

FILED

APR 16 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: 

CONSOLIDATED APPEAL NO. 305813

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

DISCOVER BANK,
Issuer of the Discover Card,
Respondent/Appellee,

v.

RICHARD R. RODRIQUEZ and SHONNA L. RODRIQUEZ,
and their marital community composed thereof,

Appellants.

APPELLANTS' BRIEF

DAVID B. TRUJILLO
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A Third-party debt-collector at one company cannot suddenly be handed and asked to vouch for alleged business records from another company whenever an alleged credit account containing those records results in contested litigation. Any affidavit based thereon is deficient and all records attached thereto are not admissible as business records.

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NOTE: Since this is a consolidated appeal from two case files, all citations to Clerks Papers coming from both of the underlying cases will always start with the CP citation from Superior Court Cause Number 10-2-03528-1 first, followed by the CP citation from Cause Number 10-2-03529-9 last.

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I. ASSIGNMENTS OF ERROR

A. First, the trial court erred by considering the alleged exhibit records attached to the Plaintiff Discover Bank's identical third-party affidavits of Patrick Sayers (CP-7-29, and See also Appendix A for the second case, consisting of the affidavit itself without exhibits, erroneously omitted from the Designation of Clerk's papers) from another company called DB Servicing Corporation. Discover filed these affidavits at issue in support of Plaintiff's motions for summary judgment (CP-5-6; CP-5-6). The affidavits differed solely in the monetary amounts referenced. Both affidavits were fatally deficient on their face and out of compliance with the governing business records statute and the basic rules of evidence for admissibility for ever considering any of the alleged evidence attached thereto which was all clearly inadmissible hearsay evidence.

B. Second, with regard to the sufficiency of

the Plaintiff Discover's affidavits for any proper admission of the disputed exhibit records (CP-7-29, and Appendix A) into evidence as alleged business records, the trial court erred by not acknowledging and construing all the facial deficiencies of the Plaintiff's affidavits in the light most favorable to the Defendants Rodriguez, pursuant to CR 56.

C. Third, the trial court erred by granting summary judgments in favor of the Plaintiff Discover despite the Plaintiff's failure to properly establish the absence of the genuine issues of material fact, given the genuine issues of material fact raised on the face of Plaintiff's own affidavit in support of the Plaintiff's motion, pursuant to CR 56.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the Affidavits of Patrick Sayers (CP-7-29, and Appendix A) properly identify and authenticate without any hearsay all of the alleged

exhibit documentation attached thereto and used against the Defendants Rodriquez at the summary judgment hearings of October 19th, 2011, and was this in full compliance with CR 56(e) and RCW 5.45.020 / ER 803(6), ER 804, ER 805, ER 901(a) and ER 901(b)(1), or at the very least is there any genuine issue of material fact thereon?

III. STATEMENT OF THE CASE

A. OVERVIEW OF BACKGROUND FACTS

On October 4th, 2010, Plaintiff Discover Bank filed two lawsuits against the Defendants Rodriquez in Yakima County Superior Court, under Cause Numbers 10-2-03529-9 (CP-1-4) and under Cause Number 10-2-03528-1 (CP-1-4).

On August 5th, 2011, Plaintiff Discover Bank filed identical motions for summary judgment in both cases (CP-5-6; CP-5-6). In alleged support for Plaintiff Discover's motions for summary judgment, Discover simultaneously filed the Affidavits of Patrick Sayers (CP-7-29, and Appendix

A) with numerous alleged exhibit records attached thereto. The affidavits at issue are not under penalty of perjury and both merely state identically in relevant part, without ever actually referencing a single specific document attached thereto:

I am an account manager in the Attorney Placement Department for DB Servicing Corporation, the servicing affiliate of DISCOVER BANK, ISSUER OF THE DISCOVER CARD, an FDIC insured Delaware State Bank collectively ("Discover"). I am responsible for managing and overseeing the Discover accounts that have resulted in contested litigation. Included within the scope of my responsibilities includes the performance of collection and recovery services. I make this affidavit on the basis of my personal knowledge and a review of the records maintained by Discover with respect to the account at issue. All such records are maintained in the regular course of business, at or near the time of the events recorded. I am a Designated Agent and a Custodian of the records and can testify as to their authenticity.

The Undersigned is informed and believes, and therefore alleges, that . . . Defendant opened a Discover Credit Card.

Attached hereto is true and correct copy of the Cardmember Agreement which governs the credit card account at issue, along with periodic statements and evidence of payments on the account . . .

(CP-7-29, and Appendix A).

The Affidavits of Patrick Sayers only make the generic argumentative and conclusory statements that the affidavits are made on his personal knowledge without any actual demonstration of the same. Mr. Sayers' declarations are clearly made only on mere information and belief at best, as he clearly stated therein. Mr. Sayers, a mere collection employee in the legal department of the DB Servicing Corporation readily admits that his affidavit is merely based on "a review of the records maintained by Discover with respect to the account at issue." - i.e. - merely looking at someone else's records handed to him after the fact. To be sure, Mr. Sayers never once claims that he personally himself maintained those records or that he himself ever personally had any

participation or involvement therein whatsoever. Furthermore, Mr. Sayers never stated what he meant by the word "maintained" and most certainly never used the words "drafted" or "created" or "authored" or "filled out" or "handled" or "directed" or "ordered" or the like, as a true witness would have and could have stated but did not.

At the very best, Mr. Sayers could only be asserting that some unidentified person at his company (DB Servicing Corporation) handed him records from some unidentified person at another company (Discover) and told him hearsay on hearsay about all the alleged "facts" and alleged "records" for him to assert and sign for in his declarations and for referencing those alleged exhibits. Both Affidavits clearly admit he only gets involved on the alleged accounts "when they have resulted in contested litigation." (CP-7-29, and Appendix A, page 1).

Mr. Sayers never even stated his collections career and when he joined the DB Servicing Corporation or whether this was before or after the alleged creation of the alleged accounts and the documents at issue. As such, Mr. Sayers, a mere third-party debt collector using someone else's records handed to him, was at best simply parroting hearsay on hearsay from what someone else allegedly told him to say to the Court from whoever the real witness was, if any.

Furthermore, Mr. Sayers clearly failed or refused to state under oath that he, personally, himself ever actually worked at Discover or was the one who actually and originally authored, drafted, created, filled out, ordered, directed, and or initially handled and was in direct charge of each and every let alone any of the document exhibits which the Plaintiff simply attached to his declaration and had him sign off on. Mr. Sayers, has absolutely no basis for alleging any

understanding and beliefs thereon. Mr. Sayers has no factual basis for asserting any valid belief that the attached records are genuine or legitimate, or were ever really created in the regular course of business, let alone at or near the alleged time of the alleged events recorded by someone therein.

Finally, Mr. Sayers' statement that he is "a Designated Agent and a Custodian of the records" establishes nothing without giving any definition of that job title, except that someone handed him records and said you are now the agent and custodian. As far as anyone knows from Mr. Sayers' very limited affidavit, a perfectly reasonable inference that must be given to the Defendants Rodriguez based on what little was stated and especially because of what was NOT stated in the affidavit, is that his entire affidavit is hearsay on hearsay or worse.

At best, it is fair to say that it appears that some unidentified person at the Plaintiff Discover company simply handed or sold for pennies on the dollar boxes of alleged bad debt files to some unidentified person in the legal department at a collection agency called DB Serving Corporation, who then handed them all to Mr. Sayers and said there you go, you are now the custodian of these files, now please sign hundreds robo-statements all day long claiming that all the documents in the boxes handed to you are what we told you they are based on what they told us they are.

Plaintiff Discover then used these Affidavits of Mr. Sayers as the foundation for Plaintiff's motion for summary judgment at the October 19th, 2011 hearings. In fact, Discover had five total debt collection motions for summary judgment on similar accounts that day (RP-2), not to mention Discover v. Gardner at Yakima County Superior Court No. 11-2-02332-9 (now at Division III No. 305961-

III for identical challenges to a nearly identical affidavit).

On October 12th, 2011, Defendants Rodriguez filed a 4-page opposition to each of the Plaintiff's motions (CP-30-33; CP-9-12). Defendant Richard Rodriguez showed up at the summary judgment hearing and personally made a hearsay objection on the record to the use of the Affidavits of Patrick Sayers and the exhibits attached thereto, which if stricken established a fatal statute of limitations problem for Plaintiff Discover that actually necessitate judgments in favor of Defendants Rodriguez. RP-5, lines 21-23; RP-6, lines 1-2 and 11-13, lines 15-16; RP-12, lines 12-19.

On October 19th, 2011, notwithstanding the Defendants' objections to the admissibility and sufficiency of the Plaintiff's affidavit and alleged evidence attached thereto, and Defendants' own cross-motion for summary judgment dismissal of

the Plaintiff's case for the reasons argued, the Court granted Plaintiff's motion for summary judgment. CP-41-42; CP-28-29; RP-12, lines 20-24 and RP-13, lines 1-7. Defendants Rodriguez then filed timely notices of appeal on November 15th, 2011. (CP-43-47; CP-30-33;) which although erroneously initiated with the Supreme Court were eventually re-routed back to Division III (CP-52; and CP-38).

IV. ARGUMENT

A. THE STANDARD OF REVIEW

1. CR 56(e) requires that a court consider ONLY ADMISSIBLE evidence when ruling on a motion for summary judgment. Cotton v. Kronenberg, 111 Wash. App. 258, 44 P.2d 878 (2002). Here, the Defendants Rodriguez assert that the trial Court's conclusions on the admissibility and sufficiency of evidence submitted with the Plaintiff's hearsay Affidavits based merely on information and belief, and any and all the proper inferences thereon was an error of law since any and all Affidavits

verified on belief only and not on actual personal knowledge do not comply with CR 56(e). Klossner v. San Juan County, 93 Wn.2d 42, 45, 605 P.2d 330 (1980) (citing to Stringfellow v. Stringfellow, 53 Wn.2d 639, 335 P.2d 825 (1959)).

Any ruling based on an error of law is an abuse of discretion. King v. Olympic Pipe Line Co., 104 Wn. App. 338, 355, 16 P.3d 45 (2000) (further citations omitted). See Marriage of Schwietzer, 81 Wash. App. 589, 595, 915 P.2d 575 (1996) (Trial Court committed Reversible Error using parol evidence impermissibly since no authority permits the use of extrinsic evidence to delete or contradict the existing written terms in a contract that are inconsistent with the extrinsic evidence proffered to get around them).

Here, the Plaintiff's attempted submission of alleged facts allegedly creating the absence of a genuine issue of fact, also necessarily based on

assuming and inferring everything in favor of the moving party plaintiff, were sufficiently objected to by Defendants Rodriguez as being inadmissible in the first place. In any event, the proper standard of review is De Novo review for summary judgments and/or judgments on the pleadings. Davis v. Baugh Industrial Contractors, 159 Wn.2d 413 (2007) (citing to Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). Accordingly, given that all aspects of this appeal involve issues of law, all the assignments of error should be reviewed de novo.

B. THE ANALYTICAL FRAMEWORK

1. For all of the assignments of error, the issue overall is simply whether the Plaintiff Discover's use of an Affidavit from an employee from another company reviewing Discover's alleged records all submitted by the Plaintiff for Plaintiff's motions for summary judgment, ever met the requirements of CR 56(e), RCW 5.45.020 / ER

803(6), ER 804, ER 805, ER 901(a) and ER 901(b)(1), or at the very least whether there is any genuine issue of material fact thereon.

No averment in an affidavit may be based on hearsay. Charbonneau v. Wilbur Ellis Co., 9 Wash. App. 474, 477, 512 P.2d 1126 (1973). The substance of the affidavit must **ACTUALLY DEMONSTRATE** that the affiant has actual personal knowledge; and a mere averment by the affiant that he or she is competent and has personal knowledge is insufficient. Antonio v. Barnes, 464 F.2d 584, 585 (4th Cir. 1972). Allegations in an affidavit must be based on more than "information and belief". Stringfellow v. Stringfellow, 53 Wn.2d 639, 641, 335 P.2d 825 (1959).

First of all, ER 901 requires authentication or identification of evidence before it is admissible. In order for any evidence in this case to be admitted, ER 901(b)(1) requires that the

Plaintiff must produce a person with actual personal knowledge of the key facts the Plaintiff wants to get into evidence. ER 901 governs the foundation needed for the admissibility of any evidence on the Plaintiff's claims in this case, whether by testimony at trial or by sworn declaration in any pre-trial hearing.

ER 901(a) requires, as a condition precedent to admissibility, IDENTIFICATION and AUTHENTICATION. ER 901(b)(1) further clarifies that for admissibility, all documents must be authenticated and then identified by a person with "knowledge". According to the legal treatise on this rule from The Law of Evidence in Washington, 2d Ed. (1993), Section 901-9 and 901-10:

Testimony of a witness with **personal [not hearsay] knowledge** is the most often used method of authentication and includes "a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory

analysis.”

Id. (Citing FRE Advisory Committee’s Note) (emphasis added). Interestingly, enough, all we know from the affidavits of Patrick Sayers is that he is a debt collector that works in the legal department of a corporation that Plaintiff Discover sends files to for alleged accounts “that have resulted in contested litigation.” (CP-7-29, and Appendix A).

As such, Mr. Sayers is at best merely the new and present custodian of the alleged records, but not the original or relevant custodian who can vouch for anything. No evidence was ever offered to establish an actual chain of custody from who first actually produced and generated the documents to when and from whom Mr. Sayers finally acquired and heard about all the documents second or third hand.

In Amtruck Factors v. International Forest

Prods., 59 Wash. App. 8, 795 P.2d 742 (1990), a chart recalculating price mark-ups on product invoices was properly excluded from evidence. The exhibit at issue therein was prepared and presented in court by an employee of the Plaintiff who did not actually participate in the mark-up determinations or agreements. Thus the witness was properly held to be NOT competent because the witness could only provide hearsay at best. Therefore, the document itself was thereby held to lack foundation under ER 901.

In the case at bar, Plaintiff Discover is most likely asserting that the documents attached to Mr. Sayer's Affidavits might allegedly qualify "business records" under ER 803(6) in order to avoid ER 804 (hearsay) and ER 805 (hearsay on hearsay) as well. However, such an attempt fails as explained herein.

ER 803(6), is reserved in Washington State,

but is the same thing as has been adopted by our legislature at RCW 5.45.020 which governs the admissibility of the business records as evidence in the exact same manner. RCW 5.45.020 states:

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 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 (emphasis added).

However, in this case, the Plaintiff's witness merely claims to be a current not original custodian. Mr. Sayers failed to establish when his position began and whether it was before or after the records were created, never mind that Mr. Sayers has demonstrated no true and actual personal knowledge of the actual creation or timing of the

creation of any of the records that were attached to his declaration. Furthermore, he has never stated that he ever was or ALWAYS was the custodian and or was and still is the original custodian.

No records custodian is competent to identify and authenticate someone else's records just handed to them second hand from the real witness at a different company. Just giving the hearsay declarant the title of "custodian" and performing robo-signatures in order to pursue potentially fraudulent or even junk debts changes nothing. A truly competent custodian is one whose affidavit actually DEMONSTRATES them to be competent to personally give first hand information on the specifically referenced and attached documents in their possession from the inception of the documents to the inquiry date. Plaintiff has no one from Discover who is willing or able to talk under oath and vouch for a single Discover document needed for Plaintiff to avoid the Rodriguez's

demand for dismissals.

Moreover, aside from HEARSAY, a second hand custodian has no actual personal knowledge about a document's actual facts which must be established under RCW 5.45.020, including: (1) the actual identity and authenticity of each document, AND (2) its mode of preparation and creation, and (3) to verify that each of those records were actually made in the regular course of business, AND (4) that each was actually made at or near the time of the alleged act, condition or event.

Plaintiff Discover never properly submitted any affidavits sufficient to meet the Plaintiff's initial burden, and as such Defendants had no burden shifted to them to submit anything at all because the Plaintiff's motion never got off the ground to start with. Kahn v. Salerno, 90 Wash. App. 110, 951 P.2d 321 (1998) (The party moving for summary judgment has the initial burden of

establishing its case and showing there is no dispute as to any issue of material fact thereon, THEN the burden shift to the non-moving party). In the case at bar, the Defendant properly objected because the Plaintiff didn't even establish anything on its case because of the lack of any proper witnesses, and nothing further was required of the defense. Frankly, there was no basis for the Court's failure to dismiss the Plaintiff's cases outright.

Without a competent witness who can personally authenticate the records rather than just claim an after the fact title of "custodian" designation while remaining silent on true witness status, the Plaintiff's case has a fatal evidence problem as well as a fatal statute of limitations problem. In the absence of a signed written contract, which the Plaintiff was never able to properly introduce in its motion for summary judgment, the time for commencing a lawsuit thereon is three years

pursuant to RCW 4.16.080(3) which states:

The following actions shall be commenced within three years:

. . . an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument . . .

RCW 4.16.080(3).

Without admissible exhibits, there is no written contract with the Defendants. Mr. Sayers could not state that he had personally negotiated any contract with the Defendants either. If the Plaintiff really has a credit card account, there is no admissible evidence about who actually opened it, who agreed to it, who used it, or who paid on it. As such, the Plaintiff's claim should have been dismissed.

V. ATTORNEY'S FEES AND COSTS

RCW 4.84.330 actually REQUIRES that reasonable attorney fees be awarded to the prevailing party even for a defendant who proves the plaintiff's

contract is unenforceable. Herzog Aluminum, Inc. v. Gen. Am. Window Corp., 39 Wash. App. 188, 191, 692 P.2d 867 (1984). The Court may not deny the fee request outright.

The court has no discretion to decide WHETHER fees should be allowed at all or not; Rather, it has discretion only in setting the proper AMOUNT to be allowed and shifted to the other side for that award. Kofmehl v. Steelman, 80 Wn. App. 279, 286, 908 P.2d 391 (1996); Farm Credit Bank v. Tucker, 62 Wn. App. 196, 207, 813 P.2d 619, review denied, 118 Wn.2d 1001 (1991) (indicating no discretion is allowed as to whether fees are permissible, but only as to the amount to be allowed). Costs are also recoverable for the ultimately prevailing party pursuant to RCW 4.84.010.

Accordingly, Defendants Rodriguez respectfully request that reasonable attorney's fees and costs which are incurred by the Defendants both below and

on appeal, be awarded to the Defendants if they are the prevailing party, at conclusion of this case, pursuant to both RCW 4.84.010 and RCW 4.84.330.

VI. CONCLUSION

For the reasons stated above, Defendants Rodriquez respectfully request that this court find that Plaintiff's exhibits did not qualify as admissible business records because the affidavits of Patrick Sayers had prima facie deficiencies which raised pivotal genuine issues of material fact over both the admissibility and therefore the legal effect of the alleged exhibit documents attached thereto.

As such, no burden ever shifted to the Defendants to do anything, and summary judgment in Plaintiff's favor was improper. Accordingly, this Court should reverse and remand for trial assuming Plaintiff ever had or has any ability to cure.

Respectfully submitted this 14th day of
April, 2012.

LAW OFFICES OF DAVID B. TRUJILLO
Attorney for Defendants Rodriguez:

By: David Trujillo
DAVID B. TRUJILLO, WSBA #25580

1
2
3
4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR YAKIMA COUNTY

5 DISCOVER BANK, ISSUER OF THE
6 DISCOVER CARD

No.: 10-2-03528-1

7 Plaintiff,

8 vs.

AFFIDAVIT IN SUPPORT
OF JUDGMENT

9 SHONNA L RODRIQUEZ and DOE I and their
marital community composed thereof,

Defendants.

10 STATE OF OHIO)

) ss.

11 COUNTY OF FRANKLIN)

12 I, Patrick Sayers, personally appeared before me, this day and after
13 being duly sworn, according to law, upon my oath and says:

14 I am an account manager in the Attorney Placement Department for DB Servicing
15 Corporation, the servicing affiliate of DISCOVER BANK, ISSUER OF THE
16 DISCOVER CARD, an FDIC insured Delaware State Bank collectively ("Discover"). I
17 am responsible for managing and overseeing the Discover accounts that have resulted in
18 contested litigation. Included within the scope of my responsibilities includes the
19 performance of collection and recovery services. I make this affidavit on the basis of my
20 personal knowledge and a review of the records maintained by Discover with respect to
21 the account at issue. All such records are maintained in the regular course of business at
22 or near the time of the events recorded. I am a Designated Agent and a Custodian of the
23 records.
24

25 The Undersigned is informed and believes, and therefore alleges, that at the time

AFFIDAVIT IN SUPPORT OF JUDGMENT

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.
720 OLIVE WAY, SUITE 1201
SEATTLE, WASHINGTON, 98101

1 COPY

Appendix A pg 1 of 2

1 of the service and filing of the summons and Complaint herein, and at all times since,
2 said Defendant(s) is not a person in the military service of the United States, as defined in
3 the Servicemembers Civil Relief Act, and that the Defendants are not infants or
4 incompetent persons.

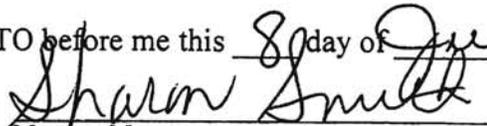
5 On or about September 28, 2008 Defendant opened a Discover Credit Card.
6 Attached hereto is true and correct copy of the Cardmember Agreement which governs
7 the credit card account at issue, along with periodic statements and evidence of payments
8 on the account. No payments have been made since November 06, 2008, and Defendant
9 has defaulted under the terms of the Cardmember Agreement by failing to make the
10 payments due as required by the agreement.
11

12 At the time that the suit was commenced, the principal balance on the account
13 was \$1,428.89.

14 Dated at New Albany, Ohio this 8 day of July,
15 2011

16 
17 AFFIANT

18 SUBSCRIBED TO AND SWORN TO before me this 8 day of July, 2011.

19 
20 Notary Name
21 Notary Public, for the State of Ohio
22 Residing at: Hocking
23 My Commission expires X

24 AFFIDVTWASJD DF012156



25 SHARON A. SMITH
Notary Public
In and for the State of Ohio
My Commission Expires
August 25, 2015