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

RAP 10.8 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 additional authorities pursuant to RAP Rule 10.8.

1) *Farrow v. Flowserve US, Inc.*, No. 69917-2-I, slip op. (March 3, 2014)[1], p. 10:

> "We review de novo a trial court ruling on a motion to strike evidence made in conjunction with a summary judgment motion." Rice v. Offshore Svs., Inc., 167 Wn. App. 77, 85, 272 P.3d 865, review denied, 174 Wn.2d 1016 (2012); accord Parks v. Fink, 173 Wn. App. 366, 375, 293 P.3d 1275 ("We review the admissibility of evidence in summary judgment proceedings de novo." (citing Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998))), review denied, 177 Wn.2d 1025 (2013).

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 argument (Petition, pp. 9–10).

Farrow v. Flowserve US, Inc., No. 69917-2-I, slip op. (March 3, 2014), pp. 12–13:

> "Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules." Young v. Key Pharm.. Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989): accord State v. DeSantiago. 149 Wn.2d 402, 414, 68 P.3d 1065 (2003). Moreover, our Supreme Court, in the absence of prior state interpretation, has been willing to adopt federal interpretations of evidentiary rules where the rules are identical. State v. Land. 121 Wn.2d 494, 498-500, 851 P.2d 678 (1993); State v. Terrovona. 105 Wn.2d 632, 639-41, 716 P.2d 295 (1986): accord Int'l Ultimate. Inc. v. St. Paul Fire &Marine Ins. Co.. 122 Wn. App. 736, 748, 87 P.3d 774 (2004).

[1] Available at http://www.courts.wa.gov/opinions/pdf/699172.pdf

Offered in support of the use of relevant federal authority previously cited by Lukashin to Division Two (including *United States v. Dibble*, 429 F.2d 598, 600–603 (9th Cir. 1970), *Latman v. Burdette*, 366 F.3d 774, 786–788 (9th Cir. 2004), *Hamilton v. Keystone Tankship Corp.*, 539 F. 2d 684, 686 (9th Cir. 1976)), as well as the federal authority cited below[2].

2) *Clabourne v. Ryan*, No. 09-99022, slip op. (9th Cir. March 5, 2014)[3], p. 30:

> It does not matter that the legal standards might have changed subsequent to the original trial. The proper admission of evidence based on the law as it stood at the time of trial does not mean that the admission of that evidence is invulnerable to any future challenge. It has been held for centuries, for example, that even if the law changed following a trial, "'[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision.'" *Henderson v. United States*, 133 S.Ct. 1121, 1126 (2013) (alteration in original) (quoting *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281 (1969), and citing *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801)). That the trial court may not have ruled improperly when it admitted Clabourne's statement into evidence in 1982 does not mean that the same evidence was necessarily admissible in 1997. By 1997 it was established that the admission of Clabourne's statement violated his rights under the Fifth Amendment. (underline 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

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[2] See also *In re Marriage of Swaka*, No. 42758-3-II (February 20, 2014), available at http://www.courts.wa.gov/opinions/pdf/D2%2042758-3-II%20%20Part-Published%20Opinion.pdf , p. 5: "Where a state rule has the same language as a federal rule, we may look for guidance to courts applying the federal rule. *Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P. 2d 237 (1998)". Judge Johanson, author of the *Lukashin* opinion, was a concurring panel member in the *Swaka* decision.

[3] Available at http://cdn.ca9.uscourts.gov/datastore/opinions/2014/03/05/09-99022.pdf

summary judgment should have been applied by Division Two as the law at the time of review) and related argument (Petition, pp. 9–10).

3) *Kelley v. Pierce County, et al.*, Nos. 43983-2-II/43986-7-II, slip op. (February 20, 2014)[4], pp. 5–6:

> We apply the de novo standard of review to a superior court's decisions under CR 12(b)(6). *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P3d 1230 (2005). Under 12(b)(6), dismissal is appropriate only if "'it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery.'" *Burton*, 153 Wn.2d at 422 (quoting *Tenore v. AT &T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P. 2d 104 (1998)). When a superior court considers matters outside the pleadings, a CR 12(b)(6) motion converts to a motion for summary judgment under CR 56. CR 12; *Sea-Pac Co., Inc. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P. 2d 217 (1985). In this case, the County submitted additional materials to the superior court in its motion to dismiss and the court considered the whole record, including Kelley's additional responsive materials; therefore, we will treat the motion as one for summary judgment.
>
> When reviewing an order for summary judgment, we engage in the same inquiry as the trial court. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 407, 282 P. 3d 1069 (2012). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends in whole or in part. *Anderson v. Dussault*, 177 Wn. App. 79, 88, 310 P. 3d 854 (2013). We construe all facts and reasonable inferences in the light most favorable to the nonmoving party, and we review all questions of law de novo. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.

[4] Available at http://www.courts.wa.gov/opinions/pdf/D2%2043983-2-II%20%20Part-Published%20Opinion.pdf . This opinion was authored by A.C.J Johanson, the author of the *Lukashin* (2013) opinion

3d 82 (2005). (footnote reference omitted, underline emphasis added)

Offered in support of the argument on pp. 11–15 of the Petition (when considering Lukashin's motion to dismiss as a cross-motion for summary judgment (VRP, p. 49, at 18–19), trial court should have granted Lukashin's motion due to Capital One's utter lack of proof of a written contract and Capital One's general failure to submit sufficient admissible evidence to withstand the defendant's summary judgment motion).

Kelley v. Pierce County, et al., Nos. 43983-2-II/43986-7-II, slip op. (February 20, 2014), pp. 12–15[5]:

In the section titled "Kelley's Motion for Sanctions", Division Two awarded Kelley $500, stating in part:

> Further, even if the County believed that the commissioner's ruling did not preclude its argument, it should have acknowledged in its opening brief that review had been denied on the collateral estoppel issue. We agree with Kelley that it was a waste of time for her to have to respond to the collateral estoppel arguments as well as for us to have to read and consider the portions of the parties' briefs that improperly addressed collateral estoppel.
>
> Under RAP 10.7, we ordinarily impose sanctions on a party or counsel who files a brief that fails to comply with the RAP rules. And RAP 18.9(a) provides that we can order a party who fails to comply with the RAP rules to pay "terms or compensatory damages to any other party who has been harmed" by the failure to

[5] These pages are in the *unpublished* portion of the part-published opinion. They are offered not as legal authority but rather as evidence of Equal Protection Clause violation prominently raised in Lukashin's Petition for Review. Plus, under the "law of the case" doctrine, it is currently permissible for Lukashin and Capital One to cite to unpublished Court of Appeals decisions to "structure argument" (especially since the block quote offered contains citations to precedential authority).

> comply or to pay sanctions to the court. Compensatory damages can include an award of attorney fees and costs to the opposing party. *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 356, 236 P.3d 981 (2010), review denied, 170 Wn.2d 1023 (2011). Because the County failed to comply with RAP 2.3(e) and made improper arguments in its opening brief, we order $500 sanctions against the County, payable to Kelley. (footnote reference[6] omitted, underline emphasis added)

This relates to Lukashin's consistent position that Capital One's attorneys, Filer and Gurule, made improper arguments both in Superior Court and in the Court of Appeals, and should be sanctioned as a result.

4) *United States v. Maloney*, No. 11-50311, slip op. (9th Cir. February 28, 2014)[7], *en banc*, p. 5 and note 2 on p. 4:

> To his credit, the trial prosecutor admitted at oral argument before the three-judge panel that he "sandbagg[ed]"the defense by waiting for rebuttal to bring up the luggage argument, but he did not seem to appreciate that this conduct could be deemed improper. See *United States v. Maloney*, 699 F.3d 1130, 1150 (9th Cir. 2012) (Gilman, J., dissenting). (footnote 2 on p. 4, emphasis added)
>
> We commend United States Attorney Laura Duffy for moving to summarily reverse the conviction, vacate the sentence, and remand to the district court. A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). More succinctly: "The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993) (p. 5, emphasis added)

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[6] Citing and discussing *Pugel v. Monheimer*, 83 Wn. App. 688, 693, 922 P. 2d 1377 1996), *review denied*, 131 Wn.2d 1024 (1997), noting also that "we do not award attorney fees" while ordering sanctions to be payable to appellant.

[7] Available at http://cdn.ca9.uscourts.gov/datastore/opinions/2014/02/28/11-50311.pdf

Offered in support of assignments of error 4, 5 and 7 and discussion on pp. 19–20 of the Petition (ethical attorneys should concede the errors they may occasionally make, especially when such errors are prejudicial; those who wilfully fail to acknowledge controlling authority or comply with their RPC obligations or engage in improper tactics[8] should be sanctioned)

5) *Huynh v. Suttel & Hammer, P.S. et al.*, 2013 WL 4010654 (D. Or.) (August 6, 2013) (attached as Exhibit 1 for the Court's convenience)[9]:

Suttell & Hammer, P.S., Capital One's law firm herein, in its role as a defendant in the federal district court action, did not oppose the following conclusions of law:

> Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Rule 56(c) mandates the entry of summary judgment 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, there can be "no genuine issue as to any material fact," since a

[8] Lukashin has argued on appeal that Mr. Filer, representing Capital One, essentially "sandbagged" Mr. Lukashin with the reference to *Plumb* unpublished opinion during the summary judgment motion hearing on January 6, 2012 (COA2 opening brief p. 9, p. 16), especially since Lukashin was thus deprived of the opportunity to offer an effective rebuttal (which would require, at the very least, reviewing the *Plumb* opinion first) at the time of the summary judgment motion hearing.

[9] Law firm's name appears to be misspelled, as is obvious from the listed names of other defendants and identical names (except Mr. Case and Ms. Case) contained here: http://www.suttellandhammer.com/attorneylist/washington-licensed-attorneys/

> complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. Id. at 32. (underline emphasis added)

Offered in support of argument on pp. 11–15 of the Petition (when considering Lukashin's motion to dismiss as a cross-motion for summary judgment (VRP, p. 49, at 18–19), trial court should have granted Lukashin's motion due to Capital One's utter lack of proof of a written contract and Capital One's general failure to submit sufficient admissible evidence to withstand the defendant's summary judgment motion)

Judicial notice is also requested of the fact that the *Huynh* (2013) decision was filed on August 6, 2013, over a month before the *Lukashin* (September 10, 2013) decision herein was filed by Division Two[10].

6) *In re Disciplinary Proceeding Against King*, 168 Wn.2d 888, 232 P. 3d 1095, 1103 (2010):

> Mr. King asserts that hearing officer Schoeggl improperly ignored Mr. King's notice of unavailability. Mr. King filed two such notices stating Mr. King would be "out of the area and unavailable" for certain dates and requested that disciplinary counsel and hearing officer Schoeggl take no official action relating to the case during these periods. ... Mr. King does not have authority to unilaterally bind disciplinary counsel or a hearing officer or to suspend a disciplinary hearing merely by filing a

[10] The Court may wish to consider, *sua sponte*, whether Ms. Gurule or Suttell & Hammer, P.S. had a duty under RPC 3.3 to disclose the *Huynh* (2013) decision to Division Two, and, if so, whether separate sanctions are warranted.

"notice of unavailability." (record reference omitted, emphasis added)

Offered under *stare decisis* doctrine for the Court's benefit in addressing the legal effect (if any) of the "notice of unavailability"[11] filed by Ms. Gurule in the instant action in January 2014.

7) *Alverado v. Wash. Pub. Power Supply Sys.*, 111 Wash.2d 424, 429–430, 759 P.2d 427 (1988)

> The issue of federal preemption was not raised by the parties in arguments before this court. However, this court has inherent authority to consider issues not raised by the parties if necessary to reach a proper decision. See *Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972), cert. denied, 411 U.S. 983 (1973); RAP 12.1(b). It is proper to do so when there is no dispute about the law. We conclude that consideration of federal preemption doctrine is necessary to properly resolve the matter before us. Although we frequently request further briefing or perhaps reargument on issues raised by the court, see *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982), we decline to do so here for reasons of judicial economy. (underline emphasis added)

Offered under *stare decisis* doctrine for the Court's benefit in addressing Lukashin's Petition (this Court has authority to consider even the issues not raised by the parties if necessary to properly resolve the matter).

///

[11] Attorneys who become "unavailable" for various reasons can arrange for other attorneys / law firms to "take over" pending cases. See e.g. *Waid v. Feguson Firm PLLC*, No. 69220-8-I, slip op. (December 30, 2013), available at http://www.courts.wa.gov/opinions/pdf/692208.pdf . On p. 2–3, *Waid* discusses how attorney Ferguson, faced with a possible suspension from practice, arranged with another law firm for joint representation of clients in pending litigation in advance and then withdrew from the joint representation after a 90-day suspension was handed down by this Court.

Respectfully submitted this
7th 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

Supreme Court No. 89776-0

Exhibit 1

To RAP 10.8 STATEMENT OF ADDITIONAL AUTHORITIES

Huynh v. Suttel & Hammer, P.S. et al., 2013 WL 4010654 (D. Or.) (Aug 6, 2013)

Slip Copy, 2013 WL 4010654 (D.Or.)
(Cite as: 2013 WL 4010654 (D.Or.))

Only the Westlaw citation is currently available.

United States District Court,
D. Oregon.

Binh HUYNH, Plaintiff,
v.
SUTTEL & HAMMER, P.S., Karen L. **Hammer**, Isaac L. **Hammer**, Patrick Layman, Mark T. Case, and Megan Case, Defendants.

No. 6:12 CV 1368–TC.
Aug. 6, 2013.

Binh Huynh, Keizer, OR, pro se.

Kevin H. Kono, Davis Wright Tremaine, LLP, Portland, OR, for Defendants.

ORDER

ANN AIKEN, District Judge.

*1 Magistrate Judge Coffin filed his Findings and Recommendation on July 12, 2013. The matter is now before me. *See* 28 U.S.C. § 636(b)(1)(B) and Fed.R.Civ.P. 72(b). No objections have been timely filed. This relieves me of my obligation to give the factual findings *de novo* review. *Lorin Corp. v. Goto & Co., Ltd.,* 700 F.2d 1202, 1206 (9th Cir.1982). *See also Britt v. Simi Valley Unified School Dist.,* 708 F.2d 452, 454 (9th Cir.1983). Having reviewed the legal principles *de novo,* I find no error.

THEREFORE, IT IS HEREBY ORDERED that, I adopt Judge Coffin's Findings and Recommendation.

FINDINGS AND RECOMMENDATION

COFFIN, United States Magistrate Judge:

Pro se plaintiff's complaint alleges a violation of the Fair Debt Collection Practices Act (p. 4 of Complaint, # 2). A law firm and attorneys are named as defendants.

Presently before the court is defendants' motion to dismiss and alternate motion for summary judgment (# 15).

For the reasons discussed below, such motion should be allowed and the action should be dismissed.

Standards

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Rule 56(c) mandates the entry of summary judgment 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, 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. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Id.* at 32. There is also no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1355 (1986); *Taylor v. List,* 880 F.2d 1040 (9th Cir.1989)

On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving

party. *Hector v. Wiens,* 533 F.2d 429, 432 (9th Cir.1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valadinqham v. Bojorquez,* 866 F.2d 1135, 1137 (9th Cir.1989). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovich v. Insurance Co. of North America,* 638 F.2d 136, 140 (9th Cir.1981).

Factual Background

***2** Plaintiff alleges he received a summons from the Circuit Court of the State of Oregon indicating that he was being sued for a debt he knew nothing about and that defendants defrauded the State Court and plaintiff and continued collection activity after receiving notice of the dispute without providing validation of the debt.

Discussion

This court issued an order for plaintiff to show cause why defendants' motion should not be granted after plaintiff failed to file an opposition to the motion. Plaintiff's response to the order was not responsive to the substance of defendants' motion. Out of extreme deference to plaintiff's pro se status, this court considered plaintiff's Sur-reply to defendants' Reply.

One of the several reasons defendants moved for dismissal asserts that there is a judgment in the state court action finding plaintiff liable on the Citibank account that is the subject of this federal action and that such conclusively established that the account is plaintiff's and the debt is valid.

Plaintiff states he need not address this argument as he did not "mention defendants' state court action at any point in plaintiff's federal complaint." P. 3 Sur-reply (# 23). Such is incorrect. See p. 3 of Complaint(# 2).

Plaintiff's claims are so "inextricably intertwined with the state court's denial in a judicial proceeding" that the federal court is "in essence being called upon to review the state court decision. This the district court cannot do." *District of Columbia Court of Appeals v. Feldman,* 460 U.S. at 483–84 n. 16 (1982).

Plaintiff's claim also fails due to issue preclusion, *see Drews v. EBI Companies,* 310 Or. 134 (1990).

Conclusion

Defendants' motion (# 15) for summary judgment should be allowed and this action should be dismissed.

D.Or.,2013.
Huynh v. Suttel & Hammer, P.S.
Slip Copy, 2013 WL 4010654 (D.Or.)

END OF DOCUMENT

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Subject: Case No: 89776-0, Capital One v Lukashin, RAP 10.8 statement of additional authorities

Attached please find a statement of additional authorities for:

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

Sincerely,

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