

FILED

DEC 07 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31080-9-III

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

DISCOVER BANK, ISSUER OF THE DISCOVER CARD,

Appellant.

v.

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

Respondents.

BRIEF OF APPELLANT

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

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101
(206) 622-5306

FILED

DEC 07 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31080-9-III

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

DISCOVER BANK, ISSUER OF THE DISCOVER CARD,

Appellant.

v.

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

Respondents.

BRIEF OF APPELLANT

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

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101
(206) 622-5306

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	3
III. STATEMENT OF THE CASE.....	5
A. Lemley obtained a credit card from Discover, and failed to honor his obligations.	5
B. The superior court erred by disregarding voluminous evidence properly in the court record and then granting summary judgment dismissal to Lemley.	6
1. Lemley admitted owing the debt in his initial pleadings, but the court denied both parties early motions for summary judgment.	6
2. The two each parties moved for summary judgment, and Discover provided significant testimonial and documentary evidence support.	7
a. Lemley filed a summary judgment motion without first conferring with Discover, contrary to Spokane County LR 40(10).....	7
b. Discover filed documents in Opposition to Lemley’s Motion for Summary Judgment and in Support of its own Motion for Summary Judgment.	8
c. Discover’s summary judgment papers included the Affidavit of Joshua Smith and attached documentary evidence.	9
d. Discover’s summary judgment papers included the Affidavit of James Ball and attached documentary evidence.	10
e. Discover’s summary judgment papers included the Affidavit of Krista L. White and attached documentary evidence.	11

3.	The superior court granted Lemley’s motion for summary judgment and declined to consider Discover’s motion for summary judgment.	12
C.	The superior court denied Discover’s motion for reconsideration and awarded Lemley attorney fees.	14
IV.	SUMMARY OF ARGUMENT	16
V.	ARGUMENT.....	17
A.	The superior court erred by refusing to consider numerous documents in the court file and, by doing so, not only declined to grant summary judgment to Discover, it granted summary judgment dismissal to Lemley, who had already admitted in his initial pleadings that he owed the debt.	17
1.	The standard of review is <i>de novo</i>	17
B.	The superior court erred by ignoring evidence and pleadings in the record and granting summary judgment dismissal to Lemley.	19
1.	Lemley’s own pleading admitting to owing the debt was sufficient to raise an issue of fact for purposes of his summary judgment, even if the amounts owed, if any, would have been left for a jury determination.	19
2.	The 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.	21
3.	The superior court erred by refusing to consider documents in the file that had been submitted in time to be considered for Lemley’s summary judgment solely because of the title on the caption, thus honoring form above substance.....	27
4.	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.	29

C.	Even if the superior court felt that Discover's motion was untimely, it was still appropriate for the superior court to enter judgment in favor of Discover, even though it was the nonmoving party.....	31
D.	The superior court erred in denying Discover's motion for reconsideration.	33
E.	The superior court erred in awarding attorney fees to Lemley.	35
F.	Discover requests attorney fees and costs on appeal based on the contract.....	36
VI.	CONCLUSION.....	36

TABLE OF AUTHORITIES
Table of Cases

	Page(s)
Federal Cases	
<i>Barthelemy v. Air Lines Pilots Ass'n</i> , 897 F.2d 999, 1018 (9th Cir. 1990)	22
<i>Chevron USA, Inc. v. Cayetano</i> , 224 F.3d 1030, 1037 & n. 5 (9th Cir. 2000) <i>cert. denied</i> , 532 U.S. 942, 121 S.Ct. 1403, 149 L.Ed.2d 346 (2001).....	27
<i>Fair Housing Council of Riverside County, Inc. v. Riverside Two</i> , 249 F.3d 1132 (9th Cir. 2001)	27, 28
Cases	
<i>Braaten v. Saberhagen Holdings</i> , 165 Wn. 2d 373, 198 P.3d 493 (2008).....	17
<i>Briggs v. Nova Services</i> , 166 Wn. 2d 794, 213 P.3d 910 (2009).....	17
<i>Citoli v. City of Seattle</i> , 115 Wn. App. 459, 61 P.3d 1165, 1174 (2002) ..	23
<i>City of Lakewood v. Pierce County</i> , 144 Wn. 2d 118, 30 P.3d 446 (2001).....	18
<i>Davis v. Baugh Indus. Contractors, Inc.</i> , 159 Wn.2d 413, 150 P.3d 545 (2007).....	17
<i>Degel v. Majestic Mobile Manor, Inc.</i> , 129 Wn. 2d 43, 914 P.2d 728 (1996).....	18
<i>Discover Bank v. Ray</i> , 139 Wn. App. 723, 162 P.3d 1131 (2007).....	2, 9, 16, 30, 32
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	17, 18
<i>Impecoven v. Dept. of Rev.</i> , 120 Wn. 2d 357, 841 P.2d 752 (1992).....	31
<i>IndoorBillboard v. Integra Telecom of Washington, Inc.</i> , 162 Wn. 2d 59, 170 P.3d 10 (2007)	17
<i>Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.</i> , 122 Wn. App. 736, 87 P.3d 774, 781 (2004)	22, 24
<i>Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC</i> , 139 Wn. App. 743, 162 P.3d 1153, 1160 (2007)	35
<i>Key v. Cascade Packing Co., Inc.</i> , 19 Wn. App. 579, 576 P.2d 929, 931 (1978).....	18

<i>Matter of Estate of Hansen</i> , 81 Wn. App. 270, 914 P.2d 127, 134 (1996).....	35
<i>Murphy v. Murphy</i> , 44 Wn.2d 737, 270 P.2d 808 (1954).....	21
<i>Neilson v. Vashon Island School District No. 402</i> , 87 Wn. 2d 955, 558 P.2d 167 (1976)	20, 21
<i>Northwest Indep. Forest Mfrs. v. Dep't of Labor & Indus.</i> , 78 Wn. App. 707, 899 P.2d 6 (1995).....	29
<i>Osborn v. Mason County</i> , 157 Wn. 2d. 18, 134 P.3d 197 (2006)	17
<i>Rubenser v. Felice</i> , 58 Wn. 2d 862, 365 P. 2d 320 (1961).....	31
<i>Simmonds v. Michael</i> , 130 Wn. App. 1012 (2005).....	21
<i>St. John Med. Ctr. v. State ex rel. Dept. of Soc. & Health Services</i> , 110 Wn. App. 51, 38 P.3d 383, 390 (2002).....	29
<i>State v. Bellerouche</i> , 129 Wn. App. 912, 120 P.3d 971 (2005).....	26
<i>State v. Ben-Neth</i> , 34 Wn. App. 600, 663 P.2d 156 (1983).....	25
<i>State v. Quincy</i> , 122 Wn. App. 395, 95 P.3d 353 (2004).....	25
<i>TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.</i> , 140 Wn. App. 191, 165 P.3d 1271, 1282 (2007).....	29
<i>Urban Dev., Inc. v. Evergreen Bldg. Products, LLC</i> , 114 Wn. App. 639, 59 P.3d 112, 119 (2002)	30
<i>Wellbrock v. Assurance Co. of Am.</i> , 90 Wn. App. 234, 951 P.2d 367, 370 (1998).....	19
<i>Young v. Liddington</i> , 50 Wn.2d 78, 309 P.2d 761 (1957)	25
Statutes	
RCW 5.45.020	5, 21, 24, 26
Rules and Regulations	
Spokane County LR 40(10)	7, 8
CR 56(c).....	3, 4, 14, 18, 19, 27, 34
CR 56(e).....	1, 2, 5, 14, 21, 22, 24
CR 59	33, 34
ER 801(d)(2).....	19
RAP 18.1.....	36

I. INTRODUCTION

This appeal arises from a collection action in which Appellant-Plaintiff Discover Bank (“Discover”) sought to recover on a defaulted credit card held by Respondent-Defendant Maurie L. Lemley (“Lemley”). Discover appeals the superior court’s order granting summary judgment dismissal to Lemley, CP 716-20, subsequent denial of reconsideration, CP 929-30, and awards of attorney fees, CP 932-36, 952-53.

The primary basis for this appeal, simply stated, is that the court improperly granted summary judgment where there were voluminous amounts of evidence that, if nothing else, raised numerous genuine issues of material fact mandating a denial of Lemley’s motion for summary judgment. In granting summary judgment, the superior court erred by refusing to consider affidavits and documents that were timely filed and in the record, including Lemley’s own Response to the Complaint, in which he admitted opening the account and defaulting on payments. CP 9-10, 13-14. This admission alone required denial of summary judgment. The superior court also erred by refusing to consider documents in the record that were filed in sufficient time to be considered at Lemley’s summary judgment hearing, where the affidavits met the requirements of CR 56(e). RP (06/15/12) at 7:1, 15:7-20; CP 713-14, CP 716-20.

Based on this misapplication of CR 56(e), the superior court erred by refusing to consider affidavits with exhibits, including: (1) a copy of the application and cardmember agreement, (2) copies of monthly transaction statements showing charges to the account, date of charges, and a calculation of balance owed, (3) copies of checks written to Discover Bank by Lemley as payment on the account, (4) copies of Lemley's bank statements showing regular monthly payments to Discover, (5) a copy of a letter from Lemley admitting to opening the account and defaulting on payments, and (6) a copy of a response to the complaint filed by Lemley wherein he also admitted opening the account. CP 366-458 (Joshua Smith Affidavit); CP 317-49 (James Ball Affidavit); CP 350-53 (Krista White Affidavit); CP 15-94 (Patrick Sayers Affidavit).

In the *Discover Bank v. Ray*, 139 Wn. App. 723, 162 P.3d 1131 (2007), Discover prevailed on an identical motion for summary judgment against the cardholder, with the same documentation presented to the superior court in this case, although in *Ray* Discover did not even have the admission of liability that Lemley has made in this case. The superior court was made aware of *Ray*, but declined to follow it.

The pleadings, answers to discovery requests, affidavits, and documentary evidence on file were sufficient to grant summary judgment

in favor of Discover. However, the superior court refused to consider voluminous amounts of evidence, both testimony and documentary evidence, that were timely entered into the court file and, by doing so, not only declined to grant summary judgment to Discover, to which it was entitled, but instead granted summary judgment dismissal to Lemley, who had admitted in his initial pleadings that he owed the debt. Thus, even if a dispute remained for trial as to the amount of the debt owed, it was clear error to grant summary judgment in Lemley's favor and hold there was insufficient evidence to support the debt.

The court then erred by denying Discover's motion for reconsideration, CP 929-30, and awarding Lemley attorney fees, CP 932-36, 952-53.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The superior court erred in granting Lemley's motion for summary judgment where the superior court refused to consider documents that were timely filed and in the record, contrary to CR 56(c).

2. The superior court erred by declining to consider and grant summary judgment to Discover based on the evidence.

3. The superior court erred by denying Discover's motion for reconsideration, especially where Lemley improperly withheld documents during the discovery process and produced them only two days before the hearing on summary judgment, and where these documents conclusively proved that he owed the debt.

4. The superior court erred by granting Lemley's motion for attorney fees and costs.

Issues Pertaining to Assignments of Error

1. Whether the superior court erred in granting Lemley's motion for summary judgment where the superior court refused to consider documents that were timely filed and in the record, contrary to CR 56(c).

2. Whether there was sufficient admissible evidence in the court record to raise a genuine issue of fact mandating denial of Lemley's motion for summary judgment.

3. Whether there was sufficient evidence for the superior court to grant summary judgment to Discover, at least on the issue of liability.

4. Whether the superior court erred by disregarding Lemley's own admissions in a pleading that he owed the debt.

5. Whether the superior court erred by improperly relying on CR 56(e) and RCW 5.45.020 to disregard a variety of declarations and affidavits that were in the record and filed sufficiently prior to the summary judgment hearing to be considered and which met the requirements of CR 56(e) and RCW 5.45.020.

6. Whether the superior court erred by denying Discover's motion for reconsideration.

7. Whether the superior court erred by not considering documents improperly withheld by Lemley during the discovery process that were produced only two days before the hearing on summary judgment, and where these new documents conclusively proved that Lemley owed the debt.

8. Whether the superior court erred by granting Lemley's motion for attorney fees and costs.

III. STATEMENT OF THE CASE

A. Lemley obtained a credit card from Discover, and failed to honor his obligations.

On October 1, 2006, Lemley opened an account with Discover for a credit card. CP 318. The terms and conditions of the credit card agreement were sent by mail along with Lemley's credit card. *Id.* Lemley admitted that he obtained a credit card with Discover and ran up a debt

that he could not pay. CP 10, 14. In “Defendant’s Response to Complaint,” Lemley stated: “I realize I asked for this credit card.” *Id.* Lemley used the credit card to make purchases, CP 369-432, and would write checks to Discover to pay down the debt. CP 433-58. Lemley ceased making payments in February 2010, and defaulted on the account. CP 319.

B. The superior court erred by disregarding voluminous evidence properly in the court record and then granting summary judgment dismissal to Lemley.

1. Lemley admitted owing the debt in his initial pleadings, but the court denied both parties early motions for summary judgment.

On December 16, 2010, Discover filed a summons and complaint alleging Discover was damaged by Lemley’s failure to honor his agreement to repay the money he had borrowed from Discover. CP 1-4.

On January 18, 2011, Lemley filed a Response to the Complaint, acknowledging that he opened the account and failed to make payments due under the terms of the credit card agreement. CP 10. Subsequent memoranda again admitted that he had opened the account. CP 14.

Early in the case, Discover made a motion for summary judgment, CP 11-12, and included with this motion was the sworn and notarized Affidavit of Patrick Sayers in Support of Summary Judgment, which

contained the cardmember agreement in effect at the time of the default, and statements regarding Lemley's account. CP 15-94. In his affidavit, Mr. Sayers testified that he is an account manager in the Attorney Placement Department for DB Servicing Corporation, the servicing affiliate of Discover. CP 15-16. Mr. Sayers testified that the documents that he attached as exhibits are maintained by his employer in the course of business, and that he is a custodian of the records at issue and can attest to their authenticity. *Id.* Mr. Sayers authenticated the terms and conditions of the cardmember agreement in effect at the time of the default, CP 18-31, and invoices sent to Lemley. CP 32-94. The motion was denied.

Lemley also made an early motion for summary judgment, CP 96-126, which was also denied. CP 127.

2. **The two each parties moved for summary judgment, and Discover provided significant testimonial and documentary evidence support.**
 - a. **Lemley filed a summary judgment motion without first conferring with Discover, contrary to Spokane County LR 40(10).**

On May 17, 2012, Lemley filed a second motion for summary judgment noting it for hearing on June 15, 2012. CP 259, 292. Although Spokane County Local Rule 40(10) required that Lemley confer with Discover on a date, Lemley did not do so, instead noting the motion on

minimum notice. CP 728. Lemley did not deny being indebted to Discover and no affidavit or declaration was submitted in support of the motion other than a declaration of their counsel contending that Discover had not produced evidence to support its claim. CP 260-91.

b. Discover filed documents in Opposition to Lemley's Motion for Summary Judgment and in Support of its own Motion for Summary Judgment.

On May 24, 2012, Discover filed its motion for summary judgment, CP 316, and document entitled "Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Its Motion for Summary Judgment." CP 354-363. Discover's motion was set to be heard on June 20, 2012. A separate hearing date for Discover's motion was necessary because its motion could not timely be heard on the date of Lemley's motion, given the minimum notice by Lemley of his motion and his failure to comply with Local Rule 40(10). CP 728. Lemley opposed having the hearings at the same time. CP 654-56. All of the documents were filed on May 24, 2012, RP (06/15/12) at 17:3-9, which was more than sufficient time to be heard at Lemley's summary judgment motion.

In its Memorandum, Discover indicated that the superior court had twice denied Lemley's prior motions for summary judgment because of

the existence of genuine issues of material fact, and that the current motion suffered from the same flaws. CP 357. Discover also informed the superior court that, in the *Discover Bank v. Ray*, 139 Wn. App. 723, 162 P.3d 1131 (2007), Discover prevailed on an identical motion for summary judgment against the cardholder, with the same documentation presented to the superior court in this case. CP 358-60; RP (06/15/12) at 14-15. Discover argued that, since it was providing documentary evidence that clearly supported Lemley's use of the credit card, that Lemley was bound by the terms of the agreement. *Id.* The documentary evidence, in addition to what was already in the record, included an Affidavit of Joshua Smith, CP 366-458, an Affidavit of James Ball, CP 317-49, and an Affidavit of Krista L. White. CP 350-53.

c. Discover's summary judgment papers included the Affidavit of Joshua Smith and attached documentary evidence.

Discover filed the signed and notarized Affidavit of Joshua Smith, entitled "Affidavit of Discover Bank Smith in Support of Summary Judgment." CP 366-458. In his declaration, Mr. Smith testified that he is an account manager for the Legal Placement Department for DB Servicing Corporation, the servicing affiliate of Discover Bank. CP 366. Mr. Smith testified that he had reviewed the documents attached to his affidavit. *Id.*

Mr. Smith testified that the documents that he attached as exhibits are created and/or maintained by his employer in the course of business, contemporaneous, and kept in the regular course of business. CP 367. Mr. Smith testified that he is a custodian of the records at issue and can attest to their authenticity. *Id.* The documents provided by Mr. Smith included copies of monthly transaction statements showing charges to the account by Lemley, the date of the charges, and a calculation of the balance owed, which totaled \$5,729.78. CP 369-433. Mr. Smith also provided copies of checks signed by Lemley to Discover for payment on the account, and on which are listed the same account number as are on the statements. CP 434-58.

d. Discover's summary judgment papers included the Affidavit of James Ball and attached documentary evidence.

The day before, in opposition to Lemley's motion and in support of its own motion, Discover also filed the signed and notarized Affidavit of James Ball, entitled "Affidavit of Discover Bank in Support of Summary Judgment". CP 317-49. In his affidavit, Mr. Ball testified that he is the Team Leader for the Legal Placement Department for DB Servicing Corporation, the servicing affiliate of Discover Bank. CP 317. Mr. Ball testified that he had reviewed the documents attached to his affidavit. *Id.*

Mr. Ball testified as to his duties as team leader, and his familiarity with the records that he has attached as exhibits. CP 318. Mr. Ball testified that the documents that he attached as exhibits are created and/or maintained by his employer in the course of business, contemporaneous, and kept in the regular course of business. *Id.* Mr. Ball testified that he is a custodian of the records at issue and can attest to their authenticity. *Id.* Mr. Ball testified as to the original cardmember agreement and some subsequent amendments, *id.*, and he provided documentary evidence of the agreements. CP 329-49.

e. Discover's summary judgment papers included the Affidavit of Krista L. White and attached documentary evidence.

On the same date, in opposition to Lemley's motion and in support of its own motion, Discover also filed the signed and notarized "Affidavit of Krista L. White in Support of Summary Judgment and Motion to Strike Answer." CP 350-53. Ms. White was the attorney or record representing Discover. Ms. White testified that, on October 18, 2010, her office had received a response from Lemley in response to an unfiled copy of the Complaint, CP 350, and she attached as an exhibit a copy of the letter signed by Lemley that had been received by her office. CP 352. Ms. White testified that, on December 16, 2010, her office had received an

Answer from Lemley in response to the filed Complaint, CP 350-51, and she attached as an exhibit a copy of the answer that had been received by her office, which was also signed by Lemley. CP 353. In each of these documents signed by Lemley, Lemley had admitted owing a debt to Discover. CP 352-53.

3. The superior court granted Lemley's motion for summary judgment and declined to consider Discover's motion for summary judgment.

On June 11, 2012, Lemley filed a response in opposition to Discover's motion for summary judgment. CP 635-39.

On June 15, 2012, Discover filed Discover Bank's Reply to Opposition to Discover's Motion for Summary Judgment, CP 694-99, and an affidavit entitled "Affidavit of Peter Osterman in Support of Summary Judgment" which attached copies of Lemley's untimely produced bank statements. CP 701-08.

On June 28, 2012, the superior court heard arguments on Lemley's motion for summary judgment. RP (06/15/12). The superior court was aware of the evidence submitted by Discover as she stated in her opening remarks at the summary judgment hearing that she would not consider any part of the Affidavit of James Ball, RP (06/15/12) at 7:1, and later stated that she would not consider any of the affidavits. RP 15:7-20. The

superior court held that the Affidavit of Joshua Smith, CP 366-458, Affidavit of James Ball, CP 317-49, and Affidavit of Krista L. White. CP 350-53 did not have sufficient reliability to be considered under CR 56(e). CP 713-14, 718. Based on this ruling, the superior court held that Discover lacked sufficient evidence to raise any genuine issue of material fact as to whether Lemley owed Discover the amount sought. RP (06/15/12) at 24-26. The superior court was also aware that Discover had timely served Lemley with discovery requests, but that Lemley did not serve a response until two days before the hearing of Lemley's motion for summary judgment. CP 690; RP (06/15/12) at 13.¹ The documents finally produced by Lemley included his bank statements which showed regular monthly payments to Discover until they defaulted in payment. CP 701-08. The superior court also declined to consider these documents.

In its Order Granting Defendants' Motion for Summary Judgment, CP 716-20, also entered on June 28, 2012, the superior court noted that Discover had alleged, among other things, that Lemley had entered into a revolving credit agreement with Discover, had agreed to make regular payments, and that he became indebted to Discover by his failure to do so. CP 717. Yet, the superior court dismissed all of Discover's claims

¹ It is also of note that the Court felt so strongly about the incivility shown by Lemley's counsel that it placed a chastisement into the record. CP 815.

because Discover had not attached a copy of the contract to the complaint, *id.*, the sworn and notarized affidavits provided by Discover “lacked reliable foundation” under CR 56(e) and were not considered, *id.*, and that Discover could not establish the exact amount of \$ 5,729.78. CP 718. The superior court then ruled it would not consider Discover’s summary judgment motion. CP 719.

C. The superior court denied Discover’s motion for reconsideration and awarded Lemley attorney fees.

On July 2, 2012, Discover timely moved for reconsideration of the superior court’s orders on the parties’ cross-motions for summary judgment. CP 722-28. The motion was supported by the Declaration of Peter R. Osterman in Support of Motion for Reconsideration. CP 729-52. In support of its motion, Discover argued that, under Civil Rule 56(c) and applicable legal authority, the superior court was required to consider all pleadings and, at a very minimum, Lemley’s Response to the Complaint, in which he admitted that he owed the debt, which created a genuine issue of material fact if not conclusive evidence in support of Discover’s claim. CP 723-24. Discover also argued that the superior court should also consider documents improperly withheld by Lemley during the discovery process that were produced at Discover’s motion to compel their production, the night before the hearing on summary judgment, and where

these new documents conclusively proved that Lemley owed the debt. CP 724. Discover also argued that the affidavits had sufficient foundation to be considered. CP 725-28. Lemley responded to the motion for reconsideration. CP 821-24, and Discover replied. CP 821-34.

On August 2, 2012, the superior court entered an Order Denying Motion for Reconsideration. CP 929-30. The superior court effectively ruled that, other than Discover's Memorandum, the other documents timely filed by Discover could only apply to Discover's own later-scheduled motion, *id.*, even though they had been filed in time to be heard in opposition to Lemley's motion, together with a memorandum in opposition to Lemley's motion, and did not state that they only related to Discover's cross-motion for summary judgment.

Lemley moved for attorney fees and costs. CP 757-58, 763-74. Discover opposed the motion on a variety of grounds. CP 835-47.

In two orders, the superior court then awarded to Lemley attorneys fees in the amount of \$30,748.29, and costs in the amount of \$1,811.79, and entered judgment against Discover. CP 908-12, 932-36, 952-56.

On August 22, 2012, Discover timely filed its Notice of Appeal. CP 922-36.

IV. SUMMARY OF ARGUMENT

The pleadings, answers to discovery requests, affidavits, and documentary evidence on file were sufficient to grant summary judgment in favor of Discover. However, the superior court refused to consider numerous documents in the file and, by doing so, not only declined to grant summary judgment to Discover, it granted summary judgment dismissal to Lemley, who had admitted in his initial pleadings that he owed the debt. Thus, even if there were a dispute as to the amount of the debt owed, it was clear error to grant summary judgment in his favor and hold there was insufficient evidence to support the debt.

In *Discover Bank v. Ray*, 139 Wn. App. 723, 162 P.3d 1131 (2007), Discover had prevailed on an identical motion for summary judgment against the cardholder, with the same documentation presented to the superior court in this case, although in *Ray* Discover did not even have the admission of liability that Lemley has made in this case. The superior court was made aware of *Ray*, but declined to follow it.

The superior court compounded its error by denying reconsideration and awarding attorney fees and costs to Lemley.

V. ARGUMENT

- A. **The superior court erred by refusing to consider numerous documents in the court file and, by doing so, not only declined to grant summary judgment to Discover, it granted summary judgment dismissal to Lemley, who had already admitted in his initial pleadings that he owed the debt.**

1. **The standard of review is *de novo*.**

Appellate courts review orders granting summary judgment *de novo*. *Briggs v. Nova Services*, 166 Wn. 2d 794, 801, 213 P.3d 910 (2009); *Braaten v. Saberhagen Holdings*, 165 Wn. 2d 373, 383, 198 P.3d 493 (2008). In reviewing a summary judgment order, the Appellate Court evaluates the case *de novo*. *IndoorBillboard v. Integra Telecom of Washington, Inc.*, 162 Wn. 2d 59, 70, 170 P.3d 10 (2007); *Osborn v. Mason County*, 157 Wn. 2d. 18, 22, 134 P.3d 197 (2006). Superior court rulings made in conjunction with a motion for summary judgment, including evidentiary rulings, are reviewed *de novo*. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Using a *de novo* standard is consistent with requirements that the appellate court conducts the same inquiry as a trial court. *Folsom*, 135 Wn.2d at 663. In fact, “[a]n appellate court would not be properly accomplishing its charge if [it] did not examine all the evidence presented

to the trial court, including evidence that had been redacted.” *Id.* In ruling on a motion for summary judgment:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c).

Summary judgment is appropriate only if all pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn. 2d 43, 48, 914 P.2d 728 (1996); *City of Lakewood v. Pierce County*, 144 Wn. 2d 118, 125, 30 P.3d 446 (2001).

“The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. If, however, there is a genuine issue of material fact a trial is necessary.” *Key v. Cascade Packing Co., Inc.*, 19 Wn. App. 579, 582, 576 P.2d 929, 931 (1978) (citing *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299, 301 (1975)). “**In making this determination the trial court** and the appellate court on review, **must consider all the evidence** and make all reasonable inferences most favorably to the non-moving party.” *Id.* at 582 (emphasis

added). The evidence that must be considered by the court includes “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any” CR 56(c). A motion for summary judgment “should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Wellbrock v. Assurance Co. of Am.*, 90 Wash. App. 234, 239, 951 P.2d 367, 370 (1998).

B. The superior court erred by ignoring evidence and pleadings in the record and granting summary judgment dismissal to Lemley.

The superior court refused to consider evidence in the record that that was not only sufficient for granting Discover’s pending summary judgment motion, it was clearly sufficient to raise genuine issues of material fact for purposes of denying Lemley’s summary judgment motion.

1. Lemley’s own pleading admitting to owing the debt was sufficient to raise an issue of fact for purposes of his summary judgment, even if the amounts owed, if any, would have been left for a jury determination.

CR 56(c) requires the court to consider “pleadings” in making summary judgment determinations. In his Response to Discover’s Complaint, Lemley admitted to owing the debt being sued upon by Discover. CP 9-10, 13-14. This response was provided in a pleading, and was a freely made admission by Lemley, a party opponent. ER 801(d)(2).

This document alone is sufficient to raise a genuine issue of material fact as to whether there was a contract between Discover and Lemley.

Lemley filed an initial pleading in which he admitted to opening the Discover account and defaulting on payments. CP 10, 14. Not only was this pleading attached to the Affidavit of Krista White, along with another letter from the Lemleys admitting to owing the debt, CP 350-51, it was on file practically from commencement of the case. CP 10, 14. Discover also discussed both of these documents at the summary judgment hearing. RP (06/15/12) at 14-15. The superior court stated: "I understand the reference Ms. White is making to the document filed January 31st. The court will consider that as argument. It has not been offered to defeat the Motion for Summary Judgment. It is argument at this time." *Id.* at 15. Thus, the superior court considered as "argument" and not "evidence" the document in which Lemley admitted to owing the debt. CP 10, 14.

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). Even when a pleading is amended or withdrawn and the superseded portion ceases to be a conclusive judicial admission, it still remains a statement against interest and as such, is

competent evidence of the facts stated therein. *Simmonds v. Michael*, 130 Wn. App. 1012 (2005). Further, where the pleadings and memoranda indicate that an issue has been impliedly withdrawn from contest, the party so doing waives the necessity of proof of that issue by the opposing party. *Neilson*, 87 Wn.2d at 958. In *Murphy v. Murphy*, 44 Wn.2d 737, 270 P.2d 808 (1954), the court held that where a fact is admitted by the pleadings, there is no necessity for any evidence to support a finding of court based thereon.

Discover referred to both documents in oral argument during the summary judgment hearing. RP (06/15/12) at 14-15. Lemley's Response to the Complaint admitted that he had a Discover Card and was indebted to Discover Bank. CP 10, 14. The superior court should have considered those admissions without the need of a sworn affidavit of Discover or its counsel, and denied the motion for summary judgment based upon the Lemleys' own admissions.

2. The 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.

The affidavits disregarded by the superior court fully complied with CR 56(e) and RCW 5.45.020.

Underlying CR 56(e) is the requirement that documents the parties submit must be authenticated to be admissible. 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. The rule does not limit the type of evidence allowed to authenticate a document; it merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be. ER 901 and 902 provide alternative means of authenticating documents in addition to those found in chapter 5.44 RCW and CR 44.

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

“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901. Authentication may be satisfied when the party challenging the document originally provided it through discovery. *Int'l Ultimate*, 122 Wn. App. at 748. The requirements of personal knowledge and competence to testify provided in Rule 56(e) “may be inferred from the affidavits themselves.” *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990). In determining the admissibility of statements in an affidavit or declaration, the court should make common sense assumptions about whether the affiant or declarant is speaking from personal knowledge.

Citoli v. City of Seattle, 115 Wn. App. 459, 475, 61 P.3d 1165, 1174 (2002).

In the Affidavit of Joshua Smith, Mr. Smith testified that he is an account manager for the Legal Placement Department for DB Servicing Corporation, the servicing affiliate of Discover Bank, CP 366, and that he had reviewed the documents attached to his affidavit. *Id.* Mr. Smith testified that the documents that he attached as exhibits are created and/or maintained by his employer in the course of business, contemporaneous, and kept in the regular course of business, CP 367, that he is a custodian of the records at issue and can attest to their authenticity, *id.*, and he attached the documents at issue. CP 369-458.

In the Affidavit of James Ball, Mr. Ball testifies that he is the Team Leader for the Legal Placement Department for DB Servicing Corporation, the servicing affiliate of Discover Bank, CP 317, that he had reviewed the documents attached to his affidavit, *id.*, that he was familiar with the records that he has attached as exhibits, *id.* at 318, that the attached exhibits are created and/or maintained by his employer in the course of business, contemporaneous, and kept in the regular course of business, that he is a custodian of the records at issue and can attest to their authenticity, *id.*, and he attached the documents at issue. CP 329-49.

It is practically impossible to see how the witnesses could have provided testimony to make their affidavits more reliable. If the court had any issues with the weight of the testimony or the documents attached, this would have created an issue of material fact that would require denying Lemley's summary judgment motion.

In addition, in the "Affidavit of Krista L. White in Support of Summary Judgment and Motion to Strike Answer," CP 350-53, Ms. White, the attorney of record for Discover, testified that, on October 18, 2010, her office had received a response from Lemley in response to an unfiled copy of the Complaint, CP 350, and that, on December 16, 2010, her office had received an Answer from Lemley in response to the filed Complaint, CP 350-51, and she attached as exhibits a copy of these documents. CP 352-53.

Attached to the Affidavit of Peter Osterman, CP 701-708, also one of Discover's attorneys, were copies of Lemley's bank statements produced in discovery showing monthly payments to Discover Bank.

CR 56(e) allows an attorney to base his or her affidavit on documents properly before the court. And this includes documents already in the court files, as well as additional documents presented by the parties in a motion for summary judgment.

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

The affidavits disregarded by the superior court also fully complied with RCW 5.45.020.

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.

Business records that are maintained in the regular course of business and are created at or about the time of the relevant events are admissible to show an “act, condition or event,” including a debt. *Young v. Liddington*, 50 Wn.2d 78, 83, 309 P.2d 761 (1957) (“Such [business] records are permitted in evidence to prove the truth and accuracy of accounts then present and contemporaneously recorded. They are the routine product of an efficient clerical system. Typical of such records are payrolls, accounts receivable, accounts payable, bills of lading, and so forth”). A party offering such records need only submit foundational testimony from a “qualified witness,” a term that has been “broadly interpreted” by Washington courts. *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, did not understand how records were assembled at the computer center, and had never been to 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).

Discover has been unable to locate any published Washington case where documents attached to an affidavit in support of summary judgment were excluded based on RCW 5.45.020.² In this case, the individuals providing testimony clearly provided sufficient foundation to present the evidence to the superior court for the superior court’s consideration.

The testimony and documents presented by James Ball, Joshua Smith, and attorneys Krista L. White and Peter Osterman 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, also competent evidence, and also was sufficient to raise a genuine issue of material fact for purposes of denying Lemley’s motion for summary judgment. The court’s error in refusing to

² There are four unpublished cases, three regarding debt collection cases, in which the courts uniformly found on summary judgment that similar records attached to similar affidavits as the ones at issue here admissible. Unfortunately, Discover may not cite to these cases on appeal.

consider large amounts of competent evidence in the record warrants reversal of the summary judgment granted to Lemley.

3. The superior court erred by refusing to consider documents in the file that had been submitted in time to be considered for Lemley's summary judgment solely because of the title on the caption, thus honoring form above substance.

Under Civil Rule 56(c), it is the court's responsibility on cross motions for summary judgment to analyze whether the record demonstrates the existence of genuine issues of material fact. *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1037 & n. 5 (9th Cir. 2000) cert. denied, 532 U.S. 942, 121 S.Ct. 1403, 149 L.Ed.2d 346 (2001).

The superior court here would not consider Discovers Declarations and Affidavits because they were entitled "in Support of Summary Judgment" as oppose to "in Support of and in Opposition to Summary Judgment," or simply "Affidavit of Discover Bank" or "Declaration of Peter Osterman."

The facts in *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132 (9th Cir. 2001), are nearly identical to the case at issue here. In *Fair Housing*, the plaintiffs and defendants filed cross-motions for summary judgment. The plaintiffs did not submit additional evidence in opposition to defendants' motion for summary

judgment, but relied on evidence submitted in support of their own motion. Plaintiffs' "Statement of Genuine Issues" contained citations to evidence that they had submitted in support of their cross-motions and, as here, their memoranda in response to the defendants' motion for summary judgment contained citation to their evidence. Despite the foregoing, the district court granted the defendant's motion for summary judgment and denied the plaintiff's motion for summary judgment, holding that the plaintiffs had not submitted admissible evidence in opposition to the motion for summary judgment. *Id.* at p.1135.

On appeal, the plaintiffs argued that the district court erred by failing to review the evidence that they had submitted in support of their own motion for summary judgment as evidence in opposition to the defendants' motion for summary judgment. The Ninth Circuit agreed, reversed, and remanded, holding that a court must 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.

Here, Discover timely submitted evidence of Lemleys' admission to owning the credit card and his failure to make the payments, CP 10, 15, along with documentary evidence containing proof of the debt and how it was calculated, all attached to competent sworn Affidavits. CP 366-458

(Joshua Smith Affidavit); CP 317-49 (James Ball Affidavit); CP 350-53 (Krista White Affidavit); CP 15-94 (Patrick Sayers Affidavit).

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. The inferences from these documents required denial of the Lemleys' motion for summary judgment.

4. 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.

To prevail on a breach of contract claim, a plaintiff must show: (1) the existence of a contract, (2) a material breach of that contract, and (3) resulting damage. *St. John Med. Ctr. v. State ex rel. Dept. of Soc. & Health Services*, 110 Wn. App. 51, 64, 38 P.3d 383, 390 (2002) (citing *Northwest Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995)). “Any failure to perform a contractual duty constitutes a breach, and an injured party is generally entitled to those damages necessary to put that party in the same economic position it would have occupied had the breach not occurred,” *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 210, 165 P.3d 1271, 1282 (2007) (citation omitted). The signatures of

both parties are not an essential elements of a contract, and ex parte writings may be sufficient to create a contract if the writing contains all of the elements of a contract. *Urban Dev., Inc. v. Evergreen Bldg. Products, LLC*, 114 Wash. App. 639, 651, 59 P.3d 112, 119 (2002). “[A] memorandum that memorializes an oral agreement between the parties satisfies the writing requirement.” *Id.*

In *Discover Bank v. Ray*, 139 Wn. App. 723, 162 P.3d 1131 (2007), the court held that use of the credit card established the contract as provided in the cardmember agreement as the one at issue here. The *Ray* court held:

Here, the cardmember agreement clearly and unambiguously provided that use of the credit card issued by Discover Bank constituted acceptance of the cardmember agreement. Mr. Ray used the credit card issued by Discover Bank for several years. There is sufficient evidence to establish that Mr. Ray accepted the terms of the cardmember agreement **through his conduct of using the credit card.**” (Emphasis supplied).

Id. at 727.

The evidence provided to the superior court clearly established use of the credit card by Lemley. CP 366-458 (Joshua Smith Affidavit); CP 317-49 (James Ball Affidavit); CP 15-94 (Patrick Sayers Affidavit). Therefore, Lemley’s use and payment of the charges establishes what he admitted in his Response. CP 10, 14. He intended to and was bound by the Cardmember Agreement. *Ray*, 139 Wn. App. at 727.

The superior court erred in holding that there was a complete failure to prove a contract simply because it was not satisfied that there was a single written contract that included all the terms of the contract. RP (06/15/12) at 24-25. Discover timely submitted evidence of Lemleys' admission to owning the credit card and his failure to make the payments, CP 10, 14, along with documentary evidence containing proof of the debt and how it was calculated, all attached to competent sworn Affidavits. RP (06/15/12) at 17:3-9; CP 366-458 (Joshua Smith Affidavit); CP 317-49 (James Ball Affidavit); CP 15-94 (Patrick Sayers Affidavit). Even if a trier of fact might have reduced the amount that Discover sought to recover on the contract, Discover still made a sufficient showing that a contract existed between Discover and Lemley, so that it was improper to completely dismiss the action.

C. Even if the superior court felt that Discover's motion was untimely, it was still appropriate for the superior court to enter judgment in favor of Discover, even though it was the nonmoving party.

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).

Lemley admitted to opening and using the Discover Card and defaulting in making payments. CP 10, 14. Further, his bank statements showed regular monthly payments to Discover up to the time of default. In support of its own claim, Discover provided a copy of the original cardmember agreements and the amended terms, copies of monthly statements showing all of the charges to the account from November 2006 to August 2010, as well as the payments, a monthly computation of the monthly balance and finance charges, and copies of Lemley's checks payable to Discover. *See* CP 366-458 (Joshua Smith Affidavit); CP 317-49 (James Ball Affidavit); CP 15-94 (Patrick Sayers Affidavit).

In *Discover Bank v. Ray*, *supra* 139 Wn. App. 723, 162 P.3d 1131 (2007), Discover prevailed on an identical motion for summary judgment against the cardholder, with the same documentation, although without the admission of liability that Lemley made in this case in the case. The Court said:

Discover Bank provided Mr. Ray with copies of account statements from March 2000 to October 2004, a copy of the cardmember agreement, and copies of several cancelled checks that Mr. Ray had sent as payment on the debt. These materials were also provided to the trial court in support of Discover Bank's motion for summary judgment, along with an affidavit from one of the bank's account managers.

Id. at pp. 726-725.

The Court of Appeals upheld the trial court's grant of summary judgment in favor of Discover, holding that the use of the credit card constituted acceptance of its terms. *Id.* at p. 727. The superior court should have granted summary judgment to Discover based on *Discover Bank v. Ray*, which it was aware of, and on the facts before it. The inferences from facts before the court were not only favorable to Discover and should have resulted in the denial of the Lemleys' motion, but should have been sufficient for the superior court to grant Discover's motion.

D. The superior court erred in denying Discover's motion for reconsideration.

The superior court entered an Order Denying Motion for Reconsideration. CP 929-30. Pursuant to CR 59, a court can grant reconsideration on a variety of grounds, including the following:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
- (2) Misconduct of prevailing party or jury ...
- (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;
- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

CR 59.

Discover timely moved for reconsideration of the superior court's orders on the parties' cross-motions for summary judgment. CP 722-28. The motion was supported by the Declaration of Peter R. Osterman in Support of Motion for Reconsideration. CP 729-52. In support of its motion, Discover argued that, under Civil Rule 56(c) and applicable legal authority, the superior court was required to consider all pleadings and, at a very minimum, Lemley's Response to the Complaint, in which he admitted that he owed the debt, which created a genuine issue of material fact if not conclusive evidence in support of Discover's claim. CP 723-24.

At minimum, Lemley's Response to the Complaint, in which he admitted that he owed the debt, created a genuine issue of material fact if not conclusive evidence in support of Discover's claim. CP 10, 14. But, in addition to this, the ruling is simply incorrect. The Affidavits were all timely filed to be heard at Lemley's motion for summary judgment, and were "in the record" as contemplated by CR 56(c). They were clearly filed for purposes of defending against Lemley's motion, as they were cited in Discover's memorandum in opposition to Lemley's motion for summary

judgment. The superior court erred by not considering all of the evidence timely before it.

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). Discover argued that the superior court should consider documents improperly withheld by Lemley during discovery that were produced at a motion to compel their discovery only two days before the hearing on summary judgment and where these new documents conclusively proved that Lemley owed the debt. CP 724. The superior court should have considered this evidence and reversed summary judgment.

E. The superior court erred in awarding attorney fees to Lemley.

The superior court erred in regard to awarding attorney fees to Lemley because it erred in granting Lemley's motion for summary judgment. If this Court reverses the superior court's grant of summary judgment to Lemley, it should automatically also reverse the award of attorney fees and costs based on the grant of summary judgment.

F. Discover requests attorney fees and costs on appeal based on the contract.

Pursuant to RAP 18.1 and the contract between the Parties, CP 23, Discover requests an award of fees and costs in accordance with the contract between the parties.

VI. CONCLUSION

For the reasons set forth herein, Discover requests this Court to reverse the superior court's orders granting Lemley summary judgment dismissal, denying reconsideration, and awarding attorney fees and costs to Lemley, and to either: (1) enter summary judgment in favor of Discover on all issues, or (2) enter partial summary judgment in favor of Discover on liability and remand for trial on the amount of damages. Discover also requests an award of attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 5 day of December, 2012.

BISHOP, WHITE, MARSHALL
& WEIBEL, PS

By: 

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 December 6, 2012, I caused service of the foregoing on each and every attorney of record herein in the manner indicated:

Kirk D. Miller
211 E. Sprague Ave.
Spokane, WA 99202
Attorney for Defendants
Via regular mail, postage pre-paid

and

Michael D. Kinkley and Scott Kinkle
4407 N. Division St., Suite 914
Spokane, WA 99207
Attorney for Defendants
Via regular mail, postage pre-paid

And

Original and one copy filed with
Court of Appeals of the State of
Washington, Division III
500 N. Cedar Street
Spokane, WA 99201
Via overnight mail

DATED this 6th day of December, 2012, at Seattle, Washington.



Eva M. Lee