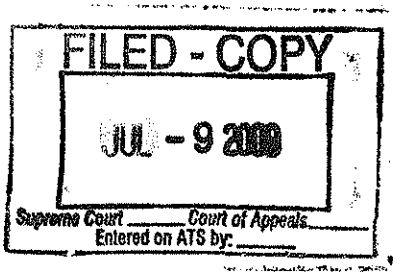
7-9-2009

Capps v. FIA Card Services, N.A. Appellant's Reply Brief Dckt. 35891

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID F. CAPPS, Plaintiff-Appellant, vs. FIA CARD SERVICES, N.A. fka MBNA AMERICA BANK, N.A., Defendant-Respondent,	)	Docket No. 35891



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho
In and For the County of Idaho

HONORABLE JOHN H. BRADBURY
District Judge Presiding

DAVID F. CAPPS, *in propria persona*
Residing at 104 Jefferson Dr., Kamiah, Idaho, 83536, (208) 935-7962, Appellant

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For Respondent

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STATEMENT OF THE CASE

This case is essentially a collection action. The Defendant, FIA Card Services, N.A. (hereinafter "FIA"), secured an award letter from the National Arbitration Forum [NAF] without proof of a valid agreement to arbitrate. When a copy of the award letter was sent to the Plaintiff, David F. Capps, (hereinafter "Capps"), he filed an action against FIA to vacate the award letter, and demanded a jury trial. FIA filed counterclaims of account stated and breach of contract to collect on the alleged delinquent credit card debt. FIA then filed for summary judgment. The district court granted FIA's Motion for Summary Judgment and Capps appealed.

STANDARD OF REVIEW

On a motion for summary judgment we will review "the pleadings, depositions, and admissions on file, together with the affidavits, if any, to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Ray v. Nampa School Dist. No. 131*, 120 Idaho 117, 814 P.2d 17 (1991).

Where, as here, a jury has been requested, the non-moving party also is entitled to the benefit of every reasonable inference that can be drawn from the evidentiary facts. *See Anderson v. Ethington*, 103 Idaho 658, 660, 651 P.2d 923, 925 (1982).

ARGUMENT

A. RESPONDENT ARGUES THAT APPELLANT PRESENTED NO ARGUMENT THAT THE TRIAL COURT ERRED BY RULING THAT THE SERVICING AGREEMENT WAS INADMISSIBLE HEARSAY AND LACKED AUTHENTICATION.

Evidence appears in a number of distinct forms, and the Rules of Evidence have been constructed to accommodate those distinct forms. Evidence in the possession of, or readily

available to the party submitting that evidence to the court, must be certified and authenticated. But evidence that is in the possession and control of the adverse party cannot be certified or authenticated without the cooperation of the adverse party. If the adverse party refuses to certify or authenticate the evidence how is that evidence to be introduced into the record? Rule 1004(3) of the Idaho Rules of Evidence specifically addresses this form of evidence, allowing the evidence to be admitted to the court record. Rule 1008 of the Idaho Rules of Evidence also allows evidence to be admitted to the court record where the authenticity may be in question when a jury is the trier of fact, as is presently the case with the Pooling and Servicing Agreement in question in this action. The proper role of the judge is to admit the evidence under these circumstances so the jury may weigh that evidence and decide its authenticity and weight.

If all of the evidence in possession and control of an adverse party can be excluded simply because it cannot be certified and authenticated by the opposing party, a great injustice would result in many cases. All a party would need to do is to refuse to cooperate in the discovery process and then claim that the opposing party has no admissible evidence and move for summary judgment, which is exactly what has happened in this case.

The court bears the responsibility to properly apply the rules of evidence to the different forms of evidence, especially when the proper rules are argued before the court. FIA states that Capps has not argued that the trial court erred by ruling that the servicing agreement was inadmissible. Capps' essential argument is that the trial court judge erred by using the wrong rule of evidence based on the specific form of the evidence presented. Capps correctly argued that the evidence was admissible under I.R.E. Rule 1004(3). FIA has not denied being in possession of the document, was put on notice and did not produce the document at the hearing; therefore the Pooling and Servicing Agreement submitted by Capps was properly admissible. In

addition, the trial court judge used the material from one of the excluded documents (the prospectus) as the basis for his decision, thus impliedly admitting the Prospectus into evidence. Capps argues that once the district court judge tacitly admitted the Prospectus, the Pooling and Servicing Agreement, which was rejected for the same reason as the Prospectus would also be admitted. The Prospectus is used in the sale of the securitized notes based on the Receivables and accounts in the Master Trust.

Since Capps demanded a jury trial, the district court judge was not allowed to weigh the evidence or determine the issues. In Altman v. Arndt, 109 Idaho 218; 706 P.2d 107 (1985), the Court of Appeals of Idaho concluded,

> "It is well settled that, [HN2] on summary judgment, the district court is not permitted to weigh the evidence or to resolve Controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 671 P.2d 1063 (1983). Further, if the pleadings, admissions, depositions and affidavits raise any question of credibility of witnesses or weight of the evidence, the motion for summary judgment should be denied. *Merrill v. Duffy Reed Construction Co.*, 82 Idaho 410, 353 P.2d 657 (1960). The parties in this case did not stipulate that the case be decided upon a weighing of the testimony, free from the constraints attendant to motions for summary judgments."

In Simpson v. Mountain Home School District No. 193, 99 Idaho 845; 590 P.2d 101 (1979) the Supreme Court of Idaho held,

> "This court has heretofore held that [HN1] the trial court, when confronted by motion for summary judgment, must determine if there are factual issues which should be resolved by the trier of facts; that on such motion it is not the function of the trial court to weigh the evidence or determine the issues, and that all doubts must be resolved against the party moving for a summary judgment. *Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 500 P.2d 218 (1972); *Anderton v. Waddell*, 86 Idaho 220, 384 P.2d 675 (1963); *In re Killgore's Estate*, 84 Idaho 226, 370 P.2d 512 (1962); *Merrill v. Duffy Reed Construction Co.*, 82 Idaho 410, 353 P.2d 657 (1960)."

Here the district court judge selected one sentence from the Prospectus as the basis for his decision, ignoring the wealth of contrary information from the Pooling and Servicing Agreement, the actual contract that defined the terms and conditions of the transfer of receivables to the

Master Trust that FIA admitted had taken place. In Tolmie Farms, Inc. v. J.R. Simplot Co., 124 Idaho 607; 862 P.2d 299 (1993), the Supreme Court of Idaho stated,

> "[HN6] In considering a motion for summary judgment, the trial court must look to the totality of the pleadings, affidavits and depositions, not merely to portions of the record in isolation. *Anderson v. City of Pocotello*, 112 Idaho 176, 179, 731 P.2d 171, 174 (1986).

The district court judge committed reversible error (abuse of discretion) in granting summary judgment to FIA and in not officially admitting the Pooling and Servicing Agreement under Rule 1004(3) of the Idaho Rules of Evidence.

1. RESPONDENT ARGUES THAT APPELLANT'S ARGUMENT RELATING TO I.R.E. 1004(3) and 1008 WERE NOT PRESERVED BELOW TO BE CONSIDERED ON APPEAL.

FIA states that the only reference to Rule 1004(3) was in Capps' Post Hearing Memorandum filed July 1st, 2008 (Respondent's Brief, p. 4, L. 8-10). That statement is not true. Capps argued the applicability of Rule 1004(3) before the court in his SUPPLEMENTAL MOTION FOR CONTINUANCE UNDER RULE 56(f) filed September 11th, 2008 (R. Vol. III, p. 553), specifically:

> **"REQUEST TO ADMIT THE EXISTING DOCUMENT AS EVIDENCE**
> In the alternative, Capps requests that this court admit the previously submitted Pooling and Servicing Agreement as evidence under Rule 1004(3) of the Idaho Rules of Evidence. Rule 1004 states:
> "**Rule 1004.** Admissibility of other evidence of contents.
> The original is not required, and other evidence of contents of a writing, recording, or photograph is admissible if: ... (3) Original in possession of opponent. At a time when original was under control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and the party does not produce the original at the hearing;
>
> "The original document is in possession of the opponent and Capps has no other opportunity to obtain a certified copy of the document with affidavits suitable to have the document entered as evidence. Capps submitted the document with his opposition to summary judgment, putting FIA on notice that the contents would be a subject of proof at the hearing. FIA did not produce the original or a certified copy at the hearing and has refused to provide the document in discovery.

FIA has also had sufficient time to object to the accuracy and authenticity of the document and has not done so. The document previously submitted is thus admissible under Rule 1004(3) of the Idaho Rules of Evidence."

Capps raised his argument regarding Rule 1008 in oral argument before the court on September 25th, 2008 (Tr. Vol. I, p.28, L. 9-25 & p. 29 L. 1-3), specifically:

"In addition to this, we have requested from FIA Card Services a certified copy of the second amended and restated pooling and servicing agreement as of October 20th. I believe the year is 2006.

"This document is essential in our defense against FIA Card Services, as it shows a genuine issue over material fact, and that is the standing of FIA Card Services in this case.

"And as a result of our discovery FIA Card Services has essentially refused to provide the document, and subsequent to that we are submitting to the Court a motion to compel FIA Card Services to produce that document or in the alternative to admit the previously submitted pooling and servicing agreement as evidence in this case. The pooling and servicing agreement under the Rules of Evidence, Rule 1008{c}, the weight of that document as evidence or other evidence of a writing. This also is another issue for the jury to decide the weight of whether this constitutes evidence or other evidence of a writing."

FIA also states that "there was no argument or evidence presented to the trial court at such time to demonstrate the applicability of Rule 1004(3) or that all of its requirements were met."(Respondent's brief, p. 4, L. 18-20) That statement is also not true as the above record reflects. FIA claims "Such a broad sweeping statement without articulation cannot be considered sufficient as to preserve the same on appeal."(Responent's Brief, p. 4, L. 20 & p. 5, L. 1). The requirements were clearly articulated and presented to the court as demonstrated in the record above. FIA has not denied that the Pooling and Servicing Agreement is in their possession and control, nor has FIA denied that they were put on notice that the document would be considered at the hearing. FIA has also not challenged the accuracy or authenticity of the document presented to the district court by Capps, thus tacitly admitting that the document is accurate and authentic. FIA did not produce the document at the hearing, thus fulfilling the requirements of Rule 1004(3) of the Idaho Rules of Evidence.

FIA also states that "there was never an adverse ruling on the applicability of I.R.E. 1004(3) or 1008 for good reason: the trial court's ruling to exclude the Servicing Agreement was based upon a determination of inadmissible hearsay and improper authentication."(Respondent's Brief, p. 5, L. 6-8). That statement is also not true. Capps raised the issue of Rule 1004(3) in his SUPPLEMENTAL MOTION FOR CONTINUANCE UNDER RULE 56(f) filed September 11th, 2008 (R. Vol. III, p. 553), supra. The trial court denied Capps' motion for continuance, and thus his argument regarding Rule 1004(3), in the court's MEMORANDUM DECISION AND ORDER filed October 30th 2008 (R. Vol. III, p. 579) specifically stating, "2. Mr. Capps' motion for continuance is DENIED." The denial of a motion is an adverse ruling against its contents.

2. RESPONDENT ARGUES THAT THE TRIAL COURT'S RULING TO EXCLUDE THE SERVICING AGREEMENT WAS BASED UPON A DETERMINATION OF INADMISSIBLE HEARSAY AND IMPROPER AUTHENTICATION.

FIA "argued among other things that the Servicing Agreement was inadmissible as the same was inadmissible hearsay and unsupported by personal knowledge as required under Idaho law."(Respondent's Brief, p. 5, L. 19-21). The Capps affidavit (AFFIDAVIT IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY JUDGMENT (R. Vol. II, p. 52-55)) establishes that Capps had personal knowledge that a Prospectus and a Pooling and Servicing Agreement existed. The fact that the Pooling and Servicing Agreement exists has never been denied by FIA, nor has FIA disputed the accuracy or authenticity of the copy of the Pooling and Servicing Agreement provided by Capps. The fact that the Pooling and Servicing Agreement is an internal document to FIA precludes Capps, or any party other than FIA, from having personal knowledge of the preparation and maintenance of the document – the specific objection FIA expressed to the district court (R. Vol. V, p. 640, L. 6-7). This is precisely the reason the district court judge

should have admitted the document under I.R.E. Rule 1004(3) as Capps argued, rather than exclude the document under the hearsay rule relied upon by FIA.

B. RESPONDENT ARGUES THAT REGARDLESS OF THE ADMISSIBILITY OF THE SERVICING AGREEMENT, APPELLANT FAILED TO RAISE A GENUINE ISSUE OF FACT TO PRECLUDE SUMMARY JUDGMENT.

The district court, in its MEMORAMDUM DECISION AND ORDER filed October 30 2008 (R. Vol. III, p. 573 – 580), stated, "Mr. Capps is correct with respect to his argument that FIA's claim of an account stated fails. I conclude, on reconsideration, that the accounting was disputed by Mr. Capps." (R. Vol. III, p. 577, L. 16 – 18). Yet the district court failed to recognize the same dispute of a material fact in FIA's Breach of Contract claim. The same dispute letters disputed the amount FIA claimed in its breach of contract claim just as the account stated claim was disputed.

I.R.C.P. Rule 56(c) states summary judgment is appropriate "if the pleading, depositions 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." (Emphasis added). The district court recognized that there was a genuine dispute over the accounting, thus precluding summary judgment. The district court thus committed reversible error in granting summary judgment to FIA.

1. RESPONDENT ARGUES THAT APPELLANT FAILED BELOW TO ARGUE THAT THE DISPUTE LETTERS RAISED AN ISSUE OF FACT AS TO RESPONDENT'S CLAIM FOR BREACH OF CONTRACT AND SHOULD NOT BE CONSIDERED ON APPEAL.

FIA's claim for Breach of Contract contains the same accounting as the Account Stated claim. Two dispute letters sent long before this action was filed disputed that accounting. FIA equates the dispute letters with affidavits, which they are not. Dispute letters sent before an

action is filed are not required to meet the same conditions of an affidavit in a summary judgment proceeding. The actual affidavit, AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION (R. Vol. III, p. 526-532), introduces those dispute letters, based on personal knowledge, as required by I.R.C.P Rule 56(e). The fact that the district court recognized that the accounting was disputed (above), by necessity, applies to the accounting of the Breach of Contract claim whether specifically articulated or not – it's the same accounting.

FIA argues that in other jurisdictions the courts have found that some of the claims in the dispute letter have been held not to constitute a genuine dispute that would preclude summary judgment. What FIA ignores is that the court was not the trier of fact in this case – the jury was. The weight of the evidence was for the jury to decide, not the district court judge. FIA also ignores the fact that the first dispute letter did contain at least one claim recognized by federal courts as a valid billing error claim, specifically the request for additional documentary evidence of indebtedness of the account charges (R. Vol. III, p. 530, second from the last paragraph). These facts, along with other evidence that may be presented to the jury were not for the district court judge to weigh and decide. The district court judge committed reversible error in weighing the evidence and deciding the facts of this case.

Capps' challenge of FIA based on I.R.C.P. Rule 17(a) as not being the real party in interest is also a genuine dispute over a material fact, which would preclude summary judgment. *See* Tolmie Farms v. J.R. Simplot Co., 124 Idaho 613, 862 P.2d 305 (1992). FIA admits that the Receivables in this case were sold and assigned to the Master Trust. The Pooling and Servicing Agreement clearly identifies Receivables as being accounts as defined in the UCC implemented in the State of Delaware. In addition, the Transferor, in the Pooling and Servicing Agreement covenants in section 2.05 (R. Vol. II, p. 306) that "(a) Receivables to be Accounts. … The

Transferor will take no action to cause any Receivable to be anything other than an account (as defined in the Delaware UCC)."

2. RESPONDENT ARGUES THAT REGARDLESS OF THEIR ADMISSIBILITY, THE SERVICING AGREEMENT AND PROSPECTUS DO NOT RAISE AN ISSUE OF FACT AS TO WHETHER RESPONDENT IS THE OWNER OF THE ACCOUNT IN QUESTION.

FIA states, "the trial court was completely correct when it ruled that "[n]othing in the evidence suggests that FIA Card Services transferred to the Master Trust anything more than the receivables on Mr. Capps' account.""(Respondent's Brief, p. 9, L. 14-16). FIA admits that it transferred the receivables to the Master Trust. The Pooling and Servicing Agreement specifies the terms and conditions of that transfer, yet FIA now claims "Appellant provides no argument that the account in question was in any way a part of those included in the Prospectus and/or Servicing Agreement." Capps does not need to argue a fact that is readily admitted by FIA. By admitting that the receivables were in fact transferred to the Master Trust, FIA concedes the terms and conditions of the Pooling and Servicing Agreement that control that transfer apply to the account in question.

FIA now argues for the first time on appeal that "Section 3.01 (b) of the Servicing Agreement reads, "[t]he Servicer [Respondent] shall service and administer the receivables and shall collect payments due...and shall have full power and authority...to do all things in connection with such servicing and administration... Servicer [Respondent] is hereby authorized and empowered...to commence enforcement proceedings with respect to such Receivables..."(Respondent's Brief, p. 11, L. 4-8). This argument was never raised in the district court and cannot be considered on appeal. Tellingly, FIA did not, and cannot, point to

any part of the record where it raised this argument in the district court. "Issues not raised below but raised for the first time on appeal will not be considered or reviewed." Highlands Dev. Corp. v. City of Boise, 188 P.3d 900 (Idaho 2008) (Jones, W., dissenting).

FIA states, "Regardless of the admissibility of the Prospectus and Servicing Agreement, the record reflects that only the receivables on Appellant's account could have been transferred to the Master Trust." (Respondent's Brief, p. 11, L. 10-12). That statement is also not true. MBNA transferred the Receivables and the associated account to the Master Trust in a process known as securitization. Capps pointed out in his Appellant's Brief (p. 14, L. 14-23 & p. 15, L. 1-12) (incorporated herein by reference) the Pooling and Servicing Agreement clearly identifies the Receivables as Accounts. In addition, Delaware statute (Delaware is the "home" state of FIA Card Services), Title 6, Chapter 27A, § 2703A(1) clearly states, "Any property, assets or rights purported to be transferred, in whole or in part, in the securitization transaction shall be deemed to no longer be the property, assets or rights of the transferor."

In McClusky v. Galland, 95 Idaho 472, 511 P.2d 289 (Idaho 1973), the Supreme Court of Idaho held,

> "Where open account and notes payable to individual were assigned to corporation prior to commencement of action to recover on the notes and the open account, the individual assignor was not real party in interest and had no standing to prosecute an action to recover on the notes and the open account and was not entitled to recover judgment thereon. Rules of Civil Procedure, Rule 17(a), I.C. §§ 5-301, 5-302, 27-104."

Capps thus provided proof that FIA was not the real party in interest as required under I.R.C.P. Rule 17(a). FIA could not simply rest on its assertion that it had standing, but was required to come forward with proof and demonstrate that it actually had standing in the district court. FIA provided no such proof or documentation to demonstrate it actually had standing.

The interpretation of the Pooling and Servicing Agreement was, nonetheless, for the jury to decide, not the district court judge in a summary judgment motion. The simple fact is MBNA sold the Receivables, and, according to the Pooling and Servicing Agreement, the account along with them to the Master Trust and were paid in full for that transfer and assignment. FIA has produced no proof of any kind that it has acquired any actual ownership of the account in question. FIA has the burden to prove that it is the real party in interest, has actual damages and thus has standing. FIA has provided no proof whatsoever to establish those conditions.

C. RESPONDENT ARGUES THAT APPELLANT'S DUE PROCESS ARGUMENT WAS NOT RAISED BELOW AND SHOULD NOT BE CONSIDERED ON APPEAL.

FIA argues that Capps' due process argument was never raised in the district court, but the fact remains that the court did not violate Capps' due process rights until it denied his motion for continuance, motion to compel discovery and motion to show cause in favor of granting summary judgment to FIA on the 30th of October 2008. While Capps' discovery motions were still before the district court, the judge could have granted Capps' motion for continuance, motion to compel discovery and motion to show cause and none of Capps' procedural due process rights would have been violated. Was Capps required to object to something that might happen in the future in order to preserve his right to bring the issue up on appeal, or is his notice of appeal sufficient, which was promptly filed well within the specified time limit?

The record clearly demonstrates that discovery was ongoing and no end date for discovery had been established. The Capps affidavits (AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE UNDER RULE 56(f) (R. Vol. III, p. 544-46) and AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE UNDER RULE 56(f) (R. Vol. III, p. 556-57)) also

establish that the documents sought in discovery were essential to Capps' defense against FIA. *The court had a responsibility to assist Capps in completing discovery.* In Celotex Corp. v. Catrett, 477 U.S. 317; 106 S. Ct 2548; 91 L.Ed.2d 265, the U.S. Supreme Court stated, "In our view, [HN2] the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, [*323] there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." (Emphasis added).

FIA submitted its Motion for Summary Judgment on May 19th, 2008, three and a half months after submitting its Answer and Counterclaims on January 30th, 2008. At the same time FIA was evading discovery and delaying Capps' attempts to obtain specific documents (such as the Pooling and Servicing Agreement) needed for his defense.

In Doe v. Sisters of the Holy Cross, 126 Idaho 1036; 895 P.2d 1229 (1995) (aka Doe v. Garcia) (Doe), the Idaho Court of Appeals stated, "We conclude that the district court should have allowed plaintiffs the opportunity to conduct further discovery relative to the proximate cause issue before acting upon the hospital's summary judgment motion. Therefore, we vacate the judgment and remand this case for further proceedings." In the court's analysis, two questions were addressed in this regard: "Two questions are therefore presented by this appeal. First, would the evidence that Doe sought to develop through further discovery have been potentially relevant to the proximate cause issue? If so, the district court should have permitted such discovery before acting on the summary judgment motion, and it would be necessary for us to vacate the judgment. Second, if such additional discovery would not have been relevant we

must decide whether, viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to Doe, reasonable minds could differ as to whether the hospital's negligence was the proximate cause of the sexual abuse suffered by Doe."

In this case FIA has admitted that the Receivables were in fact sold and assigned to the Master Trust. This raises a question over whether FIA actually owns the debt involved and is thus not the real party in interest as claimed in Capps' affirmative defenses. The Pooling and Servicing Agreement, which contains the terms and conditions regarding the transfer of assets to the Master Trust, specifically states that the Receivables are "accounts", and is thus relevant to the issue of the real party in interest and whether FIA has any actual palpable injury – the two conditions required for standing in the district court. In Doe, the court held, "It was therefore error to deny Doe's Rule 56(f) motion seeking an opportunity to conduct discovery on these points before disposition of the summary judgment motion. … We therefore conclude that the plaintiffs should have been allowed to complete discovery regarding the hospital's knowledge of Garcia's psychiatric history and sexual proclivities before being required to respond to the hospital's summary judgment motion. It follows that the district court's order granting summary judgment to the hospital must be vacated."

In this case, Capps sought a continuance in a Rule 56(f) motion (SUPPLEMENTAL MOTION FOR CONTINUANCE UNDER RULE 56(f) filed September 11th, 2008 (R. Vol. III, p. 553)) for the purpose of obtaining a certified copy of the Pooling and Servicing Agreement complete with affidavits certifying and authenticating the document. The district court committed reversible error in denying Capps' motion for continuance in favor of granting summary judgment to FIA.

FIA complains that Capps' motion for continuance was untimely because it should have been raised before the original summary judgment hearing. Capps filed his SUPPLEMENTAL MOTION FOR CONTINUANCE UNDER RULE 56(f) on September 11th 2008. The hearing (rehearing of the summary judgment motion) took place on September 25th 2008. Capps' Motion for Continuance was thus filed 14 days before the hearing in which it was being heard consistent with I.R.C.P. Rule 56(c) and was not untimely. Reconsideration is a rehearing of the original motion for summary judgment, which includes the new evidence presented in the motion for reconsideration. In Coeur d'Alene Mining Co. v. First National Bank of North Idaho, 118 Idaho 812; 800 P.2d 1026 (1990), the Supreme Court of Idaho stated,

> "[HN10] A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be."

Nothing in I.R.C.P. Rule 56 bars a motion for continuance in a rehearing of a motion for summary judgment. Indeed, Capps' motion for continuance didn't become necessary until the district court rejected the Pooling and Servicing Agreement as evidence in the original summary judgment hearing, which is an issue in this appeal.

Capps' SUPPLEMENTAL MOTION FOR CONTINUANCE UNDER RULE 56(f) also contained a MOTION TO COMPEL DISCOVERY (R. Vol. III, p. 552) which was also made orally during the hearing on September 25th 2008. In Merrifield v. Arave, 128 Idaho 306; 912 P.2d 674 (1996) the Court of Appeals of Idaho stated,

> "[HN3] Implicit in the concept of a summary judgment motion is that adequate time for discovery has been afforded the party who is faced with defending against such a motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). It has been said that sufficient time for discovery in a summary proceeding is considered especially important when the relevant facts are exclusively in the control of the opposing party. 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, *Federal Practice and*

Procedure, § 2741, p. 545 (1983). [HN4] One of the objectives of the summary judgment rules has been to insure that a diligent party is given a reasonable opportunity to prepare his case. In keeping with this philosophy, the granting of summary judgment will be held to be error when discovery is not yet complete, as for example, when there is a motion before the court to compel a response to discovery efforts, *Id.* At 541-44."

The Court of Appeals went on to say,

"One court has succinctly stated in this regard: [HN5] The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion [***15] by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits. If the documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials. Generally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests."

The Court of Appeals concluded,

"In a related vein, we have held that [HN6] reversible error occurred when the trial court granted summary judgment to a defendant following denial of a motion by the plaintiff to complete discovery with regard to information relevant to an issue raised in the summary judgment proceeding. *Doe v. Garcia*, 126 Idaho 1036, 895 P.2d 1229 (Ct. App. 1995).

At the hearing on September 25th 2008, Capps argued (Tr. p. 29, L. 10-15),

"And, in addition, FIA withholding the pooling and servicing agreement when it would establish a genuine issue for the jury to decide is essentially improper and should not be allowed. They should be ordered to put that document on the record, or the summary judgment should be vacated simply on that ground alone."

In Capps' SUPPLEMENTAL MOTION FOR CONTINUANCE UNDER RULE 56(f) (R. Vol. III, p. 553, L. 21-25) he argued,

"Capps is seriously prejudiced by FIA's refusal to provide the Pooling and Servicing Agreement. The document is an essential element of Capps' affirmative defense that FIA "lacks standing" and that FIA "is not a real party in interest under Rule 17(a), I.R.C.P." When the party seeking summary has possession of a document essential to the opposing party's defense, and the moving party refuses to provide the document, summary judgment should be refused."

In Golay v. Loomis, 118 Idaho 387; 797 P.2d 95 (1990), the Supreme Court of Idaho stated,

"[HN3] Rule 56(f) provides: **When affidavits are unavailable in summary judgment proceedings.** – Should it appear *from the affidavits of a party opposing the motion* that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or to make such other order as is just. … Rule 56(f) clearly requires a party who is unable to present affidavits which factually justify his opposition to the motion to state *by affidavit* the reasons he is unable to oppose the motion by use of affidavits."

In Capps' AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE (R. Vol. III, p. 557) Capps stated:

"4. That I have raised an affirmative defense to Defendant FIA Card Services, N.A.'s counterclaims based on a lack of standing.

5. That I have raised an affirmative defense to Defendant FIA Card Services, N.A.'s counterclaim based on Rule 17(a) of the Idaho Rules of Civil Procedure that FIA is not a real party in interest.

6. That a document, identified as the Pooling and Servicing Agreement, is essential to my affirmative defenses identified above.

7. That the document is internal to FIA Card Services, N.A.

8. That I have no other means of obtaining the document with certification and affidavits suitable to have the document entered as evidence in this lawsuit.

9. That I have requested this document in discovery.

10. That FIA Card Services, N.A. has objected to the production of this document.

11. That FIA Card Services, N.A. has refused to produce this document.

12. That I am severely prejudiced in my affirmative defenses identified above by FIA Card Services, N.A.'s refusal to produce this document."

Capps thus clearly stated by affidavit that he was unable to obtain the affidavits from FIA regarding the certification and authentication of the Pooling and Servicing Agreement because

FIA refused to provide the document (internal to FIA) with the required affidavits. Capps' affidavit thus complies with the requirements of I.R.C.P. Rule 56(f).

The district court committed reversible error in granting summary judgment to FIA while discovery was still in progress and while discovery motions were still before the district court. In granting summary judgment under these conditions, the district court violated Capps' procedural due process rights, committing reversible error.

D. RESPONDENT ARGUES THAT THE DISTRICT COURT PROPERLY DISMISSED THE PLAINTIFF'S MOTION TO SHOW CAUSE.

Reconsideration is a rehearing of the original motion, which in essence sets aside the original decision in order to evaluate the new evidence. FIA states, "*After* Respondent's counterclaims were adjudicated, Appellant filed his Motion to Show Cause on September 11, 2008. [R. 559-564]. Thus, as early as July 28, 2008, the "issue is [was] moot" as Respondent's counterclaims were adjudicated in its favor." The purpose of reconsideration is to rehear the motion with the new evidence to get a fuller understanding of the facts involved, not to consider the previous decision a permanent adjudication that bars a different conclusion in the rehearing.

The fact remains that the district court erred in not allowing the completion of discovery before finally deciding on FIA's motion for summary judgment. Capps' Motion to Show Cause was an integral part of that discovery process in overcoming the evasion and deceptions perpetrated by FIA. The district court committed reversible error in dismissing Capps' Motion to Show Cause why FIA should not be held in contempt of court for not fully complying with the court's order compelling discovery.

CONCLUSION

The judicial process, at its heart, is a search for truth. Discovery is the mechanism of revealing that truth. To short-circuit the discovery process in favor of granting summary judgment is to subvert the judicial process and subjugate justice in favor of expediency. In this case the district court judge misapplied the rules of evidence declaring Capps' copy of the Pooling and Servicing Agreement hearsay and unauthenticated when the same evidence was admissible under I.R.E. 1004(3) as argued by Capps. Capps then submitted a Motion for Continuance under I.R.C.P. 56(f) to obtain the affidavits required for certification and authentication of the Pooling and Servicing Agreement, which the district court judge denied. Capps also submitted a Motion to Compel Discovery to obtain the same affidavits for the Pooling and Servicing Agreement, which the district court judge ignored.

The district court judge used part of the disputed evidence as the basis for making his decision, tacitly admitting the evidence into the record while denying Capps the use of the same evidence. The district court judge also ignored Capps' demand for a jury trial, weighing the evidence that found favor with the court, making determinations of facts and rendering a decision in favor of FIA when the jury was the trier of facts. The district court judge recognized that there was a dispute over a material fact in the case and then proceeded to grant summary judgment in spite of the disputed material facts. Capps' attempts to complete discovery were short-changed by the district court judge in granting summary judgment in favor of FIA Card Services. Capps presented clear evidence that FIA Card Services did not own the alleged debt, was not the real party in interest, and could not prove any palpable damages. FIA presented no evidence whatsoever establishing that they were in fact the real party in interest and actually had any damages or standing to bring this action against Capps into court.

The district court judge committed numerous errors and abuses of discretion in the process of rendering a judgment against Capps. Capps therefore requests that this court vacate the summary judgment against him and return the case to the condition it was in before the district court judge violated his procedural due process rights, including reinstating Capps' claims against FIA as those claims were for the jury to decide, not the district court judge. Capps also requests that this court order the district court to allow discovery to proceed to its completion before setting this case for trial. In the alternative, Capps requests that this court dismiss FIA's counterclaims against him without prejudice on the grounds that FIA is not the real party in interest pursuant to I.R.C.P. 17(a) based on the uncontested facts in this case.

If Capps prevails in this appeal, he requests that he be awarded costs involved in this appeal.

Dated this 6TH day of July 2009.

David F. Capps, *in propria persona*

CERTIFICATE OF SERVICE

I, David F. Capps, do hereby certify, under penalty of perjury, that I mailed two true and correct copies of this APPELLANT'S REPLY BRIEF to the attorney for the respondent this 6TH day of July 2009 by Certified Mail #7006 2150 0003 4551 2504 at the following address:

Alec T. Pechota
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, ID 83701

David F. Capps