No. 43115-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HEATHER F LUKASHIN, Defendant, Appellant

v.

CAPITAL ONE BANK (USA), N.A., Plaintiff, Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF THURSTON

HONORABLE CHRISTINE A. POMEROY, JUDGE

THURSTON COUNTY SUPERIOR COURT CASE NO. 10-2-02299-3

BRIEF OF APPELLANT HEATHER F LUKASHIN, PRO SE

Appellant:

Heather F. Lukashin
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* Appellant is aware of the prohibition to cite unpublished opinions. Yet, this opinion must be considered in the appeal as it played a prominent part in Capital One's summary judgment arguments.

** Motion to publish has been granted in this case

A. INTRODUCTION

Capital One Bank was granted a summary judgment in the action it brought against Ms. Lukashin, appearing pro se, regarding an alleged credit card debt. Ms. Lukashin appeals the decision on the grounds of non-compliance with CR 56(e) and Bridges/Ryan standard, as well as serious misconduct by the counsel of the opposing party, including using an affidavit considerably predating introduction of subsequently procured business records it was alleged to identify, plagiarizing from an unpublished Court of Appeals opinion that dealt with an easily distinguishable case, and citing that same opinion during summary judgment arguments in open court. Ms. Lukashin believes that some of the misconduct was so serious that it would warrant disbarment as the presumptive sanction under ABA Standards for Imposing Lawyer Sanctions. She will also argue as to whether courts should impose sanctions equal to reasonable attorney fees where equitable grounds related to bad faith conduct would warrant attorney fees were a pro se litigant represented by an attorney. Ms. Lukashin is requesting that the summary judgment be vacated and the case be remanded to the Superior Court with instructions to dismiss under unclean hands or equitable estoppel doctrine, as well as that costs and fees, in addition to reasonable expenses and sanctions in the amount of imputed reasonable attorney fees (to be estimated by the court) be awarded to her both on appeal and for the original proceedings.

B. ASSIGNMENT OF ERROR

1. The Court erred by admitting into evidence the copies of alleged billing statement filed/served with the motion for summary judgment, as Capital One used the same affidavit a year earlier as part of its default judgment motion, and the newly introduced/procured copies of billing statements were not originally attached to / served with that affidavit.

2. The Court erred by granting the summary judgment as to liability, as Capital One has not complied with CR 56(e) requirement that "...copies of all papers of parts thereof referred to in an affidavit shall be attached thereto or served therewith" by having the Affidavit mention "Customer Agreement" yet failing to provide a signed or unsigned copy of this document.

3. The Court erred in granting the summary judgment as to the amount, as Capital One has not provided a complete set of billing statements, the judgment amount is materially different from the one stated in the affidavit, and without a complete record of transactions it is impossible to determine the actual amount owed, if any.

4. The Court erred when it ruled that **Bridges/Ryan** standard did not fully apply in the instant action, relying on a misinterpretation that Ms. Lukashin admitted the requisite elements that would otherwise needed to be proven under **Bridges/Ryan** by the wording of her Answer.

5. The Court erred when it declined to sanction Capital One's counsel on the basis of or had stricken several of Ms. Lukashin's motions despite such motions citing specific instances of RPC or court rule violations and providing relevant legal authority.

6. The Court erred when it denied Ms. Lukashin's motion for reconsideration, as the misconduct by Capital One's counsel related to motion for summary judgment pleadings/hearing promptly brought to the Court's attention by Ms. Lukashin, together with the showing not only that business records the Court relied on were not properly identified, but also that Capital One failed to comply even with plain language requirement of CR 56(e) by not providing a copy of the Customer Agreement referred to in the affidavit Given the grave nature of bad faith conduct of the opposing party, the Court should have vacated its January 06, 2012 orders, denied the motion for summary judgment, and, viewing bad faith conduct of the opposing party in its entirety, granted Ms. Lukashin's motion to dismiss under unclean hands doctrine.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1.a. Did the court abuse its discretion when admitting into evidence and relying on the newly procured copies of billing statements accompanied by the original affidavit that predates their introduction by more than a year and does not specifically refer to any copies of billing statements?

1.b. Did Capital One or its counsel engage in substantive bad faith conduct and/or RPC Title 3 or 4 violations when submitting, as part of summary judgment motion, the original affidavit, purporting, in its pleadings, that the affidavit properly identifies such business records in compliance with RCW 5.45.020?

2. Does CR 56(e) necessitate strict compliance with the requirement that copies of all documents mentioned in the affidavit are provided before a summary judgment motion can be granted?

3. Did the Court abuse its discretion when it awarded a judgment in the "New Balance" amount shown on a 2008 statement when complete records were not provided and when the record shows several payments in full?

4. Did the Court err in holding that **Bridges/Ryan** did not fully apply in the instant action when denying the motion to reconsider despite not relying on the alleged admission in the defendant's answer when ruling on the motion for summary judgment?

5. Did the Court err in denying or striking Ms. Lukashin's motions for sanctions, including CR 56(g) motion [CP 144-148], two CR 11 motions [CP 287-291, 359-363], CJC Rule 2.15 motion [CP 336-340], and LCR 5(d)(1) motion [CP 383-385]?

6. Did the Court err in denying Ms. Lukashin's motion for reconsideration, especially in light of the additional alleged misconduct pointed out to the Court by Ms. Lukashin since January 6, 2012 hearing, and in light that Ms. Lukashin appeared pro se?

D. STATEMENT OF THE CASE

Below, Ms. Lukashin briefly summarizes main events of the case relevant for the appeal. She would be happy to supplement this statement based on any guidance the Court would choose to provide.

On April 20, 2010, Ms. Lukashin was served with unfiled summons and complaint. Having ascertained that no lawsuit has been actually filed, Ms. Lukashin sent a short letter dated May 4, 2010 disputing the debt and requesting validation to Mark T. Case, the attorney signing the complaint, to Suttell & Hammer's PO Box address, receiving no response to the letter. In June 2010, Ms. Lukashin moved to a new residence.

According to court records, Summons and Complaint were eventually filed on October 18, 2010 [CP 7-8, CP 9-11]. On November 4, 2010, Ms. Lukashin received Motion and Declaration of Default Judgment filed on October 27, 2010 [CP 16-23], which has been forwarded to her new address. In the way of proof, it included Affidavit by Jamie Williams dated April 16, 2010 [CP 19-20] and attached alleged billing statement for the period ending August 24, 2009 showing no consumer-initiated activity, as well as $67.71 in interest charges and additional $78.00 in fees. [CP 21]. On November 19, 2010, the morning of the scheduled hearing, Ms. Lukashin faxed her Answer [CP 26-30] to Suttell & Hammer. In addition, her representative delivered another copy to a counsel with that law firm in the courtroom. The hearing was stricken by the court as a result. [CP 25]

On January 21, 2011, Ms. Lukashin and her spouse appeared for the scheduled status conference at the judicial assistant's office, only to find out that Capital One's counsel continued it to a later date without providing any notice to Ms. Lukashin. Before leaving the courthouse on that date, Ms. Lukashin filed the notice of appearance pro se. [CP 32].

Capital One continued two more conferences without notifying Ms. Lukashin, which led to her filing a motion to compensate [CP 140-141] which was heard on December 2, 2011. In open court, Mr. Filer, Capital One's counsel, stated that continuances took place because "...we're in the process of obtaining documents because the defendant filed an answer." [RP 14], further clarifying that: "We said we were in the process of getting more documents because of recent case law which was made." [RP 16]

On October 27, 2011, Capital One filed its Motion for Summary Judgment [CP 43-148]. As the documents were ostensibly mailed to the previous address, they were never received by Ms. Lukashin, who then filed a motion to strike or deny on November 22, 2011 [CP 142-143], resulting in the summary judgment motion being re-noted for January 6, 2012 hearing date. The motion for summary judgment included a copy of the same original affidavit by Jamie Williams dated April 16, 2010 [CP 47-48] and almost 100 pages of alleged billing statements, with the last statement provided being for the period ending November 24, 2008 and listing the "New Balance" as $2,058.44.

On December 19, 2011, Ms. Lukashin filed a response to the motion for summary judgment [CP 292-297], pointing out the problem with using the original affidavit to identify purported business records, the fact the statements provided were not sufficient to ascertain the current balance on the account, and that a copy of the alleged contract was not provided, so that **Bridges** and/or **Ryan** standards were not met. [CP 292-293].

On December 30, 2011, Capital One filed a reply [CP 307-310], in which counsel plagiarized the entire ANALYSIS 1 section from the unpublished **Plumb** opinion, as was painstakingly shown by Ms. Lukashin later, once she became aware of this, in her second motion for CR 11 sanctions [CP 359-363], also noting that plagiarism was the cause of Iowa Supreme Court suspending an attorney for at least 6 months in 2002 (thus being a serious ethical violation), plus, by doing so counsel effectively violated RAP GR 14.1(a) prohibition and effectively misrepresented facts in the instant action to the court, as that

opinion was written for a deceptively similar yet clearly distinguishable case, as was also shown by Ms. Lukashin in the motion and in item 5 of the brief in support of motion for reconsideration [CP 352-354].

On January 06, 2012, the court heard several motions, including Defendant's Motion to Dismiss and Plaintiff's Motion for Summary Judgment, denying motion to dismiss on all five grounds listed and granting summary judgment motion in the amount of $2,058.44 plus costs less the $150 offset (awarded on Ms. Lukashin's motion to compensate). During oral arguments, Mr. Filer cited and discussed the **Plumb** case, despite explicit timely objection by defendant [RP 43], without drawing any distinctions between the instant action and the **Plumb** case. Mr. Filer also acknowledged the need to meet the **Bridges** standard in response to the Court's question whether there was enough to meet the **Bridges** standard [RP 41]. Mr. Filer admitted that "They don't acknowledge that they actually have this account, which would be enough." [RP 41] and then proceeded discussing the criteria, also mentioning Ryan, claiming that the evidence provided is "enough of itself ... more than two years of statements to proceed with a motion for summary judgment" [RP 42].

When the Court asked what Capital One was seeking in terms of money judgment, Mr. Filer stated that "my client would be willing just to take the amount that was listed in the last payment ... the billing statement..." [RP 46-47] and "...my client would be willing to take the amount listed in the last billing statement of 2008 and forego the additional interest..." [RP 47]. Defendant pointed out that going with the amount on a 2008 statement, even if the facts were assumed in light most favorable to plaintiff, would not be proper, especially since record indicates two payments in full (zero balance) and one payment of $1,500 (75% of credit line) [RP 48]. Defendant further emphasized that "statements are not admissible because they're not properly identified and they're not referred to in the affidavit whatsoever." [RP 49].

The Court then ruled, denying Ms. Lukashin's motion to dismiss on all five grounds, noting that unjust enrichment ground would be an usury-type situation [RP 50] instead. Citing Bridges, and relying on "the billing statements and the affidavit of Ms. Williams and the admission in the answer", the Court ruled that is not unjust enrichment.

In ruling on summary judgment motion, the Court discussed Bridges and stated: "Whether or not there's admission, what are the detailed billings, what are the payments, I find sufficient evidence ... to grant summary judgment in the amount of $2,058.44" [RP 51]. The Court entered orders denying defendant's motion to dismiss [CP 332-333], order of summary judgment [341-342], and order denying defendant's motion for CR 11 sanctions [CP 334-335]

Ms. Lukashin filed a timely motion for reconsideration [CP 343-346] and support brief [CP 347-356]. Hearing was held on January 27, 2012. Defendant raised the issue of misconduct of the opposing party [RP 57], issues off admissibility and identification of evidence offered by the plaintiff and proof of mutual assent to contract, asserting that Capital One did not meet its burden of proof under **Ryan**. [RP 58]. To summarize, defendant further stated that "the two key points is the evidence the court relied on has not been properly identified and, thus, inadmissible, and the second is that, well the second is that counsel misled the court on multiple occasions as the defendant has painstakingly shown on the record, and that the plaintiff failed to provide sufficient admissible evidence to prove the mutual assent to contract..." [RP 61-62].

In response, Mr. Filer referred to the Bridges case, claiming that "... under two of the four prongs, specifically, Your Honor stated that Capital One had met its burden" [RP 62]. Asked to discuss why Ryan did not apply, Mr. Filer claimed the evidence is much different, further stating that "we have over two years showing payments and purchases... We never had one declaration saying none of these charges never occurred" [RP 63]. Following up, defendant pointed out that "defendant's duty to respond was

affidavits and specific factual contention arises only once the plaintiff has proven, and the defendant alleges that the plaintiff has not proven or met his burden of proof on the Ryan", further asking "Where is the customer agreement?" [RP 64]

The Court then ruled, relying on the Answer to complaint, stating "there is an admission and that negates the situation. That is very important in this case [...] answer is an admission as to having this account with these four last digits [...] that negates certain situations. I'm not going to reconsider. I stand by my decision. I think is correct, but I could be wrong. And if I am wrong, the court of appeals will tell me." [RP 64-65]

The Court entered the Order Denying Motion for Reconsideration [CP 386-387] on January 27, 2012. Ms. Lukashin timely appealed [CP 389-398], filing a notice of cash supersedeas [CP 402-403].

E. ARGUMENT

1. The Court erred when admitting voluminous copies of business records into evidence, since the affidavit submitted by Capital One could not have possibly properly identified them, as required by RCW 5.45.020.

Whether copies of alleged billing statements were properly identified is the central issue on this appeal. As was noted above, there has only been one Affidavit by Jamie Williams dated April 16, 2010, a copy of which has been submitted both with default judgment and summary judgment motions, which were filed almost exactly a year apart.

Mr. Filer, Capital One's counsel, admitted in open court that the delay in the proceedings was due to the fact that "...we're in the process of obtaining documents because the defendant filed an answer." [RP

14], further clarifying that: "We said we were in the process of getting more documents because of recent case law which was made." [RP 16]

It is reasonable to assume that a custodian or other qualified witness, in order for Capital One to comply with RCW 5.45.020 requirements, could only testify to "its identity or mode of its preparation" in case of a document actually filed with the court only if the document or a true and correct copy thereof was available for inspection by that custodian or witness at (or before) the time the affidavit was signed. Further, it is reasonable to assume that, in order to properly identify a business record, such business record must be explicitly mentioned in the affidavit, especially if the business records provided are newly generated on the basis of "books and records" the Affidavit does refer to. [CP 19, CP 47]. However, aside from "Customer Agreement" [CP 19-20, 47-48], which was never provided, Affidavit does not refer to any other specific identifiable documents. Thus, there is absolutely no evidence that Jamie Williams actually reviewed any copies of billing statements or testified that they are true and correct.

This position is strengthened by Mr. Filer's admission that, subsequent to motion for default judgment hearing (since that was also the date Ms. Lukashin filed/served her Answer), counsel and/or Capital One were "getting more documents because of recent case law which was made." [RP 16]. Since the only new evidence introduced by Capital One consisted of the voluminous copies of alleged billing statements, and since they were clearly procured long after Jamie Williams signed the Affidavit, Capital One's competent witness could not have identified such copies and testify to the mode of the statements' preparation, since even the need to obtain these records admittedly arose subsequent to the date of the affidavit to comply with recent case law.

Since the original affidavit could not have properly identified newly produced business records as it predated production of such records, the Court erred in admitting these records into evidence and explicitly relying on them [RP 51] in granting the summary judgment.

2. The Court erred when granting summary judgment as to liability as it relied on inadmissible evidence, failed to strictly comply with CR 56(e) requirements and/or Bridges/Ryan standard.

As discussed above, the voluminous copies of alleged billing statements introduced by Capital One were not properly identified. Thus, the only evidence the Court could properly base its ruling on was the Affidavit by Jamie Williams, which would clearly not be sufficient, by itself, as neither signed or unsigned contract, nor any other evidence pointing to acceptance of the agreement and personal acknowledgment of the account, as required by **Bridges/Ryan**, was presented.

Furthermore, the Court should have denied the motion for summary judgment on the fact that the CR 56(e), which requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith". Capital One had ample time (a year) to provide a copy of "Customer Agreement" the Affidavit referred to, and Ms. Lukashin has pointed that the Customer Agreement was not provided on numerous occasions in her pleadings.

The fact that the "Customer Agreement" was not provided is also evident from the fact that, while Capital One seeks attorney fees in the amount of $650.00 [CP 10], and that the Affidavit states that "...Customer Agreement ... authorizes Capital one to recover from Defendant(s) reasonable attorneys' fees and costs to the extent permitted by law." [CP 20, CP 48], in the Order of Summary Judgment prepared by Capital One, item 6, Plaintiff's attorney fees, is listed as $0.00.

Since the contract is obviously central to this case, and, furthermore, would be required under both **Bridges** and **Ryan** standards, the Court should have denied the summary judgment motion or, at the very least, continued the hearing so that Capital One could provide such evidence.

In **Ryan**, Citibank provided an affidavit signed by an employee that set forth the total sum claimed was owing, provided copies of thirteen monthly account statements, along with a six-page unsigned credit card agreement (para. 3) Citing **Bridges**, the Court of Appeals, Division 1, reiterated the standard of needing either a signed cardmember agreement or evidence of cancelled checks or online payment documentation or detailed, itemized proof of card usage.

While Capital One claims that it met two of the four prongs in Bridges, how could anyone be held assenting to a cardmember agreement when an agreement is never provided? Furthermore, there was no evidence of cancelled checks or online payment documentation. Even though an alleged copy of the statement for the period ending August 17, 2006 lists CAPITAL ONE ONLINE ACH PAYMENT in the amount of $30 [CP 49], for example, this is no better than a simple "payment" notation deemed insufficient in **Ryan**. Wouldn't online payment documentation, as referred to by **Ryan**, mean specific transaction information to include, for example, the number of the bank account the payment was drawn upon?

As to the alleged admission by Ms. Lukashin in her Answer, Mr. Filer conceded that "They don't acknowledge that they actually have this account, which would be enough." [RP 41].

Furthermore, the **Ryan** court held that "the rule in Bridges applies to the adequacy of the bank's initial proof of assent to the cardholder agreement, and does not depend on the purported cardholder's response." (para. 14).

Thus, in conjunction with the fact that the copies of billing statements were not properly identified as required by RCW 5.45.020, Capital One has submitted only an affidavit of its authorized employee, which is clearly insufficient under **Bridges** or **Ryan** standard.

3. The Court erred as to the amount of judgment, as there was no reason to simply pick the "New Balance" amount from a 2008 alleged billing statement, when the set of statements was incomplete.

Even when taking the evidence in light most favorable to Capital One (contrary to the requirement cited in **Ryan** that "...the court must construe all facts and reasonable inferences in light most favorable to the non-moving party..."), the set of statements provided was incomplete; thus, there was a genuine question as to the amount, especially given several recorded instances of a payment in full.

To see why the judgment as to the amount is inappropriate, let's consider the following hypothetical situation: Mr. A opens a credit card account and maintains it in good standing for several years. After one Christmas season, Mr. A has the balance of say $5,000, which is paid in full by the following May. The card never used by Mr. A again afterwards, and, unbeknownst to Mr. A, it (or its relevant information) is stolen and used to incur unauthorized charges. The credit card company comes seeking the $5,000 balance that once was on the card several years later, providing statements leading to that $5,000, but not the subsequent statements, even properly identifying them per RCW 5.45.020 and submitting an affidavit. Clearly, Mr. A would not be responsible for any of the charges (especially since many credit card companies have advertised "zero liability for unauthorized charges"), and wouldn't even dispute that he once had this account and made purchases on it. In the situation like this, this court would grant the credit card company the judgment for $5,000 plus costs and interest, which would clearly be inappropriate.

Thus, absent full accounting of all charges, fees and payments from the last date the account is paid in full, it is impossible to determine what amount, if any, is owed by the defendant on the account, even if

we assume for a minute that Capital One has met its burden of proof under **Bridges** or **Ryan**. Thus, the Court erred when it entered the judgment in the amount of $2,058.44 plus costs in the instant action.

4. Capital One and/or its counsel committed misconduct that resulted in the Court's granting summary judgment in Capital One's favor.

Standard 6.11 and Standard 6.21 of **ABA Standards for Imposing Lawyer Sanctions** state that disbarment is a presumptive sanction for violating them. Here, by submitting the original affidavit with newly procured business records and subsequently arguing that such business records were properly identified, Mr. Filer violated Standard 6.11. By plagiarizing an entire section from the **Plumb** opinion in a pleading submitted to the court and subsequently citing this case in open court, Mr. Filer violated Standard 6.21 by violating RAP GR 14(a), since the imputed intent was to mislead the court as to proper identification of business records; and since the Court clearly relied on these business records in making its original ruling [RP 50-51], serious injury to the opposing party and serious interference with a legal proceeding took place.

Ms. Lukashin has also pointed out that such conduct would constitute violations of RPC Title 3 (Candor Toward the Tribunal), Title 4, and Title 8 in her motions for sanctions filed with the Court, which the Court had denied or stricken.

In **Wright v. DAVE JOHNSON INSURANCE INC. (2012)**, this Court very recently visited the issue of bad-faith conduct as one of the equity grounds for awards of attorney fees. We believe that Capital One and/or its counsel demonstrated both procedural bad faith and substantive bad faith, particularly by purporting to properly identify business records and arguing the **Plumb** case (even though misconduct was believed to be violations of RPC and court rules at the time, since Ms. Lukashin did not have the benefit of this subsequent opinion of the Court of Appeals then).

5. Sanctions equal to imputed attorney fees and/or referral to disciplinary authority, in addition to dismissal with prejudice, are necessary to deter misconduct against pro se litigants

It is common knowledge that economists have modeled choices people make by stating that people compare expected benefits (EB) and expected costs (EC) of their decisions. When there are several possible outcomes, each associated with a certain probability p, the expected value of the choice would be the sum of the products of the probability of the outcome and the value of that outcome. Let us assume that the expected benefit B from bad-faith conduct is the same whether opposing party is represented by counsel or proceeds pro se. The expected cost would be zero if misconduct is unnoticed or not addressed; let us assume that the misconduct is noticed and sanctioned with a probability p and sanctions are imposed in the amount of C; the expected costs of misconduct would then be pC. Now, since reasonable attorney fees are often much larger than the amount at stake in litigation, potential imposition of such sanctions serves as a serious deterrent against misconduct when dealing with a party represented by counsel. In addition, the probability that misconduct is discovered and brought to the court's attention is much, much higher when the opposing party is represented by counsel (and misconduct does not occur since B << pC), rather than when the opposing party is pro se. This court recently, in **Johnson (2012)**, discussed "American Rule" and that bad faith conduct is one of the four recognized equity grounds for awards of attorney fees. Thus, were Ms. Lukashin represented by counsel in the instant action, bringing a frivolous motion for summary judgment could have triggered an award of attorney fees.

Given that debt collection defense estimates for a case resolved on summary judgment (using **Fred Martens' legal fees** as a guideline) are between $1,800 and $4,500, normally expected to be payable in addition to any judgment entered against a pro se party contemplating securing legal representation (with the best case scenario of the case being dismissed and judgment thus being zero), we have a very

perverse situation where a law firm initiating a "small claims" lawsuit in Superior Court would find it to be to its advantage to engage in bad-faith conduct, as the expected cost (pC) of such bad-faith conduct is very small, since both the probability of the conduct being identified and acted upon and the possible amount of sanctions are much smaller when the opposing party is pro se compared to when a party is represented by counsel. Plus, in a "small claims" action coupled with "American rule", it is almost never optimal for a pro se defendant to secure legal representation (even if such defendant sees a 50% chance of prevailing, committing to paying legal fees that are approximately equal to the value at stake would be irrational) in the first place. In the instant action, the Court sanctioned Plaintiff's counsel just $150 for two failures to appear at scheduling conferences, declining to sanction Plaintiff for any other alleged misconduct identified by Ms. Lukashin.

What could be an effective sanction to deter misconduct by parties represented by counsel against pro se litigants? Dismissal of the original action with prejudice might seem to be effective; but, by itself, it would fall short of being an effective deterrent. If the bad-faith party could not have prevailed based on the admissible evidence without engaging in misconduct, dismissal would simply put such bad-faith party in the situation where misconduct wouldn't have occurred. Thus, the expected net benefit of misconduct if the case is simply dismissed on appeal, especially given the small probability of a pro se party actually filing an appeal, is still positive (calculated as probability that the decision stands multiplied by the amount of judgment obtained). However, an award of sanctions in the amount of imputed reasonable attorney fees (based on market average rate and time that would have been spent by an attorney/legal assistant, for example) and/or mandatory invocation of CJC 2.15(B) to initiate disciplinary proceedings against the offending attorney could serve as an effective deterrent (disciplinary proceedings may have the effect of reducing expected lifetime earnings of such attorney).

In **McCollough v. Johnson, Rodenburg & Lauinger, LLC, 637 F. 3d 939 (2011)**, Court of Appeals for the 9th Circuit, addressing a debt collection case and alleged misconduct by plaintiff's counsel, held that a pro se defendant is entitled to "special treatment" by holding that requests for admissions served on a pro se defendant needed to include the language about the matters being "deemed admitted if McCollough did not respond within thirty days" (section II. C. 2.), and finding that to violate FDCPA as a matter of law; even though Civil Rules do not require such disclosure. While FDCPA relief might be available to Ms. Lukashin in an action against the Suttell and Hammer law firm, and Mr. Filer, jointly and separately, as debt collectors (see **McCollough**, II. C. 1), we believe that the court should sanction a party and/or counsel if it finds that the misconduct is much broader in nature and/or so egregious as to warrant a strong deterrent as to not "to undermine the public confidence in legal profession and the judiciary" CJC 2.15 (Comment 2).

F. CONCLUSION

Ms. Lukashin has shown that the Court erred in granting the summary judgment in favor of Capital One. There is not enough admissible evidence in the record of this case, as it is currently developed, to support such judgment. Additionally, Ms. Lukashin showed that Capital One and/or its counsel, Mr. Filer, have engaged in serious misconduct, including by using the original affidavit and purporting it to properly identify copies of alleged business records, as well as advancing arguments plagiarized from an unpublished Court of Appeals opinion that dealt with a deceptively similar yet easily distinguishable case. The misconduct resulted in the Court's admitting the records into evidence, relying on them in granting summary judgment, and denying defendant's motion to dismiss and motion for reconsideration.

Since the Court had no reasonable evidentiary basis, in case the business records are ruled not to have been properly identified by this Court, to find as to liability, and had no reasonable basis, even if the

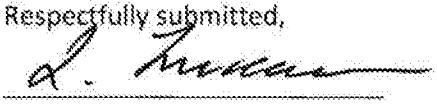
business records were properly identified, to find as to the amount, Ms. Lukashin requests that the order granting summary judgment is vacated and the case is remanded for further proceedings.

Taking into account the totality of bad-faith conduct (or professional misconduct) on the part of Capital One and/or Mr. Filer personally, which has been alleged in the record, Ms. Lukashin respectfully requests that, on remand, instructions are issued that the case is dismissed with prejudice under "unclean hands" or "equitable estoppel" doctrine, that Ms. Lukashin is awarded reasonable expenses and sanctions in the amount equivalent to imputed attorney fees (as has been argued in good faith above to be in the public interest) for having to defend against a frivolous summary judgment motion (which would be the case if the business records are to be found not to be properly identified as required by RCW 5.45.020) and having to subsequently bring in a motion for reconsideration and motions for sanctions, which certainly took a lot of time, effort, and emotional distress.

Ms. Lukashin further respectfully requests costs and fees on appeal; in addition, she requests, based on the good-faith argument for desirability of sanctions for attorney misconduct against pro se defendants in general to serve as deterrent against otherwise "rational" misconduct, sanctions in the amount of imputed attorney fees that would have been associated with bringing this appeal.

Dated this 14th day of June, 2012.

Respectfully submitted,



Igor Lukashin,

on behalf of Heather F Lukashin, pro se Appellant

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COURT OF APPEALS DIVISION II	COURT OF APPEALS NO. 43115-1-II
HEATHER F LUKASHIN Appellant, vs. CAPITAL One Bank (USA), N.A Respondent.	**DECLARATION OF MAILING**

Pursuant to RCW 9A.72.085, I certify that on the 14th day of June, 2012, I caused to be deposited in the United States mail, postage prepaid, the following documents in the above-captioned matter addressed to the parties herein as indicated below:

Appellant's Brief

Nicholas R. Filer, WSBA # 38536 SUTTELL & HAMMER, P.S. PO BOX C-90006, Bellevue, WA 98009	**[X] U.S. Mail**

Dated and signed in Olympia, Washington this 14th day of June, 2012.

Igor Lukashin,

on behalf of Heather F Lukashin, pro se Appellant

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