. C. § 8117 provides:

§ 8117. Defendant's absence from State.

If at the time when a cause of action accrues against any person, such person is out of the State, the action may be commenced, within the time limited therefore in this chapter, after such person comes into the State in such manner that by reasonable diligence, such person may be served with process. If, after a cause of action shall have accrued against any person, such person departs from and resides or remains out of the State, the time of such person's absence until such person shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action. (Code 1852, § 2751; 20 Del. Laws, c. 594; 25 Del. Laws, c. 234; Code 1915, § 4680; Code 1935, § 5138; 10 Del. C. 1953, § 8116; 70 Del. Laws, c. 186, § 1.)

The Delaware Supreme Court stated in Saudi Basic Industries Corporation v. Mobil Yanbu Petrochemical Company and Exxon Chemical Arabia, Inc., *supra* at pages 38-40:

“It is settled law that the purpose and effect of *Section 8117* is to toll the statute of limitations as to defendants who, at the time the cause of action accrues, are outside the state and are not otherwise subject to service of process in the state. n36 In those circumstances, the statute of limitations is tolled until the defendant becomes amenable to service of process. n37

n36 *Hurwitch v. Adams*, 52 Del. 247, 155 A.2d 591, 594, 2 Storey 247 (Del. 1959).

n37 *Brossman v. FDIC*, 510 A.2d 471, 472-73 (Del. 1986) (statute of limitations tolled until the effective date of the Delaware long-arm statute because prior to that time the nonresident defendant was not amenable to service of process).

Here, SABIC was "out of the state" and service of process upon SABIC could not have been accomplished in Delaware. Because SABIC lacked significant contacts with Delaware before it filed this lawsuit, the Delaware courts would have lacked personal jurisdiction over SABIC.

Therefore, ExxonMobil could not have [**39] obtained personal jurisdiction over SABIC in Delaware. Only by voluntarily initiating this action in Delaware as plaintiff did SABIC "come[] into the State" and thereby become amenable to service of process. n38 [*19] Thus, even if the three-year Delaware statute of limitations were found applicable to ExxonMobil's claims, the running of that statute was tolled until the date that SABIC filed its Superior Court action. n39

n38 Shortly after SABIC filed this action, ExxonMobil commenced an action in the New Jersey federal court, raising claims similar to its counterclaims here. SABIC immediately sought to dismiss that action, claiming that it was immune from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et. seq.* ("FSIA") and could not be sued anywhere in the United States. The United States District Court for the District of New Jersey held that SABIC's filing suit in New Jersey waived any FSIA immunity as to the overcharge claims in New Jersey and the Delaware courts. *Saudi Basic Indus. Corp., 194 F. Supp. 2d at 401-03, vacated in part and remanded on other grounds, 364 F.3d 102 (3rd Cir. 2004)* (holding that the *Rooker-Feldman* doctrine deprived the federal court of subject matter jurisdiction over suit by ExxonMobil once final judgment on the identical issue was granted by the Delaware Superior Court.), *cert. granted, 160 L. Ed. 2d 221, 125 S. Ct. 310 (2004)*.

[**40]

n39 It is undisputed that ExxonMobil asserted their overcharge counterclaims well within the three-year period from the filing of SABIC's complaint.

We conclude, for these reasons, that the Superior Court did not err by rejecting SABIC's defense (and claim-in-chief) that ExxonMobil's counterclaims are barred by the statute of limitations.”

The available case law in Delaware interpreting this statute indicates that the purpose of the statute is to toll Delaware's statute of limitations when the defendant is not available to be served by a plaintiff suing in the

State of Delaware. see, Saudi Basic Industries Corporation v. Mobil Yanbu Petrochemical Company and Exxon Chemical Arabia, Inc. If a defendant is not subject to service when a cause of action accrues against him, the relevant statute of limitations will be tolled until the plaintiff, by reasonable diligence, may serve him with process. In Brossman v. Federal Deposit Insurance Corp., 510 A. 2d 471 (1986), the Court held that the Delaware statute of limitations was tolled against Mr. Brossman, a Pennsylvania resident, until Delaware enacted its long arm statute which made Mr. Brossman subject to service. In Hurwitch v. Adams, 52 Del. 13, 151 A. 2d 286, affirmed 52 Del. 247, 155 (1959) the Court held that the statute tolling the period of limitations as to those outside the state applies only to those who are outside the state and are not otherwise subject to service of process in the state and does not apply to a nonresident motorist who is outside the state but who is subject to service of process through substituted service on his statutory agent, the Secretary of State. Here there is no evidence in the record that Appellant was subject to service of process as a result of the Delaware long arm statute.

Two recent cases, one in Florida in McCorriston v. L.W.T., Inc., 536 F. Supp. 2d 1268 (M.D. Fla. 2008) and one in California in Resurgence Financial, LLC v. Chambers, 173 Cal. App 4th Supp 1, 92 Cal. Rptr. 3rd 844 (2009) have come to results contrary to the line of Delaware cases and

have not applied the Delaware tolling statute to cases involving Delaware contracts in suits filed outside the state of Delaware. However, neither Florida nor California have the same conflicts of law provisions as Washington and therefore the court's interpretation of the Delaware tolling statute in these cases should be ignored and not followed and existing Delaware cases interpreting its own states statutes and the District's Court's analysis in Avery v. First Resolution Management Corporation, 2007 WL 1560653 at *4-5 (D. OR) Opinion Amended and Superseded on Denial of Rehearing en banc 561 F. 3d 998, affirmed 568 F.3d 1018 (2009) Cert Denied 130 S. Ct 554, 78 USLW 3113, 78 USLW 3265, 78 USLW 3269 (2009) analyzing New Hampshire's tolling statute which is similar to Delaware's tolling statute and its effect on a suit filed in Oregon which has a conflicts of laws provision similar to RCW 4.18.040 should be followed.

The effect of Appellant not residing in Delaware when the cause of action arose and with no evidence in the record that he was subject to Delaware's long arm statute, could potentially permit Delaware's tolling statute to run forever thus imposing an unfair burden on the Appellant in defending against the collection action. However Washington statutory scheme regarding Conflict of Laws addresses this exact type of unfair

burden that might be created when applying the statutes of limitations and tolling provisions of other states. RCW 4.18.040 provides:

RCW 4.18.040-Application of Limitation Period of Other State-Unfairness

If the court determines that the limitation period of another state applicable under RCW 4.18.020 and 4.18.030 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this state applies.

Under RCW 4.18.040 because the tolling provision could run indefinitely and thus impose an unfair burden on the Appellant in defending against this collection action, Washington's statutes of limitations would apply. Here the credit card statements attached to the Declaration, disclose that a payment was made on 1/4/2003 CP 245. Suit was filed on September 5, 2006 CP 1 and publication was commenced on April 20, 2007. CP 22 As a result, this action was commenced within the applicable Washington 6-year statute of limitations. RCW 4.16.040. see Avery v. First Resolution Management Corporation, supra which followed this approach when analyzing the New Hampshire tolling statute and its effect after the New Hampshire 3-year statute of limitations had run, on a suit filed on in the State of Oregon on an Oregon resident who had never lived in New Hampshire.

Assuming that the cause of action arose on the Chase claim on February 9, 2003 when Appellant failed to make the payment that was due

on that date, here based on the evidence before the Trial Court, at the time of the last payment, the Defendant was a resident of Washington and has been a resident of Washington since that date. There was no evidence in the record that the Defendant ever entered the State of Delaware to be served with Delaware process pursuant to Delaware law after the alleged 2003 default. As a result of the Delaware tolling statute, its statute of limitation never ran on this claim.

D. UNIFUND IS ENTITLED TO RECOVER ITS ATTORNEY'S FEES PURSUANT TO RAP 18.1

Pursuant to RAP 18.1 and the express terms of the creditor credit line and credit card Agreement, Respondent requests that it be awarded its attorney's fees for responding to this appeal.

E. CONCLUSION

The decision of the Trial Court in granting Summary Judgment on the U.S. Bank Line of Credit claim should be affirmed and the decision of the Trial Court denying the Motion for Summary Judgment should be reversed and Summary Judgment should be entered in favor of Unifund CCR Partners. The Respondent should be awarded its costs and attorney's fees pursuant to RAP 14 and RAP 18.1.

Dated this 6 day of May, 2010

SUTTELL & HAMMER, P.S.



- William G. Suttell, WSBA #12424
 - Patrick J. Layman, WSBA #5707
 - Karen L. Hammer, WSBA #35608
 - Isaac Hammer, WSBA #36101
 - Mark T. Case, WSBA #38589
 - Malisa L. Gurule, WSBA #40602
 - Nicholas R. Filer, WSBA #39536
 - Steven J Contos, WSBA #37102
- Attorneys for Respondent/Cross Appellant

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

UNIFUND CCR PARTNERS

Respondent

vs.

PAUL B. SUNDE

Appellant

APPELLATE COURT

No. 39244-5-II

CERTIFICATION OF MAILING

FILED
COURT OF APPEALS
MAY 10 2010
10 MAY 10 PM 1:36
STATE OF WASHINGTON
BY  DEPUTY

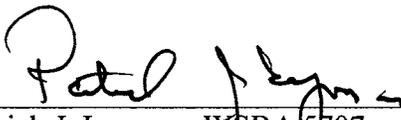
TO: Clerk of the Court

AND TO: Appellant & his Attorneys

I certify that on May 10, 2010 I mailed, postage prepaid, a copy of the Respondent/Cross Appellant's Amended Brief to:

Michael D. Kinkley
Michael D. Kinkley, P.S.
4407 N Division, Ste 914
Spokane, WA 99207

Deanna Johnson
35 W. Maine Ave., Ste 330
Spokane, WA 99201



Patrick J. Layman, WSBA 6707
Attorneys for Respondent UNIFUND CCR PARTNERS