

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF ISSUES	3
III. COUNTERSTATEMENT OF THE CASE.....	3
A. The Allegations of the Complaint and Gilchrist’s Motion to Dismiss.....	4
B. The Evidence Submitted by FNBO in Support of its Motion for Summary Judgment.....	6
C. Gilchrist’s Response and FNBO’s Reply	12
D. The Trial Court’s Grant of Summary Judgment.....	15
IV. ARGUMENT	19
A. The Assignments of Error Relating to the Trial Court’s Denial of Gilchrist’s Motion to Dismiss Are Baseless.....	19
B. The Trial Court Did Not Err in Granting Summary Judgment to FNBO.....	23
C. The “Doctrine of Account Stated” Applies	31
D. FNBO Is Entitled to Attorney Fees/Costs on Appeal.....	33
V. CONCLUSION.....	34

TABLE OF AUTHORITIES

	Page
Cases	
<i>American Express Centurion Bank v. Stratman</i> , 172 Wn. App. 667, 292 P.3d 128 (2012)	26-28, 30
<i>Bartusch v. Bd. of Higher Educ.</i> , 131 Wn. App. 298, 126 P.3d 840 (2006)	19
<i>Citibank South Dakota, NA v. Ryan</i> , 160 Wn. App. 286, 247 P.3d 778 (2011)	27-30
<i>City of Lakewood v. Pierce County</i> , 144 Wn.2d 118, 30 P.3d 446 (2001)	23
<i>Davy v. Moss</i> , 19 Wn. App. 32, 573 P.2d 826 (1978)	33
<i>Discover Bank v. Bridges</i> , 154 Wn. App. 722, 226 P.3d 191 (2010)	27-30, 32
<i>Discover Bank v. Ray</i> , 139 Wn. App. 723, 162 P.3d 1131 (2007)	27
<i>Elcon Constr., Inc. v. E. Wash. Univ.</i> , 174 Wn.2d 157, 273 P.2d 965 (2012)	23
<i>Greenhalgh v. Dep't of Corr.</i> , 160 Wn. App. 706, 248 P.3d 150 (2011)	23
<i>Harold Meyer Drug v. Hurd</i> , 23 Wn. App. 683, 598 P. 2d 404 (1979)	34
<i>Hiatt v. Walker Chevrolet Co.</i> , 120 Wn.2d 57, 837 P.2d 618 (1992)	23
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)	23
<i>Kalich v. Clark</i> , 152 Wn. App. 544, 215 P.3d 1049 (2009)	34

TABLE OF AUTHORITIES

	Page
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989).....	31
<i>In re Marriage of Tang</i> , 57 Wn. App. 648, 789 P.2d 118 (1990).....	24
<i>Mayer v. Sto Industries, Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006).....	24
<i>State ex rel New York Casualty Co. v. Superior Court for King County</i> , 31 Wn.2d 834, 199 P.2d 581 (1948).....	20
<i>Rodriquez v. Loudeye Corp.</i> , 144 Wn. App. 709, 189 P.3d 168 (2008).....	21, 22
<i>Sherwin v. Arveson</i> , 96 Wn.2d 77, 633 P.2d 1335 (1981).....	20
<i>Sunnyside Valley Irrigation Dist. v. Roza Irrigation Dist.</i> , 124 Wn.2d 312, 315, 877 P.2d 1283 (1994).....	32
<i>Tenore v. AT&T Wireless Servs.</i> , 136 Wn.2d 322, 962 P.2d 104 (1998).....	22
<i>Veit v. Burlington N. Santa Fe Corp.</i> , 171 Wn.2d 88, 249 P.3d 607 (2011).....	24
<i>Wolstein v. Yorkshire Ins. Co.</i> , 97 Wn. App. 201, 985 P.2d 400 (1999).....	21
 Statutes and Court Rules	
CR 12(b)(1).....	4, 19
CR 12(b)(6).....	4, 19, 21, 22
CR 36.....	6
CR 56.....	26
CR 56(c).....	23

TABLE OF AUTHORITIES

	Page
CR 56(e).....	23
RAP 2.2(a)	2, 3, 19
RAP 2.3.....	19
RAP 2.3(b).....	19
RCW 2.08.010	20
RCW 4.84	33
RCW 4.84.010	34
RCW 4.84.250	19, 33, 34
RCW 4.84.260	19, 33
RCW 4.84.280	33
RCW 4.84.290	34
RCW 5.45.020	25
RCW 12.20.060	33
RCW 19.36.110	22
RCW 19.36.120	22

I. INTRODUCTION

Plaintiff-Respondent First National Bank of Omaha (“FNBO” or “Plaintiff”) was granted summary judgment on its claim for monies owed against Defendant-Appellant David T. Gilchrist (“Gilchrist” or “Defendant”) based on evidence that FNBO issued a credit card account to Gilchrist and Gilchrist made numerous charges to that account over the course of many months. FNBO demonstrated Gilchrist’s assent to, and acknowledgement of, the credit card account based in part on Gilchrist’s online and other payments on said account and his failure to object to any of the charges.

Rather than directly responding to the evidence presented by FNBO regarding his credit card account, Gilchrist instead pled ignorance, claiming that he was without “information and belief” as to whether he had a credit account with FNBO or ever made charges or payments on that account. In place of a direct response to the allegations being made, Gilchrist instead made frivolous arguments intended to distract the trial court from the true issues in the case. For example, Gilchrist argued without any substantial basis that FNBO lacked standing to prosecute its claim against him because it had made an assignment of that claim to its lawyers, an assertion that was simply untrue. In addition, Gilchrist merely attacked the adequacy of FNBO’s evidence in support of its claim rather

than submitting any relevant evidence of his own to question the fact that he owed money to FNBO on his credit account.

The trial court properly concluded that Gilchrist's failure to substantively contest the asserted debt other than to say that FNBO "ought to show me more" information in support failed to "meet the Defendant's obligations on Summary Judgment." RP 34. Accordingly, the trial court granted FNBO's motion for summary judgment.

On appeal, Gilchrist continues in his efforts to distract from the real issues of whether he was issued a credit card account by FNBO, made charges and payments on that account, and acknowledged its existence. Again, instead of controverting the evidence presented by FNBO, Gilchrist assigns error to the trial court's denial of his motion to dismiss based on an asserted lack of subject matter jurisdiction and failure to state a claim. Such a denial of a motion to dismiss is not appealable to this Court because it is a non-final, interlocutory order. *See* RAP 2.2(a) (making final judgments and certain other enumerated orders not at issue in this case appealable as a matter of right). However, aside from any procedural infirmity, Gilchrist's first two assignments of error directed against the denial of his motion to dismiss are also substantively without merit because FNBO had standing to prosecute its claim against Gilchrist and the complaint clearly stated a claim.

Gilchrist's third assignment of error relating to the trial court's grant of summary judgment is equally baseless, relying once again upon a mere attack against the quality of FNBO's evidence rather than on any direct and relevant evidence of his own regarding the salient issues. This Court should affirm the decision of the Superior Court and award FNBO its attorney fees and costs on appeal.

II. STATEMENT OF ISSUES

FNBO does not assign any errors, but restates the issues on appeal as follows:

1. Is a trial court order denying a motion to dismiss appealable to this Court under RAP 2.2(a)?
2. If this Court should rule that such an order is appealable, did the trial court have subject matter jurisdiction over this case and did FNBO's complaint state a claim upon which relief may be granted?
3. Did Gilchrist shoulder his burden to establish the existence of a genuine issue of material fact by setting forth specific facts to rebut the evidence FNBO presented in support of its motion for summary judgment?
4. Is FNBO entitled to its attorney fees and costs on appeal?

III. COUNTERSTATEMENT OF THE CASE

FNBO offers the following counterstatement of the case.

A. The Allegations of the Complaint and Gilchrist's Motion to Dismiss.

FNBO filed its Complaint for Monies Due against Gilchrist in Cowlitz County Superior Court on or about November 13, 2013. CP 4-5. FNBO alleged that Gilchrist had entered into a revolving credit agreement with FNBO under which Gilchrist agreed to assume responsibility for all credit extended on the basis of the credit account and to make regular monthly payments. CP 4. FNBO further alleged that Gilchrist used his credit card account and became indebted to FNBO in the amount of \$4,302.44 and failed to pay the balance due despite repeated demands. CP 5.

After having a default judgment obtained by FNBO set aside, Gilchrist filed a motion to dismiss FNBO's complaint under CR 12(b)(1) and CR 12(b)(6). CP 7-13. Gilchrist argued in this motion that the trial court lacked subject matter jurisdiction because FNBO did not have standing to bring the claim against him. CP 8. Although difficult to understand, Gilchrist's standing argument appeared to be based on his contention that FNBO did not attach a copy of the credit account agreement to the complaint and on the unsupported assertion that FNBO's lawyers, and not FNBO itself, were the real parties in interest. CP 9-11.

Gilchrist also argued in his motion to dismiss that FNBO failed to

state a claim upon which relief could be granted. CP 12. While again difficult to understand, Gilchrist's argument appears to be based primarily on his assertion that a declaration from FNBO's records custodian that was attached to FNBO's motion for default was insufficient to state a claim because a copy of the credit account agreement was not attached. CP 10-13.

At oral argument on his motion to dismiss, Gilchrist argued that "subject matter jurisdiction is basically an evidence duty" and that FNBO was required to present a competent witness to testify that Gilchrist had breached a statutory, contractual, or common law duty owed to FNBO. RP 4. Gilchrist further argued that subject matter jurisdiction was lacking because FNBO did not attach the credit account agreement to the complaint filed against him. RP 7.

Counsel for FNBO pointed out that Gilchrist misunderstood judicial processes and there was no requirement that FNBO attach to the complaint a copy of the credit account agreement. RP 10. The trial court agreed with FNBO and informed Gilchrist that "Washington is a notice pleading state" and that a plaintiff doesn't "necessarily need to bring forth all the evidence at—at the get go." RP 12. The trial court also stated that the absence of a written contract filed with FNBO's pleadings was not dispositive and that "[c]ontracts can be formed without a written

document, obviously.” RP 13-14. Denying Gilchrist’s motion in its entirety, the trial court concluded that it possessed subject matter jurisdiction and that FNBO stated a claim upon which relief could be granted. RP 14.

B. The Evidence Submitted by FNBO in Support of its Motion for Summary Judgment.

After Gilchrist’s motion to dismiss was denied, FNBO submitted requests for admissions pursuant to CR 36. Gilchrist responded to these requests with a non-credible claim that he lacked “sufficient information or knowledge to admit or deny” (1) that he had a credit account with FNBO; (2) that he had ever used such an account for the purchase and payment for goods and services; (3) that he had ever received billing statements for such an account; (4) that he had failed to make timely payments on such an account; and (5) that there was a balance due on said account. CP 280, 283-86.

In the face of Gilchrist’s refusal to provide a substantive and good-faith response to its requests for admissions, FNBO filed a motion for summary judgment. CP 180-82. In support of its motion, FNBO presented the declaration of Scot Mayo, its custodian of records. CP 184-86. In his declaration, Mayo stated that, in the regular performance of his job functions, he had access to records maintained by FNBO in the regular course of its business activity. CP 184. These records were made at or

near the time of the act, event, or condition recorded by employees or representatives of FNBO with personal knowledge of such act, event, or condition. CP 185.

Based on his review of these business records, Mayo stated that Gilchrist and FNBO had “entered into an Agreement, whereby Plaintiff would extend credit for defendant(s) and defendant(s) agreed to repay in accordance with the terms of the agreement.” CP 185. Mayo attached a copy of the terms of the credit account agreement to his declaration. CP 187-200.¹ The agreement states that, if the cardholder does not promptly advise FNBO of a billing error upon receipt of a billing statement, “the billing statement will be considered proof of the amount you are obligated to pay.” CP 192. The agreement also contains detailed information regarding the manner in which a cardholder can dispute erroneous charges. CP 199-200.

Scot Mayo’s declaration also contained numerous billing

¹ While the Cardmember Agreement containing the terms of the credit account was attached to correspondence from FNBO to Gilchrist dated April 9, 2013, there is no evidence that the terms had changed since Gilchrist’s credit account was opened in November 2011. CP 188. Gilchrist claims that a credit report from an unidentified credit reporting agency shows that his account was closed on March 8, 2013. CP 21, 107. However, Gilchrist submitted as part of his opposition to FNBO’s motion for summary judgment a letter from FNBO dated March 13, 2013 regarding his account. CP 109. This letter does not state that Gilchrist’s account was closed.

statements. The first attached billing statement covered the billing period ending May 10, 2012 (“the May statement”). CP 202-05. The May statement established that Gilchrist made an online payment to the account on May 7, 2012, and that the account had a balance due of \$3,935.59. CP 202. Portions of the balance due were attributable to introductory balance transfers and introductory charges, which carried no interest charges. Other portions were attributable to cash advances. CP 203. The May statement indicated that there was a credit limit of \$4,000 on the account. The statement also included a notation that the “minimum payment due” going forward was \$78. CP 202.

The next billing statement for the period ending June 8, 2012 (“the June statement”) shows that Gilchrist made two payments totaling \$79, one for \$39.50 on May 14, 2012, and another for the same amount on May 30, 2012. CP 206. Thus, Gilchrist slightly exceeded the minimum payment due that had been noted on the May statement. CP 202. The June statement also showed four charges made to the account on specific dates, three to a Fred Meyer store in Longview, Washington, where Gilchrist resides, and another to a Shell gas station in the same city. The June statement indicated a “minimum payment due” of \$79. CP 206.

The billing statement for the period ending July 10, 2012 (“the July statement”) shows that Gilchrist made no payments but continued to use

his credit account on four separate occasions on identified dates to make fuel purchases at the same Shell gas station in Longview. The balance on the account now exceeded the \$4,000 credit limit on the account. The July statement indicated a “minimum payment due” of \$188. CP 210.

The billing statement for the period ending August 9, 2012 (“the August statement”) shows that Gilchrist made two payments on his account, one for \$79 on July 12, 2012 and another for \$39.50 on July 24, 2012. He continued to make charges to the account, one at a Safeway store in Kelso, Washington, and two others for fuel in the Longview/Kelso area. The balance due on the account continued to slightly exceed the \$4,000 credit limit on the account. The August statement indicated a “minimum payment due” going forward of \$185.50. CP 215.

The billing statement for the period ending September 10, 2012 (“the September statement”) shows no purchases but two payments, one for \$188 on August 10, 2012, and another for \$94 on August 23, 2012. These payments brought the balance due on the account below the \$4,000 credit limit. The September statement indicated a “minimum payment due” going forward of \$81. CP 219.

The billing statement for the period ending October 10, 2012 (“the October statement”) shows two additional payments, one for \$94 on September 14, 2012, and another for \$81 on October 3, 2012. CP 223.

The statement also shows fourteen separate charges, all in the Kelso/Longview area for various retail establishments, restaurants, and gas stations. CP 223-24. The balance due continued to be below \$4,000. The October statement indicated a “minimum payment due” going forward of \$79. CP 223.

The statement for the period ending November 8, 2012 (“the November statement”) shows no payments but five more charges to the account, four to specifically identified businesses in the Longview area. The balance due again went slightly over \$4,000, the credit limit on the account. The November statement indicated a “minimum payment due” of \$80 with a due date of December 7, 2012. CP 227.

The billing statement for the period ending December 10, 2012 (“the December statement”) shows that Gilchrist made an “expedited payment” of \$80, which was credited to his account on December 7, 2012. CP 231. This expedited payment took care of the “minimum payment due” that was set forth on the November statement. CP 227. Gilchrist made no further charges to the account.² The December statement

² The billing statements prior to this statement were mailed to Gilchrist at P.O. Box 2835, Longview, Washington 98632-8812. CP 202, 206, 210, 215, 219, 223, 227. However, commencing with the December statement, all future statements were mailed by FNBO to Gilchrist at 457 21st Ave., Longview, Washington 98632-1301. CP 231, 235, 238, 241, 243. Gilchrist admitted that this is his mailing address and he submitted as

indicated a “minimum payment due” of \$85, which was due on January 7, 2013. CP 231.

The billing statement for the period ending January 9, 2013 (“the January 2013 statement”) showed a payment of \$85 on January 7, 2013, which took care of the “minimum payment due,” which was set forth on the December statement. CP 231, 235. Gilchrist made no further charges to the account. The January 2013 statement indicated a “minimum payment due” going forward of \$82. The balance due on the account was again under the \$4,000 limit. CP 235.

The billing statement for the period ending February 7, 2013 (“the February 2013 statement”) shows that Gilchrist failed to make a payment of the amount due on the January 2013 statement but made seven additional charges to identified retail stores and gas stations in Longview. CP 238-39. These charges once more took the account balance over \$4,000. The February 2013 statement indicated a “minimum payment due” of \$190. CP 238.

The billing statement for the period ending March 8, 2013 (“the

evidence a copy of a letter that he received from FNBO dated March 13, 2013 sent to this address. CP 109, 283-84. While there is no evidence as to how FNBO obtained Gilchrist’s new mailing address, it is reasonable to infer from the change of address forms on the billing statements that Gilchrist provided this information to FNBO. *See, e.g.*, CP 230 (change of address form included with the November statement).

March 2013 statement”) shows that Gilchrist failed to make a payment of the amount due on the February 2013 statement but made no further charges on the account. The March 2013 statement indicated a “minimum payment due” of \$320. CP 241.

The billing statement for the period ending April 9, 2013 (“the April 2013 statement”) shows that Gilchrist failed to make a payment of the amount due on the March 2013 statement but made no further charges on the account. The April 2013 statement indicated a “minimum payment due” of \$458. CP 243. None of the billing statements mailed to Gilchrist, including the statements sent to him in 2013, state that Gilchrist’s account had ever been closed by FNBO. CP 202-44.

The records custodian for FNBO, Scot Mayo, stated in his declaration that Gilchrist never objected to the accuracy of the billing statements that were mailed to him. CP 185. Mayo also made a personal and thorough review of the account records for Gilchrist’s account and found no indication that Gilchrist or anyone on his behalf ever reported his credit card as being lost or stolen. Mayo stated that the amount due on Gilchrist’s account was \$4,302.44. CP 186.

C. Gilchrist’s Response and FNBO’s Reply.

Gilchrist filed an alleged “verified” memorandum in opposition to FNBO’s motion for summary judgment. CP 14-25. Attached to the

“verified” memorandum were several exhibits as well as an affidavit from Gilchrist. CP 26-112. Gilchrist’s response included correspondence between him, FNBO, and FNBO’s trial counsel, the law firm of Patenaude & Felix, A.P.C. CP 26-32. Gilchrist’s response also included copies of (1) responses to requests for admissions filed by Patenaude & Felix, A.P.C. in a federal court lawsuit filed by Gilchrist against that law firm (CP 73-103); (2) portions of credit reports from credit reporting agencies regarding Gilchrist (CP 106-08); and (3) a letter from FNBO to Gilchrist dated March 13, 2013 referencing Gilchrist’s credit account (CP 109).

The credit reports provided by Gilchrist from the credit reporting agencies stated that Gilchrist’s account with FNBO was first opened in November 2011. CP 106-08. Each credit report contained the same balance due of \$4,302. *Id.* One of the reports from an unidentified credit reporting agency contained the words “Date Closed: 03/08/2013” with no explanation of what this notation referred to. CP 107. Another credit reporting agency report contained a statement that Gilchrist “has verified to [FNBO] that the current status” and “prior paying history” on the account “[are] being reported correctly.” CP 108.³

³ Gilchrist has made much of the fact that the account number on the credit reports was different than the account number alleged by FNBO in this case. CP 18. However, FNBO explained to Gilchrist and presented sworn testimony that “FNBO provides an encrypted number to the credit bureaus

The March 13, 2013 letter from FNBO to Gilchrist that Gilchrist included in his summary judgment response expressed FNBO's willingness to work with Gilchrist "to prevent [his] account from going further past due." CP 109. This letter did not state that Gilchrist's account had been closed.

In the affidavit that Gilchrist provided in his opposition to FNBO's motion for summary judgment, he did not expressly deny that he had a credit card account with FNBO or that he had made the charges or payments to the credit card account set forth in FNBO's evidence. CP 110-11. Nor did Gilchrist deny in his affidavit that there was a balance due and owing on his account. *Id.*

Gilchrist also filed a legal memorandum in opposition to FNBO's motion. In this memorandum, Gilchrist also failed to expressly deny that he had made the charges and payments to the credit card account set forth in FNBO's billing statements. CP 14-25. With regard to the balance due on the account, Gilchrist argued only that there was a genuine issue of material fact as to "whether the Defendant actually owes the exact amount stated." CP 15. Gilchrist did not expressly deny in his memorandum that

to protect his identity" and the "account on his credit report was the same account" as the one at issue in this case. CP 113-14. In any event, the information on the credit reporting agency reports with regard to account balances matches the information on FNBO's billing statements indicating that the referenced accounts were the same. CP 106-08, 243.

he had a credit card account with FNBO or that he owed FNBO money on that account. CP 14-25.

FNBO filed a “reply declaration” to Gilchrist’s response. CP 294-95. In its reply, FNBO made clear that (1) it had not assigned the debt to any other entity; (2) its law firm, Patenaude & Felix, had not purchased the debt; and (3) Patenaude & Felix merely represented FNBO as its attorneys for collection purposes. *Id.* FNBO reiterated that it had previously informed Gilchrist that the reason why the account number on his credit reports was different than the actual FNBO account number was because the number had been scrambled or encrypted by FNBO to protect his account information. CP 113-14, 295. FNBO also reiterated that the account identified in the complaint was Gilchrist’s account, that Gilchrist had defaulted on that account, and there was a balance due and owing of \$4,302.44. CP 297.

D. The Trial Court’s Grant of Summary Judgment.

FNBO’s motion for summary judgment was argued before Superior Court Judge Stephen Warning on February 25, 2015. FNBO’s counsel contended that FNBO was entitled to summary judgment because Gilchrist had done nothing to dispute the billing statements that FNBO had provided. RP 20. FNBO’s counsel pointed out that FNBO had propounded discovery on Gilchrist and that Gilchrist had denied its

discovery requests simply due to an asserted “lack of information.” RP 19. FNBO argued that Gilchrist’s defense constituted nothing more than argument and speculation. RP 20.

For his part, Gilchrist contended that there were four genuine issues of material fact preventing summary judgment. First, Gilchrist argued that FNBO lacked standing because it had assigned its rights to collect the debt at issue to its law firm. Second, Gilchrist again pointed out that the credit reports contained a different account number than the one for the account being sued upon. Third, Gilchrist argued that there was a genuine issue of fact about the exact amount due. Fourth, Gilchrist argued that the Cardholder Agreement attached to the motion for summary judgment was dated April 9, 2013, one month after the account was allegedly closed by FNBO. RP 21.

Gilchrist attempted to explain his failure to present facts and evidence disputing his ownership of the credit card account or showing that the amount due was not correct. He stated without support that “Defendant, up until this time, was not required to show evidence to a collection agency that could not give a complete accounting of the alleged debt * * *.” RP 29.

In reply, FNBO’s counsel emphasized once more that FNBO’s claim against Gilchrist had not been assigned and that Patenaude & Felix

merely represented FNBO as its attorneys. RP 31-32. Counsel further argued that there was no legal requirement that FNBO provide a complete accounting or “validation” of the account, as Gilchrist contended. RP 32. Instead, counsel argued that FNBO had provided one full year of billing statements showing charges and payments made by Gilchrist on his account. In addition, counsel argued that Gilchrist had acknowledged the account by attaching to his summary judgment response materials a copy of the March 13, 2013 letter sent to him by FNBO regarding his account. Counsel reiterated that Gilchrist offered nothing except argument and speculation in opposition to the motion for summary judgment. RP 32-33.

After hearing the arguments of Gilchrist and FNBO’s counsel, Judge Warning granted FNBO’s motion for summary judgment. In doing so, he addressed each of Gilchrist’s arguments. Regarding the alleged assignment issue, Judge Warning ruled that Patenaude & Felix had simply been given the assignment of collecting on the debt claimed by FNBO and was not an “assignee of the debts” as Gilchrist argued. RP 33.

With regard to the different account number showing up on Gilchrist’s credit reports, Judge Warning stated that “[f]irst of all, there’s no requirement that anybody prove that a credit agency has correctly dealt with all of this.” *Id.* But, in any event, FNBO had presented adequate evidence showing why there was a different account number showing up

on the credit reports. *Id.*

With regard to the argument concerning the amount owed, Judge Warning ruled that it was incumbent on Gilchrist to present evidence that there was a charge that wasn't properly posted to his account. However, Judge Warning stated that "[w]e don't have that now. All we have is: Well, they ought to show me more, and that doesn't meet the Defendant's obligations on Summary Judgment." RP 34.

On the basis of these oral findings, the trial court granted FNBO's motion for summary judgment and entered judgment in favor of FNBO.⁴ The written order granting summary judgment stated that (1) there was "no need for plaintiff or the plaintiff's law firm to show any assignment;" (2) plaintiff had "explained the defendant's account number concern and this is not a material fact;" (3) plaintiff had "supported the balance claimed with billing statements and the plaintiff's affidavit, and the defendant has not presented any facts that would raise a material fact in dispute as to the balance;" and (4) the Court "does not make any determination about the Terms and Conditions." CP 298-99.

The final judgment in FNBO's favor included, in addition to the

⁴ Despite the trial judge's oral statement that it was granting "Plaintiff's Motion for Summary Judgment on all issues except what the applicable Terms and Conditions of the contract are," the trial court's written order finally resolved all of FNBO's claims against Gilchrist. RP 34; CP 298-99.

principal sum of \$4,302.44, the amount of \$3,600 for attorney fees
“pursuant to RCW 4.84.250 and RCW 4.84.260.” CP 300-01.

IV. ARGUMENT

A. **The Assignments of Error Relating to the Trial Court’s Denial of Gilchrist’s Motion to Dismiss Are Baseless.**

Gilchrist’s first two assignments of error complain that the trial court erred by denying his motion to dismiss FNBO’s complaint under CR 12(b)(1) and CR 12(b)(6). Amended Appellant’s Opening Brief (“Opening Brief”), p. 2. It is clear that a denial of a motion to dismiss is not an appealable order under RAP 2.2(a) because it is neither a final judgment nor an appealable order otherwise described in the rule. Such a denial can only be reviewed by discretionary review under RAP 2.3. *See Bartusch v. Bd. of Higher Educ.*, 131 Wn. App. 298, 303, 126 P.3d 840 (2006) (order denying motion to dismiss was subject to discretionary review). Here, none of the grounds stated in RAP 2.3(b) for discretionary review exist.

However, if the Court decides that the trial court’s decision to deny Gilchrist’s motion to dismiss is reviewable at this time, it is clear that the trial court did not err. Gilchrist’s arguments that the trial court lacked jurisdiction and/or that FNBO’s complaint did not state a claim reflect a basic misunderstanding of trial court processes and border on the nonsensical.

Gilchrist first argues that the trial court lacked subject matter jurisdiction over FNBO's claim. This Court reviews a trial court's decision that it had subject matter jurisdiction as a matter of law. The essential elements of subject matter jurisdiction "are said to be three: (1) the court must have cognizance of the class of cases to which the one to be adjudged belongs; (2) the proper parties must be present; and (3) the point decided must be, in substance and effect, within the issues before the court." *State ex rel New York Casualty Co. v. Superior Court for King County*, 31 Wn.2d 834, 840, 199 P.2d 581 (1948). The second element is satisfied by proper service of process on the purported defendant. *Sherwin v. Arveson*, 96 Wn.2d 77, 79-80, 633 P.2d 1335 (1981).

Here, there is no doubt, and Gilchrist has not questioned, that the trial court had jurisdiction over "the class of cases to which the one to be adjudged belongs," that is, a civil action where the demand for money damages exceeds three hundred dollars. RCW 2.08.010. Nor has Gilchrist argued that he was not properly served with the complaint or that the trial court was being asked to decide any legal point that was not within the issues properly posed by FNBO's claim for monies owed.

Instead, Gilchrist has merely questioned whether the proper parties were before the trial court, not based on any alleged defect regarding service of process, but based on the erroneous assertion that FNBO's

attorneys were the real parties in interest and not FNBO. In his motion to dismiss, Gilchrist claimed that paragraph 9 of the complaint in which it is alleged that “plaintiff’s attorneys are debt collectors” and the complaint was “an attempt to collect a debt” somehow meant that FNBO was not the real party in interest. CP 11. However, at oral argument, when asked by the trial judge whether he was alleging that this statement in the complaint made FNBO’s attorney “a real party in interest,” Gilchrist answered in the negative. RP 5.

The bottom line is that the complaint in this case contained factual allegations establishing FNBO’s standing as the entity that provided credit to Gilchrist and was due money from him. *See Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206, 985 P.2d 400 (1999) (standing is reviewed *de novo* by the appellate court). Gilchrist’s arguments to the contrary are frivolous and should be rejected. Subject matter jurisdiction of the trial court was clearly established.

Gilchrist’s argument that FNBO did not state a claim upon which relief could be granted under CR 12(b)(6) is also frivolous. As with issues of standing and subject matter jurisdiction, the issue of whether a complaint states a claim for relief is reviewed *de novo*. *Rodriquez v. Loudeye Corp.*, 144 Wn. App. 709, 717, 189 P.3d 168 (2008). “Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the

plaintiff cannot prove any set of facts which would justify recovery.” *Id.* at 717. Motions to dismiss under CR 12(b)(6) should be granted “sparingly and with care” and “only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). The court’s inquiry is normally confined to the factual allegations contained in the complaint and these allegations are presumed to be true. *Id.*

Here, Gilchrist’s argument, distilled to its essence, appears to be that FNBO cannot state a claim without attaching a signed copy of the credit account agreement to the complaint. Opening Brief, pp. 12-13. However, as recognized by the trial court, this is simply untrue. RP 12. There is no requirement that the credit card account agreement at issue here be memorialized by a signed writing. *See* RCW 19.36.120 (credit or charge card agreements are not subject to the requirement of RCW 19.36.110 that credit agreements must be in writing in order to be enforceable). The trial court thus properly ruled that FNBO’s failure to attach to the complaint a signed copy of the credit account agreement did not mean that it failed to state a claim upon which relief could be granted.

B. The Trial Court Did Not Err in Granting Summary Judgment to FNBO.

An appellate court reviews a summary judgment *de novo*. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). An appellate court considers all facts and reasonable inferences from them in the light most favorable to the nonmoving party. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001). “However, where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is appropriate.” *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65-66, 837 P.2d 618 (1992).

Once the moving party meets its burden of showing there is no genuine issue of material fact, the nonmoving party must set forth specific facts rebutting the moving party’s contentions. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.2d 965 (2012). The party opposing the summary judgment motion “may not rest upon the mere allegations or denials of a pleading * * *. CR 56(e). It is also insufficient for the non-moving party to rely on “argumentative assertions, conclusory statements, and speculation” to demonstrate the existence of a genuine issue of material fact. *Greenhalgh v. Dep’t of Corr.*, 160 Wn. App. 706,

714, 248 P.3d 150 (2011).

An appellate court reviews a trial court's evidentiary rulings, such as whether to admit or exclude evidence, under an abuse of discretion standard. *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011). A court only abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990).

Application of these general principles leads inexorably to the conclusion that the trial court properly granted summary judgment in this case. Here, FNBO submitted in support of its motion an affidavit of its records custodian with detailed billing records over the course of many months that showed the specific retail stores, restaurants, and gas stations that Gilchrist purchased goods or services from with use of his credit card. CP 202-44. The evidence established that these records were mailed to Gilchrist and that he never contacted FNBO to deny or question the charges or balance accounts. CP 185-86.

The billing statements also establish that Gilchrist made several payments on the account, one by electronic means and the others by non-electronic means. CP 202, 206, 215, 219, 223, 227, 231, 235. These payments were sometimes in the exact amount of the "minimum payment

due” set forth in the prior billing statement from FNBO. CP 223, 227, 231, 235. On one occasion, Gilchrist made an expedited payment when he apparently missed payment of the previous statement’s “minimum payment due” amount. CP 227, 231. Some of Gilchrist’s payments appear calculated to keep the account balance on the account from exceeding the account’s stated credit limits. CP 215, 219, 231, 235.

In response to this evidence, Gilchrist did not expressly deny that he had an account with FNBO or that he had made the charges and payments described in the billing statements. Rather, he confined his attack to the adequacy and/or reliability of the evidence presented by FNBO, although he never set forth an express evidentiary objection to the trial court’s admission of that evidence. CP 22-23.

And perhaps more importantly, Gilchrist has not assigned as error in this Court the trial court’s decision to admit any of the evidence relied upon by FNBO in support of the motion for summary judgment, including the credit account agreement itself. Opening Brief, pp. 2-3. But even had Gilchrist done so, the trial court clearly did not abuse its discretion in considering the existence of the credit agreement as well as the detailed account billing statements presented by FNBO because these documents were clearly subject to the business records exception to the hearsay rule. RCW 5.45.020.

Under these circumstances, FNBO shouldered its burden under CR 56 to establish the absence of any genuine issue of material fact and is entitled to judgment as a matter of law. This is made clear by *American Express Centurion Bank v. Stratman*, 172 Wn. App 667, 292 P.3d 128 (2012) (“*Stratman*”), a case that is very close on its facts to this case. In *Stratman*, the credit card company, like FNBO in this case, moved for summary judgment in reliance on the sworn statement of its records custodian along with an unsigned copy of a Cardmember Agreement and attached billing records for a one-year period showing both charges and payments to the account. *Id.* at 669. The defendant responded with a general denial without presenting specific evidence to rebut American Express’s evidence. *Id.* at 671. The trial court granted American Express summary judgment and the defendant appealed, claiming that the trial court erred in finding there was no genuine issue of material fact. *Id.*

The Washington Court of Appeals affirmed the grant of summary judgment. The Court stated:

To prevail on its claim, American Express must demonstrate the existence of a contract with [Defendant]. 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.

Id. at 673 (emphasis added; citations omitted).

The Court stated that “[t]here is no genuine issue of material fact that [Defendant] used the credit card” and that the account statements were sufficiently detailed and itemized because they “provid[ed] the date and amount of individual purchases made by [Defendant], as well as the name of the entity from whom the goods or services were purchased.” *Id.* at 674. Based on this evidence, the Court held that the defendant assented to the terms of the credit card agreement. *See also Discover Bank v. Ray*, 139 Wn. App. 723, 727, 162 P.3d 1131 (2007) (the debtor’s conduct in using the credit card constituted acceptance of the credit card agreement’s terms).

In reaching the conclusion that there was no genuine issue of material of fact regarding the defendant’s acceptance of the credit card agreement, the Court in *Stratman* distinguished two other cases from the Washington Court of Appeals, *Discover Bank v. Bridges*, 154 Wn. App. 722, 727-28, 226 P.3d 191 (2010) (“*Bridges*”), and *Citibank South Dakota, NA v. Ryan*, 160 Wn. App. 286, 247 P.3d 778 (2011) (“*Ryan*”). The Court in *Stratman* stated that these cases stood for the proposition “that ‘a generic summary of the purported account balance and payments made on it’ was insufficient to prove the debtor assented to the terms of the credit card agreement because ‘[n]one of the notations on the

statements...actually explained what the supposed purchase was or who it was from.” *Stratman*, 172 Wn. App. at 674, quoting *Bridges*, 154 Wn. App. at 728, and *Ryan*, 160 Wn. App. at 293.

The Court in *Stratman* was correct in distinguishing *Bridges* and *Ryan*. In *Bridges*, the Court’s decision to reverse summary judgment against the debtor was based on the fact that the bank’s evidence disclosed “neither a signed agreement between Discover Bank and the Bridgeses nor detailed, itemized proof of the Bridgeses’ card usage.” *Bridges*, 154 Wn. App. at 727. Nor did the evidence presented by the bank “show that the Bridgeses acknowledged the debt, for example, through evidence of cancelled checks or online payment documentation.” *Id.* All that the bank presented regarding the charges and payments was “a generic summary of the purported account balance and payments made on it.” *Id.* at 728.

The Court in *Ryan* was confronted with a similar situation. In that case, the statements offered by the bank merely “listed a numerical amount under the heading ‘purchase’.” *Ryan*, 160 Wn. App. at 293. The Court in *Ryan* interpreted the decision in *Bridges* to require that the bank provide detailed and itemized documentation of payments made on the account in order to demonstrate the debtor’s assent to, and acknowledgement of, the account agreement. *Id.* at 293-94. The Court held that this standard was not met under the facts as presented:

None of the notations on the statements offered by Citibank here actually explained what the supposed purchase was or who it was from. Nor is it clear whether these were individual “purchases” or were only total amounts for the period covered by the statement. Moreover, these supposed purchases did not add up to anything near the total Citibank claimed was owed on the card. And the account statements did not otherwise provide a basis to match the listed amounts with any particular charge slip or purchase. The materials Citibank provided thus did not constitute the detailed and itemized documentation required by *Bridges*.

Ryan, 160 Wn. App. at 293.

In ruling that the proof submitted did not meet the “assent” test set forth in *Bridges*, the Court in *Ryan* emphasized that its holding was “limited to the facts present in this record as currently developed.” *Id.* at 294. The Court further stated:

The *Bridges* court specifically described additional means besides cancelled payment checks that could establish the requisite proof, including a signed agreement, online payment records, detailed and itemized proof of the defendant’s card usage, or other evidence of the defendant’s personal acknowledgment of the account. 154 Wn. App. at 727-28. But without such evidence here, Citibank did not provide adequate proof to support summary judgment based on its theory that Ryan assented to a contract by accepting the unsigned cardmember agreement and personally acknowledging the account.

Id. (emphasis added).

The use of the disjunctive word “or” is significant in that the Court in *Ryan* recognized that detailed and itemized proof of the defendant’s card usage in and of itself constituted sufficient proof of the debtor’s

assent and acknowledgement of the account.

Here, the proof presented by FNBO meets the *Bridges* test for debtor assent and acknowledgement as construed in both *Ryan* and *Stratman*. First, the evidence clearly established that Gilchrist entered into a credit agreement with FNBO under which FNBO agreed to provide credit to Gilchrist and Gilchrist agreed to pay the amounts charged. CP 184-86. Gilchrist made no direct attempt to deny the same.⁵ The evidence further established numerous instances of charges in specific amounts on specific dates made by Gilchrist on his credit card account to identified retail stores, restaurants and gas stations in the Longview-Kelso area where he resides. CP 202-64. The evidence also established numerous payments by Gilchrist on specific dates in response to the amounts due on the prior account statement, evidencing his intent to keep the account active and within credit limits. *Id.* There is also evidence of at least one online payment, which is another indicia of assent mentioned in the *Ryan* case, as well as one expedited payment by Gilchrist in order to keep his account from going past due. CP 202, 231.

⁵ While the trial judge ruled that there was a genuine issue of material fact regarding the terms of the credit card agreement because of the fact that the terms proffered by FNBO were dated in April 2013 after Gilchrist ceased making charges on the account, this did not prevent the entry of summary judgment because there was no genuine issue of fact about the existence of a credit account agreement.

However, additional evidence other than the billing statements supports the conclusion that Gilchrist assented to the credit card agreement. First, Gilchrist never contacted FNBO during the period he was using the credit card to question any of the account statements or charges to the account or to indicate that his card had been lost or stolen. CP 185-86. Second, a credit report presented by Gilchrist in opposition to the motion for summary judgment stated that he had “verified” to FNBO that “the current status” of the account and the “prior paying history” had been “reported correctly. CP 108.⁶ Third, Gilchrist acknowledged in his reply to the motion for summary judgment that he received correspondence from FNBO dated March 13, 2013, indicating that his account was past due. CP 109. This evidence, along with the “detailed and itemized” information regarding charges and payments in the billing records, supports the existence of the debtor assent and acknowledgement required under this Court’s case law.

C. The “Doctrine of Account Stated” Applies.

An appellate court may affirm the trial court on any basis that is supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770

⁶ While this statement is hearsay, Gilchrist offered the document containing the statement into evidence without objection by FNBO and the statement is hence part of the summary judgment record and properly considered by this Court.

P.2d 1027 (1989). In *Bridges*, the Court held that the “doctrine of account stated” was potentially applicable to the facts presented. *Bridges*, 154 Wn. App. at 728, n. 4. The Court stated:

The doctrine of account stated applies when both the creditor and the debtor manifest that a stated sum is an accurate computation of an amount due. *Sunnyside Valley Irrigation Dist. v. Roza Irrigation Dist.*, 124 Wn.2d 312, 315, 877 P.2d 1283 (1994). Evidence of assent in some form is required, and the court determines assent by examining all the circumstances and acts of the parties. *Sunnyside Valley*, 124 Wn.2d at 316. Therefore, assent may be implied. *Sunnyside Valley*, 124 Wn.2d at 316. Payment, absent an object manifestation of protest or intent to negotiate the sum in the future, sufficiently establishes an account stated. *Sunnyside Valley*, 124 Wn.2d at 316 n.1.

Id. The Court in *Bridges* concluded that the “evidence insufficiently demonstrates the assent necessary to establish an account stated” because the record “lacks any personal acknowledgment by the Bridgeses of the account, such as a cancelled check or online payment.” *Id.*

However, for the reasons stated above with regard to the existence of mutual assent, FNBO contends that it has established an account stated as an alternative grounds for affirmance. Here, the payments by Gilchrist, including an online payment, made after receiving detailed and itemized billing statements from FNBO coupled with the lack of any protest by him regarding the amount due as well as the other evidence discussed above sufficiently establishes an “account stated.” *See infra*, pp. 30-31.

D. FNBO Is Entitled to Attorney Fees/Costs on Appeal.

FNBO sought and was awarded attorney fees in the trial court based on RCW 4.84.250 and RCW 4.84.260. RCW 4.84.250 states:

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

RCW 4.84.260 states that "[t]he plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280."

The trial court granted attorney fees pursuant to these statutes and Gilchrist has not assigned that ruling as error. CP 299, 301. Gilchrist's only attack on the attorney fee judgment below is that attorney fees should not have been granted if the trial court erred in granting summary judgment. Opening Brief, p. 16.

RCW 4.84.250 and RCW 4.84.260 apply to both tort and contract actions, such as this case. *Davy v. Moss*, 19 Wn. App. 32, 34, 573 P.2d 826 (1978). And perhaps most importantly, the statutory scheme grants

the prevailing party the right to attorney fees both at trial and on appeal.

Thus, RCW 4.84.290 states that, “if the prevailing party on appeal would be entitled to attorneys’ fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys’ fees for the appeal.” *See also Kalich v. Clark*, 152 Wn. App. 544, 552, 215 P.3d 1049 (2009) (party who is entitled to attorney fees for prevailing at trial under RCW 4.84.250 is also entitled to attorney fees for prevailing on appeal under RCW 4.84.290); *Harold Meyer Drug v. Hurd*, 23 Wn. App. 683, 687, 598 P. 2d 404 (1979) (the same). Accordingly, because FNBO was granted attorney fees under RCW 4.84.250 at trial and Gilchrist has not contested the application of that statute, FNBO is also entitled to attorney fees on appeal under RCW 4.84.290.

FNBO is also entitled to its costs on appeal. RCW 4.84.010; *Kalich*, 152 Wn. App. at 552. Accordingly, should this Court affirm the trial court judgment, it should award FNBO its attorney fees and costs on appeal.

V. CONCLUSION

For the reasons stated above, the judgment of the trial court should be affirmed in its entirety and FNBO should be awarded its attorney fees and costs on appeal.

Dated: February 16, 2016

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____

Michael T. Garone, WSBA #30113
mgarone@schwabe.com
Telephone: 503.222.9981
Facsimile: 503.796.2900
Attorneys for Plaintiff-
Respondent, First National Bank of
Omaha

FILED
COURT OF APPEALS
DIVISION II

2016 FEB 17 AM 9:33

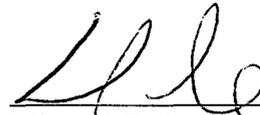
CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I hereby certify that on the 16th day of February, 2016, I caused to
be served the foregoing **RESPONDENT'S BRIEF** on the following party
at the following address:

David T. Gilchrist
475 21st Avenue
Longview, WA 98632
mortetyranni1776@hotmail.com

by delivering to him a true and correct copy thereof, certified by me as
such, by way of U.S. Postal Service-ordinary first class mail.



Michael T. Garone