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**STATE OF WASHINGTON**  
**IN THE COURT OF APPEALS, DIVISION I**  
Court of Appeal Case Number 68573-2

AMERICAN EXPRESS BANK, FSB )  
 )  
Plaintiff-Respondent/Appellee )  
 )  
v. )  
 )  
DIANA J. BURLINGTON, )  
Defendant-Appellant. )  
\_\_\_\_\_ )

**APPELLANT'S OPENING BRIEF**

Filed by:

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STATE OF WASHINGTON  


Appeal from the Superior Court for Island County  
Case Number 09-2-00292-9  
**the Honorable Alan R. Hancock, Presiding**

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III. THE TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT WHEN THE AFFIDAVITS SHOWED THAT MORE THAN A TRIABLE MATERIAL ISSUE OF FACT EXISTED AS TO THE AMOUNT OF DAMAGES.

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[There is no appendix of materials outside of the record.]

[There are no related cases known to Appellant BURLINGTON.]

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**TABLE OF AUTHORITIES**

**WASHINGTON DECISIONAL LAW:**

**WASHINGTON CONSTITUTIONS, STATUTES, & RULES:**

**FOREIGN DECISIONAL LAW:**

**FOREIGN CONSTITUTIONS, STATUTES & RULES:**

**TREATISES & OTHER SCHOLARSHIP:**

## **INTRODUCTION**

This appeal solely concerns the propriety of a trial court's entry of Summary Judgment. Appellant urges that it was error for several different reasons.

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## **ASSIGNMENT OF ERRORS**

### **I.**

THE TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT, WHEN THE PLAINTIFF FAILED TO MAKE ANY DEMONSTATION THAT IT LACKED CAPACITY UNDER THE "DOOR-CLOSING STATUTE".

### **II.**

THE TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT BASED UPON A THEORY OF EXPRESS CONTRACT, WHEN THE PLAINTIFF FAILED TO MAKE ANY DEMONSTRATION OF THE EXISTENCE OF SUCH A CONTRACT.

### **III.**

THE TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT WHEN THE AFFIDAVITS SHOWED THAT MORE THAN A TRIABLE MATERIAL ISSUE OF FACT EXISTED AS TO THE AMOUNT OF DAMAGES.

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**STATEMENT OF THE CASE**

The instant case was commenced on or about April 8, 2009, by the filing of the case in the Superior Court of Island County.

The Complaint contains only five Roman-numeral numbered paragraphs. [CP165-166.] It uses language in its paragraph III that states a cause of action for an “action on account” that is grounded on some kind of express agreement. [CP165-166.] It also contains a possible cause of action under a theory of “implied contract” at its paragraph IV. [CP166.]

The Answer, a copy of which the Plaintiff acknowledged having received, very clearly pleaded the denial or “negative defense” that Plaintiff lacked capacity to sue, under Washington’s “door-closing statute”. [CP123, as paragraph 1.] The Answer admitted the existence of an *implied* three-party agreement that governed the credit card account’s transactions, and she specifically denied that any written or other express agreement governed the account. [CP122, as paragraph 4.] As a result, she denied many of the charges within the total proffered account, on grounds that they arose under

an express written contract by which she was not bound. [CP123, as paragraphs 2 and 3.] Thus, these factual issues were framed.

On May 5, 2009, Plaintiff AMERICAN EXPRESS BANK filed a “Note for Motion Docket” and the underlying “Motion for Default Judgment or Alternatively Summary Judgment”. [CP137-138 and CP160-162 et seq.] Nowhere in the moving papers does address the special negative defense which was raised in the Answer, namely, that Plaintiff AMERICAN EXPRESS BANK was a foreign corporation that is not registered with the Secretary of State of the State of Washington. Further, nothing in the moving papers discusses the distinction between “express contract” and “implied contract” which was defensively preserved in the Answer, as noted above.

Defendant-appellant BURLINGTON on or about June 25, 2009, filed an Affidavit in opposition to the Motion for Summary Judgment. [CP106-116.] In the sworn Affidavit, defendant BURLINGTON repeatedly states that she never used the subject credit card with knowledge of any express agreement: paragraphs 2, 5, and 6. She also again asserted that she had

## **ARGUMENT CONCERNING ASSIGNED ERRORS**

I. THE TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT, WHEN THE PLAINTIFF FAILED TO MAKE ANY DEMONSTRATION THAT IT HAD CORPORATE CAPACITY TO SUE, UNDER THE “DOOR-CLOSING STATUTE”.

As noted above in the Statement of the Case, the Answer, a copy of which the Plaintiff acknowledged having received, very clearly pleaded the negative defense that Plaintiff lacked capacity to sue, under Washington’s “door-closing statute”. [CP123, as paragraph 1.]

As further established in the Statement of the Case above, Defendant-appellant BURLINGTON on or about January 17, 2012, filed an Affidavit in opposition to the Motion for Summary Judgment. [CP 56-62.] In the sworn Affidavit, then-defendant BURLINGTON again asserted that she had personally confirmed that plaintiff is an unregistered foreign corporation, and specifically asked for more discovery, should the Plaintiff at some point contend that it was registered. There can be no doubt that she had reasserted this core “mega-denial” from her Answer during the Summary Judgment motion proceeding.

II. THE TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT BASED UPON A THEORY OF EXPRESS CONTRACT, WHEN THE PLAINTIFF FAILED TO MAKE ANY DEMONSTRATION OF THE EXISTENCE OF SUCH A CONTRACT.

As noted above in the Statement of the Case, the Answer admitted the existence of an implied three-party agreement that governed the credit card account's transactions, and defendant BURLINGTON specifically denied that any written or other express agreement governed the account. [CP52, as paragraph 3.] As a result, she denied many of the charges within the total proffered account, on grounds that they arose under an express written contract by which she was not bound. [CP53, as paragraphs IV and V.] Thus, these factual issues were framed.

Defendant-appellant BURLINGTON on or about January 17, 2012, filed an Affidavit in opposition to the Motion for Summary Judgment. [CP56-62.] In the sworn Affidavit, defendant BURLINGTON repeatedly states that she never used the subject credit card with knowledge of any express agreement: paragraphs 3, 5, and 6. There can be no doubt that she

had reasserted this core “mega-denial” from her Answer – a denial of any express written agreement -- during the Summary Judgment motion proceeding.

That the trial court accepted a theory of express contract is clear from the fact that it issued a Summary Judgment that provided for an award of prevailing party’s attorneys’ fees, which of course would depend upon a provision of express contract.

**III. THE TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT WHEN THE AFFIDAVITS SHOWED THAT MORE THAN A TRIABLE MATERIAL ISSUE OF FACT EXISTED AS TO THE AMOUNT OF DAMAGES.**

Assuming *arguendo* that, despite the award of attorneys’ fees, the trial court sustained the Summary Judgment on a theory of implied contract rather than express contract, then the trial court ought to have then first adjusted the amount of damages which were prayed for, so as to remove those charges which depended upon the existence of an express contractual provision. This the trial court did not do, and if it made a finding of express contract, then its failure to do so is clear error.

Defendant-appellant BURLINGTON pleaded, as her Third Affirmative Defense, that “Defendant alleges... that some or all of the charges in the alleged account are not supported by any consideration paid or made by the Plaintiff.” That would include the affirmative defense of “partial or total failure of consideration”, because the duty to pay out to the third party merchant on Defendant’s behalf was the *sine qua non* of performance in a three-party credit arrangement. Further, paragraph 4 of her Affidavit in Opposition to Plaintiff’s Motion for Summary Judgment objects that “the lack of a complete account has made it impossible for me to challenge particular charges in specificity... When those charges are all removed, the amount which I owe, if any, will be greatly less than the \$13,458 which Plaintiff has demanded.” [CP137.]

When the trial court faces uncertainty of damages, due to its other determinations that certain factual matters are no longer triable issues, then Washington’s Rules of Civil Procedure, Rule 56(d) requires that “[i]f on motion under the rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary,

the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy, and what material facts are actually and in good faith controverted.”

Needless to say, if whole categories of charges arise from a contract that has not been proven, and all of those have been challenged by the adverse party, then all of the information about such charges falls solely with the apparent Plaintiff AMERICAN EXPRESS. But the trial court made no attempt to “interrogate” counsel for AMERICAN EXPRESS; there is no record of it from the hearing.

CERTIFICATE OF SERVICE BY MAIL

I, Todd Burlington, declare:

I am not a party to this action. I am employed for this service in the County of Island in the State of Washington. I placed a copy of the foregoing document entitled "APPELLANT'S OPENING BRIEF" into sealed envelope that had sufficient prepaid postage attached to them, and that were addressed to:

Isaac Hammer, Esq.  
SUTTELL & ASSOCIATES, P.S.  
P. O. Box C-90006  
Bellevue, WA 98009

Honorable Alan R. Hancock  
Superior Court for County of Island  
P.O. Box 5000  
Coupeville, WA 98239

I then deposited the sealed envelope into the United States mail at Coupeville, State of Washington, on July 25, 2012.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: July 25, 2012



TODD BURLINGTON

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