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Appeal No. 67440-4-1

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

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AMERICAN EXPRESS CENTURION BANK

Respondent

V.

ZAAKERA STRATMAN

Appellant

APPEAL FROM KING CASE NO 11-2-09592-4SEA

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**RESPONDENT'S BRIEF**

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~~COURT OF APPEALS DIV I  
STATE OF WASHINGTON~~

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## **I. INTRODUCTION**

This is a collection case in which the defendant-appellant, Zaakera Stratman (hereinafter “Stratman”), seeks to avoid paying her credit card debt. Stratman claims the trial court erred when it allowed Plaintiff’s evidence into the record, the trial court erred in determining that there were no genuine issues of material fact, and that the trial court erred when Stratman asserted that service of process was improper.

As recognized by the trial court, Stratman was served with a summons and complaint. American Express Centurion Bank (hereinafter “American Express”) submitted admissible evidence which showed Stratman entered into a credit card agreement with American Express, utilized the credit card, and thus was liable for the debt she incurred through use of the card. The trial court entered judgment against Stratman. Accordingly, American Express respectfully requests this Court affirm the judgment.

## **II. STATEMENT OF CASE**

American Express issued a credit card ending in 3009 to Stratman. CP 11-139. Stratman used the credit card to make purchases and she made payments on the account. CP 29-126. Stratman failed to make payments on the credit account and was indebted to American Express, as of September 22, 2010, in the amount of \$21,939.37. CP 15-16. On October 27, 2010, Stratman was served with a summons and complaint for the

amount due and owing to American Express CP 1-7. King County Deputy Sheriff, Rusell White, served a copy of the summons and complaint on Saajeda Stratman, Stratman's adult daughter. Deputy White also noted that Stratman arrived as he was leaving and he explained the papers to her. On March 11, 2011, American Express filed this case with the King County Superior Court. CP 1. On March 25, 2011 Stratman filed her answer with the court. CP 8-9.

American Express filed a motion for summary judgment on March 30, 2011, setting a hearing for April 29, 2011. CP 10-141. Plaintiff's motion was supported by the Declaration of Paul Lavarta (hereinafter "Lavarta"), an authorized agent of American Express, who confirmed the debt of \$21,939.37. CP 15-16. Also supporting the motion for summary judgment was billing statements with closing dates July 9, 2009 – July 22, 2010 and a copy of the Cardmember Agreement between American Express Credit Cardmember and American Express Centurion Bank. CP 18-126. The Cardmember agreement reads, "When you keep, sign or use the Card issued to you (including any renewal or replacement cards), or you use the account associated with this Agreement (your "Account"), you agree to the terms of this Agreement." CP 128.

The billing statements on the account show detailed, itemized usage of the account. CP 29-126. These billing statements show payments made

on the account. CP 29, 37, 48, 51, 59, 68, 75, 82, 90, 115, 123. The billing statements also show a purchase made on the account. CP 75, 101. Stratman used her credit card to make purchases at Costco. CP 75. Stratman also used her American Express card to make purchases with Google, Whole Foods, and Super Supplements. CP 101.

At the Summary Judgment hearing on April 29, 2011, the court continued the hearing to allow American Express to file a reply to Stratman's untimely response. CP 142, 144. On May 25, 2011 Stratman filed her opposition to summary judgment and motion to dismiss. CP 145-155. Stratman's motion objected to the Declaration of Lavarta, stated there was no competent testimony before the court, and claimed American Express violated CR 4 when serving the Summons and Complaint. CP 145-155. On June 1, 2011, American Express filed its reply in support of summary judgment asserting the account stated doctrine as "a manifestation and assent by debtor and creditor to a stated sum as an accurate computation of an account due to the creditor." CP 156-161. American Express also asserted that Stratman failed to provide evidence showing she disputed the balance prior to the initiation of the lawsuit or to request validation of the debt in a timely manner as is authorized under the Fair Debt Collection Practices Act. CP 158. Furthermore, American Express asserted that Lavarta's Declaration was made under penalty of

perjury in accordance with GR 13 and was admissible as an unsworn statement. CP 159. Finally, American Express asserted that Lavarta's Declaration was based upon and incorporated the business records of American Express and therefore was properly admissible under the Business Records exception to the hearsay rule. CP 159-160.

On June 6, 2011 Stratman filed her reply to Plaintiff's reply in support of summary judgment. CP 172-175. Stratman's reply asserted, again, that service was improper, that Lavarta's Declaration was inadmissible, and asserted that American Express had no evidence properly before the court. CP 172-175.

On June 17, 2011 the Honorable Theresa B. Doyle heard argument on Plaintiff's motion for summary judgment. CP 176. At the hearing, American Express argued that Stratman failed to set forth specific facts showing a genuine issue of material fact. RP 3, June 17, 2011. American Express argued that Stratman did not deny opening the credit card account with American Express, did not deny making purchases or payments on the account, nor did she deny receiving billing statements at the address where Stratman still resides. RP 4, June 17, 2011. Moreover, American Express argued that Stratman assented to the amount due and owing under the Account Stated Doctrine when Stratman failed to dispute the amount

owing, but rather continued to make monthly payments on the account. RP 5, June 17, 2011.

Stratman stated that since she did not know whether Lavarta exists and since there was no original documentation, she was asking for a motion to dismiss the case. RP 5, June 17, 2011. In rebuttal, American Express asserted that under Court Rule 56, all testimony is by affidavit, a live witness was not required, and Lavarta's declaration was proper. RP 6, June 17, 2011. Additionally, American Express reminded the court that Stratman's motion to dismiss was not properly before the court and should not be heard. RP 7, June 17, 2011.

Judge Doyle ruled in favor of American Express, granting its motion for summary judgment, finding no genuine issues of material fact. RP 7, June 17, 2011. Judge Doyle stated she had reviewed all briefing including the motion for summary judgment which included the Lavarata declaration, Stratman's response, American Express's responsive brief and Stratman's second brief. RP 7, June 17, 2011. Judge Doyle ruled that the Accounts Stated Doctrine applied, determined an account was open, purchases were made, payments were made and statements were sent out. RP 7, June 17, 2011. Judge Doyle ruled that Lavarta's Declaration was "appropriate under CR 56 and other civil rules, it does comply with the requirements for the business records exception to the hearsay rule, it's

valid in form. I don't find that it's conclusory". RP 6, lines 12-14, June 17, 2011. Judge Doyle also stated that copies of documents were appropriate as a basis for a motion for summary judgment. RP 7, June 17, 2011. This appeal was then filed.

### **III. ARGUMENT**

#### **A. ISSUES ON APPEAL**

1. The first issue is whether the trial court committed error in admitting American Express's Declaration with attached exhibits.
2. The second issue is whether the trial court properly granted summary judgment.
3. The third issue on appeal is whether service of the Summons and Complaint was proper.

#### **B. STANDARD OF REVIEW**

##### **1. ADMISSIBILITY OF EVIDENCE**

The trial court's decision to admit evidence is reviewed for a manifest abuse of discretion. *See State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995), *see also State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990)(trial court's decision to admit business records is reviewed only for a manifest abuse of discretion). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007)(citing *Wash.*

*State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, Wn. 2d 299, 339, 858 P.2d 1054 (1993)).

## 2. GRANTING OF SUMMARY JUDGMENT

When reviewing a grant of summary judgment, the court reviews the grant *de novo*, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary Judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When considering a Summary Judgment, the court must construe all facts and reasonable inferences in the light most favorable to the non-moving party. *Lybbert*, 141 Wn.2d at 34.

## 3. REVIEWING SERVICE OF PROCESS:

When reviewing service of process, to determine if it is proper under CR 4, the court reviews the service *de novo*, engaging in the same inquiry as the trial court. *Pascua v. Heil*, 126 Wash.App 520, 527, 108 P.3d 1253 (2005).

## C. THE COURT PROPERLY ADMITTED AMERICAN EXPRESS'S EVIDENCE

Stratman raised numerous evidentiary objections under ER 602, 801, 802, 904(c), and 1002. The trial court took Stratman's objections into consideration and found American Express's evidence to be

admissible. There is nothing in the record suggesting Judge Doyle's ruling was an abuse of discretion.

Stratman argues Lavarta's declaration was admitted in violation of Evidence Rule 602, 801, & 802. Lavarta's declaration is admissible under RCW 5.45.020 as a business records exception to the hearsay rule. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is not admissible except as provided by these rules, by other court rules, or by statute. ER 802. While Lavarta's declaration and the attached billing statements are hearsay, they fall under the business records exception to the hearsay rule. RCW 5.45.020 reads:

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.

Lavarta declares under the penalty of perjury that he is an assistant custodian of records, which would make him a qualified witness. CP 26-27. Lavarta declares he knows from his personal knowledge that the books and records kept by American Express Centurion Bank are kept in the ordinary course of business and it is the regular practice to record all transactions on or about the time of occurrence. CP 26. Lavarta declares

that the statements made in his declaration are done so under the penalty of perjury. CP 27.

The trial court's evidentiary rulings are reviewed for a manifest abuse of discretion. Here, the trial court considered both written and oral argument on the admissibility of American Express's evidence. Judge Doyle reviewed Stratman's concerns as mentioned in her responsive pleadings and Judge Doyle ruled Lavarta's declaration was appropriate under Court Rule 56 and ruled it complied with the requirements for the business records exception to the hearsay rule. Stratman has provided nothing to show that Judge Doyle abused her discretion in making this evidentiary ruling.

Stratman next argues the trial court erred in admitting Plaintiff's documents in violation of ER 904(c) and ER 1002. Plaintiff's documents are admissible under ER 1003, which allows for the admissibility of duplicates. Judge Doyle was very clear in her ruling that she considered both sides written and oral testimony in making her ruling. RP 7, June 17, 2011. Judge Doyle, in reviewing Stratman's responsive pleadings, took all her objections into consideration. After reviewing the pleadings and the Lavarata declaration, Judge Doyle ruled that the copies of the documents could be used as a basis for a motion for summary judgment and admitted the documents into the record. Stratman has failed to show

any facts to establish that Judge Doyle abused her discretion in making this evidentiary ruling. Because there is no evidence or legal argument establishing that the trial court based its decision on unreasonable or untenable grounds and thus, abused its discretion, the trial court's ruling on this issue should be affirmed.

**D. SUMMARY JUDGMENT WAS APPROPRIATE AS A  
MATTER OF LAW BECAUSE THERE ARE NO GENUINE  
ISSUES OF MATERIAL FACT**

When reviewing a grant of summary judgment, this court reviews the grant de novo, engaging in the same inquiry as the trial court. Summary Judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Absent a genuine issue of material fact, the moving party is entitled to Summary Judgment as a matter of law. *Client A vs. Yoshi Naka*, 128 Wn.App 833, 116 P.3d 1081 (2005). After the moving party for Summary Judgment has produced evidence showing that no factual dispute exists that might affect the trial's outcome, the burden shifts to the non-moving party to set forth facts showing there is a genuine issue of material fact. *Olive v. TRA Industries Inc.*, 127 Wn. App. 13, 111 P.3d 1192 (2005).

In support of its motion for summary judgment, American Express submitted Lavarta's declaration stating the amount due and owing on the

account, CP 26-27, records of usage of the account by Stratman, CP 29-126, and the Cardmember Agreement, CP 128-139. In Stratman's opposition she claims there is no competent testimony before the court. However, Stratman does not deny getting the billing statements, does not deny making purchases or payments on the account.

Under the Account Stated Doctrine, American Express proved the existence of a contract. CP 156-161. The account stated is "a manifestation and assent by debtor and creditor to a stated sum as an accurate computation of an account due to the creditor." *Sunnyside Valley Irrigation Dist. v. Roza Irrigation Dist.*, 124 Wn.2d 312, 315 (1994) (quoting 2 Restatement (Second) of Contracts § 282(1), at 386 (1981)). CP 157. One of the purposes of the Account Stated Doctrine is to permit the court to impute an agreement in the absence of an explicit agreement about the amount. *Sunnyside*, 124 Wn.2d at 317. CP 157. While there must be some form of assent to the account, that assent may be implied from the circumstances and acts of the parties. *Id.* at 316 (quoting *Shaw v. Logue*, 58 Wash. 219, 221 (1910)). CP 157. Here, Stratman received monthly billing statements for a long period of time. These billing statements show purchases Stratman made on the account as well as payments Stratman made. Assent to the account can be implied from Stratman's acts: making purchases on the account, receiving billing statements, and making payments on the account.

Stratman introduced no evidence that she ever disputed any of the charges on the account and made payments without dispute for years.

Furthermore Stratman failed to follow the provisions of the Fair Credit Billing Act. Under the Fair Credit Billing Act provisions of Truth in Lending, cardholders have 60 days from the transmission of a billing statement to object to any billing errors appearing on the statements. *Regulation Z*, 12 C.F.R. 226.13(b)(1). CP 158. American Express's Credit Card Agreement gives Stratman 60 days from the date the statement was sent to provide written notice of any billing errors or questions she may have about their account. SP 131. Stratman failed to set forth evidence showing that she ever disputed any alleged billing errors on her account. Stratman's payments and usage on the account, along with her lack of disputes to the billing statements, show assent to the credit card agreement, and to the balance due and owing on the account.

Next, assent to a contract and acceptance of the terms of a credit card agreements can be shown by the use of a credit card coupled with evidence of payments on the account. *Discover Bank v. Ray*, 139 Wn. App. 723, 728, 162 P.3d 1131 (2007). CP 157. The billing statements provided by American Express, CP 29 – 126, show that Stratman made numerous payments and purchases on the account, thus assenting to the contract and the credit card

agreement. Stratman's usage of the credit card was assent to the terms of the credit card agreement as stated in the Cardmember Agreement. CP 128.

American Express also meets the standards for showing assent to an account as established by *Ryan* and *Bridges*. Several means can show a person's assent, including cancelled payment checks, a signed agreement, online payment records, detailed and itemized proof of the defendant's card usage, or other evidence of the defendant's personal acknowledgement of the account. *Citibank South Dakota NA v. Ryan*, 160 Wn.App. 286, 294, 247 P.3d 778, 782 (2011) (quoting *Discovery Bank v. Bridges*, 154 Wn.App. 722, 727-28, 226 P.3d 191 (2010)).

This present case is distinguished from *Ryan* and *Bridges* because American Express's billing statements show both payments on the account as well as purchases made by Stratman. American Express provides over one year's worth of billing statements which show detailed, itemized usage of the account. CP 29-126. Specifically, the billing statements show payments made on the account on the following dates: July 1, 2009; July 16, 2009; July 29, 2009; July 30, 2009; August 24, 2009; September 21, 2009; September 25, 2009; October 20, 2009; November 17, 2009; January 4, 2010; February 2, 2010; February 17, 2010; June 7, 2010, and July 1, 2010. CP 29, 37, 48, 51, 59, 68, 75, 82, 90, 115, 123. The billing statements also show purchases made on the account. CP 75, 101.

Stratman used her credit card to make a purchase at Costco on December 11, 2009 in the amount of \$13.13. CP 75. Stratman also used her American Express card to make purchases with Google on March 14, 2010 in the amount of \$2000.00, Whole Foods on March 20, 2010 in the amount of \$15.77, and Super Supplements on March 20, 2010 in the amount of \$128.12. CP 101. The detailed, itemized usage of the account show Stratman's assent to the account and the card member agreement. This court should affirm the trial court's decision in granting summary judgment.

**E. SERVICE OF THE SUMMONS AND COMPLAINT WAS  
PROPER UNDER RCW 4.28.080(15)**

An Appellate Court conducts a de novo review of the trial Court's decision on the service of the summons and complaint. A facially correct return of service is presumed valid and, after judgment is entered or when challenged, burden is on the person attacking the service to show by clear and convincing evidence that service was irregular. *Miebach v. Colasurdo*, 35 Wn.App. 803, 670 P.2d 276, appeal decided 102 Wn.2d 170, 685 P.2d 1074, *see also*, *Lee v. Western Processing*, 35 Wn.App. 466, 667 P.2d 638 (1983), *In re Dependency of A.G.*, 93 Wn.App. 268, 968 P.2d 424 (1998), amended on reconsideration, *Woodruff v. Spence*, 88 Wn.App. 565, 945 P.2d 745 (1997), *Sheldon v. Fettig*, 77 Wn.App. 775, 893 P.2d 1136 (1995) affirmed and remanded 129 Wn.2d 601, 919 P.2d 1209.

RCW 4.28.080(15) states, in relevant part, that service is authorized “[on] the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.” While there is no bright line rule for what age constitutes a person of suitable age and discretion, case law establishes that service on a fifteen year old co-resident was considered service on a person of suitable age and discretion. *Miebach v. Colasurdo*, 35 Wn.App 803, 808 (1983).

In this case, Stratman was served properly when Saajeda Stratman, “adult daughter”, was served with a copy of the summons and complaint on October 17, 2010 by Russell White, a King County Deputy Sheriff. Furthermore, Mr. White notes the Defendant arrived as he was leaving and he explained the papers to her. In this Court’s *de novo* review of service, it should find that service upon Stratman was proper and affirm the decision by the trial court.

#### **IV. CONCLUSION**

As stated many years ago:

The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.

*Preston v. Duncan*, 55 Wn.2d 678, 684, 349 P.2d 605 (1960). In this case, the trial court properly distinguished that which was “pretended in denial” from genuine and substantial issues of fact. The trial court properly admitted evidence into the record, the trial court properly granted summary judgment, and the trial court found service of the summons and complaint to be proper. American Express respectfully requests that the Court affirm the \$22,238.87 judgment entered in its favor.

RESPECTFULLY SUBMITTED this 28th day of November, 2011.

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