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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

No. 43115-7-II

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

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CAPITAL ONE BANK (USA), N.A.

Respondent

V.

HEATHER F LUKASHIN

Appellant

APPEAL FROM THURSTON CASE NO. 10-2-02299-3

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**RESPONDENT'S BRIEF**

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE CASE.....	1-6
III.	ARGUMENT.....	6-15
	A. ISSUES ON APPEAL.....	6
	B. STANDARD OF REVIEW.....	6-7
	1. ADMISSIBILITY OF EVIDENCE.....	6-7
	2. GRANTING OF SUMMARY JUDGMENT.....	7
	3. DENIAL OF SANCTIONS.....	7
	C. ANALYSIS.....	8-15
	1. ADMISSION OF PLAINTIFF’S EVIDENCE WAS NOT AN ABUSE OF DISCRETION.....	8-12
	2. SUMMARY JUDGMENT IS APPROPRIATE AS A MATTER OF LAW BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT.....	12-15
	3. DENIAL OF DEFENDANT’S MOTION FOR SANCTIONS WAS NOT AN ABUSE OF DISCRETION.....	15
IV.	CONCLUSION.....	16

**TABLE OF AUTHORITIES**

**CASES**

*Citibank South Dakota NA v. Ryan*, 160 Wn. App. 286 (2011)..... 4, 13, 14, 15

*Dix v. ICT Group, Inc.*, 160 Wn.2d 826 (2007) ..... 7

*Discovery Bank v. Bridges*, 154 Wn. App. 722 (2010)..... 4, 5, 13, 15

*Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217 (1991)..... 7

*Lybbert v. Grant County*, 141 Wn.2d 29 (2000).....7

*Miller v. Badgley*, 51 Wn. App. 285 (1998)..... 15

*State v. Powell*, 126 Wn.2d 244 (1995)..... 6

*State v. Ziegler*, 114 Wn.2d 533 (1990)..... 6

*Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751 (2002)..... 7

*Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, Wn.2d 299, 339 (1993)..... 7

**FEDERAL STATUTES**

15 U.S.C. §§ 1666-1666j..... 11

**WASHINGTON STATUTES**

RCW 5.45.020.....4, 8, 10, 11

**RULES**

CR 11..... 5, 15

CR 56..... 3, 7, 8, 9, 12, 15

## **I. INTRODUCTION**

This is a simple collection case in which the defendant Heather Lukashin (hereafter “Lukashin”), seeks to avoid paying a credit card debt that she incurred. Lukashin has never denied the fact that she applied for, received, used, and made payments on a credit card account issued by plaintiff Capital One Bank (USA), N.A. (hereafter “Capital One”). In the defendant’s answer to the plaintiff’s complaint, Lukashin admitted to having the credit card account ending in 8703. Lukashin did not submit a contravening affidavit to the trial court in response to Capital One’s Motion for Summary Judgment.

Lukashin now claims that the trial court erred in determining whether genuine issues of material fact existed, and that the trial court erred in admitting evidence. As recognized by the trial court, Capital One’s evidence was admissible and clearly showed that Lukashin entered into a credit card agreement with Capital One and that Lukashin was liable for the debt that she incurred. The trial court found that Lukashin’s admission of having the credit card account at issue was enough for the plaintiff to make a prima facie case of liability. As a result, judgment was entered against the defendant. Capital One respectfully requests that this Court affirm the judgment that was entered on January 6, 2012.

## **II. STATEMENT OF THE CASE**

Capital One issued Lukashin a credit card account ending in 8703. CP 47-48. Lukashin used the credit card to make purchases for goods and

services. CP 47-138. Notably, Lukashin purchased a roundtrip airplane ticket to Moscow in Lukashin's own name. CP 53-54. Likewise, Lukashin purchased a rental car under Lukashin's own name. CP 93-94. Lukashin made consistent online ACH payments on the credit card account. CP 47-138. Lukashin subsequently defaulted by ceasing to make payments on the credit card account and was indebted to Capital One, as of March 27, 2010, in the amount of \$3,309.13. CP 47-48.

On April 20, 2010, Lukashin was served with a summons and complaint for the amount due and owing to Capital One. CP 7-11, 24. On October 18, 2010, Capital One filed the summons and complaint with the Thurston County Superior Court. CP 7-11. On October 27, 2010, Capital One filed a motion for default judgment, setting a hearing date for November 19, 2010. CP 12-13, 16-23. On November 19, 2010, Lukashin filed her answer to the complaint, and the motion for default judgment was stricken. CP 25, 26-30. In Lukashin's answer to the complaint, Lukashin admitted to having a Capital One credit card account ending in 8703. CP 26-30.

On October 27, 2011, Capital One filed a motion for summary judgment, setting a hearing date for December 2, 2011. CP 39-40, 43-138. On November 22, 2011, Lukashin filed a motion to strike or deny plaintiff's motion for summary judgment because the motion had been

sent to Lukashin's old address. CP 142-143. In response to Lukashin's motion, Capital One re-noted the motion for summary judgment, setting a new hearing date for January 6, 2012. CP 331. On November 23, 2011, Lukashin filed a motion to sanction plaintiff for CR 56(g) violation, and set the hearing for December 2, 2011. CP 144-148. The trial court denied Lukashin's motion for sanctions for an alleged violation of CR 56(g) and ruled that, "I don't think there is sufficient material here for sanctions, and so I find that no sanction is, but to compensate for failure to appear for the scheduling conference." RP 12, December 2, 2011. It should be noted that Lukashin seeks to include this ruling on December 2, 2011, in the instant appeal, but the notice of appeal was filed on February 22, 2012, which is more than thirty (30) days after this ruling occurred, thus the December 2, 2011, ruling as to Lukashin's motion for sanctions under CR 56(g), is not appealable. CP 389-398.

Capital One's motion for summary judgment was supported by the affidavit of Jamie Williams, an authorized agent of Capital One, who declared under the penalty of perjury that Lukashin owed the debt of \$3,309.13 to Capital One. CP 47-48. Also supporting the motion for summary judgment were billing statements with closing dates for September 17, 2006, through November 24, 2008. CP 49-138. The billing statements show detailed and itemized usage of the account by

Lukashin. CP 49-138. In particular, the billing statements show that Lukashin bought herself a roundtrip airplane ticket to Moscow in 2006, and that Lukashin bought herself a rental car in 2007. CP 53-54, 93-94. The billing statements also show that Lukashin made consistent online ACH payments on the credit card account for several years. CP 49-138.

On December 19, 2011, Lukashin filed her response to plaintiff's motion for summary judgment. CP 292-297. Lukashin's response alleged that Capital One had not provided admissible evidence under Bridges, Ryan, or RCW 5.45.020, to support Capital One's motion for summary judgment. CP 292-297. On December 30, 2011, Capital One filed its reply in support of summary judgment asserting that Capital One's affidavit satisfied the requirements of RCW 5.45.020, that Capital One had met its burden under Bridges and Ryan, and that Lukashin had failed to submit a contravening affidavit. CP 307-310.

On January 6, 2012, the Honorable Judge Christine Pomeroy heard argument on Capital One's motion for summary judgment. CP 331. Lukashin argued that Capital One had not properly supported its claim under Bridges, Ryan, and RCW 5.45.020, and Lukashin requested that the court dismiss the case and award sanctions against Capital One's counsel. RP 25-40, January 6, 2012. Capital One argued that it met the Bridges standard for summary judgment because in Lukashin's answer to the

complaint Lukashin acknowledged having a Capital One credit card account ending in 8703, and that Capital One had shown detailed and itemized usage of the account by providing years of billing statements. RP 41-42, January 6, 2012. Capital One also argued that Lukashin had failed to submit any affidavits to contradict the evidence put forth by Capital One. RP 48-49, January 6, 2012.

Judge Pomeroy granted Capital One's motion for summary judgment and denied Lukashin's motion to dismiss and Lukashin's motion for CR 11 sanctions. RP 49-52, January 6, 2012. Judge Pomeroy held that Capital One had met the Bridges standard, and she made the following ruling:

Bridges says that it can be the billing statement, can be the payments. We do not have a signed alleged contract here and so we rely on other things that Bridges tells us about. Whether or not there's admission, what are the detailed billings, what are the payments, I find sufficient evidence to grant summary judgment in the amount of \$2,058.44.

RP 51, January 6, 2012.

On January 13, 2012, Lukashin filed a motion for reconsideration and set the hearing for January 27, 2012. CP 343-346. The court heard oral argument and the motion for reconsideration was denied because Judge Pomeroy found that the Bridges standard had been met because Lukashin admitted to having the credit card account in her answer to the

complaint. CP 386-387, RP 64-65, January 27, 2012. Judge Pomeroy explained her ruling as follows:

I am not going to reconsider. In the answer, if you'll look to the answer to the complaint, there is an admission and that negates the situation. That is very important in this case, and if the court of appeals is looking at this case, I tell them, look to the answer. The answer is an admission as to having this account with these four last digits. When you look to the answer, having an admission, that negates certain situations. I'm not going to reconsider. I stand by my decision. I think it is correct, but I could be wrong. And if I am wrong, the court of appeals will tell me.

RP 64-65, January 27, 2012. Lukashin subsequently filed this appeal on February 22, 2012. CP 389-398.

### **III. ARGUMENT**

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

1. Whether the trial court erred in admitting Capital One's affidavit and billing statements into evidence.
2. Whether the trial court properly granted summary judgment.
3. Whether the trial court erred in denying Lukashin's motion for sanctions.

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

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

A trial court's decision to admit evidence is reviewed for a manifest abuse of discretion. State v. Powell, 126 Wn.2d 244, 258 (1995); State v. Ziegler, 114 Wn.2d 533, 538 (1990). 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 (2007) (citing Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., Wn.2d 299, 339 (1993)).

## **2. GRANTING OF SUMMARY JUDGMENT**

An appellate court engages in a *de novo* review of a ruling granting summary judgment, engaging in the same inquiry as the trial court. Lybbert v. Grant County, 141 Wn.2d 29, 34 (2000). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c), Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217 (1991). An appellate court may affirm an order granting summary judgment on any basis supported by the record. Truck Ins. Exchange v. Vanport Homes, Inc. 147 Wn.2d 751 (2002).

## **3. DENIAL OF SANCTIONS**

A trial court's decision denying or granting CR 11 sanctions is reviewed only for an abuse of discretion. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., Wn.2d 299, 338-39 (1993). Abuse of discretion occurs when an order is manifestly unreasonable or based on untenable grounds. Id. at 339.

## **C. ANALYSIS**

### **1. ADMISSION OF PLAINTIFF'S EVIDENCE WAS NOT AN ABUSE OF DISCRETION**

This Court must review the admission of evidence and affidavits under an abuse of discretion standard. Trial courts have considerable discretion in admitting and excluding evidence. Under the hearsay exception for business records, RCW 5.45.020 expressly states that the trial court may take into consideration any records that, "... in the opinion of the court, the sources of information, method and time of preparation were such as to justify [the record's] admission." Capital One's evidence is admissible under RCW 5.45.020 as a business record exception to the hearsay rule.

Lukashin argues that Capital One's evidence does not comply with CR 56(e) or RCW 5.45.020. It is clear from the record that the trial court took Lukashin's evidentiary arguments into consideration and found that Capital One's evidence was admissible. Lukashin's evidentiary objections were argued *ad naseum* in Lukashin's briefing and during oral argument. By ruling against Lukashin and entering summary judgment in favor of Capital One, it is clear that the trial court overruled Lukashin's evidentiary objections. There is nothing in the record to suggest that Judge Pomeroy's ruling was an abuse of discretion.

Capital One's affidavit was admissible under CR 56(e). CR 56(e)

reads in relevant part:

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 the matters stated therein.

CR 56(e). The affidavit of Jamie Williams satisfies these requirements, as the affidavit states that Ms. Williams is competent to make the affidavit and that she is familiar with the manner and method in which Capital One maintains its normal business books and records, including the computer records of the Capital One account ending in 8703. CP 47-48. The affidavit further states that Capital One's books and records show that Lukashin opened an account, that Capital One issued a credit card to Lukashin ending in 8703, that the credit card was used to obtain goods and services, and that Lukashin breached the customer agreement. CP 47-48. Lukashin claims that the affidavit was not admissible because it referenced the customer agreement, but that the customer agreement was not attached. However, all of the material terms of the customer agreement were included in Ms. Williams affidavit and the billing statements. By entering summary judgment in favor of Capital One, and by relying on the Capital One affidavit, the trial court overruled Lukashin's evidentiary objection. RP 50-51, January 6, 2012. Lukashin has failed to put forth

any facts or legal arguments that would show this ruling to be an abuse of discretion.

Capital One's affidavit and billing statements were admissible under RCW 5.45.020. The requirements for admitting business records as evidence are set out in RCW 5.45.020 as follows:

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

RCW 5.45.020. The custodian of records or other qualified witness must testify to the following: (1) the record's identity, (2) its mode of preparation, (3) if it was made in the regular course of business, and (4) if it was made at or near the time of the act, condition or event. The Williams affidavit identifies the records as being the books and records of Capital One, including computer records of defaulted accounts. CP 47-48. The affidavit swears that the records are made by a computer or other similar digital means. The affidavit swears that the records are made in the course of regularly conducted business activity. Finally, the affidavit cites that the records were made at or near the time of the events that they purport to describe occurred. The affidavit refers to the books and records of Capital One, which incorporate the billing statements for the account.

Thus, the affidavit and the billing statements satisfy the requirements of RCW 5.45.020, and the affidavit and the billing statements were properly admitted as evidence by the trial court. Again, Lukashin has failed to show that there was an abuse of discretion.

Similarly, Capital One's records on their face were sufficiently trustworthy to justify admission. The records were prepared by a national bank which is extensively regulated by the Comptroller of Currency and federal law and regulations that dictate the formatting appearance and information contained on monthly billing statements. In addition, the Federal Fair Credit Billing Act, 15 U.S.C. §§ 1666-1666j gives a consumer specific rights to dispute incorrect information that appears on the consumer's monthly billing statements to insure that the information on the account statements are accurate.

Lukashin's account had a history of statements that showed online ACH payments being made by Lukashin on the account for several years. Lukashin never offered any affidavits in opposition to the billing statements. The affidavit of Jamie Williams and the billing statements establish an uncontroverted basis for the trial court granting summary judgment. The documents were properly admitted and the trial court could place whatever weight the trial court deemed appropriate.

Admitting the affidavit and the billing statements was not an abuse of discretion, and the summary judgment should be affirmed.

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

Summary Judgment is appropriate 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). Pursuant to CR 56(e), an adverse party “may not rest upon the mere allegations or denials of his pleading, but his response, by *affidavits* or as otherwise provided in this Rule, must set forth *specific facts* showing that there is a genuine issue for trial.” CR 56(e) (emphasis added). Lukashin has failed to put forth any affidavits that set forth specific facts showing that there is a genuine issue for trial.

In support of its motion for summary judgment, Capital One submitted the affidavit of Jamie Williams (hereafter “Williams”), an authorized agent of Capital One, who declared under the penalty of perjury that Lukashin owed the debt of \$3,309.13 to Capital One. CP 47-48. Also supporting the motion for summary judgment were billing statements with closing dates for September 17, 2006, through November 24, 2008, showing that Lukashin made consistent purchases and payments on the credit card account. CP 49-138. In particular, Lukashin purchased a roundtrip airplane ticket to Moscow in Lukashin’s own name, and

Lukashin purchased a rental car under her name. CP 53-54, 93-94. Lukashin also made consistent online ACH payments on the credit card account. CP 47-138.

Lukashin has not submitted an affidavit denying that she was the holder of this Capital One credit card account. In fact, in Lukashin's answer to the complaint, Lukashin admitted to having a Capital One credit card account ending in 8703. CP 26-30. Lukashin has not submitted an affidavit denying that she made purchases on the credit card account. Lukashin has not submitted an affidavit denying that she made payments on the credit card account. Lukashin has not submitted any affidavits explaining that the amount owed is incorrect. Lukashin has not submitted any affidavits stating that the amount owed was paid in full.

Lukashin alleges that Capital One has not met the summary judgment standard as set forth in Bridges and Ryan. In Bridges, this Court ruled that the bank had to show that the Defendant had mutually assented to the credit card agreement and personally acknowledged the account. Discover Bank v. Bridges, 154 Wn. App. 722, 727 (2010). The Court ruled that personal acknowledgement of the account could be proven through a signed agreement between the parties, through copies of checks or electronic payments, through detailed itemized proof of the card's usage, or through other evidence of the Defendant's personal acknowledgement of the account.

Id. at 727-728. In Citibank v. Ryan, the Court of Appeals Division I reiterated these ways that the bank can show the Defendant's personal acknowledgement of the credit card account. Citibank v. Ryan, 160 Wn. App. 286, 294 (2011).

Here, Capital One has provided all billing statements on the account from September 17, 2006, through November 24, 2008, showing that Lukashin made consistent purchases and payments on the credit card account. CP 49-138. Those billing statements show all purchases and payments made on the account during that period, including a roundtrip airplane ticket to Moscow in Lukashin's name and a rental car in Lukashin's name. CP 53-54, 93-94. The billing statements also show that Lukashin made continuous online ACH payments on the account throughout those years. CP 49-138.

In combination with Lukashin's admission that she had a Capital One account ending in 8703, CP 26-30, Capital One has clearly provided a detailed and itemized usage of the account to show Lukashin's personal acknowledgement of the account. Further, Capital One has shown Lukashin's personal acknowledgement of the account by providing a billing statement where Lukashin purchased a roundtrip airplane ticket for herself, and a billing statement where Lukashin purchased a rental car for herself. CP 53-54, 93-94. Thus, Capital One has proven assent to the credit card

agreement pursuant to the summary judgment standard as set forth in Bridges and Ryan. Because Lukashin has not provided any evidence in contradiction to that provided by the Plaintiff, as required by CR 56, there are no issues of material fact and Summary Judgment is appropriate. Capital One's motion for summary judgment was proper and should be affirmed.

**3. DENIAL OF DEFENDANT'S MOTION FOR SANCTIONS WAS NOT AN ABUSE OF DISCRETION**

The trial court is given deference on decisions regarding CR 11 sanctions because the trial judge has personal contact with the attorneys and the case. Miller v. Badgley, 51 Wn. App. 285, 300 (1988). Here, Lukashin argues that the trial court erred in denying Lukashin's motions for sanctions. The court denied Lukashin's motion for CR 11 sanctions, stating, "There are no incidents here of violation of the Civil Rule 11, *absolutely none*. I will not grant any CR 11 sanctions, so I'll deal with that." RP 49-50, January 6, 2012 (emphasis added). There is no evidence in the record that the trial court abused its discretion in denying Lukashin's motion for CR 11 sanctions. Because the trial court should be given deference on decisions regarding CR 11 sanctions, the trial court's ruling on this issue should be affirmed.

**IV. CONCLUSION**

The decision of the trial court in admitting evidence into the record and granting Summary Judgment on Capital One's claim should be affirmed. Capital One respectfully requests that this Court affirm the judgment that was entered on January 6, 2012.

Dated this 18 day of July, 2012

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CERTIFICATION OF MAILING

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TO: Clerk of the Court

AND TO: Appellant

I certify that on July 18, 2012, I mailed, postage prepaid, a copy of Respondent's Brief to:

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