

FILED
COURT OF APPEALS
DIVISION II
JUN 20 2007 1:00
SUN
BY: *SW*

No. 36151-5
COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

APPEAL OF KITSAP COUNTY SUPERIOR COURT No. 05-2-01700-9
(SUMMARY JUDGMENT)

JIM AYHAN, APPELLANT

V.

UNIFUND CCR PARTNERS, RESPONDENT

BRIEF OF APPELLANT

CERTIFICATE OF SERVICE

Certificate of Service

This is to certify under the penalty of perjury subject to the laws of the State of Washington, that I Jim Ayhan served the above entitled pleading on Unifund CCR, Suttle and Associates, 7525 SE 245th St., Mercer Island WA 98040, by First Class U.S. Mail, on June 20, 2007.

Jim Ayhan

Jim Ayhan
8843 Clearwater Lane
Port Orchard WA 98367

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ASSIGNMENTS OF ERROR

1. The trial court erred in refusal to hear or rule upon the defendant's MOTION TO DISMISS CR 41(b); MOTION TO STRIKE AFFIDAVITS AND DECLARATIONS OF PLAINTIFF CR 56(e); MOTION TO COMPEL DISCOVERY CR 37(a); MOTION FOR DENIAL OF SUMMARY JUDGMENT, OR CONTINUANCE UNTIL PLAINTIFF COMPLIES

WITH DISCOVERY AND DISCLOSURE, CR 56(f); or MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW SETTING ASIDE DEFAULT JUDGMENT, prior to ruling on or entry of summary judgment, for denial of due process rights of defendant.

2. The trial court erred in failure to consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the non-moving party.
3. The trial court erred in denial of defendant's right to a jury trial, for material facts in issue requiring trial, and for defendant's request and payment for a jury trial, and for denial of due process rights of defendant on this ground, see error One, above.
4. The trial court erred in failure to provide relief to defendant, either in denial of plaintiff's Motion For Summary Judgment, or in denial of continuance pending plaintiff's compliance with mandatory disclosure and discovery, pursuant to CR 56(f), upon defendant's timely MOTION FOR DENIAL OF SUMMARY JUDGMENT, OR CONTINUANCE UNTIL PLAINTIFF COMPLIES WITH DISCOVERY AND DISCLOSURE, CR 56(f) Affidavit.
5. The trial court erred in failure to provide relief to defendant on defendant's timely MOTION TO COMPEL DISCOVERY CR37(A) and AFFIDAVIT, with all Exhibits and referenced pleadings incorporated therein, and in granting summary judgment to plaintiff over relief defendant was entitled to thereupon as a matter of law.
6. The trial court erred in failure to provide relief to defendant on defendant's timely MOTION TO DISMISS CR 41(b) And AFFIDAVIT, with all Exhibits thereto and referenced pleadings incorporated therein, (provided as bench copies for review prior to hearing 3/02/07, and properly before that court at issuance of Summary Judgment).

7. The trial court erred in failure to provide relief to defendant on defendant's timely MOTION TO STRIKE AFFIDAVITS AND DECLARATIONS OF PLAINTIFF CR 56(e), and in granting plaintiff Summary Judgment absent hearing and ruling upon that motion, for failure to take judicial notice or cognizance of facts and law of record barring judgment for plaintiff and requiring further proceedings and trial, again in denial of due process rights.

8. The trial court erred in awarding excessive attorney's fees to plaintiff, because Suttle & Associates, attorneys for plaintiff, misrepresented the amount of attorney's fees to which it was entitled to the court.

9. The trial court erred in failure to consider defendant's defenses of record barring judgment for the plaintiff, in defendant having timely invoked the Clean Hands Doctrine, for fraud of original creditor and/ or plaintiff and/or plaintiff's attorneys, and for actual notice to the court of record.

10. The trial court erred in entering Summary Judgment based in part upon plaintiff's claim of default evidence allegedly obtained by plaintiff's Requests For Admissions or for Production (of responsive documents concealed or withheld by plaintiff from discovery or disclosure).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

STATEMENT OF THE CASE

When defendant first noticed unauthorized charges on his Providian credit card, he called Providian and notified Providian in writing, and was assured his credit card insurance, for which he paid an additional premium, was in force and covered the charges complained of, and defendant relied in good faith upon the statements of the representative of Providian. When the charges continued to be billed, defendant cancelled the card, complaining again to Providian, and was again assured the matter was resolved in his favor. Some time later, defendant was served a summons by appellee/plaintiff Unifund CCR and their apparent contingent fee attorneys, Suttle and Associates. Defendant

timely responded in writing, and went to file his response in the Kitsap County Superior Court, only to be informed by the clerk that no lawsuit was pending against him or on file there. Just after that, without further contact with defendant, Suttle & Associates obtained a Default Judgment by fraud and misrepresentation to the court. Although defendant was successful in having that default judgment vacated, the court denied dismissal the claim. From that time on, the plaintiff has been unresponsive in any meaningful manner to discovery and disclosure requests of defendant, of record, attempting to acquire documents, records, proofs and admissions under the control of plaintiff or the original creditor essential to mount any defense. When defendant attempted to have finding entered on that order vacating default, noting hearing for that purpose before Judge Hartman, he was re-routed to a commissioner's court and told he had no right to see the same judge. Each time defendant attempted to note subsequent hearings before that department, the case was assigned to some other judge. The plaintiff filed for default judgment again, then cancelled the hearing when defendant responded. The plaintiff then filed for summary judgment, which was denied, but the facts were not set forth in the order, even though this was requested in defendant's response, and the court refused to enforce discovery. Defendant then redoubled his efforts to obtain discovery, disclosure, and setting of a trial date, but was stone-walled by plaintiff's attorney's gamesmanship in avoiding any discovery conference for an extended period of time, while plaintiff's attorneys used their delay to attempt to manufacture default evidence by Request for Admissions. The plaintiff then moved for and was awarded Summary Judgment and attorneys fees, but the court again failed to enter the required facts in the Order as to pleadings considered in entry of judgment, and plaintiff's attorneys again stalled and delayed entry of any corrected Order, in a transparent attempt to prevent this appeal. When defendant composed an accurate Order for entry and noted it for the docket for signing, plaintiff's attorneys successfully opposed entry of that order by spurious objection to content, and the court failed again to rule on what was spelled out in detail before it, with second bench copies of everything provided at Summary Judgment hearing supplied timely in proofs by defendant that his Order was accurate, the court instead telling defendant to come back when he came to agreement with plaintiff's attorneys as to content. Since that time, defendant has attempted repeatedly to have the

order stipulated to and entered by plaintiff's attorneys, even signing their inaccurate version of the Order under protest and requesting entry, in the attempt to preserve his right of appeal, but plaintiff's attorneys have not kept their commitments to enter the order. Defendant now brings his brief to this Court to preserve his right of appeal, to show his Appeal has merit, and to avoid any claim by plaintiff or plaintiff's attorneys that defendant is dilatory as to compliance with the rules. Defendant has a motion before the Court to compel plaintiff's attorneys to enter the necessary order, but notes his objection to the inaccurate form presented by plaintiff's attorneys in the apparent attempt to limit the record and issues on appeal.

ARGUMENT

Assignment of Error 1.

The trial court erred in denial of constitutional due process rights of Appellant, in denial of consideration, or hearing at a meaningful time and in a meaningful manner of, and rulings upon, Appellant's pleadings and motions properly noted for hearing the date summary judgment was entered, said pleadings proving summary judgment was barred as a matter of law.

Olympic Prod. v. Chaussee Corp., 82 Wn.2d 418, 511 P.2d 1002 (1972).

[1] Constitutional Law-Due Process-Federal and State Constitutions -Construction. To the extent that the due process clause of U.S. Const. art. 6 affords greater protection than does the due process clause of Const. art. 1, SS 3 it must prevail; constructions placed by the federal courts upon the federal due process clause should be given great weight, although they are not controlling, with respect to the state due process clause.

[2] Constitutional Law-Due Process-Mature-Minimal Requirements.

The minimal requirements of due process when a deprivation of life, liberty, or property is threatened are notice reasonably calculated to apprise interested parties of the pendency of the action and an opportunity for a hearing appropriate to the nature of the case, given at a meaningful time and in a meaningful manner.

CP. Defendant's NOTE FOR DOCKET 3/2/07, MOTION TO DISMISS CR 41(b); MOTION TO STRIKE AFFIDAVITS AND DECLARATIONS OF PLAINTIFF CR 56(e); MOTION TO COMPEL DISCOVERY CR 37(a); MOTION FOR DENIAL OF SUMMARY JUDGMENT, OR CONTINUANCE UNTIL PLAINTIFF COMPLIES WITH DISCOVERY AND DISCLOSURE, CR 56(f); or MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW SETTING ASIDE DEFAULT JUDGMENT.

RP. March 2, 2007, entire; page 2 lines 10-12, trial court nods silent assent to counsel for plaintiff to proceed with the summary judgment motion absent prerequisite hearing of preliminary defense motions before the court, denying all hearing or ruling upon defense motions; page 4 lines 24-25, court denies defense opportunity to bring its issues on for hearing.

Assignment of Error 2.

The trial court erred in failure to consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the non-moving party, in reversible error and abuse of discretion. The facts with supporting authorities are set forth more fully in the following assignments of error.

Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030(1982)

This court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the non-moving party.

A trial court must accept the truth of the nonmoving party's evidence and must view all reasonable inferences in the light most favorable to the non-moving party.

Douglas v. Freeman, 117 Wn.2d 242, 247, 814 P.2d 1160 (1991).

Thomas v. Wilfac, Inc., 65 Wn. App. 255, 828 P.2d 597 (1992).

[9] Courts - Judicial Discretion - Abuse - What Constitutes.

A trial court abuses its discretion only if no reasonable person would have adopted its position.

An abuse of discretion occurs if no reasonable person would take the position adopted by the trial court. State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979) (citing State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

CP. Defendant's NOTE FOR DOCKET 3/2/07, MOTION TO DISMISS CR 41(b); MOTION TO STRIKE AFFIDAVITS AND DECLARATIONS OF PLAINTIFF CR 56(e); MOTION TO COMPEL DISCOVERY CR 37(a); MOTION FOR DENIAL OF SUMMARY JUDGMENT, OR CONTINUANCE UNTIL PLAINTIFF COMPLIES WITH DISCOVERY AND DISCLOSURE, CR 56(f); or MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW SETTING ASIDE DEFAULT JUDGMENT; DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT, with Exhibits thereto.

RP. March 2, 2007, entire.

Assignment of Error 3.

The trial court erred in denial of defendant's right to a jury trial, for material facts in issue requiring trial, and for defendant's request and payment for a jury trial, and for denial of due process rights of defendant on this ground, see error One, argument, above.

W.G. Platts, Inc. v. Platts, 73 Wn.2d 434, 441, 438 P.2d 867, 31 A.L.R.3d 1413 (1968).

" . . . Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury *if they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists*"

Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) (quoting Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940)

Defendant is afforded a right to a jury trial under Article 1, section 21 of the Washington Constitution, where material facts are at issue, and the instant civil case is clearly of a legal nature, well settled as to enforcement of contracts, financial instruments, and alleged resultant indebtedness.

In re Marriage of Firchau, 88 Wn.2d 109, 114, 558 P.2d 194 (1977)

This constitutional provision guarantees those rights to trial by jury that existed at the time of the adoption of the Washington Constitution.

CP. DEMAND FOR JURY and Request For Setting of Trial Date, dated March 20, 2006; Defendant's NOTE FOR DOCKET 3/2/07; MOTION TO STRIKE AFFIDAVITS AND DECLARATIONS OF PLAINTIFF CR 56(e); MOTION TO COMPEL DISCOVERY CR 37(a); MOTION FOR DENIAL OF SUMMARY JUDGMENT, OR CONTINUANCE UNTIL PLAINTIFF COMPLIES WITH DISCOVERY AND DISCLOSURE, CR 56(f); DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT, with Exhibits thereto.

RP. March 2, 2007, page 5, lines 14-16

Assignment of Error 4

The trial court erred in denial of relief to defendant, either in denial of plaintiff's Motion For Summary Judgment, or in denial of continuance pending plaintiff's compliance with mandatory disclosure and discovery, pursuant to CR 56(f), upon defendant's timely

MOTION FOR DENIAL OF SUMMARY JUDGMENT, OR CONTINUANCE UNTIL PLAINTIFF COMPLIES WITH DISCOVERY AND DISCLOSURE, CR 56(f)

Affidavit.

Bernal v. American Honda Motor Co., 87 Wn. 2d 406 (1974); Foster & Himes Commentaries, 56(f); 10A Charles Wright et al.; Federal Practice and Procedure Section 2740 (1983); Coggle v. Snow, 56 Wn. App. 499 (1990):

“Rule 56(f), despite its express language, has been interpreted to apply to any type of evidence authorized by Rule 56(e), not just affidavits. The rule should be applied liberally.”

The trial court thereby unjustly placed defendant in the untenable position of not being able to present evidence which the plaintiff simply refused to produce and the court refused to compel production of, which would tend to prove fraud by plaintiff, plaintiff's attorney's for fraud and misrepresentation of consideration, value, or contingency fees, and/or of the original creditor, and would extinguish plaintiff's claim for proof the original creditor, Providian, is a non-party at fault under RCW 4.22.070(1), for conversion of credit card insurance monies, undisclosed charge off, or other federal crimes. This paragraph applies equally to number 5, below.

Assignment of Error 5

The trial court erred in denial of relief to defendant on defendant's timely MOTION TO COMPEL DISCOVERY CR37(A) and AFFIDAVIT, with all Exhibits and referenced pleadings incorporated therein, and in granting summary judgment to plaintiff over relief defendant was entitled to thereupon as a matter of law, as reversible error and abuse of discretion. Offer and proofs of record were before the court that plaintiff had refused to comply with discovery for at least one year, and that plaintiff had refused to conduct discovery conference in good faith upon repeated requests, for the purpose of stall and delay intended to deprive defendant of his right to a jury trial. Material circumstantial evidence of plaintiff's intent to use the rules of court for further nefarious purpose is also before this Court in the repeated attempts of plaintiff to obstruct and delay defendant's continuing attempts to simply have a lawful order on summary judgment entered for purposes of this appeal. Plaintiff's non-compliance with discovery rules was intended to and resulted in the trial court denying constitutional due process rights of defendant, by

concealment of evidence supporting the defense; see argument on assignment of error One, above.

“No rule of this court was ever intended to be an instrument of oppression or injustice or to deprive a litigant of ... his property without due process of law.”
State v. Brown, 26 Wn.2d 857, 176 P.2d 293 (1947)

“If a party disagrees with the scope of production requested during discovery, or wishes not to respond, it must move for a protective order and cannot withhold discoverable materials.”
Johnson v. Jones, 91 Wash. App. 127, 955 P.2d 826, (1998)

“Court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.” Johnson v. Jones, 91 Wash. App. 127, 955 P.2d 826, (1998)

CP. MOTION TO COMPEL DISCOVERY CR37(A) and AFFIDAVIT, with all Exhibits and referenced pleadings incorporated therein; MOTION FOR DENIAL OF SUMMARY JUDGMENT, OR CONTINUANCE UNTIL PLAINTIFF COMPLIES WITH DISCOVERY AND DISCLOSURE, CR 56(f) Affidavit; DEFENDANT’S RESPONSE TO PLAINTIFF’S SECOND MOTION FOR SUMMARY JUDGMENT, with Exhibits thereto.

RP. March 2, 2007, entire.

Assignment of Error 6

The trial court erred in failure to provide relief to defendant on defendant’s timely MOTION TO DISMISS CR 41(b) And AFFIDAVIT, with all Exhibits thereto and referenced pleadings incorporated therein, (provided as bench copies for review prior to hearing 3/02/07, and properly before that court at issuance of Summary Judgment).

CR 41(b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute, or to comply with these rules... a defendant may move for dismissal of an action or any claim against him.

“Where no default is taken for plaintiff’s failure to reply to affirmative defense, and no proof is introduced in support of matters alleged in such defense, only judgment authorized is one of dismissal of plaintiff’s action.”
Waite v. Wingate, 4 Wn 324, 30 P 81, (1892)

Although defendant was unable to obtain findings of fact and conclusions of law on the ruling vacating the prior Default Judgment upon repeated application, (or, indeed,

allowed to note that issue before the right judge, despite having done so by Note), Plaintiff's default judgment was dismissed for failure to comply with the civil rules and for misrepresentation to the Court of material facts. Plaintiff also failed to comply with the CR in discovery or conference, to the real prejudice of the defense and right to jury trial of material facts in issue, and failed to reply to the timely raised affirmative defense of credit card fraud, breach of contract, or other material misrepresentation, unlawful misconduct, or fraud of Plaintiff, refusing to provide authenticated records and information under the control of Plaintiff which would tend to prove those defenses; or which records, documents, and information which might altogether bar Plaintiff's claim in law for fraud or on other grounds. Plaintiff also violated the CR and ER, with applicable law, by applying in bad faith a second time for summary judgment by the intentional use of hearsay as alleged evidence in support of its claims.

"Where affiant's personal knowledge is lacking, affidavit will be accorded no consideration in ruling on motion for summary judgment."

Loss v. DeBord, 67 Wn 2d 318, (1965)

Plaintiff has presented, and the trial court granted summary judgment upon, unauthenticated hearsay document copies, and its affidavits and declarations show verifiable misrepresentation, as more fully set forth in the Motion To Strike. Plaintiff has refused to validate the alleged debt as required by Federal Law, Validation of debts, 15 USC 1692g, Section 809, upon repeated written application, or to make full disclosure required of collection agents.

This issue also does not comport with due process pursuant to authorities at Assignment of Error One, above, for denial of hearing.

CP. MOTION TO DISMISS CR 41(b) And AFFIDAVIT, with all Exhibits thereto and referenced pleadings incorporated therein:

Defendant's Answer To Plaintiff's Second Motion For Summary Judgment, Motion To Compel Discovery, Motion For Denial Of Summary Judgment, and Motion To Strike Plaintiff's Affidavits and Declarations.

MOTION TO STRIKE AFFIDAVITS AND DECLARATIONS OF PLAINTIFF CR 56(e);

MOTION TO COMPEL DISCOVERY CR 37(a); MOTION FOR DENIAL OF SUMMARY JUDGMENT, OR CONTINUANCE UNTIL PLAINTIFF COMPLIES WITH DISCOVERY AND DISCLOSURE, CR 56(f); or MOTION FOR FINDINGS OF

FACT AND CONCLUSIONS OF LAW SETTING ASIDE DEFAULT JUDGMENT; together with all Exhibits of record to the listed Motions.

RP. March 2, 2007, entire; page 5 lines 14- 23; page 4, lines 6-25.

Assignment of Error 7

The trial court erred in failure to provide relief to defendant on defendant's timely MOTION TO STRIKE AFFIDAVITS AND DECLARATIONS OF PLAINTIFF CR 56(e), and in granting plaintiff Summary Judgment absent hearing and ruling upon that motion, for offer and proofs before the court that plaintiff's alleged declarations are hearsay unsubstantiated under the rules of evidence and case law, in further denial of due process hearing of pleadings and law before the court preliminary and prerequisite to any judgment, showing further proofs of issues of material fact for trial, and of law barring judgment, which the court erred in failure to take judicial notice and cognizance of.

Defendant timely asserted his challenge to sufficiency.

"Counsel should generally move to strike any defective affidavit submitted by an opposing party. By failing to make such an objection, a party waives its right to challenge the sufficiency of the affidavit." Meadows v. Grant's Auto Brokers, Inc., 71 Wn 2d 874,881(1967)

The subject affidavits relied upon in error by the trial court in awarding summary judgment are insufficient as a matter of law.

"The substance of the affidavit must demonstrate that the affiant has personal knowledge; a mere a mere averment by the affiant that he or she is competent and has personal knowledge is insufficient." Antonio v. Barnes, 454 F. 2d 584, 585, (4th Circuit 1972).

Meadows v. Grant's Auto Brokers Inc., 71 Wn. 2d 874,878-79(1967)

Any affidavit submitted must include sworn or certified copies of all papers or parts thereof referred to in the affidavit. The court is more likely to scrutinize the affidavits of the moving party than those of the opposing party.

Charbonneau v. Wilbur Ellis Co., 9 Wn. App. 474, 477(1973)

Because all the affidavits must be based on personal knowledge, no averment in an affidavit may be based on hearsay.

"Where affiant's personal knowledge is lacking, affidavit will be accorded no consideration in ruling on motion for summary judgment." Loss v. Debord, 67 Wn 2d 318, (1967)

“Attorney’s affidavit which states beliefs formed on the basis of hearsay is not made on personal knowledge or admissible in evidence as required by CR 56(e).”
State v. Evans Campaign Committee, 86 Wn 2d 503, (1976)

See also: ER 201; ER 401; ER 801; ER 901; ER 904(c); ER1002

The Declaration of Autumn Hopkins relied upon by the trial court for summary judgment is without foundation to be considered as evidence in adjudication of summary judgment because it is hearsay reporting of the “review of corporate records” of a third party, and does not specify what records were reviewed, does not authenticate or certify any third party computer generated record provided, provides no evidence or foundation for this declarant’s expertise, positional or professional competency to review the alleged records, and no address or contact information for this person is provided as required for any necessary confirmation or discovery. The claim is advanced that this person “..has under his/her control all of the books and records of the creditor..”, but the present creditor demanding payment, Unifund CCR, is not the original creditor, and this claim therefore ambiguous, as well as hearsay, until proven by certified documentary evidence authenticated by the entity or person who kept or generated such records.. Any alleged knowledge this person has with regard to some general category of books and records kept in the ordinary course of business is not relevant.

The record will show that Judge Hartman, in setting aside default judgment in this matter with this same allegations before the Court, found that plaintiff has no evidence of its claim, (RP ordered, to be provided). That is one reason Defendant attempted repeatedly to get findings of fact and conclusions of law entered on that decision, and attempted to bring this issue to the attention of the trial court at hearing March 2, 2007, (RP, page 3 line 20). The trial court had notice and evidence the plaintiff repeatedly engaged in unfair and deceptive practices under RCW 19.86.020, and in violation of;

Fair Debt Collection Practices Act at 15 USC § 1692 et seq., which states in relevant part that, “A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt” which includes “the false representation of the character, or legal status of any debt” and “the threat to take any action that cannot legally be taken” all of which are violations of applicable state and federal law.

The FTC holds that the collector has to obtain the validation info from the *original* creditor and relay it to the debtor upon request (which is precisely what defendant did request in discovery and disclosure requests for validation of record, as per the FDCPA in 15 USC 1692g sec. 809), so any affidavit drafted by anyone other than the original creditor is not validation; and the court had notice and evidence that defendant's liability for the credit card fraud is limited to \$50 under the Fair Credit Billing Act.

<http://www.in.gov/judiciary/opinions/archive/03260101.ewn.html> , Spears v. Brennan, No. 49D02-9802-CP-236, Indiana Court Of Appeals, 2001

Further, as fully set forth in Defendant's discovery requests of record provided to the trial court for hearing 3/2/07, issues of material fact exist which this Declaration is designed to ignore or circumvent, and which might prove false or deliberately misleading general statements of Hopkins, including but not limited to the credit card insurance contract in force, whether that insurance was applied by the original creditor as required or misappropriated, whether records exist to prove the origin and nature of purchases or charges in dispute for credit card fraud, whether the original creditor illegally assigned the account after charging off the debt, the amount of consideration paid by Unifund, (profiteering / fraud), and so forth. The Hopkins affidavit and all exhibits thereto should have been stricken from the record, for failure to meet any evidentiary or legal standard of validation that Defendant is liable for the subject debt, under Validation of debts, 15 USC 1692g, Section 809. Defendant also objected to want of timely service of said affidavit, as a bar in law to any summary judgment proceedings.

The Declaration of Mailing dated January 30, 2007, 4 pages, signed by some unidentified person for Suttle & Associates and listing documents mailed, should also have been stricken, for Plaintiff's exclusion of any semblance of a legible copy of the AMENDED DECLARATION IN SUPPORT OF PLAINTIFF'S MOTION, (actual copy received attached to Defendant's Answer as Exhibit 6). As this illegible copy is properly considered omitted as a matter of law, the Declaration was therefore further defective and factually false, and should be stricken. Further, the Declaration was not in proper form, for omission of the identity of the person signing.

Barrie v. Hosts of America, 94 Wn.2d 640, 618 P.2d 96 (1980)

[2] Judgment - Summary Judgment - Affidavits - Hearsay.

An affidavit containing hearsay evidence cannot create, by itself, a genuine issue of fact for purposes of a summary judgment proceeding even though the affidavit may be used to impeach an opposing affidavit.

Haueter v. Cowles Publishing Co., 61 Wn. App. 572, 811 P.2d 231 (1991)

[12] Judgment -- Summary Judgment -- Matters Considered - Hearsay.

When ruling on a motion for summary judgment, a trial court may not consider hearsay evidence that would not be admissible at trial.

The trial court also clearly relied upon hearsay declarations of plaintiff's attorneys, and hearsay statements or misrepresentations to the court by plaintiff's attorneys, as evidenced by RP 3/2/07.

Welling v. Mount Si Bowl, Inc., 79 Wn.2d 485, 487 P.2d 620 (1971)

[2] Judgment-Summary Judgment-Affidavits-Attorney's Hearsay Statement.

An attorney's affidavit which merely relates certain factual assertions that have been made to him by his client, constitutes hearsay and does not "set forth facts which would be admissible in evidence," as required by CR 56(e) for affidavits in summary judgment proceedings.

RP 3/2/07, at pages 2-3 counsel for plaintiff misrepresents the represents the third party hearsay of Autumn Hopkins as fact of record, the nature of the controversy in material fact, that requests for admission are admitted by default, and that defendant had not presented any issues of material fact requiring trial, which is apparently accepted by the trial court in adjudication, in error. The record on review shows otherwise:

**CP. MOTION TO STRIKE AFFIDAVITS AND DECLARATIONS OF PLAINTIFF
CR 56(e);
DEFENDANT'S AFFIDAVIT IN OBJECTION TO PLAINTIFF'S
INTERROGATORIES AND REQUESTS FOR ADMISSION WITH AUTHORITIES;
DEFENDANT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND
MOTION FOR MORE TIME TO RESPOND
MOTION TO STRIKE DECLARATION OF AUTUMN HOPKINS AND MOTION
FOR FINDINGS & CONCLUSIONS ON ORDER VACATING DEFAULT
JUDGMENT AND MOTION TO COMPEL DISCOVERY AND COUNTER-MOTION
FOR DISMISSAL, dated June 30, 2006; DEFENDANT'S RESPONSE TO
PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT, with Exhibits
thereto; MOTION TO SET ASIDE JUDGMENT -
DEFENDANT'S DELARATION AND NOTICE OF FRAUD AND IDENTITY
THEFT, dated 12/7/05; ORDER VACATING DEFAULT JUDGMENT, dated 2/24/06.**

RP. March 2, 2007; February 24, 2006 (ordered) – Vacate Default Judgment

Assignment of Error 8

The trial court erred in awarding excessive attorney's fees to plaintiff, because Suttle & Associates, attorneys for plaintiff, misrepresented the amount of attorney's fees to which it was entitled to the court, in violation of 15 U.S.C. §§ 1692e(2)(B) and 1692f(1).

15 U.S.C. § 1692e provides in pertinent part:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(2) The false representation of –

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

15 U.S.C. § 1692e(2)(B). 15 U.S.C. § 1692f further provides:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

15 U.S.C. § 1692f(1).

Valparaiso Technical Inst., Inc. v. Porter County Treasurer, 676 N.E.2d 416 (Ind. Ct. App. 1997).

The court held that:

“A contingent fee agreement in a collection case that is the product of a bargain between the attorney and client is presumed to be reasonable as between them. *Id.* at 420 (citing Waxman Indus., Inc. v. Trustco Dev. Co., 455 N.E.2d 376, 382 (Ind. Ct. App. 1983)). We explained that where such a fee is subtracted from the amount recovered, the third-party debtor is unaffected by the fee agreement. *Id.* We noted, however, that it is an entirely different matter when the fee is added to the judgment against the debtor, as was the case here. Under such circumstances, the debtor has a direct pecuniary interest in how the fee is determined. *Id.* Thus, a one-third contingent fee that is reasonable when deducted from a client's recovery may be unreasonable when added to a debtor's judgment. *Id.* As this court observed in *Waxman*:

A contingent fee, even between an attorney and his client, is not enforceable unless it is founded upon a prior agreement. It then follows inexorably that a contingent fee contract of the obligee on an instrument with his attorney cannot be enforced against the party obligor who has merely agreed in the instrument to pay a “reasonable attorney fee” for the fundamental reason that the obligor has never agreed or has never even been consulted concerning the arrangement.”

Defendant, as shown above and of record, was repeatedly denied mandatory disclosure and discovery to ascertain the nature and amount of consideration between either the original creditor and plaintiff, or plaintiff and its attorneys, as material to defendant's affirmative defenses of credit card fraud and/or identity theft and/or conversion and fraud of the original creditor, plaintiff, or plaintiff's attorneys. This issue is also fraught with reversible error and/or abuse of discretion, together with denial of due process, as set forth above. As set forth in defendant's answer as a defense, plaintiff and plaintiff's attorneys are in violation of the Clean Hands Doctrine.

Assignment of Error 9

The trial court erred in failure to consider defendant's defenses of record barring judgment for the plaintiff, in defendant having timely invoked the Clean Hands Doctrine, for fraud of original creditor and/ or plaintiff and/or plaintiff's attorneys, in his DEFENDANT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT... dated June 30, 2006; DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT, with Exhibits thereto; MOTION TO SET ASIDE JUDGMENT - DEFENDANT'S DELARATION AND NOTICE OF FRAUD AND IDENTITY THEFT, dated 12/7/05; and other actual notice to the court of record, or for failure of the court to enforce discovery rules and federal or state disclosure law upon the plaintiff, upon timely application of defendant.

In re Estate of Boston, 80 Wn.2d 70,76, 491 P.2d 1033 (1971).

2 Pomeroy's Equity Jurisprudence (5th ed.) SS 385, p.52,
in discussing the maxim "he who seeks equity must do equity," states: "... it may be applied, in fact, in every kind of litigation and to every species of remedy.

Malo v. Anderson, 62 Wn.2d 813, 817, 384 P.2d 867 (1963).

Malo, at 815, quoting Thisius v. Sealander, 26 Wn.2d 810, 818, 175 P.2d 619 (1946)
also held: "There is no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable. . . ."

Assignment of Error 10

The trial court erred in entering Summary Judgment based in part upon plaintiff's misrepresented claim of default evidence allegedly obtained by Requests For Admissions. Defendant had denied the alleged "admissions" any number of times in sworn affidavits of record, including his DEFENDANT'S AFFIDAVIT IN OBJECTION

TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR ADMISSION WITH AUTHORITIES, dated January 28, 2007, which was properly before the trial court at entry of Summary Judgment.

“ So long as party who is deemed to have admitted making statement, on his failure to answer request for his admission as to having made statement, has, by pleading or affidavit denied truth of such statement, material issue to fact contained in statement remains so as to prevent granting of summary judgment.”

Phillips v. Richmond, 59 Wn 2d 571 (1962); Salvino v Aetna Life Ins. Co., 64 Wn 2d 795 (1964)

“Requests for admissions as to central facts in dispute are beyond the proper scope of CR36 because they, in effect, request an adversary to admit the truth of the assertion that he should lose the lawsuit.”

Reid Sand & Gravel Inc. v. Bellevue Properties, 7 Wn App 701(1972)

“Request for admission of facts does not comply with rule, where it does not describe or exhibit any document the genuineness of which is sought to be admitted, it does not indicate that any such document had been furnished, and it sets forth no matters of fact, but simply requests that each and every allegation in certain paragraphs of reply be admitted as true, such allegations consisting of mixture of facts, conclusions, and argumentative statements.”

Weyerhaeuser Sales Co. v. Holden, 32 Wn 2d 714, (1949)

CP. DEFENDANT'S AFFIDAVIT IN OBJECTION TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR ADMISSION WITH AUTHORITIES; DEFENDANT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT... dated June 30, 2006; DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT, with Exhibits thereto, dated February 11, 2007; MOTION TO SET ASIDE JUDGMENT - DEFENDANT'S DELARATION AND NOTICE OF FRAUD AND IDENTITY THEFT, dated 12/7/05; Plaintiff's Request For Admissions and Production Of Documents.

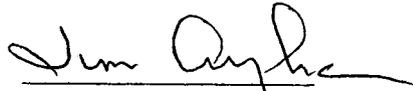
RP. March 2, 2007, entire; page 2 line 25 through page 3 line 3.

CONCLUSION

For good and sufficient cause shown herein, Appellant respectfully requests the Court reverse the Summary Judgment, order the trial court to dismiss appellee's claim with

prejudice, to order such other relief as this Court may deem just in the circumstances; and award an order for costs, fees, and sanctions to Appellant against appellee and appellee's attorneys in an amount the Court considers appropriate to the case, but not less than \$2,000.

Respectfully submitted June 20, 2007.

A handwritten signature in black ink, appearing to read "Jim Ayhan", with a horizontal line underneath it.

Jim Ayhan, Appellant
8843 Clearwater Lane
Port Orchard WA 98367