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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

DISCOVER BANK

RESPONDENT / PLAINTIFF

V.

JOHN S. BRIDGES AND JULIE A. BRIDGES

APPELLANT(S) / DEFENDANT(S)

Appeal from the Superior Court of Cowlitz County
The Honorable James Warme
Cowlitz County Superior Court Cause No. 08-2-02092-5

REPLY BRIEF OF APPELLANT

By
JOHN S. BRIDGES
Appellant / Defendant
pro-se

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NOTE TO THE COURT

In the Appellants Brief, the Bridges erroneously used the Superior Courts Clerks designation of papers numbering instead of the correct Appellate Court Clerks papers numbering. Below is a cross reference chart of the papers referred to in order of appearance in the Bridges Brief.

The Bridges apologizes to the Court for this error.

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CP29 – pg 3-----	170-172
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A. REPLY TO DISCOVER BANK'S RESTATEMENT OF ISSUES

1. The Trial Court Did Err When it Granted Discover Bank's Motion for Summary Judgment.

2. The Trial Court Did Err When Relying Upon the Affidavits and Declarations Submitted in Support of Discover Bank's Motion for Summary Judgment. Said Affidavits and Declarations Do Not State Facts Sufficient to Grant Summary Judgment; Said Affidavits and Declarations Were Not Made by Competent Witness's with First Hand Knowledge as to the Facts Pled in Discover Bank's Complaint; Said Affidavits and Declarations State Matters That Are Outside the Pleadings of Discover Bank's Complaint; Said Affidavits and Declarations State Facts That Are Not in Evidence; Said Affidavits and Declarations Are Made by Parties that are Not a Party to said Lawsuit; Therefore Based Upon Bridges' Pleadings and Un-controverted Affidavits There ARE Genuine Issues of Material Fact in Controversy.

3. Whether or not the trial court abused its discretion in denying the Bridges' Motion for Reconsideration is Irrelevant and Immaterial to Bridges' Stated Issues for Appeal.

4. The Bridges should be awarded their costs and expenses on review pursuant to RAP 18.1.

B. REPLY TO DISCOVER BANK'S RESTATEMENT OF THE CASE

1. Statement of Facts

The facts in this case are very straightforward.

Discover Bank claims the Bridges opened a credit card account, and are in default of same. Discover Bank has Not submitted any admissible evidence to support said claims, and Bridges' have stated in their uncontroverted Affidavits that have not opened said account nor are they in default of said account, both of which are Genuine Issues of Material Fact.

Each of the Bridges' *sworn* affidavits state:

"I further state that I have never executed, consented to, received or signed any document with regard to the "revolving credit agreement" or "agreement" that is the subject of Plaintiff's lawsuit. That I have never entered into any agreement or contract with Plaintiff to "make regular monthly payments" or that would cause me to be "indebted to the plaintiff in the principal sum of \$11,957.97", nor have I "agreed to pay attorney's fees and costs", nor have I agreed to "payments", nor am I "in default under the terms and conditions of the agreement", that is the subject of Plaintiff's lawsuit." (CP 4 -5 & 6-7 also filed as exhibits A CP 135-136 & 137-138).

And also state,

"That Plaintiff is not providing any consideration to me, nor providing any performance for which I am indebted; that I do not owe Plaintiff any money for any reason whatsoever and that the allegations brought forth in this matter are completely false." (CP 4 -5 & 6-7 also filed as exhibits A CP 135-136 & 137-138).

2. Procedural History

The Bridges concur with Discover Bank's basic time line of events relating to procedural history and take exception to the erroneous facts stated therein by Discover Bank's counsel, that are controverted within Bridges' pleadings in the trial court and the Appellant Court.

C. REPLY TO DISCOVER BANKS ARGUMENT

1. The trial court did err in granting discover bank's motion for summary judgment.

The Bridges concur with CR 56(c) except that there **are** genuine issues of material fact and the moving party is not entitled to a judgment as a matter of law.

The Bridges concur with the de novo standard of review on summary judgment.

- A. The Bridges have raised genuine issues of material fact in response to Discover Bank's motion for summary judgment and Discover Bank is not entitled to judgment as a matter of law.

At summary judgment Discover Bank sought a monetary judgment on its claim for the alleged sums due and owing on the consumer account that is the subject of the original lawsuit. (CP 117-118 & CP 170-172). Discover Bank has not submitted any admissible documents to support the existence of "sums due and owing" or that said "consumer account" exists.

The affidavits and declarations from the three representatives of DFS services, Adkins, Brooks and Kiser, are not Parties in the lawsuit, and neither Discover Bank nor the three representatives of DFS have submitted any admissible documents to support their statements that they are servicing agents of Discover Bank; therefore these out-of-court utterances are all third party hearsay testimony. (CP 94-113, 115-116 and 15-16).

Quoting the Adkins declaration,

“I am responsible for managing and overseeing the Discover Accounts that have resulted in contested litigation. Included within the scope of my job responsibilities includes the performance of collection and recovery services. I make this certification on the basis of my personal knowledge and a review of the ***records maintained by Discover*** with respect to the account at issue.” (Emphasis added.) (CP 94-96).

By their own testimony Adkins, Brooks and Kiser admit they do not work for Discover Bank, and that Discover Bank maintains its own records. Adkins, Brooks, and Kiser can only attest that information has been provided to them as maintained by Discover Bank, they cannot attest to having any personal first hand knowledge of Discover Bank’s records, and cannot attest to the ***accuracy*** or ***validity*** of Discover Bank’s records.

Since Discover Bank is the custodian of the records, the Adkins, Brooks, and Kiser testimony, (CP 94-113, 115-116 & 15-42), is hearsay (ER 801c) and does not fall into the hearsay exception (ER 803 and RCW

5.45.20), the Adkins declaration, (CP 94-113), and the Brooks and Kiser affidavits and attachments, (CP 115-116 & 15-42), as hearsay, are inadmissible as evidence at trial.

Discover Bank has no evidence to prove its claims. Discover Bank has provided no proof that the Bridges ever received or agreed to an agreement, ever received or used a Discover credit card, or ever entered into an agreement with Discover bank or are obligated to Discover Bank whatsoever.

Discover Bank has provided no documents bearing the Bridges' signatures to prove that Discover Bank has standing to bring this suit. The burden of proof is on the moving party. But again Discover Bank is asking the Bridges to prove something that does not exist, or to prove that the Bridges are not obligated to or do not owe money claimed by Discover Bank to be owed. It is virtually impossible to prove the non-existence of something; its very absence must be taken as proof of its non-existence.

Ernst v. Jesse L. Riddle, P.C., M.D.La.1997, 964 F.Supp. 213 First requisite element of debt under Fair Debt Collection Practices Act (FDCPA) is existence of obligation.

In Discover Bank's brief it challenges that the Bridges' affidavits were filed improperly and are nonsensical and conclusory. This was never challenged in any pleadings in the case file or challenged at summary judgment; therefore this issue cannot be argued before the appellate court.

Since the Bridges affidavits have not been controverted or challenged at trial they must be accepted as fact before the court.

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 Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

The Bridges factual first hand knowledge affidavits, (CP 4-5 & 6-7 also filed as exhibits A CP 135-136 & 137-138), that were filed in response to Discover Bank's complaint provide the only admissible evidence to said lawsuit. The Bridges un-controverted affidavits in support of the Bridges' pleadings fully state the controversy before the trial court and fully state the genuine issues of material fact; therefore Summary Judgment should not have been granted. CR56 (e).

The Court must examine the pleadings, 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.* The non-moving party's factual allegations must be taken as true for purposes of summary judgment. *State ex rel. Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963)

1. The Bridges did raise the issue of Subject Matter jurisdiction in their trial court pleadings.

First, the trial court lacks statutory or common law authority to hear the lawsuit since there exists no verifiable contract or agreement between Discover Bank and the Bridges', Discover Bank does not have a right of action. Second, there is insufficiency of pleadings due to the lack of

appearance and testimony by a competent fact witness of Discover Bank regarding an injury (cognizable cause of action). The maxims of law state that:

“Where there is no injured party established, there can be no claim. One who has not been damaged or put at risk by another has no basis to make claims or charges against him.”

Therefore the trial court lacks Subject Matter jurisdiction.

2. The Bridges have not agreed to the terms of said “cardmember agreement.”

As stated in the Bridges factual affidavits, (CP 4 -5 & 6-7 also filed as exhibits A CP 135-136 & 137-138), the Bridges did not receive, accept, agree to, execute or otherwise sign any card member agreement or other documents that would lead to the receipt and use of the Discover Bank credit card, that is the subject of this lawsuit. Discover Bank has not provided any documents bearing the Bridges’ signature indicating that the Bridges “used” said “credit card” and therefore there was no failure to cancel the account within any given time frame and no acceptance of any agreement and/or amendments.

3. The Bridges deny using said Discover credit card.

Use of said credit card to make a purchase or otherwise that would obligate the Bridges to Discover Bank, would entail signing (executing) a document commonly known as a charge slip or receipt. Said document would be a necessary element to prove that the Bridges’ did in fact use

said card that caused them to be obligated to Discover Bank. This element is well established in Washington State case law and the RCW, as well as most all states of the union, and is most distinctly stated in the following case:

“Credit card obligations are subject to contract, though the offer and acceptance aspects of credit card law differ somewhat from other types of contracts. The receipt of an application in the mail and the return of the application to the credit card company does not create a contract, nor does the issuance of the credit card by the credit company to the cardholder. A credit card holder does not provide consideration of the extension of credit simply by providing information to the card issuer. The issuance of a card by a credit card company is nothing more than an offer to extend credit. No obligation is imposed upon either the cardholder or the card issuer until such time as a purchase is made. **It is the use of the credit card which creates the contract** whereby the credit card company promises to pay the obligation incurred by use of the credit card. The card holder in return promises that they will pay to the credit card company the charges incurred in these transactions.” See *Garber v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675, 432 N.E. 2d 1309, 60 Ill. Dec.410 (Ill. App. Ct. 1982) and *in re Stewart*, 91 B.R. 489, 495 (Bankr. S.D. Iowa 1989).

The Bridges’ un-controverted affidavits state in relevant part:

“I further state that I have *never executed*, consented to, received or signed any document with regard to the “revolving credit agreement” or “agreement” that is the subject of Discover Bank’s lawsuit. (Emphasis added) (CP 4 -5 & 6-7 also filed as exhibits A CP 135-136 & 137-138).

Black's Law Dictionary with Pronunciations Sixth Edition at page 567 defines Execute as follows:

“To complete, to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfill the command or purpose of; To perform all necessary formalities, as to make and sign a contract, or sign and deliver a note.”

Discover Bank has produced no documents or evidence whatsoever, whether admissible at trial or otherwise, evidencing Bridges' "use" of said "credit card," the subject of the original lawsuit.

In reply again to Discover Banks repeated allegations that the Bridges affidavits are conclusory and unsupported by evidence, the Bridges repeat section C-1-A pages 3-6 of this document in its entirety.

2. The trial court, in the second instance, did error when considering the affidavits and declarations under CR 56(e).

The trial court, Judge Stephen M. Warning presiding, in the first instance did NOT consider and admit into evidence third party affidavits submitted by Discover Bank's counsel. (Cp 114). It was after Discover Bank's re-note for summary judgment, in the second instance, Judge James E. Warne presiding, that the trial court erred in considered third party affidavits. CR 56(a) and CR 56(e)

For reasons stated above, in the entirety of section C-1-A pages 3-6 of this document; the trial court did not properly consider Discover Bank's Affidavits under the requirements of CR 56(e).

- A The trial court, in the second instance, did error when considering the affidavits and declarations under CR 56 (e).

For reasons stated above, in the entirety of section C-1-A pages 3-6 of this document; the trial court did error when considering the third party affidavits submitted by Discover Bank's counsel under the requirements of CR 56(e).

Said affidavits do not qualify under CR 56(e) as they do not pass the threshold of the Rules of Evidence specifically:

Rule 701, in that the witnesses can only offer opinion or inference to the fact that Adkins, Brooks, and Kiser can only attest that information has been provided to them by Discover Bank, they cannot attest to having any personal first hand knowledge of Discover Bank's records, and cannot attest to the *accuracy* or *validity* of Discover Bank's records;

Rules 702 and 705, in that the Adkins, Brooks, and Kiser can only offer opinion or inference to the fact that information has been provided to them by Discover Bank, they cannot attest to having any personal first hand knowledge of Discover Bank's records, and cannot attest to the *accuracy* or *validity* of Discover Bank's records, nor has been deemed or authenticated as to their expert witness status;

Rule 801(d), in that Bridges were denied and should be allowed to cross examine said witnesses.

As such said affidavits are Hearsay specifically under Rules of Evidence:

Rule 801(c), in that said statements are out-of-court utterances not made while testifying at trial or hearing;

Rule 802, in that Hearsay testimony is not admissible;

Rule 803, in that the testimony does not qualify as an exception to hearsay;

Rule 806, in that Bridges should be allowed to attack the credibility of the declarants, the third party affiants, and to present admissible evidence in support; and,

CR 56(e), in that Adkins, Brooks, and Kiser can only offer opinion or inference to the fact that information has been provided to them by Discover Bank, they cannot attest to having any personal first hand knowledge of Discover Bank's records, and cannot attest to the *accuracy* or *validity* of Discover Bank's records.

B. The affidavits and declarations are hearsay.

For reasons stated above in section C-1-A pages 3-6 and 2 A pages 9-11 of this document, the affidavit and declarations are hearsay. (CP 94-113, 115-116 & 15-42).

3. Whether or not the trial court abused its discretion in denying the bridges motion for reconsideration is irrelevant and immaterial to Bridges' stated issues for appeal.

4. Whether or not Discover bank should be awarded attorney fees and costs on appeal pursuant to rap 18.1 and the cardmember agreement; This argument is irrelevant and immaterial to Bridges' stated issues for appeal. Except that if the trial court's summary judgment is found to be in error then no attorney fees would be allowed as provided by RAP 18.1.

D. CONCLUSION

For reasons stated above in this document, and the fact that Discover Bank has not provided documents as evidencing any of the following,

1. A copy of an agreement or contract between Discover Bank and the Bridges bearing the Bridges' signature(s).
2. A copy of a document, charge slip or receipt or the like, evidencing the use of said credit card and establishing a contract between Discover Bank and the Bridges bearing the Bridges' signature(s).
3. A copy of a document evidencing that the Bridges where ever sent or mailed or received an agreement, update to agreement, or said Discover credit card that is the subject of this lawsuit, from Discover Bank or a third party.

Based on the facts stated above, there are real genuine issues of material fact, summary judgment was not appropriate and the case should have gone to trial.

Because a motion for reconsideration is a prerequisite for appeal the Bridges realize that if the court overturns the order of summary judgment there would be no need for reconsideration. The Bridges respectfully request that the court overturn the trial courts summary judgment order on 3-16-09.

The Bridges should be awarded their costs and expenses pursuant to RAP 18.1.

RESPECTFULLY submitted this 22nd day of October, 2009



JOHN S BRIDGES
Appellant / Defendant
Pro-se



JULIE A BRIDGES
Appellant / Defendant
Pro-se

CERTIFICATE OF SERVICE

I, JOHN S. BRIDGES, certify under penalty of perjury under the laws of the State of Washington that I served the foregoing document by the method, on the date, and on each attorney(s) and/or person(s) identified below as indicated.

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Dated This 22nd day of October, 2009



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