IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 89776-0

CAPITAL ONE BANK (USA), N.A.

Plaintiff, Respondent,

vs.

HEATHER F LUKASHIN

Defendant, Petitioner

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS, DIVISION TWO, OF THE STATE OF WASHINGTON

COURT OF APPEALS CASE NO. 43115-7-II

SECOND STATEMENT OF ADDITIONAL AUTHORITIES

Petitioner:

Heather F. Lukashin, *pro se*

3007 French Rd NW

Olympia, WA 98502

(360) 870-0909

Petitioner Heather F. Lukashin, *pro se*, offers the following second statement of additional authorities pursuant to RAP Rule 10.8.

1) *Kitsap Co. & Kitsap Co. Sheriff. v. Kitsap Co. Correctional Officers Guild, Inc.*, No. 44183-7-II, slip op. (March 13, 2014)[1], p. 8:

> We review a summary judgment order de novo, engaging in the same inquiry as the trial court. ***Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)**. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); ***Folsom*, 135 Wn.2d at 663**. We construe the facts and reasonable inferences in favor of the nonmoving party. *Korslund v. DynCorp Tri- Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P. 3d 119 (2005). (underline and bold emphasis added)

Offered in support of assignments of error 1.a) – c) (*Folsom* (1998) *de novo* review standard for evidentiary rulings in connection with a summary judgment) and related Equal Protection Clause argument (Petition, pp. 9–10).

Judicial notice is requested that Division Two just explicitly recognized the *Folsom* (1998) standard in a published opinion.

2) *Manary v. Anderson*, 176 Wn.2d 342, 292 P.3d 96, 100 (January 17, 2013):

> We review summary judgment orders de novo. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998).

[1] Available at http://www.courts.wa.gov/opinions/pdf/D2%2044183-7-II%20%20Published%20Opinion.pdf

Offered in support of assignments of error 1.a) – c) (*Folsom* (1998) *de novo* review standard for evidentiary rulings in connection with a summary judgment) and related Equal Protection Clause argument (Petition, pp. 9–10).

Judicial notice is requested that this Court cited *Folsom* (1998) in its 2013 opinion and before Division Two issued its opinion herein.

3) List of Washington Court of Appeals published and unpublished opinions citing ***Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998)** (not including those previously referenced) in 2010–2014, attached hereto as Exhibit 1.

Judicial notice is requested of the fact that divisions of the Washington Court of Appeals cited to this Court's *Folsom* (1998) opinion in their decisions dozens of times since 2010.

Offered in support of assignments of error 1.a) – c) (*Folsom* (1998) *de novo* review standard for evidentiary rulings in connection with a summary judgment) and related Equal Protection argument (Petition, pp. 9–10); as well as **assignments of error 5 and 7** and discussion on p. 20 of the Petition (RCW 2.48.220(10) "gross incompetency" and RCW 2.48.220(11) "violation of the ethics of the profession" argument – what a competent, RPC-compliant attorney would have known).

4) *Discover Bank v. Maurie Lemley, et ux*, No. 31080-9-III, slip op. (March 18, 2014)[2]:

> At the conclusion of the June 15 summary judgment hearing, the court stated:
>
> > The burden to [Discover Bank] in summary judgment[,] when the motion is being brought by [defendants,] is to establish at least questions of material facts on their prima facie case.
> >
> > As the court has reviewed the documents that have been provided since the original denial of summary judgment for [Discover], I have been looking for documentation in response to this motion to establish a prima facie case as to how that debt was identified, what the terms of that debt were, how they were defined, what are the material components of that contract.
>
> CP at 712. "It does not," the court explained, "provide adequate evidence as a matter of law to computer generate a copy of what might have been terms at a particular point in time without a connection between those terms and the party being sued on those terms." CP at 712. "Response by affidavits or otherwise must set forth specific facts showing that there is a genuine issue for trial" CP at 713.
>
> In its written order, the trial court repeated its reasoning. The order reads that the affidavit and supporting documents Discover Bank submitted in "opposition to [the Lemleys'] Motion for Summary Judgment and *in support of [Discover's] Motion for Summary Judgment* do not contain the ... reliable foundation, pursuant to Court Rule 56(e), to establish that the Affiant had personal information about the alleged obligation in the amount of $5,729.78." CP at 718 (emphasis added). **The bank's failure to provide competent evidence establishing an essential element of its case – damages – entitled the Lemleys to summary judgment**. (pp. 11–12, underline and bold emphasis added)
>
> ...

[2] Available at http://www.courts.wa.gov/opinions/pdf/310809.opn.pdf

> The court, however, refused to consider the attachments to the memorandum because of a lack of authentification. (p. 13)

Offered in support of assignments of error 1.d) – g) and 2 and related argument (Petition, pp. 9–16); as well as to indicate the "substantial public interest" called for by RAP 13.4(b)(4), as the *Lemley* court did not address [t]he principal issue raised by the parties on appeal:

> ... the qualifications needed by an affiant on behalf of a major credit card company to identify the controlling contract with the debtor and establish the amounts owed, in response to a summary judgment motion. (p. 1)

while this Court has an opportunity to address exactly that issue by granting Lukashin's petition for review.

Judicial notice is requested that the initial (Sayers) affidavit in *Lemley* (deemed insufficient by the trial court to preclude summary judgment in favor of Lemley) failed to attach "Application" specifically mentioned in the Sayers Affidavit, but did attach the "Cardmember Agreement", also specifically mentioned in Sayers Affidavit (unsigned and dated two years after Lemley made his last purchase), (pp. 3–4).

The *Lemley* court also observed:

> Sixty-three pages of credit card account statements, beginning in November 2006 and ending in August 2010, follow the cardmember agreement as attachments to Patrick Sayers' affidavit. The statements disclose credit tactics employed by Discover Card to maximize revenue and personal details of Maurie Lemley's life. Of course, the truth of the information contained on the statements is subject to a determination of whether Patrick Sayers could properly identify the statements. (p. 5, underline emphasis added).

Furthermore, the *Lemley* court observed as follows while ruling:

> Our ruling also does not address whether Joshua Smith or James Ball qualifies to testify to the facts stated in their respective affidavits or whether either qualifies to identify the documents attached to their respective affidavits. If the trial court denies the Lemleys' motion to strike because of untimeliness or discovery violations, the trial court will need to otherwise determine the admissibility of the two affidavits. (p. 17, emphasis added)

5) *Hash v. Children's Orthopedic Hosp. and Medical Center*, 110 Wn.2d 912, 915, 757 P. 2d 507 (1988):

> "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The burden of showing that there is no issue of material fact falls upon the party moving for summary judgment; all reasonable inferences must be resolved against the moving party, and the motion should be granted only if reasonable people could reach but one conclusion. *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 108, 751 P.2d 282 (1988).
>
> If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980). Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact. *Graves*, at 302. (underline emphasis added)

Offered under *stare decisis* doctrine[3] for the Court's benefit in addressing Lukashin's Petition (moving party's failure to meet the burden

[3] This Court subsequently cited to ***Hash v. Children's Orthopedic Hosp.*, 110 Wash.2d 912, 915, 757 P.2d 507 (1988)** in *Malnar v. Carlson*, 128 Wash.2d 521, 910 P. 2d 455, 461 (1996); *Greater Harbor 2000 v. City of Seattle*, 132 Wash. 2d 267, 937 P. 2d 1082, 1089 (1997), n. 22 and 24; *Green v. APC*, 136 Wash.2d 87, 960 P.2d 912, 917–918

of showing there's no issue of material fact makes summary judgment in its favor inappropriate, even if the non-moving party does not submit any affidavits).

6) *Macias v. Mine Safety Appliances Co.*, 244 P. 3d 978, 980 (2010)[4]:

> We review a trial court's denial of summary judgment de novo. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wash.2d 225, 230, 119 P.3d 325 (2005). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "If... the plaintiff `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,' then the trial court should grant the motion'" because "`a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *Young v. Key Pharmaceuticals., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). (underline emphasis added)

Offered in support of assignments of error 1.e) – h) (plaintiff's insufficient evidence to establish a single essential element of its claim renders all other facts immaterial) and related Equal Protection Clause arguments (Petition, pp. 11–16).

(1998); and *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wash. 2d 291, 996 P. 2d 582, 590 (2000) (Sanders, J., dissenting). *Hash* is also in accord with *Hamilton v. Keystone Tankship Corp.*, 539 F. 2d 684, 686 (9th Cir. 1976) (per curiam), previously cited by Lukashin.

[4] Judge Worswick, concurring member of the *Lukashin* panel, authored Division Two's *Macias* opinion (reversed by this Court in *Macias v. Saberhagen Holdings, Inc.*, 282 P. 3d 1069 (2012), a 5-4 ruling, on grounds unrelated to the summary judgment standard block-quoted on this page).

7) *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, No.88080-8, slip op. (March 20, 2014)[5]

> On matters of federal law, we are bound by the decisions of the United States Supreme Court. *Home Ins. Co. of N.Y v. N. Pac. Ry.*, 18 Wn.2d 798, 808, 140 P.2d 507 (1943). Decisions of the federal circuit courts are "entitled to great weight" but are not binding. *Id.* (p.7)
>
> Generally, under stare decisis, we will not overturn prior precedent unless there has been "a clear showing that an established rule is incorrect and harmful." *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). However, this court must have the flexibility to consider emerging United States Supreme Court case law when considering earlier decisions on federal issues. (pp. 12 – 13)
>
> ...
>
> Thus, we can reconsider our precedent not only when it is has been shown to be incorrect and harmful but also when the legal underpinnings of our precedent have changed or disappeared altogether. See United States v. Gaudin, 515 U.S. 506, 521, 115 S. Ct. 231 0, 13 2 L. Ed. 2d 444 (199 5) (declaring that stare decisis may yield when a precedent's "underpinnings [have been] eroded[] by subsequent decisions of [the] Court"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55, 112 S.13 Ct. 2791, 120 L. Ed. 2d 67 4 (1992) (observing that review of a precedent might be justified when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"). (pp 13–14, underline emphasis added)

Offered under *stare decisis* doctrine for the Court's benefit in addressing Lukashin's Petition and the authority submitted by Lukashin (including offered under *stare decisis* doctrine), as well as for the proposition that decisions of federal circuit courts are entitled to "great weight".

[5] Available at: http://www.courts.wa.gov/opinions/pdf/880808.pdf

8) *Target National Bank v. Jeanette E. Higgins*, No. 31575-4-III, slip op. (March 20, 2014)[6]:

> Target filed suit for breach of contract against Jeanette Higgins for nonpayment of a credit card debt in the amount of $2,052.37. In its complaint, Target requested reasonable attorney's fees, although it did not identify any basis for the request. In a default judgment motion, Target also claimed it was "entitled to its costs and attorney's fees pursuant to contract and/or statute." Clerk's Papers (CP) at 12. In her answer, Higgins denied liability, admitting only that she "at one time had an account with some Target affiliated entity." CP at 6. She also requested "reasonable attorney's fees and costs for the defense of such action." CP at 7. The answer did not specify any basis upon which attorney's fees were sought.
>
> ...
>
> Before the hearing on Jeanette Higgins' summary judgment, Target moved for summary judgment and responded to Higgins' requests for discovery. As part of its response to Jeanette Higgins' summary judgment motion, Target filed a copy of the purported credit card agreement.
>
> ...
>
> The trial court heard Target's motion for summary judgment first. The trial court denied Target's motion, ruling that Target failed to produce admissible evidence to support a debt owed by Higgins. Two weeks later, the trial court granted Higgins' motion for summary judgment. The trial court repeated its ruling that Target failed to produce admissible evidence to establish a foundation for the Target credit card agreement. (pp. 2–3, portions omitted, underline emphasis added)

Offered in support of assignments of error 1.e) – h) (plaintiff's failure to establish a single essential element of its claim, like the foundation for the Target credit card agreement in Higgins, renders all other facts

[6] Available at: http://www.courts.wa.gov/opinions/pdf/315754.opn.pdf .

immaterial) and related Equal Protection Clause arguments (Petition, pp. 11–16); as well as for apparent similarity of the facts (yet Target filed a purported credit card agreement in Higgins, while Capital One did not in the Lukashin case) resulting in a completely opposite trial court decision (see RAP 13.4(b)(4)).

9) *Salas v. Hi-Tech Erectors*, 230 P. 3d 583, 587 (2010)

> Our standard for determining abuse of discretion is whether the court's decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Stenson*, 132 Wash.2d at 701, 940 P.2d 1239. We should not permit untenable decisions to stand merely because the parties failed to adequately brief the court. We are sympathetic to busy trial courts that must rely on the authority provided to them, but just because an error is understandable does not mean it is excusable. Because we conclude that, with regard to lost future earnings, the probative value of immigration status, by itself, is substantially outweighed by its risk of unfair prejudice, the trial court's decision to the contrary is based on untenable reasons. Therefore, the trial court's decision is an abuse of discretion. (underline emphasis added)

Offered under *stare decisis* doctrine for the Court's benefit in addressing Lukashin's Petition (untenable decisions should not stand merely because parties[7] failed to adequately brief lower courts).

///

///

///

///

[7] See RPC 3.3(a)(1) and 3.3(a)(3).

Respectfully submitted this
20th day of March, 2014

IGOR LUKASHIN,

on behalf of Heather F. Lukashin,
pursuant to RCW 4.08.040

3007 French Rd NW
Olympia, WA 98502
(360) 447-8837

Exhibit 1

To SECOND STATEMENT OF ADDITIONAL AUTHORITIES

List of Washington Court of Appeals published and unpublished opinions citing ***Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998)** (not including those previously referenced) in 2010–2014

Washington Supreme Court No. 89776-0, *Capital One v. Lukashin*

Published[1] Washington Court of Appeals opinions citing
***Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998)**

Citation	Opinion date	Note
Kellar v. Estate of Kellar, 291 P. 3d 906, 913	12/31/2012	E
Capitol Specialty Ins. v. JBC Entertainment, 289 P. 3d 735, 737	12/10/2012	E
Davis v. Fred's Appliance, Inc., 287 P. 3d 51, 56	10/23/2012	E, H
NYBA v. Supreme Northwest, Inc., 285 P. 3d 70, 76	5/7/2012	
Rice v. Offshore Systems, Inc., 167 Wn. App. 77, 272 P. 3d 865, 870	1/17/2012	E
Frisino v. Seattle School Dist. No. 1, 249 P. 3d 1044, 1049	3/21/2011	
Cornish College v. 1000 VIRGINIA LTD., 242 P. 3d 1, 8	10/25/2010	
Moore v. Hagge, 241 P. 3d 787, 791–792	8/16/2010	E
Renfro v. Kaur, 235 P. 3d 800, 805	5/17/2010	E
Matsyuk v. State Farm Fire & Cas. Co., 229 P. 3d 893, 896	3/29/2010	
Averill v. Farmers Ins. Co. of Washington, 155 Wash. App. 106, 229 P. 3d 830, 832	3/15/2010	
Ensley v. Mollmann, 230 P. 3d 599, 603	3/1/2010	E, H
Lane v. Harborview Medical Center, 154 Wash.App. 279, 227 P. 3d 297, 300	2/1/2010	E

Note legend:

E – contains discussion of review standards for evidentiary decisions in connection with summary judgment;

H – contains discussion of hearsay admissibility.

[1] All published Court of Appeals decisions in this table are from Division One, with the exception of *Davis v. Fred's Appliance, Inc.*, 287 P. 3d 51, 56 (2012), which is a Division Three opinion

Unpublished Washington Court of Appeals opinions citing
***Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998)**

(page 1, 2012–2014)

Case name	Case no.	Opinion date	Note
West v. Washington State Association of Cities	43787-2-II	2/4/2014	WC
Barrett v. Loew's Home Centers, Inc.	43024-0-II	1/28/2014	
Bank of America, NA v. Short	68545-7-I	9/23/2013	E
Beck v. Grafe	67641-5-I	4/8/2013	
Discover Bank v. Gardner	30596-1-III	1/31/2013	E
Discover Bank v. Rodriquez	30581-3-III	1/31/2013	E
Columbia State Bank v. Girard	42627-7-II	1/29/2013	E, WC
New Grace Investment, Inc. v. Chung	67771-3-I	1/14/2013	E
Cardenas v. Interocean American Shipping Corporation	40382-0-II	9/7/2012	E, WA
Evarone v. Lewis	66176-1-I	3/12/2012	E[2]

Note legend:

E – contains discussion of review standards for evidentiary decisions in connection with summary judgment;

WC – Judge Worswick (a member of the *Lukashin* panel) concurred in the opinion;

WA – Judge Worswick authored the opinion.

[2] Footnote 9 of the *Evarone* opinion stated as follows: "The defendants erroneously assert that an abuse of discretion standard applies even for evidentiary rulings in the course of summary judgment proceedings. But they cite pre-1998 law or cases citing pre-1998 law. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), makes clear that the de novo standard applies."

Unpublished Washington Court of Appeals opinions citing
***Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998)**

(page 2, 2010–2011)

Case name	Case no.	Opinion date	Note
Michael v. Farmers Insurance Company of Washington	65569-8-I	8/15/2011	E
Entler v. Department of Corrections	66042-0-I	7/25/2011	
Hale v. Wellpinit School District No. 49	28898-6-III	6/23/2011	E
Discover Bank v. Butler	65069-6-I	5/31/2011	E
McKibbin v. City of Seattle	65177-3-I	5/31/2011	E
Wheeler v. Calloway	28734-3-III	3/29/2011	E
Carter v. SUTTELL AND ASSOCIATES, PS[3][4]	63628-6-I	1/31/2011	
Abel v. City of Algona	63599-9-I	6/6/2010	E
Poletti v. Overlake Hospital Medical Center	63568-9-I, 62818-6-I	5/24/2010	E
Kulp v. Golden Resources, Inc.	27876-0-III	3/18/2010	E
Paschal v. Ferguson	38579-1-II	1/26/2010	E
Bloome v. Haverly	62974-3-I	1/11/2010	E

Note legend:

E – contains discussion of review standards for evidentiary decisions in connection with summary judgment

[3] Suttell and Associates, P.S. was subsequently renamed Suttell & Hammer, P.S. (see footnote 1 of the *Carter* opinion). Suttell & Hammer, P.S. is Capital One's law firm in the *Lukashin* proceedings.
[4] Suttell & Hammer, P.S. was thus made aware of this Court's *Folsom* (1998) opinion in early 2011 at the latest.

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, March 20, 2014 2:56 PM
To: 'igor_lukashin@comcast.net'
Subject: RE: Case No: 89776-0, Capital One v Lukashin, second statement of additional authorities

Rec'd 3-20-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: igor_lukashin@comcast.net [mailto:igor_lukashin@comcast.net]
Sent: Thursday, March 20, 2014 2:52 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: igor_lukashin@comcast.net
Subject: Case No: 89776-0, Capital One v Lukashin, second statement of additional authorities

Attached please find a second statement of additional authorities for:

Supreme Court No. 89776-0, Capital One v. Heather Lukashin

Sincerely,

Igor Lukashin, pro se
(360) 447-8837
igor_lukashin@comcast.net