FILED

JUN 01 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 30596-1-III

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

DISCOVER BANK, ISSUER OF THE
DISCOVER CARD

Respondent

v.

ALAINE GARDNER, ET AL.,

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. Discover Bank v. Bridges, 154 Wash. App. 722, 226 P.3d 191 (2010) is of no help to Discover Bank on the facts of this case. 1

B. The medical treaters and public records hearsay exemptions judicially recognized for third-party colleague witnesses without actual personal knowledge, are afforded to fellow treating doctors and police officers therein, but do not extend to lazy and purely profit-motivated private collection agencies seeking commissions and profits on unsubstantiated junk debts in private commercial matters with absolutely no similar indicia of inherent reliability. 6

C. The only non-treating physician / non-medical records case that Discover Bank cites to is the case of State v. Iverson, 126 Wash. App. 329, 108 P.2d 799 (2005), which is of no help to Discover Bank. Rather, State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981) makes clear that Discover Bank's clearly hearsay records submitted by third-party DB Servicing corporation without any personal knowledge should have been stricken and summary judgment granted to Defendants instead. 15

II. CONCLUSION 24

TABLE OF AUTHORITIES

Discover Bank v. Bridges,
154 Wash. App. 722, 226 P.3d 191 (2010)
. 1,2,3,4

Discover Bank v. Peters, 2011-Ohio-3480
(Case No. 2010CA00309, July 11th, 2011) . 4,5

State v. Ziegler, 114 Wn.2d 533,
789 P.2d 79 (1990) 6,7,8,9,
10,11,12,
20

Cantrill v. American Mail Line, Ltd.,
42 Wn.2d 590, 257 p.2d 179 (1953) . . 9,16

State v. Sellers, 39 Wash. App. 799,
695 P.2d 1014, review denied,
103 Wn.2d 1036 (1985) 10,11

State v. White, 72 Wn.2d 524,
433 P.2d 682 (1967) 14

State v. Iverson, 126 Wash. App. 329,
108 P.2d 799 (2005) 15,16,
18,19,20,
22,23,

State v. Garrett, 76 Wash. App. 719,
887 P.2d 488(1995) 16

State v. Tharp, 96 Wn.2d 591,
637 P.2d 961 (1981) 22

STATUTES AND RULES

CR 56(e) 5,6,7,15,25

RCW 5.45.020 6,25

RCW 5.44.040 20

I. RESPONSE TO DEFENDANTS' ARGUMENTS

A. First, the Respondent Plaintiff Discover Bank attempts to bolster the declaration of DB Servicing Corporation's Natasha Szczygiel with citation to another pre-typed fill in your name Supplemental Affidavit signed by Robert Adkins at (CP-283-304) and filed at some unknown point of time on the very date of the summary judgment hearing, not 11-14-11 as implied by Discover Bank at page 2 of their brief. Discover claims that "strikingly similar" affidavits were allegedly found sufficient in Discover Bank v. Bridges, 154 Wash. App. 722, 226 P.3d 191 (2010). However, in Bridges, Discover Bank's summary judgment motion was actually denied even with the addition of the Adkins affidavit to the other DB Servicing co-worker, Ms. Ashlea Kiser. Id., at 724-5.

Discover then ended up having to submit a THIRD AFFIDAVIT of a Ms. Denise Brooks to overcome their deficiencies in a re-filed summary judgment

motion. Id. at 725. Only then did the Appellate Court make its "collective" findings of sufficiency to all three of the particular affidavits in that case with a key part of those findings being that all three of those affidavits were signed "under penalty of perjury" which Adkins and Szczygiel both did NOT do in the case at bar.

The Bridges case also does not address the serious concerns present in our case over how Discover Bank's sworn answers to interrogatories claimed that the records custodian for the alleged Gardener account records was actually a Mr. James Ball, and was not Mr. Adkins or the same Ms. Szczygiel who actually notarized Mr. Ball's CR 26(g) certification that Mr. Ball was the custodian of records. CP-239-240.

Additionally, Discover Bank's alleged cardmember agreement submitted in the general pile of exhibits loosely attached to the sworn

declaration of Szczygiel asserts that the Gardeners allegedly opened an account in the year 2000 (CP-36), but yet the attached cardmember agreement which Discover claims the Gardeners signed up for is inexplicably copyrighted for year 2010 indicating a poorly hidden fabrication of records. CP-130. This blatant and wholly unexplained 10 year evidentiary conflict raised serious questions and genuine issues of material fact about the veracity and admissibility of Discover Bank's alleged records which was not raised in Bridges.

The Court in Bridges, supra. at 726, was fully satisfied that the sworn statements were "based on personal knowledge" and that "the attached records are true and correct copies made in the ordinary course of business". However, those ultimate issues in our case are far from being resolved, notwithstanding all the tidbits of completely un-demonstrated and hollow "personal knowledge" language thrown in to Discover Bank's affidavits as

noted in page 16 of Appellants' opening brief.

In fact, the Bridges case does not even make clear what the actual wording or format of the declarations in that case were which had allegedly satisfied the court in that instance. So, Discover Bank can hardly claim the case is binding authority to somehow validate their affidavits in this case. Moreover, Szczygiel and Adkins both admit their involvement and knowledge for DB Serving Corporation is entirely limited to Discover accounts that go into "contested litigation". CP-35, lines 16-19; CP-284, lines 9-11.

Moreover other Courts have in fact found Discover Card's use of third-party "servicer" affidavits to be insufficient. Discover Bank v. Peters, 2011-Ohio-3480 (Case No. 2010CA00309, July 11th, 2011). Therein, the Fifth Appellate District of the Ohio Court of Appeals properly reversed and remanded as requested here a Discover Bank summary

judgment order based on an affidavit of Natasha Szczygiel filed with Discover Bank's September 7th, 2010 summary judgment motion, because for summary judgment purposes, it did not comply with CR 56(e) for failure "to establish the affiant's personal knowledge" and failed "to affirmatively show the affiant is competent to testify to those matters" such that "the trial court should have granted Appellant's motion to strike". Id.

In the Peters case, Szczygiel similarly claimed she was "a Legal Placement Accounts Manager for DFS Services, LLC, the servicing agent of Discover Bank". In the case at bar, Szczygiel likewise claims she is an account manager in the Attorney Placement Department for DB Servicing Corporation, the servicing affiliate of DISCOVER BANK . . . ". CP-35. As the Ohio Court of Appeals noted, a title alone "does not establish the affiant has personal knowledge or is competent to testify as to Appellant's account." CR 56(e) makes

clear that conclusory, self-serving statements are wholly insufficient, the affiant must actually demonstrate, not just argue, that they are competent to make the statement.

B. Next, Discover Bank argues that even if Szczygiel and Adkins were not involved in the underlying commercial transaction or the making of any of the records and despite the fact they have no direct personal knowledge of the documents and facts therein as they previously and improperly tried to lead the trial judge to believe, other Washington State courts have allowed health care and police workers to authenticate reliable third-party evidence. Armed with that narrow crack in the door, Discover claims or implies that in EVERY type of case, the Court will NEVER require any direct personal knowledge or chain of custody showings in strict adherence to RCW 5.45.020 or CR 56(e), based on cases like State v. Ziegler, 114 Wn.2d 533, 789 P.2d 79 (1990).

Discover Bank urges this Court to take the medical and public records team member leniency exceptions afforded to fellow treating doctors and police officers therein, and extend it to corner-cutting private collection agencies seeking commissions and profits on unsubstantiated junk debts in purely commercial matters. Discover simply wants to avoid the normal commercial business plaintiff's burden of proof and compliance with CR 56(e) and basic rules of evidence with available witnesses like everyone else. However, the Ziegler case is readily distinguished.

In Ziegler, a four year old little girl was raped and the issue was the admissibility, through the live testimony of one treating doctor (Dr. Gerrish), regarding rape evidence obtained from lab results from a third-party provider called Cooperative Medical Laboratory. Those lab results had been sent for from another doctor (Dr. Bishop, the partner of Dr. Gerrish who was unavailable for

testifying at trial) and were contained in the patient's common medical files maintained at their Snohomish Family Medical Center and collectively ordered and maintained and used by these same two treating physicians for the same patient. Ziegler, supra. at 536-7.

The defense objected to admissibility, claiming that Dr. Gerrish was not competent to authenticate with actual personal knowledge or as his own business records the CML lab reports which actually consisted of their own medical records not created or supervised in their formation by Dr. Gerrish or his clinic, but by third-party Cooperative Medical Laboratory. Id., at 537.

However, Dr. Gerrish had testified that he and his client Snohomish Family Medical Center consistently used that lab - Cooperative Medical Laboratory, and that he was familiar with the lab's method of testing at issue. Id. Dr. Gerrish

actually explained the lab's method of testing for the evidence at issue as part of his live trial testimony regarding the lab results. Id. Dr. Gerrish also testified that he and his clinic routinely relied on lab results from that lab for giving medical treatment to their patients. Id.

The Ziegler Court relied upon the long established case of Cantrill v. American Mail Line, Ltd., 42 Wn.2d 590, 608, 257 p.2d 179 (1953), which specially carved out for admission of hospital (medical) records often created by a large team of "attendants, nurses, physicians, X-ray technicians, laboratory and other hospital employees who all collaborated to make the record of the patient." Id., at 538, citing to Cantrill, supra. at 608). "It is not necessary to examine the person who actually created the [MEDICAL] record so long as it is produced by one who has the custody of the record as a regular part of his work or has supervision of its creation". Cantrill, at 608.

Obviously, one member of the judicially recognized large medical teams normally involved in any medical situation would necessarily and most importantly include the final treating physicians like Dr. Gerrish whose clinic regularly ordered, kept and relied upon such lab records without the Court requiring the lawyers to bother to call the actual underlying lab technician who had done the tests or their supervisor in order to directly authenticate the same - where the circumstances obviously indicated to the judge that the records are trustworthy. Clearly, Dr. Gerrish's medical clinic wasn't about to treat a 4 year old little girl for a venereal disease caught from her attacker unless the lab report was accurate and the records properly and accurately kept for them to make highly critical decisions in reliance thereon.

The Ziegler court at 539 also cited to the case of State v. Sellers, 39 Wash. App. 799, 806, 695 P.2d 1014, review denied, 103 Wn.2d 1036

(1985). Therein, the Court readily observed:

> The blood tests [the authenticity and admissibility of which was at issue] were requested and used by Pamela's physician in his treatment of her for two pregnancies and other health matters during her 8 years as his patient. This is very convincing evidence of their trustworthiness. The report was properly admitted."

State v. Sellers, supra. at 806-7. Accordingly, the Ziegler court concluded:

> Similar to the situation in Sellers, J's treating physician ordered the Chlamydia tests and relied upon the test results in his treatment of the child. The record was in the custody of Snohomish Family Medical Center as part of J's medical file. Dr. Gerrish testified regarding his familiarity with the laboratory and

> its testing procedures. The trial court found the test results admissible as business records because of Dr. Gerrish's knowledge of the lab's operation and his clinic reliance upon the lab's test results in treating patients. We hold the trial court did not err in admitting the lab reports as part of the business records of Snohomish Family Medical Center.

Ziegler, supra. at 539-540.

However, the corporate Plaintiff Discover Bank is no little child in need of help, is not part of any judicially recognized team, nor are Adkins and Szczygiel anything like treating physicians entitled to rely on other medical technicians and labs in making wholly disinterested but serious life-impacting medical decisions as part of their regular business/medical practice, nor are they making any critically important decisions at all.

The only thing they're trying to make, is money. DB Servicing Corporation and Adkins and Szczygiel are just debt collectors and cannot try to pull on the sheep's clothing of the special medical records team exemptions allowed in such limited medical evidence situations.

That special exception is not to be expanded for the mere convenience of corner-cutting commercial debt collectors trying to maximize their own profits by admitting questionable and highly contested records on potentially fraudulent accounts with mere third-party robo-signers, when the weight and reliability of the records and the credibility of the witnesses allegedly vouching for the same are ALL DIRECTLY AT ISSUE.

To the contrary, our Supreme Court has made clear that "If the hearsay goes to the heart of an issue at trial, so that when believed by the jury, it could be regarded as proof on that issue, the

hearsay should be rejected." State v. White, 72 Wn.2d 524, 530, 433 P.2d 682 (1967). Unfortunately for Discover Bank, their entire and purely commercial case is likewise solely founded on nothing more than completely unverified commercial hearsay lacking any judicially recognized element of inherent reliability, all while the ignorant third-party witnesses Adkins and Szczygiel add nothing substantive to the query for corroboration.

Unlike Dr. Gerrish, NONE of DB Servicing Corporation's witnesses (Szczygiel or Adkins) provided any affidavits or testimony which ACTUALLY DEMONSTRATED, let alone established, any familiarity with Discover Bank's actual business activities or what happens at Discover Bank, especially since DB Servicing Corporation admitted that they only gets involved after an alleged account goes into contested litigation. As such, they cannot speak to or actually demonstrate anything, one way or the other, about the actual

reliability, validity, or accuracy of any of those records at all or how in the world they could ever reasonably rely thereon. This does not comply with CR 56(e) at all.

It is inexplicable that Plaintiff Discover Bank does not have a single employee custodian witness or a single person with actual personal knowledge of anything to try to authenticate under penalty of perjury any of its own alleged records. At best, enormous genuine issues of material fact exist on that count, especially when viewed in the light most favorable to the non-moving Gardeners.

C. The only non-treating physician / non-medical records case that Discover Bank cites to is State v. Iverson, 126 Wash. App. 329, 108 P.2d 799 (2005). However, that case did NOT involve an authenticity objection to wholly uncorroborated hearsay records going to the very heart of the case, but a constitutional challenge for the right

of confrontation in a criminal trial.

Furthermore, the Iverson case, supra at 338, ultimately cited to and relied upon the narrow medical records team member exception case of Cantrill v. American Mail Line, 42 Wn.2d 59, 608, 257 P.2d 179 (1953) as well as State v. Garrett, 76 Wash. App. 719, 887 P.2d 488(1995), both of which were entirely founded upon strong public policy favoring evidentiary leniency for patently trustworthy medical records. However, Discover Bank has no medical case, isn't a little 4 year old girl or a domestic violence victim and their records never kept any worthy matter of vital public interest, or anything that shows any bit of judicially recognized inherent and unbiased reliability like medical and public records have.

In Iverson the testimony actually included a public police officer witness who not only provided his own direct corroborating eye-witness testimony

on the issue about the identity of the understandably reluctant domestic violence victim by pointing out that he saw her face (which matched the records at issue) and she had personally stated her name to him (which name also matched the intake photo records and name thereon). Her identity on the scene was one of the essential elements at issue in the case regarding the violation of a restraining order protecting the vulnerable victim.

The officer explained how he regularly used the reliable third-party public records data entry system at issue just like his fellow officers and the other officers at the jail did, in order to provide "sufficient testimony" regarding the manner in which the records were created - all of which the Defendant did NOT challenge on the basis of authenticity as the Gardeners have done here.

On the other hand, DB Servicing Corporation's declarants were not dealing with public records

like the police officer serving an important public policy concern by enforcing a no-contact order for an uncooperative domestic violence victim in Iverson. Adkins and Szczygiel only got involved with private the profit-motivated collections work entirely after the fact of litigation for a private, purely commercial dispute for their own maximum personal gain. However, the Iverson case involved public security officers who critically relied on each other's records for the safety of themselves, the inmates, their fellow officers, the public, and to properly do their jobs.

Thus, the Court recognized the law enforcement public servant team exception for accepting indirect third-party verification of their inherently trustworthy and regularly relied upon records. This important and inherently trustworthy law enforcement/public safety exception is much like that recognized by the courts for medical records situations with the same guarantees of

trustworthiness and the lack of motive or incentive to fabricate the same in a critical medical or heath care situation of vital public importance.

Clearly, doctors and police officers, although not always having first-party personal knowledge or custodian status, are fully qualified to authenticate the third-party records of their colleagues and closely allied third-parties when they are demonstrably familiar with the records keeping process and if they normally rely on the same in the ordinary course and have substantial unbiased reliability with no personal interests, incentives or motive for fabrication. On the other hand, DB Servicing Corporation in its purely profit-driven commercial collection business focusing solely on collections for accounts that go into litigation, simply cannot say the same.

In fact, it was beyond argument in Iverson, that a public jail booking record, when certified,

is already automatically admissible by itself under the public records statute of RCW 5.44.040. "If the officers had thought to obtain certified copies of these [exact same] booking records, they would have been admissible under the public records statute, without further ado." Iverson, supra. at 340. Not so Discover Bank's alleged records. Also, the domestic victim in Iverson was understandably hesitant to testify against the defendant for the violation of the restraining order. Discover Bank's silence is inexplicable and nothing the public interest needs to trust or accommodate like the vulnerable victims in Ziegler, and Iverson.

So, if (1) the records do not involve such unbiased duties of public safety and medical matters where the immediate repercussions of inaccuracy can mean serious injury or death or compromise to personal or public safety, and (2) the supplier of the alleged information at Court had no involvement in the creation of the records

or the activities of the ordinary business at the time they actually occurred, THEN there is no incentive for accuracy and the essential link of trustworthiness is absent for ever trusting a non-custodial third-party's attempt to vouch for records without any actual personal knowledge.

Such a purely commercial third-party witness with no accountability or concerns except their own profit is then just giving unsubstantiated second or even third hand hearsay opinions motivated solely by the chance to profiteer based on nothing more than pure hopeful speculation at best. Worse yet, the purely for-profit commercial witness has not personally verified anything about the accuracy of the alleged information directly at issue.

Comparing and contrasting the cases shows that a valid distinction exists and should be maintained between admitting health and public safety records verified by dependent third-party colleagues

despite their lack of any direct personal knowledge, and those mere commercial records being submitted by purely profit-driven third-parties with no personal knowledge or incentives for accuracy either. The difference is the presence of built-in assurances of reliability of public and medical records verses private for-profit records.

Thus, in contrast to the Iverson case, supra., which allowed a police officer to authenticate jail intake booking records created by other public worker colleagues in the ordinary course of their duties, our Supreme Court in State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981) held INADMISSIBLE a similar intake record maintained by a non-testifying motel worker created in the ordinary course of a private commercial motel on the date of the alleged act in question. See also State v. Tharp, 26 Wash. App. 184, 186, 612 P.2d 11 (1980).

As in the J. Elliott Tharp case, Discover has

presented no direct evidence that any of their information or records of the same are inherently accurate or should be deemed as reliable as public or medical records. Furthermore, no one has actually identified who used the alleged Discover credit card just like no one in the J. Elliott Tharp case actually identified who had actually registered as "Jay Elliott T." at the motel.

In Iverson, the testifying police officer had directly witnessed the victim at issue personally identify herself. He then matched her face and identity to the public booking records and photos kept by his colleagues at the jail to verify the name she gave was correct. Iverson, supra. at 332. That personal identification by the eye-witness was direct independent corroborating evidence connecting what would otherwise have been just the public records going to the ultimate issue.

In any event, the differing treatment of

public health and safety records and purely profit-driven commercial business records is obvious, as well as the justifications for the same which should likewise be enforced here. Commercial records are simply not presumed accurate like pubic safety/health records given tremendously greater leeway around hearsay because of reliability from their unique surrounding circumstances which are not present in Discover Bank's situation at all.

II. CONCLUSION

The purely commercial, private bank's alleged records in this case were not so inherently trustworthy and reliable that third-party collection agency employees from the DB Servicing Corporation with no actual personal knowledge could ever step in after the fact when a file goes into litigation and suddenly claim, solely for profit-driven collection purposes, to be vouching for the same records they have no personal knowledge of or any unbiased recognized basis for relying thereon.

As such, the declarations didn't comply with CR 56(e) and the alleged business records did not comply with RCW 5.45.020 either. DB Servicing Corporation witnesses admitted their only involvement was after and for litigation purposes. Worse yet, the profit-driven records have a serious date and credibility issue indicating fabrication.

As such, this Court should rule that the DB Servicing Corporation declarations failed as a matter of law to comply with CR 56(e) and thus never properly authenticated the alleged business records under RCW 5.45.020 and should have been stricken. The Court should reverse the summary judgment order and rule that summary judgment should have been granted for the defendants.

Respectfully submitted this 31st day of May, 2012.

LAW OFFICES OF DAVID B. TRUJILLO
Attorney for Defendants Gardner:

By: David Trujillo
DAVID B. TRUJILLO, WSBA #25580