

FILED

JUN 04 2012

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON**
By

CONSOLIDATED APPEAL NO. 305813

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

DISCOVER BANK,
Issuer of the Discover Card,
Respondent/Appellee,

v.

RICHARD R. RODRIQUEZ and SHONNA L. RODRIQUEZ,
and their marital community composed thereof,
Appellants.

APPELLANTS' REPLY BRIEF

DAVID B. TRUJILLO
WSBA NO. 25580
Attorney for Appellants
4702A Tieton Drive
Yakima, WA 98908
Phone (509) 972-3838

FILED

JUN 04 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CONSOLIDATED APPEAL NO. 305813

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

DISCOVER BANK,
Issuer of the Discover Card,
Respondent/Appellee,

v.

RICHARD R. RODRIQUEZ and SHONNA L. RODRIQUEZ,
and their marital community composed thereof,
Appellants.

APPELLANTS' REPLY BRIEF

DAVID B. TRUJILLO
WSBA NO. 25580
Attorney for Appellants
4702A Tieton Drive
Yakima, WA 98908
Phone (509) 972-3838

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATUTES AND RULES iv

I. RESPONSE TO DEFENDANTS' ARGUMENTS . 1

A. DB servicing corporation's third-party affiant Patrick Sayers had no direct personal knowledge to ever vouch second or third hand for the admissibility of the first party plaintiff Discover Bank's records and allegations at issue for the purposes of a profit-motivated commercial collection case, because he expressly admits (at CP-7, lines 17-19; and at CP-41, lines 17-19) that he was never responsible for any Discover Bank transaction or account records until only after contested litigation resulted thereon such that both his affidavits and all the facts therein and all the alleged exhibits attached thereto never complied with the basic admissibility requirements of either cr 56(e) OR RCW 5.45.020.
. 1-10

II. CONCLUSION 11

NOTE: Since this is a consolidated appeal from two case files, all citations to Clerks Papers coming from both of the underlying cases will always start with the CP citation from Superior Court Cause Number 10-2-03528-1 first, followed by the CP citation from Cause Number 10-2-03529-9 last.

TABLE OF AUTHORITIES

<u>Discover Bank v. Bridges</u> , 154 Wash. App. 722, 226 P.3d 191 (2010)	2,3,4
<u>Antonio v. Barnes</u> , 464 F.2d 584, 585 (4 th , Cir. 1972)	10

STATUTES AND RULES

RCW 5.45.020	.	.	.	.	.	1,2,3,4,11
CR 56(e)	.	.	.	.	.	1,2,3,4,8, 11

I. RESPONSE TO RESPONDENT DISCOVER BANK'S
ARGUMENTS:

The first party Plaintiff Discover Bank's entire case about alleged credit card contracts allegedly formed with the Rodriguezes and all the alleged indebtedness and histories thereon are all founded entirely on the bare word of its sole third-party alleged witness, Patrick Sayers, an employee at an entirely different company called DB Servicing Corporation, who filed two nearly identical declarations at CP-7-29 and at CP-41-80.

Discover Bank asserts the Patrick Sayers Affidavits at issue, and all the facts and allegations asserted therein and all the exhibits and alleged business records attached thereto were all properly admissible and conclusively proved their case without any genuine issues of material fact in full compliance with both CR 56(e) and RCW 5.45.020.

Furthermore, Discover Bank claims or implies

that the Division II Court of Appeals has already held that the same or similar type of affidavit has been conclusively deemed proper under both CR 56(e) and RCW 5.45.020. Respondent's Brief at pages 12-13 (citing to a Pro Se case of Discover Bank v. Bridges, 154 Wash. App. 722, 226 P.3d 191 (2010)).

However, in the Bridges case, supra., Discover Bank submitted two sworn affidavits of a Ms. Kiser and a Mr. Adkins and yet their motion for summary judgment was actually DENIED. Id., at 724-5. It was only after they submitted their third affidavit of a Mr. Brooks did Discover Bank finally have enough belts and suspenders to overcome their Pro Se opponent for the dubious and short-lived victory of having the trial court to grant summary judgment. Nevertheless, the Court of Appeals reversed it all anyhow due to genuine issues of material fact even with all three affidavits COMBINED.

Bridges is hardly a dispositive or controlling case here. To the contrary, Discover Bank's allegation at pages 12-13 of its appellate brief claiming that the Sayers affidavit in the case at bar is the same or similar to allegedly successful affidavits from the Bridges case is troubling at best.

The reported text of the Bridges case does not include any quotes to any of the actual language of any of the three affidavits used by Discover Bank therein. However, the holding of the appellate Court in Bridges shows that those affidavits had to have been much more strongly and appropriately worded unlike the Sayers Affidavits at issue in the case at bar.

In Bridges, the Appellate court expressly considered CR 56(e) and RCW 5.45.020 and found that the Discover affidavits had "collectively stated" that:

Kiser and Adkins had access to the Bridgeses' account records in the course of their employment [NOT MERELY AFTER LITIGATION COMMENCED THEREON]. . . [and] made their statements based on personal knowledge [NOT SECOND OR THIRD HAND KNOWLEDGE]. . . and under penalty of perjury . . . [and] the attached account records were true and correct copies made in the ordinary course of business [NOT JUST THROWN TOGETHER FOR LITIGATION PURPOSES].

Bridges, supra. at 726.

However, in the case at bar, Discover Bank's attempted use of the Patrick Sayers Affidavits to comply with CR 56(e) and RCW 5.45.020 UTTERLY FAILED based on one enormously fatal fact that would not hold muster under Bridges either. Unlike the three affidavits described above by the

Division II Court of Appeals, the Patrick Sayers affidavits in this consolidated appellate case at bar were NOT made under penalty of perjury, and ALSO could not possibly be based on any personal knowledge for ever authenticating any facts or documents which pre-dated the litigation.

Patrick Sayers NEVER stated he had any direct personal knowledge about any part of the transaction, or the alleged formation of any agreement, or any of the history or activity on any of the alleged accounts whatsoever. That is the distinguishing and dispositive fact of the matter because Mr. Sayers admitted that he is at best just a third-party servicing agent only "responsible for managing and overseeing the Discover accounts **THAT HAVE RESULTED IN CONTESTED LITIGATION.**" CP-7, lines 17-19; and CP-41, lines 17-19 (Emphasis added).

The litigation for both the alleged account

disputes at bar was simultaneously commenced on October 4th, 2010. CP-1-4. Yet, all we have is a third-party witness trying to talk about what records he has maintained since litigation started, which establishes nothing.

Furthermore, on the alleged Richard Rodriquez account, other than finance charges, late fees and over-limit fees, the latest hint of alleged activity is dated July 4th, 2009, A FULL YEAR AND THREE MONTHS PRIOR TO ANY CONTESTED LITIGATION and also more than a year and three months prior to Mr. Sayer's involvement or any personal knowledge up till then at all. See Discover Card Brief, Appendix A, Statement closing dated August 3, 2009.

Likewise, Mr. Sayers' alleged Shonna Rodriquez account records from whoever at Discover Card created them list the last alleged account activity as having occurred on July 17th, 2009. CP-25. Again, that is A FULL YEAR AND THREE MONTHS PRIOR

TO ANY CONTESTED LITIGATION and more than a year and three months prior to Mr. Sayer's involvement or any personal knowledge up till then at all. So, if there is any competent witness at all in this case, it is NOT this third-party, Patrick Sayers.

Worse yet for the suspected robo-signing witness Patrick Sayers, the third-party DB Servicing Corporation, and Plaintiff Discover Bank, is the troubling fact that with regard to the alleged Shonna Rodriguez account, their alleged cardmember agreement documentation (at CP-44) shows those documents were copyrighted on year 2010 and also somehow dated for 12/15/09. However, the all alleged Shonna Rodriguez transaction records pre-date the same by at least another year starting in 2008 (at CP-58-80).

So, either the alleged agreement form from 2010 or the alleged 2008 transaction records based on the same were fabricated, calling all records

into question.

In any event, the minimum requirements of CR 56(e) require an actual DEMONSTRATION of personal knowledge in the affidavit, yet Mr. Sayers makes no claim about ever actually witnessing anything at any relevant time with regard to either of the two alleged accounts. He makes no claims about being involved in contract formation or with any pre-litigation alleged account activities whatsoever.

The only thing Mr. Sayers demonstrated, in the fill your witness name in the vague robo-signature affidavits written up in a manner that allowed any documents whatsoever to be attached to them when affidavits should specifically identify each document attached thereto, is that when Discover Bank had accounts that went into contested litigation, those Discover account files then got sent out from first-party plaintiff Discover Bank to a Third-Party company (DB Servicing Corporation)

for outside collections instead of handling it in-house.

Thus, the alleged Discover account records were simply handed off to a third-party company called DP Servicing Corporation. Then DP Servicing Corporation may have handed some of those alleged records to its own employee Patrick Sayers and may have sued under Discover Card's name.

However, at best, and when the evidence is viewed in the light most favorable to the Rodriguezes, Patrick Sayers was merely handed two nearly identical fill-in your name, robo-affidavits to sign on nothing more than mere hearsay information and belief and an after-the-fact second or third-hand review of whatever alleged records some identified people at DP Servicing Corporation handed to him from whoever handed it all to them at First-party Discover Bank.

Mr. Sayers' magical inclusion of conclusory magic language merely claiming his affidavit is on "personal knowledge" is of no consequence and was not sufficient to survive the Rodriguezes' proper demand for summary judgment dismissal of both of Discover Bank's cases leading to this consolidated appeal. Mere averments by the affiant that he or she is competent and has personal knowledge is insufficient. Antonio v. Barnes, 464 F.2d 584, 585 (4th, Cir. 1972).

Worse yet, if Patrick Sayers' admission about not having any responsibility for the files until they went into contested litigation is true, then there may be a perjury issue in this case on top of a fully warranted summary judgment dismissal with prejudice of both Discover cases which were founded solely on the affidavits of Patrick Sayers.

//

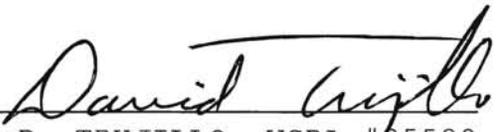
II. CONCLUSION

For the reasons stated above, Defendants Rodriquez respectfully request that this court find that Plaintiff Discover Bank's Affidavits of Patrick Sayers and the exhibits attached not only did not comply with CR 56(e) or qualify under RCW 5.45.020 as admissible business records to support Plaintiff's motion for summary judgment, but they were simultaneously not enough to survive the Defendants' cross-motions for summary judgment.

This is because the affidavits of Patrick Sayers, had prima facie, fatal deficiencies based on his admissions that he was not involved until after litigation commenced, which not only raised pivotal genuine issues of material fact against ever granting any summary judgment motions in favor of Discover Card, but to the contrary, mandated dismissals with prejudice in favor of the Rodriquezes.

Respectfully submitted this 1st day of June,
2012.

LAW OFFICES OF DAVID B. TRUJILLO
Attorney for Appellants Rodriguez:

By: 
DAVID B. TRUJILLO, WSBA #25580