

**FILED**

**DEC 13 2013**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SONOMA  
By *[Signature]* DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA  
APPELLATE DEPARTMENT

MIDLAND FUNDING, LCC,  
Plaintiff/Respondent,  
vs  
LAWRENCE EDWARDS,  
Defendant/Appellant.

Case No. MCV 217245

ORDER ON DECISION ON APPEAL

This matter was set for oral argument on the appellate calendar of October 24, 2013. Seated en banc were the Honorable Peter Ottenweller, presiding, the Honorable Bradford DeMeo and the Honorable James Bertoli.

Neither plaintiff nor Plaintiff's counsel were present. Counsel Ian D. Chowdhury was present on behalf of Defendant/Appellant Lawrence Edwards. The matter was submitted to the court for decision, after oral argument.

Statement of the Case

This appeal stems from a credit collection trial resulting in a limited jurisdiction money judgment against appellant/defendant Lawrence Edwards ("appellant"), and in favor of respondent/plaintiff Midland Funding, LLC ("respondent") in the amount of \$14,434.

1 Respondent is a debt-buyer, and claimed to have acquired the rights to pursue a  
2 debt originally owed to Washington Mutual. Respondent alleged causes of action for  
3 breach of contract and account stated. A bench trial was held on September 21, 2012.  
4 The trial court took the case, as well as all evidentiary objections, under submission. A  
5 written judgment was filed on December 17, 2012.

### 6 7 Statement of Facts

8 At trial, respondent proceeded by offering a declaration (from Mycah Struck) in  
9 lieu of live testimony pursuant to CCP Sec.98. Several documentary exhibits were  
10 attached to the declaration: (1) a "bill of sale" from Chase Bank indicating that Chase  
11 Bank sold various unpaid Washington Mutual Credit Card accounts to respondent; (2) a  
12 collection letter from Midland Credit Management, Inc. ("MCM"), the "servicer" of the  
13 account on behalf of respondent<sup>1</sup>; and (3) a handful of Providian Bank statements.

14 It appears the declaration was intended to serve a dual purpose in that it was: (1)  
15 intended to provide substantive testimony of Mycah Struck regarding the existence of  
16 the alleged unpaid debt; and (2) intended to lay the foundation for the admission of  
17 various documents attached to the declaration.

18 Appellant objected to the declaration and attached documents on the following  
19 grounds: hearsay, lack of personal knowledge, lack of authentication, and lack of  
20 compliance with CCP Sec.98.

21 The trial court ultimately ruled that the declaration and accompanying documents  
22 were admissible pursuant to Evid.C.Sec.1561 and Evid.C.Sec.1271. No express  
23 findings were made as to the admissibility under CCP Sec.98. However, it appears the  
24 trial court impliedly found that CCP Sec.98(a)'s requirement that the declarant make  
25 himself available for service of process had been satisfied.<sup>2</sup>

26  
27 <sup>1</sup> It appears that MCM is either the parent company of Midland Funding, LLC or is at least associated in some way  
with Midland Funding, LLC.

28 <sup>2</sup> The judgment states: "She also indicated in her declaration that despite the fact that she is a resident of the State of  
Minnesota where the records were housed, that she would make herself available for service of process should the  
Defendant so desire at two specific locations in California well within the 150 mile range of the Sonoma County  
Courthouse." (Judgment, p.2, lns.8-13).

1 Appellate Arguments

2 Appellate raises two claims on appeal: (1) the trial court erred overruling  
3 appellant's hearsay, lack of personal knowledge, and lack of authentication objections  
4 to the declaration and accompanying documents ; and (2) the trial court erred in  
5 overruling appellant's objection to the declaration and accompanying documents on the  
6 grounds that the declaration failed to comply with the statutory requirements of CCP  
7 Sec.98.

8 Respondent filed an opposition brief to the appeal, arguing the trial court  
9 committed no error in admitting the CCP 98 declaration and that the declaration laid a  
10 proper foundation to admit the documents presented as business records under  
11 Evid.C.Sec.1561 and Evid.C.Sec.1271.

12 Oral arguments were heard on October 24, 2013. Appellant's counsel appeared  
13 and argued. No appearance was made by respondent's counsel. The Appellate  
14 Division took the matter under submission.

15 Standard of Review

16 The standard of review for rulings concerning the admissibility of evidence is an  
17 *abuse of discretion* standard. Pannu v. Land Rover North America, Inc. (2011) 191  
18 Cal.App.4<sup>th</sup> 1298. However, the standard for review for interpretation and application  
19 of a statute is *de novo* review, as that is a question of law. Boy Scouts of America  
20 National Foundation v. Superior Court (2012) 206 Cal.App.4<sup>th</sup> 428, 443.

21  
22 The Trial Court Erred in Overruling Appellant's Hearsay, Lack of Personal Knowledge,  
23 and Lack of Authentication Objections to the Declaration and Accompanying  
24 Documents

25 We find that the trial court abused its discretion by concluding that the declaration  
26 and documents were admissible under Evid.C.Sec.1561 and Evid.C.Sec.1271.

27 In Evid.C.Sec.1560 et seq., the Legislature has provided a streamlined method  
28 for the production of the records of a business in response to a subpoena duces tecum.

1 Taggart v. Super Seer Corp. (1995) 33 Cal.App.4<sup>th</sup> 1697, 1705. Unless the subpoena  
2 provides otherwise, the custodian or other qualified witness may send a copy of the  
3 records by mail in a sealed envelope. Evid.C.Sec.1560(b). If the subpoena is for  
4 attendance in court, the custodian mails the sealed envelope to the court.  
5 Evid.C.Sec.1560(c)(1); Taggart at 1705. Along with the records, the custodian must  
6 also send an affidavit that complies with Evid.C.Sec.1561. As amended in 1996,  
7 Evid.C.Sec.1561 now requires (via subdivisions (a)(4) & (5)) that the affidavit also  
8 satisfy the Evid.C.Sec.1271 business records hearsay exception. Evid.C.Sec.1562 also  
9 requires that for an Evid.C.Sec.1561 affidavit to overcome a hearsay objection, it must  
10 be the case that "the requirements of Section 1271 have been met."

11 Evid.C.Sec.1271 provides:

12 "Evidence of a writing made as a record of an act, condition, or event is not  
13 made inadmissible by the hearsay rule when offered to prove the act, condition, or  
14 event if:

- 15 (a) The writing was made in the regular course of a business;  
16 (b) The writing was made at or near the time of the act, condition, or event;  
17 (c) The custodian or other qualified witness testifies to its identity and the  
18 mode of its preparation; and  
19 (d) The sources of information and method and time of preparation were  
20 such as to indicate its trustworthiness."

21 In Cooley v. Superior Court (Greenstein) (2006) 140 Cal.App.4<sup>th</sup> 1039, the Court  
22 emphasized that simply being the person or entity currently in possession of the records  
23 is not enough to satisfy the statutory scheme, because the custodian of records or other  
24 qualified witness contemplated by Evid.C.Sec.1561 must also be able to attest to  
25 various attributes of the records relevant to their authentication and trustworthiness. As  
26 such, execution of an Evid.C.Sec.1561 affidavit is more than simply a clerical task.

27 Cooley at 1044.  
28

1 As an initial matter, we question whether the Evid.C.Sec.1560 et seq. procedure  
2 is even available when the declaration and documents are not the result of a *subpoena*  
3 to a third party. We note that the language in Evid.C.Sec.1560 and 1561 refers to  
4 *subpoenaed* records. In the present case, there's no evidence that the affidavit and  
5 documents were obtained by way of a *subpoena* to a third party business. Instead, it  
6 appears sufficiently clear that no such subpoena was used, as the affidavit is from  
7 respondent's own employee and the records were records possessed by respondent  
8 itself. In any event, we need not decide whether a plaintiff can introduce its *own*  
9 business records pursuant to Evid.C.Sec.1561 et seq. because the affidavit failed to  
10 satisfy the requirements of Evid.C.Sec.1561 and Evid.C.Sec.1271.

11 The documents can be broken up into three categories: (1) documents  
12 originating from Providian (the underlying credit card statements showing balance  
13 owed); (2) documents originating from Chase (a "bill of sale" document); and (3)  
14 documents originating from "MCM."

15 As for the documents originating from Providian and Chase, the Mycah Struck  
16 declaration fails to specify how he knows about the record creation or record keeping  
17 practices of those independent entities. Mr. Struck is not an employee of Providian,  
18 Chase or Washington Mutual. Instead, he is employed as a "Legal Specialist" for  
19 Midland credit Management, Inc. ("MCM"), the "servicer" of the account on behalf of  
20 respondent. The Struck declaration fails to demonstrate the "mode of production" of the  
21 Providian and Chase documents, or how he would have any personal knowledge of the  
22 mode of production for Providian and Chase documents. Nor does the Struck  
23 declaration demonstrate that the Providian and Chase documents, which were  
24 produced by corporations separate and distinct from MCM and respondent, are  
sufficiently trustworthy.

25 As for the documents generated by MCM itself, Mr. Struck does declare that he  
26 is familiar with the manner and method by which MCM creates and maintains its  
27 business records. However, the declaration only provides conclusory statements.  
28 Aside from merely stating that he's employed as a Legal Specialist for MCM who has

1 "access to" the records, Mr. Struck fails to establish any *basis* for any claim of personal  
2 knowledge over the "mode of production" of the MCM documents. Nor do the  
3 declaration's conclusory assertions demonstrate the MCM document is sufficiently  
4 trustworthy. Furthermore, the MCM document is merely a collection letter from MCM to  
5 appellant, based on a purported debt that was purportedly purchased by MCM from  
6 Chase, who purportedly obtained rights over the debt from another entity. To the extent  
7 the MCM document has any relevancy at all, its relevancy is dependent upon the  
8 aforementioned Providian documents – documents for which Mr. Struck lacks any  
9 personal basis to demonstrate their mode of production or trustworthiness.

10 Finally, to the extent the Struck declaration was intended to go beyond merely  
11 laying a foundation for the accompanying documents by providing substantive evidence  
12 on the elements of the causes of action, the declaration was based upon hearsay and  
13 Mr. Struck failed to demonstrate any basis for personal knowledge over the facts  
14 asserted.

15 In sum, the trial court abused its discretion in overruling appellant's hearsay, lack  
16 of personal knowledge, and lack of authentication objections to the Struck declaration  
17 and accompanying documents.

18 CCP Sec.98

19 Appellant's alternate and independent ground for appeal is that the Struck  
20 declaration failed to comply with CCP Sec.98(a)'s requirement that the declarant be  
21 "available for service of process" at an address within 150 miles of the trial court for a  
22 twenty-day period before trial. Appellant relies on Target National Bank v. Rocha  
23 (2013) 216 Cal.App.4<sup>th</sup> Supp.1.

24 In Target, the Santa Clara County Appellate Division held that the "available for  
25 service of process" requirement of CCP Sec.98 means that the declarant needs to be  
26 available for *personal service* of a subpoena for twenty days before trial at an address  
27 within 150 miles of the trial court. According to Target, designating another person to  
28

1 receive service on the declarant's behalf does not amount to compliance with the  
2 statute.

3 In the present case, we need not decide whether we agree with the Target  
4 decision or whether we find Target distinguishable. Regardless of whether the  
5 "available for service of process" requirement was met or not, the declaration and  
6 accompanying documents were inadmissible, as discussed above, on hearsay, lack of  
7 personal knowledge, and lack of authentication grounds.

8 CCP Sec.98 provides in relevant part:

9 **"To the extent the contents of the prepared testimony would have been**  
10 **admissible were the witness to testify orally thereto, the prepared testimony**  
11 **shall be received as evidence in the case, provided that either of the following**  
12 **applies:..."** (Emphasis added).

13  
14 For the reasons discussed earlier, the contents of the Struck declaration and  
15 accompanying documents were objectionable, and would have been objectionable even  
16 if Mr. Struck appeared at trial and testified to those same facts in person. Therefore,  
17 assuming arguendo that the CCP Sec.98(a) "available for service of process"  
18 requirement was satisfied, the declaration and documents would still not be admissible  
19 under CCP Sec.98.

20 Appellant Was Prejudiced by the Erroneous Admission of Evidence

21 Except in those few situations where error is considered "reversible per se,"  
22 prejudice is not presumed. Rather, appellant has the burden of affirmatively  
23 demonstrating prejudicial error; i.e., that "it is reasonably probable that a result more  
24 favorable to the appealing party would have been reached in the absence of the error."  
25 Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 800; Pool v. City of Oakland (1986)  
26 42 Cal.3d 1051, 1069.

27 Appellant was clearly prejudiced from the evidentiary error, since respondent's  
28 case was based entirely on the Struck declaration and accompanying documents.

1 Remedy

2 After a judgment or order is reversed on appeal, the case generally proceeds to  
3 retrial in the trial court as if the appealed judgment or order had never been rendered.

4 Ordinarily, an unqualified reversal (i.e., reversal without directions to the trial court)  
5 vacates the appealed judgment or order and remands the case for a new trial or  
6 evidentiary hearing as though it had never been tried or heard. On remand, the parties  
7 are placed in the same positions and have the same rights as before rendition of the  
8 reversed judgment or order. Weisenburg v. Cragholm (1971) 5 Cal.3d 892, 896;  
9 Gapusan v. Jay (1998) 66 Cal.App.4th 734, 743; see Barnes v. Litton Systems, Inc.  
10 (1994) 28 CA4th 681, 683–684.

11 An appellate court indication that judgment be entered without a *retrial* after an  
12 unqualified reversal is likely to arise only where the facts are undisputed and there  
13 would be no new evidence on retrial. Bank of America v. Superior Court (1990) 220  
14 Cal.App. 3d 613, 623.

15 Appellant requests that judgment be entered in favor of appellant. However,  
16 appellant fails to demonstrate any exception to the general rule allowing for a retrial.  
17 Therefore, the Court declines appellant's request for outright judgment in his favor.  
18 Instead, the judgment is REVERSED and the case is REMANDED for further  
19 proceedings consistent with this decision.

20  
21 Conclusion:

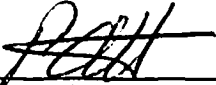
22 The trial court erred in overruling appellant's hearsay, lack of personal  
23 knowledge, and authentication objections to the Mycah Struck declaration and  
24 accompanying documents. The error was prejudicial. The judgment is REVERSED  
25 and the matter is REMANDED for further proceedings consistent with this decision.



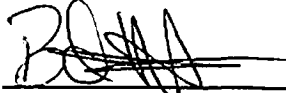
1 IT IS SO ORDERED.

2 DATED: <sup>December</sup> November 13, 2013.

3 Per Curiam

4 

5 \_\_\_\_\_  
6 PETER OTTENWELLER,  
7 Presiding Judge of the Superior  
8 Court, Appellate Division

4 

5 \_\_\_\_\_  
6 BRADFORD DEMEO,  
7 Judge of the Superior Court

4 

5 \_\_\_\_\_  
6 JAMES BERTOLI,  
7 Judge of the Superior Court


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PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Drive, Room 107-J, Santa Rosa, CA 95403; that I am not a party to this cause; that I am over the age of 18 years; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of the foregoing attached papers in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: December 13, 2013

JOSÉ OCTAVIO GUILLÉN  
COURT EXECUTIVE OFFICER

by   
Deputy Clerk

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Via personal delivery*