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Brief of App  
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8/20/10

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NO. 65069-6

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**COURT OF APPEALS DIVISION 1  
STATE OF WASHINGTON**

**DISCOVER BANK, ISSUER OF THE DISCOVER CARD  
Plaintiff,**

**v.**

**LESA M. BUTLER AND DOE I, and their marital community  
composed**

**Appellant(s) / Defendants**

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**Appeal from the Superior Court of Island County  
The Honorable Vickie I. Churchill  
Island County Superior Court Cause**

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**Brief of Appellant**

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**By Danny L. Watts  
and Lesa Butler  
Appellants / Defendants  
Pro-Se  
P.O. Box 58  
Greenbank, WA  
360-222-3164**

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## TABLE OF CONTENTS

<b>A. Introduction.....</b>	<b>1</b>
<b>B. Assignment of error and issue.....</b>	<b>1</b>
<b>Pertaining thereto</b>	
1. Did the trial court err when it considered plaintiffs hearsay affidavits for its summary judgment ruling?	
2. Did the trial court err when it granted the plaintiffs motion for summary judgment where the plaintiff failed to meet its burden that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law?	
3. Did the court err in not reconsidering the argument by the defendants that the plaintiff's attorney had raised a genuine issue of Fact in the initial hearing, that of "chain of custody" and plaintiffs had not presented evidence in accordance with Rule 901 4(d)?	
4. Did the trial court err in not reconsidering Defendants argument that Attorney Jeffrey Mackie's affidavit for fees included the reference "for the limited purpose to support Plaintiffs request for reasonable Attorney's fee's" but also stated that "Plaintiff has retained Bishop, White & Marshall, P.S. on the basis of a contingent fee set out below" which constituted a description of valid assignment. This hearsay affidavit did not meet the standard of proof for such assignment under RCW 5.45.020 or TITLE VIII - DEBT COLLECTION PRACTICES [Fair Debt Collection Practices Act] § 803. Definitions [15 USC 1692a].	

**C. Statement of the Case**

**1. FACTS..... 3**

**D. Argument..... 5**

**E. Conclusion..... 33**

**F. Prayer for Relief..... 35**

**TABLE OF AUTHORITIES**

**CASES**

**Washington Cases**

***Mrc Receivables Corp, Respondent V. Almitra Zion,*  
Appellant, NO. 60926-21): Court of Appeals Division I.. 25**

***Discover Card v. John and Julie Bridges*  
(2010) Washington Court of Appeals, Division II,  
39209 – II..... 10**

***Owen V. Burlington Northern And Santa Fe Railroad*  
*Company.*  
Wn.2d 780, 787, 108 P.3d 1220 (2005)..... 1**

**Cases Outside of Washington**

**SUPREME COURT OF THE UNITED STATES**

**[04/18/95]o. 94-367 GEORGE W. HEINTZ, et al.,  
PETITIONERS v. DARLENE JENKINS  
on writ of certiorari to the united states court of appeals for  
the seventh circuit..... 28**

***United States vs, Lovasco,*  
431 U.S. 783 (1977)..... 2**

***Gonzales v. Buist,*  
(04/01/12) 224 U.S. 126..... 2**

***Holt v. United States,*  
218 U.S. 245 (1910)..... 2**

<b><i>In re: Vinhnee,</i></b> <b>336 B.R. 437 (9th Cir. BAP 2005).....</b>	<b>8</b>
<b><i>GE Capital Hawaii, INC, v. Yonenaka</i></b> <b>25.P.3d 807, 96 Hawaii 32.....</b>	<b>6</b>

**Legal Literature**

<b><i>Stanford Encyclopedia of Philosophy</i></b> <b>Precedent and Analogy in Legal Reasoning</b> <b>First published Jun 20, 2006.....</b>	<b>20</b>
--	-----------

<b>In re Rex O. OSBORNE; Helen C. Osborne, Debtors. UNITED STATES INTERNAL REVENUE SERVICE, Appellant, v. Rex O. OSBORNE, fdba: the Original Hamburger Stand # 7; fdba: Tommies Hamburgers; Helen C. Osborne, fdba; the Original Hamburger Stand # 7; fdba: Tommies Hamburgers, Appellees. No. 94-55890. United States Court of Appeals, Ninth Circuit.....</b>	<b>22.</b>
---	------------

**RULES**

**Civil Rule 56 (e)**

**Rule CR 59**

**Rule Er 901, Requirement of Authentication Or Identification (9) Process or System**

**RCW 5.45.020**

**TITLE VIII - DEBT COLLECTION PRACTICES [Fair Debt Collection Practices Act] § 803. Definitions [15 USC 1692a**

**Fed. R. Evid. 803 (6)**

**CR 56 Summary Judgement (e).**

## **A. INTRODUCTION**

The Court realizes that this is an appeal of a summary judgment order. This Court is required to review the trial court's decision on summary judgment de novo and must perform the same inquiry as the trial court.

Owen V. Burlington Northern and Santa Fe Railroad Company., Wn.2d 780, 787, 108 P.3d 1220 (2005). The court must examine the pleadings and, affidavits, and depositions before the trial court and "take the position of the trial court and assume facts [and reasonable inferences] most favorable to the nonmoving party." Id.

## **B. ASSIGNMENT OF ERRORS AND ISSUES PERTAINING**

### **THERE TO:**

1. Did the trial court err when it considered plaintiffs hearsay affidavits for its summary judgment ruling?
2. Did the trial court err when it granted the plaintiffs motion for summary judgment where the plaintiff failed to meet its burden

that there is no issue of material fact and that they are entitled to judgment as a matter of law?

3. Did the trial court err in not reconsidering the argument by the defendants that the plaintiff's attorney had raised a material issue of law in the initial hearing, that of "chain of custody" and plaintiffs had not presented evidence in accordance with Rule 901 4(d)?

4. Did the trial court err in not reconsidering defendants argument that Attorney Jeffrey Mackie's affidavit for fees included the reference "for the limited purpose to support Plaintiffs request for reasonable Attorney's fee's" but also stated that "Plaintiff has retained Bishop, White & Marshall, P.S. on the basis of a contingent fee set out below" which constituted a description of assignment or contract. This hearsay affidavit did not meet the standard of proof for such assignment under RCW 5.45.020 or TITLE VIII - DEBT COLLECTION PRACTICES [Fair Debt Collection Practices Act] § 803. Definitions [15 USC 1692a]. . *United States vs, Lovasco, 431 U.S. 783 (1977), Gonzales v. Buist, 224 U.S. 126 (1912), Holt v. United States, 218 U.S. 245 (1910).*

## **D. STATEMENT OF THE CASE**

### **1. FACTS:**

That on 6/27/2009 Defendants were served with a complaint at law and summons by Bishop , White and Marshall. The case had not been filed yet and had no case number. The defendants responded with a motion for discovery on July 14, 2009. Bishop, White and Marshall responded to the Request for Production on September 1, 2009. They objected in general to many of the requests for production, especially request No 5 (CP 85):

“A contract, agreement, assignment, or other means demonstrating that: Bishop, White & Marshall, P.S. 720 Olive Way, Suite 1301, Seattle, WA 98253 has the authority and capacity, and is legally entitled to collect on the alleged debt (Discover Bank) with Account Number. Defendants also request a copy of the business license to prove that Bishop, White & Marshall, P.S are licensed in Washington state to collect money on delinquent accounts.”

That on 10/15/2009 Defendants received a copy of a Motion and Declaration from Bishop, White & Marshall, P.S for Summary

Judgment via the Greenbank, WA U.S. Post Office. On 10/15/2009, Defendant received a copy of a declaration of mailing from Plaintiff and Affidavits and Declarations of Robert Adkins and Jeffrey Mackie. Attached to Mr. Adkins Declarations were alleged copies (CP 96) from Discover of billings to Ms. Butler. On 10/15/2009, Lesa M. Butler and Danny L. Watts, and their Marital community received a Note for Motion from Bishop, White & Marshall, P.S. 720 Olive Way, Suite 1301, Seattle, WA 98253 that proceedings would be heard on November 17, 2009 at 9.30 AM of that day. On 10/21/2009 Lesa M. Butler and Danny L. Watts, and their Marital community received a Re-Note for Motion from Bishop, White & Marshall, P.S that proceeding would be heard on November 16, 2009 at 9.30 AM of that day. On 11/4/2009, Defendants filed with the Court, pro se, a Response to Motion and Declaration for Summary Judgment by Bishop, White & Marshall. In addition, Defendants filed both a Motion to Dismiss and a Motion for Continuance. Plaintiffs agreed with the Motion for Continuance.

A summary judgment hearing was held on January 11, 2010 and Judge Vickie Churchill granted Discover Bank's Motion for Summary Judgment. (CP 29).

Defendants Butler and Watts then filed a Motion for Reconsideration on January 20, 2010 to be heard February 22, 2010. The Motion for reconsideration was heard by Judge Vicki Churchill on 2/22/2010 and the Motion was denied. A new order denying reconsideration and upholding the summary judgment was granted and signed by the Judge on 2/22/2010.

#### **E. ARGUMENT**

1. The trial court erred in the first and second hearings, when it allowed plaintiffs Hearsay Affidavit, by a person who does not have first hand knowledge of the billing documents submitted, to be admitted as evidence in making its summary judgment ruling.

The affidavit of Robert Adkins, of DFS Services LLC, is inadmissible as evidence, as it is not sworn testimony by a witness with first hand knowledge. (CR56(e))

Robert Adkins admits to being an employee of DFS Services LLC. He does not work directly for Discover Bank who has brought this suit and therefore does not have first hand knowledge. Robert Adkins states that his knowledge is based “on my personal

knowledge and a review of the records” because his knowledge is based upon “a review” of the statements in the records maintained by Discover his testimony of that knowledge is hearsay. Because there is no applicable hearsay exception, his testimony is inadmissible hearsay. (CR56(e)).

The argument the defendants made regarding hearsay is “Person A getting a document from person B and any statement as to personal knowledge then being hearsay. Hearsay is always inadmissible under ER 803.” GE Capital Hawaii v. Yonenaka (CIV. NO. 97-1297)

There is no proof that Mr. Adkins keeps the documents in the course of regularly conducted business since he only receives copies of documents after they go into collections. There is no evidence that Mr. Adkins has knowledge of the sources, methods, circumstances or preparation, nor has he sworn such in his Affidavit.

The Plaintiff’s attorneys referred to RCW 5.45.20. (CP 47) and (CP 10) to defend Mr. Robert Adkins Affidavit:

RCW 5.45.020

**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.

In addition, however, another Federal Rule, Fed. R. Evid. 803(6), applies to the basic elements for the introduction of business records under the hearsay exception for records of regularly conducted activity that apply to records maintained electronically.

Such records must be: **(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other

qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Fed. R. Evid. 803(6).

Mr. Adkins Affidavit stated that he makes this affidavit on the basis of his personal knowledge and review of the record maintained by Discover. He did not make a statement that he had personal knowledge that the record was made "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. He did not claim to know the mode of its preparation. Mr. Adkins is not the person who made the record, had any participation in its creation, is not the person who supervises the creation of the record, is not the person who regularly has custody of the record as part of his or her employment, nor is the person who supervises the creation of the record..

Since this was an electronic record Plaintiffs also cite, Vinhnee, 336 B.R. 437 (9th Cir. BAP 2005), in Number 3. below.

2. The trial court erred when it granted the plaintiffs motion for summary judgment where the plaintiff failed to meet its burden that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law.

The defendants stated at their Hearing for Reconsideration (Page 3 Verbatim Report) that the billing was not accurate and that this was a genuine issue of material fact.

From the Defendants Motion for Reconsideration (CP 9)

“Mr. Watts also made the argument that the billing statements could not be correct since the last two billing records show two payments expected to be paid on both June 18, 2009 and June 25, 2009 even though the final billing was supposed to be a an internal write off with no balance due. Mr. Watts stated that he could find nothing in the agreement that explained these billings.

Attorney McPherson referred to this as “some issue where they seem to think the billing is incorrect.”

The defendants believe the court should have questioned Ms. McPherson further on the correctness of the billings.

In plain English, Mr. Watt's argument is that the court should not accept a rote, carte blanche, affidavit written in the form, but not adhering to the legal requirements of the business exception rule to hearsay. No witnesses with personal knowledge of the billings were available to testify as to why these billings were accurate, when the final two billings open serious questions as to their accuracy. If the billing was not true and correct then Mr. Adkins' affidavit that they were true and correct could not have been true and correct. Mr. Watt's argument as to the accuracy of the billings was not taken into consideration by the court and should have been."

Defendant's cite: Discover Card v. John and Julie Bridges  
(2010) Washington Court of Appeals, Division II, 39209- II

**The Appellate Court Determined:**

"To establish a claim, Discover bank had to show the Bridges mutually assented contract by accepting the cardmember agreement and personally acknowledged their account.

Discover Bank's Pleadings disclose neither a signed agreement between Discover Bank and the Bridges nor detailed itemized proof of the Bridge's card usage. Nor do they show that the Bridges acknowledged the debt, for example, through evidence of canceled checks or online payment documentation. The record contains only monthly statements summarizing alleged account balance and payments purportedly made thereon and affidavits form DFS employees, who were familiar with the Bridges' purported account.

In *Discover Bank v. Ray*, 139 Wn. App. 723, 728, 162 P.3d 1131 (2007), Division Three affirmed summary judgment in favor of Discover Bank under circumstances differing from those here. It reasoned that sufficient evidence established that Ray had accepted the terms of his cardmember agreement by using his credit card, which constituted mutual assent to a contract. *Ray*, 139 Wn. App. at 726-27.

But in *Ray*, Discover Bank introduced copies of several cancelled checks that Ray had sent as payment on his credit card account. 139 Wn. App. at 725. Thus, the present case is distinguishable from *Ray* because Discover Bank did not produce any similar evidence of the Bridges' personal acknowledgment of the account.<sup>4</sup> It produced only a generic summary of the personal acknowledgment by the Bridges of the account, such as a cancelled check or online payment. Just as the evidence insufficiently establishes the mutual assent necessary to the formation of a contract, the evidence insufficiently demonstrates the assent necessary to establish an account stated purported account balance and payments made on it. Therefore, material issues of fact preclude summary judgment."

In *Discover Bank v. Lesa Butler and Doe I*, the defendants don't deny that they owe something to Discover, since, when asked by the Judge in court whether they were denying the debt, Mr. Watts stated he wasn't saying that. However, they questioned the accuracy of the purported amounts as well as the billing due to a lack of proven knowledge by Mr. Adkins and the double billing within several weeks, within the same month, before Discover supposedly wrote off the account. Nothing in the agreement supports that such a billing is part of the agreement. Mr. Adkins could not possibly have real knowledge of the documents when

they do not contain specific itemized purchases, checks, or other proof of payments made aside for the purported "accurate" generic electronic copies.

Nor has Discover produced anything other than an alleged copy of a contract and the same kind of generic billings as described in the Bridges' case. There are no canceled checks nor is there any proof of internet payments. Disputes of billings, payments and amounts are genuine issues of fact. The trial court erred in not determining that there were genuine issues of fact.

3. The trial court erred in not considering the argument by the defendants that the plaintiff's attorney had raised a Material Issue of Law in the initial hearing, that of "chain of custody" and plaintiffs had not presented evidence in accordance with Rule 901 4(d)?

From The Defendants Motion for Reconsideration  
(CP 19):

"The plaintiff's attorney then made the argument to the judge that this was "like a chain of custody for evidence." She also stated that if defendants could use the hearsay argument that no records could ever be passed from one party to another. This was an oral argument of a precedent in law (See below - Gallego v.

United States of America, 276 F.2d 914 (9th Cir. 1960) raised only in the court orally and not included in the plaintiffs' written response, for which the defendant had no opportunity to respond. This also constitutes newly discovered evidence for which the defendants could not have conducted discovery and produced with reasonable diligence at the trial.

Mr. Watts was unable to make further response or object as the Court made an Order for Summary Judgment immediately upon hearing Attorney McPherson argument and Mr. Watts could make no further arguments against the Plaintiff. Mr. Watts should have been allowed the opportunity to object to and challenge the "chain of Custody" argument since there is both statute and case law regarding this.

If chain of custody was a valid argument why was this not part of the Plaintiffs' written reply to the defendants? Defendants had no chance to respond to this new argument. Even if chain of custody was allowed as an argument, the rules for chain of custody, or rules were not followed by the Plaintiffs, nor were they considered by the Court in the Plaintiffs' presentation of evidence regarding chain of custody:

Defendants Cite:

Gallego v. United States of America, 276 F.2d 914 (9th Cir. 1960) (citing United States v. S.B.Panicky & Co., 136 F.2d 413, 415 (2d Cir. 1943)). Chain of custody testimony would include documentation on how the data was gathered, transported, analyzed, and preserved for production. This information is important to assist in the authentication of electronic data since it can be easily altered if proper precautions are not taken.

As these billings were the product of electronic records Defendants also cite:

*In re: Vinhnee*, 336 B.R. 437 (9th Cir. BAP 2005): "The court held a status conference on December 23, 2003, at which it fixed a trial date, noting that, if Vinhnee did not appear, it would exercise its discretion to require the plaintiff to adduce evidence to prove its case. Vinhnee's default was entered at American Express' request on February 11, 2004. No motion for default judgment was filed.

Trial was held on March 25, 2004. American Express appeared and was prepared for trial. Vinhnee did not appear. The court, without objection by American Express, proceeded with the trial consistent with its prior announcement that it would require proof of entitlement to the relief requested.

An American Express employee testified that he was the

custodian of records for the monthly statements, that the entries thereon were made at or about the time of the transactions, that the records were kept in the regular course of business, and that the regular practice was to retain the records.

The witness, in response to the court's inquiry, testified that the term "duplicate copy" appeared on the exhibits because the records were maintained electronically.

The court then explained that the electronic nature of the records necessitated, in addition to the basic foundation for a business record, an additional authentication foundation regarding the computer and software utilized in order to assure the continuing accuracy of the records.

When the witness knew little about the computer software or hardware, the court deferred ruling on the admission of the exhibits. Offering American Express an opportunity to cure the foundational defect later, and calling counsel's attention to an evidence treatise on point, it completed the rest of the trial.

At the close of trial, the court held the evidentiary record open so that American Express could supplement its foundation for admission of the computer records.

Once American Express made its post-trial submission and the evidentiary record closed, the court rendered written findings.

The court refused to admit the electronic business records because it concluded that the defective evidentiary foundation was not cured by the supplemental materials. The declaration did not establish the declarant's qualifications to testify. Nor did the court perceive testimony that the business conducts its operations in reliance upon the accuracy of the computer in the retention and retrieval of the information in question.

The refusal to admit the billing statements in evidence left American Express with only Vinhnee's admissions on his schedules as evidence. He had admitted to a gold card debt of only \$3,245.00, which was less than the \$5,617.16 American Express conceded was discharged. His admission to a platinum card debt of \$21,098.00 did not reveal the dates or nature of specific charges."

"Creditor's electronic business records were properly not admitted into evidence sua sponte, resulting in judgment for the debtor."

The panel wrote:

A

**“The basic elements for the introduction of business records under the hearsay exception for records of regularly conducted activity all apply to records maintained electronically.**

**Such records must be: (1) made at or near the time by, or from information transmitted by, a person with knowledge; (2) made pursuant to a regular practice of the business activity; (3) kept in the course of regularly conducted business activity; and (4) the source, method, or circumstances of preparation must not indicate lack of trustworthiness. Fed. R. Evid. 803(6);<sup>4</sup> Catabran, 836 F.2d at 457.**

**These elements must either be established by the testimony of the custodian or other qualified witness or must meet prescribed certification requirements. Fed. R. Evid. 803 (6).**

**Such records, however, will not be admitted unless the court is also persuaded by their proponent that they are authentic.**

**Ordinarily, because the business record foundation commonly covers the ground, the authenticity analysis is merged into the business record analysis without formal focus on the question.**

**5 Weinstein § 900.06[2][a].”**

**The primary authenticity issue in the context of business records is on what has, or may have, happened to the record in the interval between when it was placed in the files and the time of trial.**

In other words, the record being proffered must be shown to continue to be an accurate representation of the record that originally was created.

## B

Authenticating a paperless electronic record, in principle, poses the same issue as for a paper record, the only difference being the format in which the record is maintained: one must demonstrate that the record that has been retrieved from the file, be it paper or electronic, is the same as the record that was originally placed into the file. Fed. R. Evid. 901(a).5

Hence, the focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created.

In the case of a paper record, the inquiry is into the procedures under which the file is maintained, including custody, access, and procedures for assuring that the records in the files are not tampered with. The foundation is well understood and usually is easily established. See EDWARD J. IMWINKELRIED,

EVIDENTIARY FOUNDATIONS § 4.03[1] (5th ed. 2002)

(“IMWINKELRIED”);

5 WEINSTEIN § 900.07[1][b][i].

The paperless electronic record involves a difference in the format of the record that presents more complicated variations on the authentication problem than for paper records. Ultimately, however, it all boils down to the same question of assurance that the record is what it purports to be.”

#### CONCLUSION

“The bankruptcy court did not conduct the required evidentiary hearing with witnesses available for direct testimony and cross-examination on the disputed material factual issues, as required by Rule 9014(d). Furthermore, the absence of detailed findings of fact and conclusions of law in support of the bankruptcy court’s decision to sustain the trustee’s objections to Claim Nos. 6, 7, and 16, coupled with the absence of a record of an evidentiary hearing that might enable us independently to fill the gaps in findings, makes meaningful appellate review impossible.

Since this case is too complex and too important to be decided based on the inadequate record before us, we VACATE and

**REMAND for further proceedings consistent with this decision.” (CP  
19)**

**As Plaintiffs attorney raised this argument only during the  
Summary Judgment Hearing and not in the written response,  
Defendants should be granted reconsideration in order to argue the  
standards the cited cases as well as RULE ER 901,  
REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION  
“(9) Process or System. Evidence describing a process or system  
used to produce a result and showing that the process or system  
produces an accurate result.”**

**At the Hearing for Reconsideration, the Judge stated to the  
Defendants that “attorneys make analogies all the time without  
claiming that’s exactly what happened here.” In this case Attorney  
McPherson’s use of “analogy” was a direct reference to Federal  
Rule 901 b (9), for which there is ample precedent in case law and  
is a legal argument which cannot help but embody precedent and is  
a material issue.**

**Plaintiffs Cite:**

**Stanford Encyclopedia of Philosophy**

**Precedent and Analogy in Legal Reasoning**

**First published Tue Jun 20, 2006**

**4. Analogy**

An analogical argument in legal reasoning is an argument that a case should be treated in a certain way because that is the way a **similar** case has been treated. Arguments by analogy complement arguments from precedent in two ways: (i) they are used when the facts of a case do not fall within the **ratio** of any precedent, in order to assimilate the result to that in the analogical case; and (ii) they are used when the facts of a case **do** fall within the **ratio** of a precedent, as a basis for distinguishing the case at hand from the precedent. The **force** of an argument from analogy is different to that from precedent. An indistinguishable precedent must be followed unless the court has the power to overrule the earlier decision and does so. By contrast, arguments from analogy vary in their strengths: from very 'close' analogies (which strongly support a result) to more 'remote' analogies (which weakly support a result). Analogies do not bind: they must be considered along with other reasons in order to reach a result. That an analogy is rejected in one case does not preclude raising the analogy in a different case.

As the defendants argued, since there was no written reference in the Plaintiff's response to the Motion for Reconsideration to "Chain of Custody" there was no opportunity to prepare an argument against this and cite cases with precedence and this constituted surprise under Rule CR 59:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial

granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

A. Causes materially affecting the substantial rights under RULE CR 59 of Lesa M. Butler and Doe I (Danny L. Watts), and their Marital community composed Thereof;

(3) Accident or surprise which ordinary prudence could not have guarded against.

On page 15 of the Verbatim Report of the Hearing for Reconsideration on February 22, 2010, Molly McPherson stated:

On page 22 of the same Verbatim Report Judge Churchill states to Mr. Watts that :

“As to accident or surprise on this chain of custody, that was an analogy. Attorneys’ make analogies all the time without claiming that that’s exactly what happened here.

If – the attorney or the person, Mr. Adkins had the affidavit, certified that those were true and correct records that were kept in the regular course of business. That’s again something that is pretty normal and occurs.”

While the Business exception is well established. under Washington State law in RCW 5.45.20 the case law in : Vinhnee, 336 B.R. 437 (9th Cir. BAP 2005) sets a precedent that must be taken into consideration.

In re Rex O. OSBORNE; Helen C. Osborne, Debtors. UNITED STATES INTERNAL REVENUE SERVICE, Appellant, v. Rex O. OSBORNE, fdba: the Original Hamburger Stand # 7; fdba:

Tommies Hamburgers; Helen C. Osborne, fdba; the Original  
Hamburger Stand # 7; fdba: Tommies Hamburgers, Appellees.

*No. 94-55890.*

United States Court of Appeals,  
Ninth Circuit.

A judicial precedent attaches a specific legal  
consequence to a detailed set of facts in an adjudged  
case or judicial decision, which is then considered as  
furnishing the rule for the determination of a  
subsequent case involving identical or similar  
material facts and arising in the same court or a lower  
court in the judicial hierarchy

In a day and age where large corporations, particularly  
banks, have been proven by the economic collapse not to  
conduct business in any regular way, the trust of someone  
signing an affidavit in good faith under the business  
exception must come under much closer scrutiny, such as  
was applied in *Vinhnee*, 336 B.R. 437 (9th Cir. BAP 2005).

4. The trial court erred in not reconsidering defendants  
argument that Attorney Jeffrey Mackie's affidavit for fees included  
the reference "for the limited purpose to support Plaintiffs request

for reasonable Attorney's fee's" but also stated that "Plaintiff has retained Bishop, White & Marshall, P.S. on the basis of a contingent fee set out below" which constituted a description of valid assignment. This hearsay affidavit did not meet the standard of proof for such assignment under RCW 5.45.020 or TITLE VIII - DEBT COLLECTION PRACTICES [Fair Debt Collection Practices Act] § 803. Definitions [15 USC 1692a].

From the very beginning of this case Mr. Watts questioned the status of Bishop Wright and Marshall..P.S. to collect the debt. In Mr. Watts Request for Documents of July 14, 2009 (CP 81), prior to a court case number being assigned Mr Watts in Item 5. Requested:

5. A contract, agreement, assignment, or other means demonstrating that: Bishop, White & Marshall, P.S. 720 Olive Way, Suite 1301, Seattle, WA 98253Has the authority and capacity, and is legally entitled to collect on the alleged debt (Discover Bank) with Account Number. Defendants also request a copy of the business license to prove that Bishop, White & Marshall, P.S are licensed in Washington state to collect money on delinquent accounts.

The Plaintiff's Attorneys responded in Objection # 5. of their Response (CP 85): "Objection, this request is compound, not reasonably calculated to lead to the to the discovery of admissible evidence and seeks information protected by the attorney-client privilege and/or work product."

Mr. Watts argued the issue of valid assignment at the Hearing for Reconsideration on February 22, 2010. He made the argument for the need for valid assignment by citing:

We cite the court of appeals of the state of Washington Court of Appeals Division I regarding Mrc Recievables Corp, Respondent V. Almitra Zion, Appellant, NO. 60926-2I):

No. 60926-2-I / 7

"In Washington, RCW 4.08.080 authorizes an assignee of a chose in action to file suit in its own name, but requires such an assignment to be in writing:

Any assignee or assignees of any judgment, bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an

4 Wilson, 134 Wn.2d at 698.

5 Warth v. Seldin, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); Norm Adver., Inc. v. Monroe St. Lumber Co., 25 Wn.2d 391, 398, 171 P.2d 177 (1946).

6 Smith v. Rowe, 3 Wn.2d 320, 323, 100 P.2d 401 (1940).

7 Although it is not the basis on which we reverse, we note that, contrary to MRC's description in its brief, Sharp's affidavit does not actually assert that MRC received the account directly from Providian, only that MRC's "predecessor in Interest" sold all rights in the Providian account to MRC. Sharp's affidavit actually leaves open the possibility of any number of intervening owners of the assignment.

6

No. 60926-2-I / 7

action or actions in his or her name, against the obligor or obligors, debtor or debtors, named in such judgment, bond, specialty, book account, or other chose in action, notwithstanding the assignor may have an interest in the thing assigned.

**Here, MRC provided no direct or even indirect proof of any written assignment by Providian.<sup>8</sup> We therefore need not resolve the parties' other numerous points of contention about whether Sharp's affidavit presented only inadmissible hearsay and speculation.<sup>9</sup> Even if MRC had established beyond question that Zion had a delinquent account with Providian for the claimed amount, without Proving a written assignment, MRC still failed to meet its burden of establishing that it was entitled to judgment as a matter of law.<sup>10</sup> We must accordingly reverse the order on summary judgment and remand for further proceedings.**

<sup>8</sup> Washington case law recognizes an exception to the writing requirement when the assignor personally testifies to the assignment, which thus forecloses any possibility of more than one person seeking recovery on the debt. See *Zimmerman v. Kyte*, 53 Wn. App. 11, 17-18, 765 P.2d 905 (1988). But MRC has not even addressed the writing requirement of RCW 4.08.080, much less argued that any exception applies. Moreover, this record contains no materials from any representative of Providian that could satisfy this exception.

<sup>9</sup> Should the matter proceed further on remand, of course, MRC will have the opportunity to address these problems. These include Sharp's failure to reference the alleged Providian account number, the lack of foundation for entry of the bills as a business record, the failure of those records to match the total amount claimed to be owing, and the lack of an explanation for how Sharp's status as a Midland employee provides her personal knowledge of her assertions regarding MRC, Zion's account with Providian, and how MRC came to own it. Conversely, Zion will also have the opportunity to address the deficiencies that MRC has argued are contained in her affidavits as well.

<sup>10</sup> It is therefore also unnecessary for us to address Zion's further claim that the trial court erred in denying her motion to reconsider.

<sup>11</sup> Zion requests the remedy of a remand with directions to dismiss. But Zion neither filed a cross-motion for summary judgment in her favor nor filed a

-7-

No. 60926-2-I / 8

**The parties each request fees under the credit card contract. MRC is not a prevailing party here, however, and Zion's request is**

premature because fees under the contract must abide the ultimate outcome of the determination of liability.

We remand for further proceedings consistent with this opinion.

WE CONCUR:

cross-appeal. Nor does our conclusion that MRC failed to meet its initial burden on summary judgment establish that MRC necessarily cannot meet that burden in further proceedings. Zion is entitled only to the remedy here ordered.

<sup>12</sup> See *Stuart v. Am. States Ins. Co.*, 134 Wn.2d 814, 824, 953 P.2d 462 (1998).

Mr. Watts and Judge Churchill took up Pages 9 through 15 of the verbatim report discussing Mr. Watts issue regarding assignment. Mr. Watts basic argument was that if attorneys can choose not to disclose some evidence of their contract, assignment or representation the defendant can never be sure who actually has the debt:

“Danny Watts: My understanding is that even when an attorney is representing a company it’s still considered an assignment. I have nothing that proves that it didn’t go to Mr.-- And -- part of this , in this Zion, is unless you have absolute proof of valid assignment , you don’t know how many parties hands its gone through.”

Attorney McPherson also responded at the Reconsideration

Hearing on Page 18:

“Regarding the assignment issue, I have no idea where they’re trying to go with this. My guess is they’re thinking of rules regarding if you’re assigned to a collection company, a credit bureau instead of an attorney.”

This is an attorney representing a company collecting a debt. So I - I don’t believe that’s an issue.”

Judge Churchill also addressed in her closing of the Reconsideration Hearing, Page 22, Verbatim Report:

“I’d like to take up this attorney - client fee representation contract. This is a Standard.”

“This is not taking on an assignment of somebody’s claim. It’s a representation. And so the contract they had with their client, Discover, is not necessarily something they give to each and everyone.

They certify that X-amount was incurred as a result of the representation and that their client should have their have that reimbursed. That’s what you’re talking about.

You’re not talking about an assignment of the claim so it’s not contrary to law.”

The issue then is whether a defendant can question the relationship of Attorneys with Clients? Mr. Watts has been confused all how along that numerous affidavits from Plaintiffs are accepted Carte Blanche by courts simply because by law if a person states they are asserting something by notarized affidavit it must be true.

When are attorneys considered debt collectors versus purely legal representatives? We have the answer in a US Supreme Court Case.

**SUPREME COURT OF THE UNITED STATES**  
**No. 94-367 GEORGE W. HEINTZ, et al., PETITIONERS v.**  
**DARLENE JENKINS**  
**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR**  
**THE SEVENTH CIRCUIT [April 18, 1999]**

5FDCPA applies to lawyers engaged in debt collection and states specifically as follows: “...a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings meets the Act’s definition of ‘debt collector’: one who ‘regularly collects or attempts to collect, directly or indirectly, [consumer] debts owed ... another.” 15 U.S.C. Section 1692a(6) Additionally, a

1986 senate report 99-405 included attorney's as well as judges in the prohibitions.

“Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the District Court dismissed Jenkins's Fair Debt Collection lawsuit for failure to state a claim. The court held the Act does not apply to lawyers engaging in litigation. However, the Court of Appeals for the Seventh Circuit reversed the District Court's judgment, interpreting the Act to apply to litigating lawyers. *Jenkins v. Heintz*, 25 F. 3d 536 (1994). The Seventh Circuit's view in this respect conflicts with that of the Sixth Circuit. See *Green v. Hocking*, 9 F. 3d 18 (1993) (*per curiam*). We granted certiorari to resolve this conflict. 513 U. S. \_\_\_\_\_ (1994). And, as we have said, we conclude that the Seventh Circuit is correct. The Act does apply to lawyers engaged in litigation.

There are two rather strong reasons for believing that the Act applies to the litigating activities of lawyers. *First*, the Act defines the "debt collector[s]" to whom it applies as including those who "regularly collec[t] or attemp[t] to collect, directly or indirectly, [consumer] debts owed or due or asserted to be owed or due another." §1692a(6). In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly "attempts" to "collect" those consumer debts. See, e.g., Black's Law Dictionary 263 (6th ed. 1990) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings").

**Second, in 1977, Congress enacted an earlier version of this statute, which contained an express exemption for lawyers. That exemption said that the term "debt collector" did not include "any attorney at law collecting a debt as an attorney on behalf of and in the name of a client." Pub. L. 95-109, §803(6)(F), 91 Stat. 874, 875. In 1986, however, Congress repealed this exemption in its entirety, Pub. L. 99-361, 100 Stat. 768, without creating a narrower, litigation related, exemption to fill the void. Without more, then, one would think that Congress intended that lawyers be subject to the Act whenever they meet the general "debt collector" definition."**

**Bishop, White and Marshall, P.S. meet the standards of both the 5FDCPA and the ruling in Heintz v. Jenkins. They meet the criteria of "... a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings meets the Act's definition of 'debt collector': one who 'regularly collects or attempts to collect, directly or indirectly, [consumer] debts owed ... another."**

**The law firm's web site states this::**

**For more than 30 years, Bishop, White, Marshall & Weibel, P.S. has served the legal needs of the creditor industry, accumulating more than a century of experience in collections, foreclosure, bankruptcy, and litigation.**

**The simple formula for our success has endured:  
Adapt to the needs of our clients, large and small.  
Provide the highest-quality service. Obtain the best-possible results at a reasonable cost.**

**Our attorneys provide extensive, coordinated, technologically sophisticated services, with a professional support team of associates, paralegals,**

support staff, and investigators for each of our practice areas. And everything is under one roof.

They go on to say on their collections page:

Bishop, White, Marshall & Weibel's Collections Department offers a full range of creditor-oriented legal services to meet the diverse needs of creditors on both the local and national levels.

Based on our innovative approaches and straightforward philosophy in representing clients, our experienced and professional staff has built an excellent reputation in the following practice areas:

- Automobile loans, deficiencies, and leases
- Credit card debt
- Consumer finance
- Replevin/Repossession
- Bankruptcy: Claims, Reaffirmations, and Litigation
- Acquired debt
- Student loans

Further proof of their near full time engagement in debt collection is on a website at:

<http://www.jobmonkey.com/debtcollection/career-collections.html>

### A Career In Debt Collection

Lisa Walters  
Paralegal, Collections Department  
Bishop, White, and Marshall, P.S.

Q: First, could you provide a little background about yourself. How did you get started in the collections industry?

A: Shortly after I graduated college I was hired as a

receptionist at a third party collection agency. They quickly moved me to the legal department which consisted of two people: the attorney and myself. I got to learn about collections and civil litigation at the same time and how they complemented each other.

Q: Next, can you tell us a little about the company you work for?

A: The company I'm with now is actually a law firm that specializes in creditors' rights and handles not only legal collections in five states, but also foreclosures and bankruptcies. It is all third party debt, although the majority of our clients still own the debt and, in many cases, have not yet written it off. I've also done first party collections for a company in the transportation industry, which was 1/3 collections, 1/3 customer service and 1/3 basic accounting.

Q: Can you tell us about your job, what do you find rewarding about a career in collections?

A: I prepare a lot of the paperwork for new and ongoing collections lawsuits for the attorneys to review and sign. I also act as a sort of liaison between the collectors and the client as well as the attorneys and the client. There are a lot of things that I do that are specific to a law firm, but collections knowledge and experience is essential to know how to handle each specific file. Collections is rewarding because there is a constant opportunity to use communication and negotiation skills that I have developed and apply it to each unique situation.

**It is difficult to tell from Ms. Walter's description how much debt is third party debt versus that of original owners, however, it underscores the need of a defendant to know who actually owns the debt and what role the Plaintiff's attorneys are playing.**

It is clear that their claim of pure representation is overwhelmed by their debt collection activities.

One last piece of evidence that they are debt collectors i.e. a collection agency, is a dunning letter sent to the Defendants January 28, 2010. The letter starts by stating "Put a bad year behind you," then goes on to offer an amorphous "significant reduction" of debt.

Bishop, White and Marshall. P.S. are debt collectors despite being attorneys and were required by law to show evidence that they are licensed to collect in Washington State pursuant to Mr. Watts request for documents.

#### **E. Conclusion**

Defendant's Butler and Watts raised issues of material fact regarding Plaintiffs' affidavits and the issues of whether the billing was true and correct and whether Mr. Robert Adkins had real knowledge of the contract and billing documents. The bill examples were generic and contained no detail of the purchases made in each billing cycle. No proof as check copies or internet payment of bills were presented.

Plaintiff's records also do not meet the tests of In re: Vihnee, 336 B.R. 437 (9th Cir. BAP 2005):

"The court refused to admit the electronic business records because it concluded that the defective evidentiary foundation was not cured by the supplemental materials. The declaration did

not establish the declarant's qualifications to testify. Nor did the court perceive testimony that the business conducts its operations in reliance upon the accuracy of the computer in the retention and retrieval of the information in question.

The refusal to admit the billing statements in evidence left American Express with only Vinhnee's admissions on his schedules as evidence. He had admitted to a gold card debt of only \$3,245.00, which was less than the \$5,617.16 American Express conceded was discharged. His admission to a platinum card debt of \$21,098.00 did not reveal the dates or nature of specific charges."

"Creditor's electronic business records were properly not admitted into evidence sua sponte, resulting in judgment for the debtor."

Jeffery Mackie's Affidavit was purported to be only for the limited purpose of establishing fees, yet it also alludes to contract with Discover. Bishop White and Marshall meet the definition of Debt Collectors as established by the United States Supreme Court in o. 94-367 George W. Heintz, Et Al., Petitioners V. Darlene Jenkins.

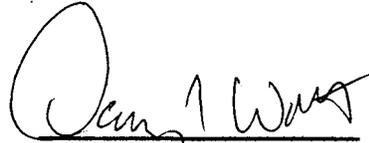
As Debt Collectors they must show that they are licensed in the State of Washington to collect debt and respond to the defendant's request for records as to this fact as well their true relationship to the original creditor.

**F. Prayer for Relief**

**Appellant prays for relief of the following issues,**

- 1. Overturn the trial courts' summary judgment order on 1/11/2010. (CP 37)**
- 2. Overturn the trial courts order denying defendants Motion for Reconsideration of 2/22/210. (CP 6)**

**RESPECTFULLY submitted this 25<sup>th</sup> day of August, 2010**



**Danny L. Watts  
Appellant / Defendant  
Pro - se**



**Lesa Butler  
Appellant / Defendant**

**CERTIFICATE OF SERVICE**

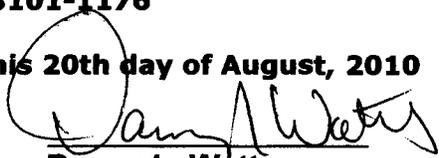
**I, DANNY L. WATTS, certify under penalty of perjury Under the laws of the State of Washington that I served the Crrected Version of the Defendant's appeal brief by the method, on the date, and on each attorney (s) and or person identified below as indicated**

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**Dated this 20th day of August, 2010**



**Danny L. Watts  
Appellant / Defendant  
Pro-se**

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