

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 42627-7-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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COLUMBIA STATE BANK,

Respondent.

v.

ELECTRONIC SERVICE PROVIDER, INC.,  
TOM GIRARD, AND DEBORAH MONTALVO,

Appellants,

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**BRIEF OF APPELLANTS**

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 ORIGINAL

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## INTRODUCTION

Appellants seek review by the Washington State Court of Appeals Division II of the Order Denying Defendant's Motion to Dismiss for Improper Venue entered on April 22, 2011, Order Denying Defendants Motion to Strike Testimony offered in Motion for Summary Judgment and Order Granting Summary Judgment entered on August 26, 2011. The Summary Judgment was granted by the Honorable James Orlando filed under Pierce County Superior Court Cause Number 11-2-06116-2.

This case involves a commercial suit by a lender against a debtor for monies claimed owed on a promissory note. This appeal offers an important review of what constitutes proper venue in commercial contract setting when choice of venue language in a promissory note is disputed. It further offers important review what constitutes admissible testimony when proving damages.

## **ASSIGNMENTS OF ERROR**

1. The Superior Court erred in denying ESP and Girard's Motion to Dismiss for Improper Venue when the Columbia Bank's Complaint was filed in Pierce County but the parties' agreed and consented to venue in King County, Washington.

2. The Superior Court erred in denying ESP and Girard's Motion to Strike Testimony as Inadmissible when the Testimony offered to prove damages relied on evidence not provided in its Motion.

## **ISSUES PRESENTED**

1. Whether an agreement that states choice of venue if a lawsuit is filed requires a party to file in that venue?

2. Whether testimony that references documents regarding damages is inadmissible because the declarant did not provide those documents in support of their motion for summary judgment?

## STATEMENT OF CASE

### 1. Venue.

On September 28, 2005, Defendant Electronic Service Provider (“ESP”) executed and delivered to Plaintiff Columbia State Bank (“Columbia Bank”) a Small Business Administration Note (“Note”). CP 2. The Note was in the original amount of \$1,000,000. CP 24 – 27.

On February 3, 2011, Columbia Bank filed a complaint in Pierce County Washington alleging Breach of Promissory Note, Commercial Guaranties and for Replevin. CP 1 – 5.

Columbia Bank’s filed its Motion for Summary Judgment on March 21, 2011. CP 6-12. ESP and Girard filed its Motion to Dismiss due to Improper Venue on April 14, 2011. CP 56-61.

Defendant Electronic Service Provider, Inc. (“ESP”) is located 950 Andover Park East, Suite 6, Tukwila, King County, Washington 98188. CP 62. ESP has never transacted business in Pierce County.

*Id.* Defendants Tom Girard and Deborah Montalvo (“Girard”) reside in Enumclaw, Pierce County, Washington. CP 63.

For security for the loan, ESP executed a Commercial Security Agreement (“CSA”), which gave Columbia Bank a security interest in ESP’s collateral. CP 29 - 35. All the collateral is located in King County, Washington. CP 63. Tom Girard and Deborah Montalvo also signed commercial loan guarantees. CP 45- 48.

In the CSA, choice of venue is addressed: “**Choice of Venue.** If there is a lawsuit, Grantor agrees upon Lender’s request to submit to the jurisdiction of the courts of KING County, State of Washington.” CP 33. The Promissory Note and guarantees do not state the choice of venue. CP 63.

The Motion to Dismiss for Improper Venue was denied and the hearing on the Motion for Summary Judgment was continued. CP 98-99.

**2. Alana Rouff’s Declaration Regarding Damages.**

In support of its Motion for Summary Judgment, Columbia Bank filed the declaration of Alana Rouff, Vice President of Special Credits at Columbia State Bank, on March 21, 2011. CP 17-48.

As part of Ms. Rouff's declaration, Ms. Rouff attached as exhibits copies of the Promissory Note, Commercial Security Agreement, Change in Terms and personal guarantees. CP 17-48, Ex. A-F.

Ms. Rouff states:

"Plaintiff is the owner and holder of the Note and CSA. With the aid of Plaintiff's computer software and records, I have determined Plaintiff was owed **\$609,621.20** under the Note as of March 14, 2011, exclusive of attorney's fees and costs incurred by Plaintiff in connection with this case." CP 18.

ESP and Girard filed its Motion to Strike Testimony of Alana Rouff as Inadmissible on August 17, 2011. CP 111-114. Ms. Rouff and Columbia Bank do not provide as part of their Motion for Summary Judgment any supporting documents or copies of any

purported computer software or records that Ms. Rouff claims to have used to arrive at the alleged amount owed. CP 107-108.

In reply, Columbia Bank and Ms. Rouff provided documentation of the account summary and computer records listing the alleged amount due. CP 120-143.

### **ARGUMENT**

**1. The Court of Appeals Should Reverse the Superior Court's Decision to Deny ESP and Girard's Motion to Dismiss for Improper Venue when the Action was Filed in a Venue not Set Forth in the Parties' Agreement.**

Columbia Bank filed their complaint in the wrong venue. It should be dismissed.

Choice of venue is agreed to and set forth in the CSA: "**Choice of Venue.** If there is a lawsuit, Grantor agrees upon Lender's request to submit to the jurisdiction of the courts of KING County, State of Washington." CP 33. The Promissory Note and guarantees do not state the choice of venue. CP 63.

The Washington Court of Appeals has addressed this issue presented in this case. When the parties have agreed on a forum, the trial court must enforce the agreement unless the party objecting to the chosen forum can establish that enforcing it would be "unreasonable and unjust." *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 617-618, 937 P.2d 1158 (1997).

The party challenging such a clause bears a heavy burden to show that it should not be enforced. *Id. at 618* (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) and *Restatement (Second) Conflict of Laws sec. 80, cmt. c* (Supp. 1989)).

To meet its heavy burden of proving "unreasonable and unjust" enforcement, Columbia Bank must show either that: (1) the venue agreement was obtained by fraud, undue influence, or unfair bargaining power or (2) the chosen forum would be so seriously inconvenient as to deprive the party of a meaningful day in court. *Bank of Am., N.A. v. Miller*, 108 Wn. App. 745, 748, 33 P.3d 91 (2001). If the objecting party does not prove the venue agreement is unreasonable and unjust,

failure to enforce the agreement is reversible error. *See Miller*, 108 Wn. App. at 749.

A contract provision is void as contrary to public policy if it seriously offends law or public policy. *In re Marriage of Hammack*, 114 Wn. App. 805, 810-11, 60 P.3d 663, *review denied*, 149 Wn.2d 1033 (2003). By enacting *RCW 4.12.080*<sup>1</sup>, the legislature specifically approved forum selection clauses by mandating that such agreements will determine venue, even if grounds exist to locate the forum elsewhere. *RCW 4.12.080*; and *see RCW 4.12.030*. "Particularly in the commercial context, the enforcement of forum selection clauses serves the salutary purpose of enhancing contractual predictability." *See Voicelink* at 617. The Washington Supreme Court also has stated that "the policy of this state is that, if the parties agree to a venue for a suit, the trial court cannot allow the suit to be brought in any county other

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<sup>1</sup> *RCW 4.12.080* states: Notwithstanding the provisions of *RCW 4.12.030* all the parties to the action by stipulation in writing or by consent in open court entered in the records may agree that the place of trial be changed to any county of the state, and thereupon the court must order the change agreed upon.

than the one agreed on by the parties." *Mangham v. Gold Seal Chinchillas, Inc.*, 69 Wn.2d 37, 45, 416 P.2d 680 (1966). Washington's public policy strongly favors enforcement of forum selection clauses.

Columbia Bank's filing of their action in Pierce County is not proper when the Commercial Security Agreement they drafted specifically states choice of venue is King County, Washington. Columbia Bank cannot state or show how their agreed selection of venue in King County is unreasonable or unjust. Columbia Bank cannot show or state that venue in King County in their drafted CSA was obtained by fraud, undue influence, or unfair bargaining power or that the chosen forum would be so seriously inconvenient as to deprive them of a meaningful day in court.

Columbia Bank or its attorneys do not deny drafting or preparing the CSA or the guarantees or the change in terms. If their intent was to file in Pierce County, they could have chosen that language in their CSA. If their intent was to be able to file in any county in Washington, then they could have stated clearly they could file in any county and the laws of the State of Washington would

apply. Further, if venue in King County was elective, Columbia Bank could simply state it “may” file in King County. Columbia Bank did not do any of the above.

"[C]ontract language subject to interpretation is construed most strongly against the party who drafted it, or whose attorney prepared it." *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966). If the CSA choice of venue language is in any way ambiguous or subject to interpretation, it should be construed “most strongly” against Columbia Bank.

The choice of venue does not require a condition precedent event to file in King County other than “if there is a lawsuit.” The choice of venue provision states that jurisdiction is in KING county (no emphasis added), “if there is a lawsuit.” It states that the Grantors, ESP and Girard in this case, agree upon Lender’s request to submit to the jurisdiction of King County. The provision presupposes that Lender will request jurisdiction in King County by including the word “upon.” The choice of venue provision does not state “if Lender requests to submit to the jurisdiction of the courts of KING County,

State of Washington” or provide a condition precedent for filing in the proper county. (Emphasis added).

Essentially, Columbia Bank is arguing that even though a Choice of Venue clause is in its contract, the court should ignore it because Columbia Bank is ignoring it.

Columbia Bank cannot demonstrate how dismissing their action without prejudice is unreasonable or unjust. Columbia Bank can file it again in the proper county. Columbia Bank is not deprived of its day in court. See *Bank of Am., N.A. v. Miller*, 108 Wn. App. 745, 748, 33 P.3d 91 (2001).

Lastly, Columbia Bank claims venue is proper because defendants Tom Girard and Deborah Montalvo personally reside in Pierce County. That is not enough reason or grounds to void a choice of venue clause. The primary Defendant, Electronic Service Provider, Inc., is situated in and operates from King County. CP 62. By enacting *RCW 4.12.080*, the legislature specifically approved forum selection clauses by mandating that such agreements will determine venue, even

if grounds exist to locate the forum elsewhere. *RCW 4.12.080*; and *see RCW 4.12.030*. Washington's public policy strongly favors enforcement of forum selection clauses. *See Keystone v. Garco*, 135 Wn. App. 927, 933, 147 P.3d 610 (2006). Tom Girard and Deborah Montalvo are personally involved as commercial guarantors of the CSA. What they allegedly guarantee, the CSA, provides choice of venue is King County.

ESP and Girard request the Court of Appeals to reverse the Superior Court's decision to deny their motion to dismiss for improper venue.

**2. The Court of Appeals Should Reverse the Superior Court's Decision to Deny ESP and Girard's Motion to Strike Testimony of Alana Rouff as Inadmissible when the Declarant references documents not offered as evidence.**

CR 56(e) provides in pertinent part:

*Form of affidavits; further testimony; defense required.*

Supporting and opposing affidavits shall be made on personal knowledge, **shall set forth such facts as would be admissible in evidence**, and shall show affirmatively that the affiant is competent to testify to matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. (emphasis added)

Ms. Rouff's testimony regarding the alleged damages owed to Columbia Bank is inadmissible and should be stricken as hearsay testimony and as unauthenticated, ER 801 and 901 respectively.

ER 801(c) provides that "[h]earsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted."

ER 901(a) states "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

Ms. Rouff and Columbia Bank are asserting as truth that Defendants owe \$609,621.20 as of March 14, 2011. CP 18. That amount was not achieved through Ms. Rouff's personal knowledge but through review or the "aid" of Columbia State Bank's software and their records. The alleged amount owed is a product of software or records that were not produced or provided in Columbia Bank's original Motion for Summary Judgment.

Ms. Rouff's statement of the amount claimed to be owed by Defendants is inadmissible as hearsay. Any of Columbia Bank's computer software or records that Ms. Rouff claims to have used and not provided in their motion likewise was not authenticated. Columbia Bank cannot rely on Ms. Rouff's inadmissible testimony in their Motion for Summary Judgment. CR 56(e).

Ms. Rouff's statement and Plaintiff's claims are allegations and conclusory. Mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish such a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Hearsay evidence contained within an affidavit either in support of or opposition to a motion for summary judgment does not meet the requirements of this rule and is not competent." *Charbonneau v. Wilbur Ellis*, 9 Wn. App. 474, 512 P.2d 1126 (1973).

Judge Orlando granted Columbia Bank's Motion for Summary Judgment. CP 145. In his ruling, Judge Orlando states "[t]here's a printout showing what appears to be the current balance owed and any

payments that were applied to the debt.” RP 7-8. This printout, however, was presented by Columbia Bank in Ms. Rouff’s Reply Declaration. CP 120-143. It was not provided by Columbia Bank in its original motion or Ms. Rouff’s original declaration. CP 17-48. Ms. Rouff referenced the account balances in her declaration but did not provide copies of them. Her testimony provided in her March 17, 2011 declaration should be stricken. ESP and Girard did not have an opportunity to respond to the documents that were provided in Columbia Bank’s reply.

### **CONCLUSION**

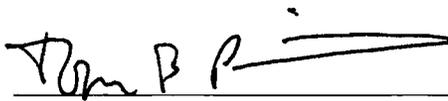
ESP and Girard respectfully request the Court of Appeals reverse the superior court’s order denying their motion to dismiss Columbia Bank’s motion for summary judgment for improper venue. The superior court’s decision is contradicted by the plain language of the agreement which states if a lawsuit is filed, the debtor agree to King County upon Columbia Bank’s request. Columbia Bank’s claims in Pierce County Superior Court should be dismissed without prejudice.

The Court of Appeals should also reverse the superior court's decision to deny ESP and Girard's motion to strike testimony of Alana Rouff as inadmissible. Columbia Bank offered hearsay testimony regarding alleged damages and referenced records that were not provided to the court in its motion and were not authenticated. ESP and Girard did not have an opportunity to respond to those records. ESP and Girard respectfully request the Court of Appeals reverse the superior court's order granting summary judgment because it was based upon inadmissible evidence contrary to CR 56(e).

Dated this 9<sup>th</sup> day of February 2012.

Respectfully Submitted,

BY: RAO & PIERCE, PLLC

A handwritten signature in black ink, appearing to read "Tom B. Pierce", written over a horizontal line.

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Attorney for Appellants

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 MONTALVO, )  
 )  
 Appellants. )

**CERTIFICATE OF SERVICE**

I certify that I served a true and correct copy of the Brief of the Appellants and this Certificate of Service, via Electronic mail and U.S. mail, postage prepaid, through USPS, on Respondent's Attorney:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATE this 9 day of February, 2012, at Seattle, WA.

  
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MICHELLE MORRELL, Legal Assistant