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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By.....

NO. 31080-9-III

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION III

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DISCOVER BANK, ISSUER OF THE DISCOVER CARD,

Appellant.

v.

MAURIE L. LEMLEY and Doe I, and their marital community composed  
thereof,

Respondents.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Appellant Discover Bank, Issuer of the Discover Card (“Discover”) has asked this court to vacate the superior court’s grant of summary judgment to Respondent Maurie L. Lemley, (“Lemley”) and the corresponding award of attorney fees. Discover also requests that summary judgment be granted in its favor or that the court hold that genuine issues of material fact remain for trial as to the extent of the contract and amounts owing between Discover and Lemley.

It is the position of Discover that, under Washington law, summary judgment should have been granted to Discover because it presented overwhelming evidence of a contract between the parties as well as the balance owing thereon. It produced:

1. The card member agreement;
2. Monthly statements containing detail of the charges, the date of the charges, a computation of finance charges, payments made by Lemley and the balance owed at the end of each month;
3. Copies of cancelled checks signed by Lemley;
4. Copies of Lemley’s bank statements showing payments to Discover; and
5. An admission by Lemley in pleadings that that he incurred the debt.

Lemley did not produce any evidence in opposition to Discover's motion for summary judgment. He has completely failed to present any argument or authority directly addressing the arguments made by Discover. He did not rebut the argument that his own pleading was sufficient to raise an issue of fact for purposes of his summary judgment. Nor did he rebut Discover's analysis regarding the factors that make a document admissible for purposes of summary judgment. Nor did Lemley rebut Discover's argument and authority that a contract can be proved by course of conduct, and that sufficient evidence of the existence of the contract was presented to the superior court to raise a genuine issue of material fact to prevent a grant of summary judgment.

Instead, Lemley attempts to smear Discover's image by making easily disprovable misstatements about alleged events that are not supported by the record. It is clear from the record that the superior court improperly disregarded Discover's evidence, that it should have granted Discover's motion or, at the very least, found that there were genuine issues of material fact preventing summary judgment from being entered in favor of Lemley.

## II. ARGUMENT

- A. Lemley misstates the record to make it appear that Discover used documents in summary judgment that it did not produce in discovery; but these misstatements are easily shown to be false.**

In his “facts” section, Lemley does not follow any cognizable timeline, but jumps around in time, repeating certain alleged events to apparently imply that they were recurring, and misstating the record while doing so.

For example, Lemley discusses a CR 26(i) conference, occurring on May 2, 2012, although he does not present the date of the conference in the brief’s first mention. Resp. Br. at 2 - 3 (citing CP 881-905). Then after jumping back to events occurring in 2010-2011, Resp. Br. at 3-5, Lemley again discusses the same discovery conference. Resp. Br. at 5-6.

Lemley uses discussions of the discovery conference to make it appear Discover withheld documents it later used to support its summary judgment motion. For example, Lemley states: “Plaintiff refused to produce any more information in response to the written discovery propounded by the Defendant.” Resp. Br. at 2 (citing CP 881-905). Yet, if one actually looks at the clerks papers, and reviews what is purported to be a transcript of a discovery conference, it is obvious that documents were, in fact, produced to Lemley in response to the discovery requests. *See e.g.*, CP 887 (“The answer is no, I haven’t withheld anything”); CP

889 (“I attached a contract”); CP 890 (“You have provided some monthly statements – are those the only ones you have available?”); CP 898 (Q: “are you saying we have all the documents that you’re going to be producing?” A: “You have what I have now”). An complete review of this document, created by Lemley, and whose accuracy is questionable, also reflects that additional documents were produced as to some categories of requests, while others did not exist.

In fact, most of the evidence used in Discover’s second motion for summary judgment had already been previously provided on July 8, 2011, as attachments to the Affidavit of Patrick Sayers in support of Discover’s first motion for summary judgment. CP 15-94. Discover also used the admissions in Lemley’s own pleading, which had been previously filed on January 18, 2011, to support its argument that Lemley had conceded to owing the debt. CP 10, 14 and produced copies of Lemley’s own bank statements and cancelled checks showing payments to Discover.

The point of the affidavit of James Ball, CP 317-49 was to address the issues raised by Lemley. Discover, in its first motion for summary judgment, had produced the cardmember terms in effect at the time Lemley defaulted in making payments. CP 18-31. As provided in the original cardmember agreement, changes in the cardmember terms had occurred over the years since the account was first opened. *Id.* at 21.

Lemley questioned why the cardmember agreement produced in the first motion for summary judgment bore a date of 12/15/09, rather than when the account was first opened. CP 97. The Ball affidavit primarily explained that the contract had been amended over the years. CP 318-19. Some of the terms of original cardmember agreement had been replaced with the terms of the cardmember agreement produced in July 2011. *Id.* The Ball affidavit did not produce any new evidence. It merely explained why the applicable cardmember agreement bore the date that it did.

Further, Lemley's discovery requested "all contracts that were signed by Defendant". *See* CP 889. There was no such signed document, *id.*, and Discover's counsel assumed Lemley would be advancing the erroneous argument that there was no binding contract in the absence of a signed agreement, which he did. CP 264-65.

Other than the actual testimony contained in the affidavits of Joshua Smith, CP 366-458, and James Ball, CP 317-49, Lemley had previously been provided with the same evidence that was submitted with the second motion for summary judgment. CP 15-94.

It is also very important to note that the superior court did not strike any of Discover's evidence as a punishment for any discovery abuses; it disregarded the evidence on the grounds that it allegedly did not have sufficient reliability to be considered under CR 56(e). CP 713-14,

718. *See also* Resp. Br. at 7-8. Therefore, Lemley's erroneous statements about alleged discovery abuses are not only unfounded, they are irrelevant.

**B. Lemley makes only two weak arguments in his response brief: (1) that Discover did not produce any evidence that would raise a genuine issues of fact for purposes of summary judgment; and (2) that he did not admit to owing the debt.**

Although he was allowed fifty (50) pages and six months to present argument and authority, Lemley presents only two weak arguments within four pages of his response brief. Lemley first argues that Discover did not produce sufficient evidence to raise a genuine issue of material fact for purposes of summary judgment. Resp. Br. at 8-10. Lemley then argues that he did not admit to owing the debt in his initial response to the complaint. Resp. Br. at 10-11. Lemley does not otherwise present any rebuttal to the arguments and authority presented by Discover.

**1. Discover did present sufficient evidence to raise a genuine issue of material fact to prevent Lemley from obtaining summary judgment.**

In his discussion on the summary judgment standard, Lemley discusses the second of two types of summary judgment.

A defendant can move for summary judgment in one of two ways. First, the defendant can set out its version of the facts and allege that there is no genuine issue as to the facts as set out. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988). Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n. 1, 770 P.2d

182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)). In this latter situation, the moving party is not required to support its summary judgment motion with affidavits. *Young*, 112 Wn.2d at 226.

*Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21-22, 851 P.2d 689, 691 (1993). See also *Seybold v. Neu*, 105 Wn. App. 666, 677, 19 P.3d 1068, 1074 (2001) (same).

Lemley chose to use the second method. Resp. Br. at 8. Then, without any analysis on what constitutes admissibility, he merely states that the superior court did not need to consider the several different affidavits and attached documents submitted by Discover where it found them “unreliable”. Resp. Br. at 10. Both Lemley and the superior court are clearly in error on this point under the current law in Washington.

An excellent example of what is admissible in a case like this is found in *Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 292 P.3d 128 (2012), in which a bank sued a cardholder to collect on credit-card debt. American Express brought a motion for summary judgment supported by the declaration of Paul Lavarta. *Id.* at 670. The contents of the declarations, which are set forth on the *Stratman* opinion, are almost identical to the contents of the affidavits submitted in this case by Patrick Sayers, CP 15-94, Joshua Smith, CP 366-67, and James Ball. CP 317-20. Evidence attached to the Lavarta declaration was also similar to that here.

Attached as Exhibit B to the motion were copies of Stratman's account statements from July 2009 to July 2010, showing that Stratman had been issued a credit card by American Express and had made both purchases and payments on the account. Each statement was addressed to Stratman at the same address in Duvall, Washington and showed the same account number (redacted to its final six digits). Attached as Exhibit C to the motion was an unsigned document entitled "Agreement Between American Express Credit Cardmember and American Express Centurion Bank." The cardmember agreement stated, in relevant part:

When you keep, sign or use the Card issued to you (including any renewal or replacement Cards), or you use the account associated with this Agreement (your "Account"), you agree to the terms of this Agreement....

...

You promise to pay all Charges, including Charges incurred by Additional Cardmembers, on your Account.

*Stratman*, 172 Wn. App. at 671.

The *Stratman* court went on to find that detailed billing statements were sufficient to support the existence of a contract.

To prevail on its claim, American Express must demonstrate the existence of a contract with Stratman. A valid contract requires an objective manifestation of mutual assent to its terms, which generally takes the form of offer and acceptance. Acceptance of an offer may be made through conduct. The use of a credit card, if sufficiently detailed and itemized, constitutes acceptance of terms clearly stated in a cardmember agreement.

There is no genuine issue of material fact that Stratman used the credit card. The account statements provided by American Express provide the date and amount of individual purchases made by Stratman, as well as the

name of the entity from whom the goods or services were purchased. For example, on March 14, 2010, Stratman made a purchase from Google in the amount of \$2,000. On March 20, 2010, she made purchases from Whole Foods in Redmond, Washington and Super Supplements in Kenmore, Washington in the amounts of \$15.77 and \$128.12, respectively.

*Stratman*, 172 Wn. App. at 673-74.

Here, as in *Stratman*, Discover also presented detailed billing statements, which had been on file for almost a year when the summary judgment motions at issue were being considered. *See* CP 32-94 (Sayer affidavit); CP 369-458 (Ball affidavit). The debtor in *Stratman* also raised the same evidentiary objections as raised here, but such objections were rejected by the court, which held as follows:

The admissibility of evidence in summary judgment proceedings is reviewed de novo. Business records are an exception to the hearsay rule and are admissible as evidence when they meet the requirements of RCW 5.45.020, which provides that

[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.

Lavarta is an American Express employee who had personal knowledge of how American Express's records were kept. His declaration indicated that the account statements were kept in the ordinary course of American

Express's business and the transactions within them were recorded at the time of occurrence. The documents were properly admitted.

We also reject Stratman's claim that the documents were inadmissible because they were not originals as required by ER 1002. ER 1001(c) defines an "original" of data stored in a computer as "any printout or other output readable by sight, shown to reflect the data accurately." The documents were originals as defined by ER 1001.

*Stratman*, 172 Wn. App. at 674-75.

As set forth in Discover's opening brief, Discover's employee's each provided a notarized affidavit showing that they had personal knowledge of the documents and how the records were kept. App. Br. at 6-7, 9-12. The affidavits themselves were clearly admissible, and if the superior court had questions about the documents, such as accuracy or authenticity, it should not have weighed the evidence, but required a trial.

It is also critical to note that the Affidavit of Jushua Smith, CP 366-67, attached checks that Lemley had made out for payment to Discover and had submitted together with corresponding invoice stubs. CP 433-458. At the bottom left of the checks, Lemley included the last four numbers from his Discover account number. *Id.* Discover's invoices coupled with Lemley's payments on the invoices reflect an unambiguous understanding by Lemley that he used the card and was paying the debt he had accrued with Discover.

Discover also submitted a declaration of its attorney, Krista White, who had offered documents signed by Lemley in which he discusses, “my debt to discover” CP 352, and “what I borrowed”. CP 350-53.

Finally, Discover produced copies of Lemley’s bank statements showing regular payments to Discover, which corresponded by date and amount to the monthly statements produced by Discover. CP 566-631.

By submitting the affidavits, Discover met its burden, and was entitled to summary judgment, unless Lemley could disprove what was contained in the declarations and attached invoices, or at least raise a genuine issue of fact about them.

The trial court does not weigh the evidence or assess witness credibility on a motion for summary judgment. Only when Stratmen can show there was a genuine issue of material fact should the matter proceed to trial and allow her “to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.”

*Stratman*, 172 Wn. App. at 676.

As Lemley stated, he did not submit any affirmative defense but merely sought to make Discover present evidence sufficient to overcome summary judgment. Resp. Br. at 8-9. Discover did present evidence, not only sufficient to overcome Lemley’s motion for summary judgment, but to grant summary judgment on its own motion. Lemley did not submit

any evidence disproving the information contained in the documents attached to Discover's affidavits.

A court may, after considering all of the evidence, enter summary judgment in favor of the nonmoving party. *Rubenser v. Felice*, 58 Wn. 2d 862, 365 P. 2d 320 (1961); *Impecoven v. Dept. of Rev.* 120 Wn. 2d 357, 841 P.2d 752 (1992). The court's error in refusing to consider overwhelming amounts of competent evidence in the record warrants reversal of the summary judgment granted to Lemley. Even if the superior court had considered the technical noting date of Discover's cross-motion for summary judgment flawed in some way, it was still appropriate for it to enter summary judgment in favor of Discover.

**2. Lemley did admit to owing a debt, and this alone raised genuine issues of fact regarding the scope of the debt to prevent him from obtaining summary judgment.**

Lemley's only remaining argument is that he never admitted to owing a debt to Discover. Resp. Br. at 10-11. Lemley argues that such claim is "wholly unsupported by the record." Resp. Br. at 11. However, in a letter signed by Lemley, he unambiguously states: "I stopped using the card and was trying to get it paid . . . Since I have not been able to make payment **my debt to discover** has double[]." CP 352 (emphasis added). In a second document signed by Lemley, he states: "They have double[] what **I borrowed**." CP 10, 14, 353 (emphasis added).

Lemley's debt to Discover is obviously supported by the record, so Lemley's argument is demonstratively erroneous. A statement of fact made by a party in his pleading is an admission that the fact exists as such and is admissible against him in favor of his opponent. *Neilson v. Vashon Island School District No. 402*, 87 Wn. 2d 955, 958, 558 P.2d 167 (1976). At the very least, it becomes a statement against interest and as such, is competent evidence of the facts stated therein. *Simmonds v. Michael*, 130 Wn. App. 1012 (2005).

Lemley next attempts to support his argument that there is a total absence of any evidence of a contract between himself and Discover by arguing that he disputed the interest rate, and that the cardmember agreements provided by Discover, CP 18-31 (attached to Sayer affidavit); CP 322-334 (attached to Ball affidavit); were somehow not the "complete" agreement. Resp. Br. at 11. Clearly, these cardmember agreements, which are the same type presented in *Stratman* are sufficient to show a contract, especially when combined with the billing invoices. CP 32-94 (attached to the Sayer affidavit); CP 369- 458 (Ball affidavit). See *Stratman*, 172 Wn. App. at 673-74. Yet, Lemley produced no evidence, or even argument, that the interest rates charged were erroneous.

Lemley next argues that the phrases, "my debt to discover" CP 352, and that "what I borrowed," CP 10, 14, 350-53, does not

constitute an admission that he borrowed anything or ever owed a debt to Discover. Resp. Br. at 11. He argues these statements would not preclude him from receiving summary judgment. However, when the sole issues in the case were whether a contract existed between Discover and Lemley and, if so, how much was owed, these statements made in pleadings signed by Lemley, and construed in a light most favorable to Discover as the non-moving party, raised a genuine issue of fact as to whether he owed Discover a debt which precluded Lemley from obtaining summary judgment.

**C. Lemley did not rebut Discover's analysis of the factors that make a document admissible for purposes of summary judgment.**

Discover argued that affidavits disregarded by the superior court fully complied with CR 56(e) and RCW 5.45.020 and the superior court erred by disregarding them under these authorities. Resp. Br. at 21-26. Other than merely stating that the superior court found the documents to be "unreliable," Resp. Br. at 10, Lemley has not provided any analysis discussing what constitutes an admissible document or in any way rebutting Discover's arguments regarding CR 56(e) and RCW 5.45.020. Thus, it is undisputed that:

Because the proponent seeking to admit a document must make only a prima facie showing of authenticity, the rule's requirement of authentication or identification is met if the

proponent shows proof sufficient for a reasonable fact-finder to find in favor of authenticity

App. Br. at 22 (quoting *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745-46, 87 P.3d 774, 781 (2004)).

It is also undisputed that the requirements of personal knowledge and competence to testify provided in Rule 56(e) “may be inferred from the affidavits themselves,” App. Br. at 22 (quoting *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990)). As previously stated, it is practically impossible to see how the witnesses in this case could have provided testimony to make their affidavits more reliable. CP 366-458 (Joshua Smith Affidavit); CP 317-49 (James Ball Affidavit); CP 350-53 (Krista White Affidavit); CP 15-94 (Patrick Sayers Affidavit).

The *Stratman* court held that detailed billing statements were sufficient to support the existence of a contact. *Stratman*, 172 Wn. App. at 673-74. Here, as in *Stratman*, Discover presented detailed billing statements, which had been on file for almost a year when the summary judgment motions at issue were being considered. See CP 32-94 (attached to the Sayer affidavit); CP 369- 458 (Ball affidavit).

It is also undisputed that a party offering such records need only submit foundational testimony from a “qualified witness,” a term that has been “broadly interpreted” by Washington courts. App. Br. at 25-26

(citing *State v. Quincy*, 122 Wn. App. 395, 399, 95 P.3d 353 (2004). *See also, State v. Ben-Neth*, 34 Wn. App. 600, 603-05, 663 P.2d 156 (1983) (bank's computer records admitted, over objections, that foundation witnesses did not create or supervise creation of computer records and did not understand how records were assembled at the computer center) and *State v. Bellerouche*, 129 Wn. App. 912, 917, 120 P.3d 971 (2005) (testimony that record “filed, kept, and accessed in accordance with the routine record keeping procedures” was sufficient foundation)).

The testimony and documents presented by James Ball, Joshua Smith, and attorney Krista L. White were properly before the superior court, but the superior court refused to consider this evidence. The earlier testimony and evidence from Patrick Sayers was also in the record to be reviewed as competent evidence, and also was sufficient to raise a genuine issue of material fact for purposes of denying Lemley’s motion for summary judgment, along with Lemley’s own pleadings which the superior court also refused to consider, and copies of his bank records, though tardily produced by Lemley after remaining in his counsel’s possession for over two months. CP 722, 724, 729-53; RP 06/15/12 at 13. The court’s error in refusing to consider large amounts of competent evidence in the record warrants reversal of the summary judgment granted to Lemley and entry of summary judgment in favor of Discover.

**D. The superior court erred by not considering timely filed documents solely because of their captions.**

Lemley admits in his “facts” section that Discover’s cross-motion for summary judgment was noted to be heard on the on the last date permitted by the superior court’s scheduling order. Resp. Br. at 1. Therefore, it is undisputed that the motion was timely brought. It is also undisputed that the supporting papers on Discover’s cross-motion for summary judgment were timely filed such that the court could have considered them when considering Lemley’s motion for summary judgment. However, the superior court would not consider Discover’s supporting affidavits, apparently because they were entitled “in Support of Summary Judgment” as opposed to “in Support of and in Opposition to Summary Judgment,” or simply “Affidavit of Discover Bank” or “Declaration of Peter Osterman.”

Discover offered to this Court, and the superior court, the case *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132 (9th Cir. 2001), whose facts are nearly identical to this case. See App. Br. at 27-28. Since Lemley did not respond to this argument, it is undisputed here that a court should consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them. *Id.* at 1135.

No purpose would have been served in filing duplicate affidavits both in support of and opposition to summary judgment, and it was error not to consider these documents. Not only that, but elevating form over substance in this way, requiring additional documents merely to provide a caption entry, violates at least two of the purposes of CR 1, which requires the rules to be interpreted in a manner that secures a just, speedy, and inexpensive determination of every action. *See also Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498, 933 P.2d 1036, 1042 (1997) (“our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action”).

CR 1 and its federal counterpart, Fed.R.Civ.P. 1, contain the same language urging resolving of cases on the merits. In discussing the policy behind the federal rules, the Supreme Court said it is “entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of ... mere technicalities.” *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

*DGHI, Enterprises v. Pac. Cities, Inc.*, 137 Wash. 2d 933, 954, 977 P.2d 1231, 1241 (1999).

It was clear error for the superior court to choose to ignore supporting affidavits, timely and properly in the record, because the captions were entitled “in Support of Summary Judgment” as opposed to

“in Support of and in Opposition to Summary Judgment,” or simply “Affidavit of Discover Bank” or “Declaration of Peter Osterman.” This is so especially where CR 56(c) expressly requires consideration of all such documents in the record.

**E. Discover should have been permitted to prove the contract by course of conduct.**

It is undisputed that Discover’s lawsuit against Lemley was a breach of contract claim. Discover has presented an argument supported by authority showing that a contract can be proved by course of conduct, and sufficient evidence of the existence of the contract was presented to the superior court to raise a genuine issue of material fact to prevent a grant of summary judgment. App. Br. at 29-33. Lemley again did not rebut Discover’s analysis that a contract can be proved by course of conduct, and that sufficient evidence of the existence of the contract was presented to the superior court to raise a genuine issue of material fact to prevent a grant of summary judgment.

Washington law clearly establishes documented use of a credit card, evidenced by detailed billing statements, is sufficient to show the existence of a contract. *Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 673-74, 292 P.3d 128 (2012); *Discover Bank v. Ray*, 139 Wn. App. 723, 727, 162 P.3d 1131 (2007). Here, Discover offered documents authenticated by its employees that included its cardmember agreement with

Lemley, monthly statements sent to Lemley chronicling his purchases, payments, finance charges and balances, cancelled checks that had been made out to Discover by Lemley memorializing payments he made on purchases he understood to be his and Lemley's own bank statements. There was abundant evidence upon which to raise an issue of fact as to Lemley's motion, if not outright grant the cross-motion for summary judgment brought by Discover.

**F. Lemley has not presented any rebuttal regarding Discover's argument that the superior court erred in denying Discover's motion for reconsideration.**

Discover also appealed the superior court's error in denying its CR 59 motion for reconsideration. It is undisputed that Discover timely moved for reconsideration of the superior court's orders on the parties' cross-motions for summary judgment. App. Br. at 34 (citing CP 722-28). The motion was supported by the Declaration of Peter R. Osterman in Support of Motion for Reconsideration. *Id.* (citing CP 729-52). Not only did the superior court err by not considering the documents that Discover had timely submitted, as discussed above, but a trial court can consider new evidence in granting a motion for reconsideration reversing a prior summary judgment order. *See e.g., Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 755, 162 P.3d 1153, 1160 (2007); *Matter of Estate of Hansen*, 81 Wn. App. 270, 283, 914 P.2d 127, 134

(1996). Bank statements improperly withheld by Lemley during discovery and produced by Lemley at a motion to compel their discovery only two days before the hearing on summary judgment conclusively proved that Lemley owed the debt. CP 724. The superior court should have considered this evidence and reversed summary judgment, but instead entered an Order Denying Motion for Reconsideration. CP 929-30. This was also error and should be reversed.

**G. Lemley's request for attorney fees should be denied, and fees should be granted to Discover.**

After his "conclusion," Lemley requests attorney fees on appeal. Resp. Br. at 13. Since the grant of summary judgment to Lemley should be reversed, the order granting attorney fees below should also be reversed, and Lemley should also be denied attorney fees on appeal. Rather, the Court should award Discover attorney fees on appeal, as requested in Appellant's Brief at 36.

### III. CONCLUSION

Compelling evidence produced by Discover warranted denial of Lemley's motion for summary judgment and the granting of Discover's motion for summary judgment. At the very least, the superior court should have found that a genuine issue of material fact existed for trial. Its decisions below, including the grant of attorney's fees and denial of reconsideration, should be reversed.

Respectfully submitted this 15 day of May, 2013.

BISHOP, WHITE, MARSHALL  
& WEIBEL, PS

By:   
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Krista L. White, WSBA No. 8612  
Of Attorneys for Appellant  
Discover Bank

## CERTIFICATE OF SERVICE

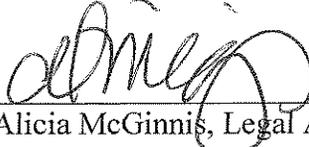
I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on May 15, 2013, I caused service of the foregoing on each and every attorney of record herein by first class mail, postage prepaid at the following address:

Kirk D. Miller  
211 E. Sprague Ave.  
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and

Michael D. Kinkley  
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DATED this 15 day of May at Seattle, Washington.

  
\_\_\_\_\_  
Alicia McGinnis, Legal Assistant