IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 89776-0

Court of Appeals No. 43115-7-II

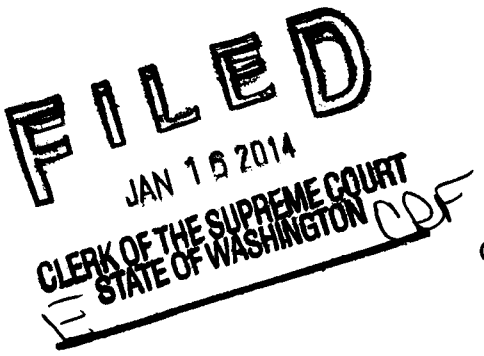
HEATHER F. LUKASHIN,

Petitioner,

v.

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

Respondent.



PETITION FOR REVIEW

Petitioner:

Heather F. Lukashin, *pro se*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES AND SOURCES

Other sources[1]

[1] Lukashin is aware of GR 14.1 prohibition to cite unpublished sources as authority. These sources are referenced solely as evidence to establish violation of Equal Protection Clause of the federal and state constitutions, and not as precedential authority. Furthermore, pursuant law of the case doctrine, a party is permitted to use unpublished opinions to "help structure its argument" (Op., p. 13).

I. Identity of Petitioner

Petitioner Heather F. Lukashin, *pro se*, the appellant in the Court of Appeals case No. 43115-7-II, brings this RAP Rule 13.4 petition for review and respectfully asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part II of this Petition.

II. Citation to the Court of Appeals Decision

Lukashin seeks review of the unpublished opinion ("Op.") filed September 10, 2013. (App. A hereto). The Court of Appeals denied cross-motions to publish and Lukashin's motions for reconsideration and for sanctions against the respondent on December 11, 2013 (App. B hereto).

III. Issues Presented for Review

1. Did the Court of Appeals violate equal protection clauses of the federal and state constitutions, U.S. Const. amend. XIV § 1; Const. art. I, § 12, prohibiting unjust discrimination between similarly situated persons, by:

a). Failing to apply the correct appellate review standard for evidentiary rulings in connection with a motion for summary judgment in its original unpublished opinion and subsequently effectively refusing to apply the controlling authority set forth by this Court in *Folsom v. Burger King*, 135 Wash. 2d 658, 663, 958 P. 2d 301 (1998)?

b) Failing to apply the correct *de novo* evidentiary ruling review standard articulated in *Folsom*, even though the same panel of Division Two

explicitly recognized the *Folsom* standard in an unpublished opinion, *Santos v. Insurance Commissioner*, No. 42431-2-II, slip op. (November 13, 2013)[1], and a different panel – in another unpublished opinion[2], while Lukashin's motion for reconsideration was pending in Division Two?

c) Failing to apply the correct *de novo* review standard articulated in *Folsom*, even though a number of recent published Court of Appeals decisions, including *Parks v. Fink*, 293 P. 3d 1275, 1280 (2013) and *Kenco Enterprises Northwest, LLC v. Wiese*, 291 P. 3d 261, 264 (2013), specifically referenced this standard and the *Folsom* decision?

d) In a breach-of-contract case, when the alleged written contract was never made part of the record by Respondent, by holding that "...Lukashin personally acknowledged and assented to the terms of the credit card agreement" (Op., p. 11), when the Court of Appeals was fully aware of the need to interpret "what was written"[3] and when recent precedent[4] indicates a reversal of summary judgment is proper when all material terms of the purported agreement have not been specifically proven by the movant?

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[1] Available at http://www.courts.wa.gov/opinions/pdf/D2%2042431-2-II%20%20Unpublished%20Opinion.pdf , see p. 30 thereof.

[2] *Sound Support, Inc. v. DSHS*, No. 43678-7-II, slip op. (November 19, 2013), available at: http://www.courts.wa.gov/opinions/pdf/D2%2043678-7-II%20%20Unpublished%20Opinion.pdf . See p. 8 thereof (citation is identical to that found in *Santos*. Judge Worswick was a panel member for both *Sound Support* and *Lukashin* cases.

[3] *First Citizens Bank & Trust Co. v. Cornerstone Home & Dev Llc*, no. 43619-1-II, slip op. (Wash. App., December 03, 2013), available at: http://www.courts.wa.gov/opinions/pdf/D2%2043619-1-II%20Published%20Opinion.pdf , see pp. 3–4. Judges Worswick and Johanson, who concurred in the *First Citizens* opinion, were also members of the *Lukashin* panel.

[4] *Kilcullen v. Calbom & Schwab, P.S.C.*, No. 30792-1-III, slip op. (Wash. App., October 15, 2013), see discussion on pp. 8–10 thereof.

e) In a breach-of-contract case, when the alleged written contract was never made part of the record by Respondent, while reviewing cross-motions for summary judgment, by failing to follow published precedent[5] to reverse and remand with instructions to grant Lukashin's motion to dismiss, when Respondent lacked evidence (alleged contract) to support an essential element of its "breach-of-contract" claim (thereby reaching a result directly opposite to that of an unpublished opinion filed by Division One on November 18, 2013, see footnote 5 below)?

f) By failing to hold the Respondent to its burden of proof that it actually had an actionable breach of contract case according to the standard the Division Two itself articulated in *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995)[6]?

g) By failing to correct the trial court's erroneous admission of the alleged billing statements that were not properly identified and authenticated by the Respondent, contrary to this Court's binding precedent in *State v. DeVries*, 72 P. 3d 748, 750 (2003) (admitting an exhibit that was not

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[5] *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 197, 198, 831 P. 2d 744 (1992); *Boguch v. Landover Corp.*, 224 P. 3d 795, 802 (2009); *BUILDING INDUSTRY ASS'N v. McCarthy*, 218 P. 3d 196, 203 (2009). See also a recent unpublished decision by Division One in *Curry V. Viking Homes, Inc.*, No. 69155-4-I, slip op. (November 18, 2013) (Lukashin's motion to publish the *Curry* opinion, provided as App. C hereto (judicial notice is requested) was denied).

[6] Judge Worswick (back then, a J.P.T.), concurred in *Nw. Indep. Forest Mfrs.* opinion. This opinion (and standard) was also recently cited by Division Three in *1031 PROPERTIES v. FIRST AMERICAN TITLE*, 301 P. 3d 500, 503 (2013), see also *Myers v. State*, 218 P. 3d 241, 243 (2009), and Division Two's *Fidelity and Deposit Co. of Maryland v. Dally*, 201 P. 3d 1040, 1044 (2009) (finding that "Here, the contract did not impose a duty on AllianceOne to use a specific payee on its checks to the City. Nor did the contract impose a duty to verify the indorsements on those checks. As there was no duty, there can be no breach or resulting damages.") as well as *St. John Med. Center v. State Ex Rel. DSHS*, 38 P. 3d 383, 390 (2002) and *Seabed Harvesting, Inc. v. DNR*, 60 P. 3d 658, 661 (2002)

properly identified and authenticated by a witness held to constitute a manifest abuse of discretion) and *PE SYSTEMS, LLC v. CPI CORP.*, 289 P. 3d 638, 642 (2012) ("...merely attaching a document to a pleading does not necessarily make it admissible or establish that it may be otherwise considered as evidence.")?

h) By failing to correct the trial court's erroneous reliance on the Williams Affidavit in light of the U.S. Supreme Court's holdings in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2538–2541 (2009) and this Court's reasoning in *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 955–956, 421 P. 2d 674 (1966) (bare allegations in plaintiff's affidavit of a binding promise by defendant to pay royalties insufficient to prevent summary judgment for defendant)?

2. Did the Court of Appeals err in holding that, when a creditor presents an incomplete set of alleged periodic statements, the creditor may pick a past statement of its choosing and have a court enforce the amount on that statement as due and owing, especially when a number of periodic statements following the statement picked are not in the record?

3. Did the Court of Appeals err when it, while reviewing and affirming a summary judgment, de-facto construed facts and references therefrom in light most favorable to the Respondent (the moving party), not Lukashin?

4. Did the Court of Appeals err by holding that, as long as an unpublished case cited (or mentioned or discussed) by a party is not used as

precedential authority but, rather, to help structure the party's argument that is supported by "other, legitimate citations", sanctions are not warranted, contrary to holdings in several published opinions of the Court of Appeals[7] and contrary to its own previous holding in a 2013 unpublished opinion[8]?

5. Did the Court of Appeals err in denying Lukashin's motion for RAP 18.9 sanctions based on the fact that Gurule, who authored Respondent's appellate brief, advocating incorrect "manifest abuse of discretion" review standard for evidentiary rulings in connection with summary judgment, learned of the proper *Folsom* standard by virtue of also being a counsel of record in *American Exp. Centurion Bank v. Stratman*, 292 P. 3d 128, 132 (2012), months before the instant action was set for no-oral-argument hearing in May 2013 and almost a year before September 10, 2013 unpublished opinion, with Gurule moving to publish the opinion likewise without disclosing *Stratman*?

6. Did Court of Appeals err in concluding affirmative defenses were waived in light of this Court's footnote 10 in *State v. Ruen* (2013)?

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[7] *State v. Nysta*, 168 Wn. App. 30, 44, 275 P. 3d 1162 (2012), review denied. 177 Wn.2d 1008 (2013); *Johnson v. Allstate Ins. Co.*, 108 P. 3d 1273, 1278 (2005); and, very recently, *In Re The Marriage Of: Lalida Schnurman v. Seth Schnurman*, No. 70048-1-I, slip op. (December 30, 2013), p. 11. Yet compare this Court's opinion in *Condon v. Condon*, 298 P. 3d 86, 93 (2013), where the Court stated its strong disapproval of a GR 14.1 violation and held that it "will not consider the cases in violation of this rule".

[8] *State v. Betts*, No. 42519-0-II (July 30, 2013) – Division Two sanctioned counsel's citation to unpublished portions of two appellate decisions, finding that to be contrary to GR 14.1(a), $50 apiece, for a total of $100; also discussed the duty of "candor toward the tribunal", sanctioning counsel for failing in that duty. Judge Johanson, author of the *Lukashin* opinion, was a panel member in *Betts*.

7. Did the Court of Appeals err by declining to award sanctions against Respondent and/or its attorneys in the amount sufficient to make misconduct against pro se parties at least as unappealing as misconduct against parties represented by attorneys (where sanctions can include often considerable awards of reasonable attorney fees)?

IV. STATEMENT OF THE CASE

The Opinion (App. A hereto) provides a reasonably detailed and mostly accurate[9] summary of the case on pp. 2–7, and is incorporated herein by reference. Yet, it omits several important details – that Capital One, by and through its attorneys, Suttell & Hammer, P.S.[10], made a sole breach of contract claim[11], alleging the contract provided for "a reasonable attorney's fee in the event of suit"[12], and that "defendant has defaulted on said agreement"[13]. Respondent further alleged that it was entitled to a minimum of $650.00 in reasonable attorney fees[14] and to an unpaid balance of "$3317.52 fully due and owing to plaintiff, together with such greater sum as may be proved at the time of trial, together with interest thereon at the highest legal rate"[15]. Cover sheet filed by attorney William

[9] For example, the VRP (p. 49, at 18–19) clearly indicates the trial court considered cross-motions for summary judgment on January 6, treating Lukashin's motion to dismiss as a summary judgment motion. Yet compare Op., p. 6, at 1 ("the summary judgment motion", in the singular).
[10] Formerly known as Suttell & Associates, P.S. – see Compl., p. 6, at 21.
[11] Compl., para. III
[12] *Id.*
[13] *Id.*
[14] Compl., para. V.
[15] Compl., para. IV

G. Suttel, WSBA # 12424, on October 18, 2010, clearly indicated "Breach of Contract (COM 2)" as the case category.

The Williams Affidavit (App. D hereto), used by Capital One to support its motion for summary judgment, alluded to the existence of "Customer Agreement governing use of that account" and that "Defendant(s) has/have breached the Agreement by failing to make periodic payments as required thereby" (para. 3). It further alluded to contractual interest rate of 26.10% and contractual right "to recover from Defendant(s) reasonable attorneys' fees and costs to the extent permitted by law" arising from the "Customer Agreement" (para. 4)

Yet, in moving for summary judgment, Suttell's attorney Gurule, did not request reasonable attorneys' fees, and the Order of Summary Judgment prepared by Suttel & Hammer P.S. and filed on January 6, 2012, lists "6. Plaintiff's attorney fees" as $0.00. Also, even though Capital One requested 26.10% interest rate, the trial court explicitly found that "I have never been presented with whether or not I should impose the higher amount" (VRP, p. 50, at 20–22), and imposed "12 percent interest, not the 26.10 because of our usury rates and our usury laws" (VRP, p. 50, at 13–15). Trial court also granted "summary judgment in the amount of $2,058.44", not the $3,300+ prayed for both in the Complaint and in the motion for summary judgment.

During oral argument on January 6, 2012, Lukashin pointed to lack of alleged Customer Agreement, the central element to Capital One's claims, in the record, despite Capital One's having over a year to properly introduce evidence justifying recovery into the record (VRP, pp. 27–28), lack of proper identification of the specific copies of alleged billing statements under RCW 5.45.020, therefore making them inadmissible (VRP, p. 37, at 15–18, p. 40, at 5–12), lack of specific date of default despite claims that "defendant has defaulted on said agreement" (*Id.*, at 23–25), and that the set of alleged billing statements provided was incomplete, thereby making it impossible for any court to "independently determine whether defendant is responsible for any of the debt" (VRP, p. 37, at 21–22). Lukashin also distinguished the *Bridges* and *Ryan* cases (VRP, p. 38), as, in both of those cases, a copy of the card member agreement was provided.

Yet, in a "run-of-the-mill" breach of contract case, where breach of contract was the sole claim pled by Capital One, and where it failed to provide a copy of the alleged written contract, an essential element of a breach of contract claim, providing only conclusory allegations as to alleged existence and certain terms a Customer Agreement in the Williams Affidavit, the trial court granted summary judgment and the Court of Appeals, incredulously, affirmed in the unpublished Opinion, subsequently denying Lukashin's motion for reconsideration. This timely petition for review follows.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Court of Appeals violated the Equal Protection Clause of the federal and state constitution by, *inter alia*, first failing and then refusing to apply the correct appellate review standard for evidentiary rulings in connection with summary judgment, articulated by this Court in *Folsom* (1998).

This Court should review the decision of the Court of Appeals because its treatment of the instant case raises significant questions of law involving violations of the Equal Protection Clauses of the federal and state constitutions, which prohibit unjust discrimination between similarly situated persons. U.S. Const. amend. XIV § 1; Const. art. I, § 12.

In the Opinion, Court of Appeals applied "manifest abuse of discretion" review standard to the decision to admit or exclude business records. (Op., p. 8). After Lukashin filed her motion for reconsideration on September 30, advising, on p. 3 thereof, that this Court held, in *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998), that "admissibility of evidence in summary judgment proceedings is reviewed de novo", the same panel of Division Two recognized "*de novo*" as the proper review standard in an unpublished opinion, *Santos v. Insurance Commissioner*, No. 42431-2-II, slip op. (November 13, 2013), holding, in part, as follows:

> Ordinarily we review a trial court's evidentiary rulings for abuse of discretion, but we review rulings made in conjunction with a summary judgment motion de novo. *Momah v. Bharti*, 144 Wn.

> App. 731, 749, 182 P. 3d 455 (2008) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 662 -64, 958 P. 2d 301 1998) (holding that we review all evidence presented to the trial court, conduct the same inquiry, and reach our own conclusion about the admissibility of evidence)). (p. 30, emphasis added)

Judge Johanson, author of the *Lukashin* opinion, concurred in that opinion. Furthermore, a different Division Two panel provided an identical citation on p. 8 of *Sound Support, Inc. v. DSHS*, No. 43678-7-II, slip op. (November 19, 2013) unpublished opinion. Judge Worswick was a member of all three panels (*Lukashin*, *Santos*, and *Sound Support*). Given that Lukashin's motion for reconsideration remained pending the Court of Appeals between September 30 and December 11, by denying the motion, Division Two in essence refused to apply the correct appellate review standard for evidentiary rulings in connection with a summary judgment in Lukashin's case, thus denying Lukashin equal protection of the laws guaranteed by federal and state constitutions.

That decision is even more puzzling and the constitutional violation even more egregious in light of a number of recent published Court of Appeals decisions, including *Parks v. Fink*, 293 P. 3d 1275, 1280 (2013) and *Kenco Enterprises Northwest, LLC v. Wiese*, 291 P. 3d 261, 264 (2013), specifically referencing this *de novo* standard and the *Folsom* (1998) decision of this Court.

Astoundingly, attorney Gurule, who signed Capital One's motion for summary judgment in the trial court and advocated the "manifest abuse of discretion" review standard adopted by Division Two in her appellate

brief, became aware of the *Folsom* standard no later than November 13, 2012, when Division One filed its decision in *American Exp. Centurion Bank v. Stratman*, 292 P. 3d 128, 132 (2012) (Ms. Gurule was a counsel of record therein). Yet, Ms. Gurule failed to advise the Court of Appeals of the proper standard, even though it was her duty under RPC 3.3(a)(1) and (3) (see also Comments [2], [4], and [13] to RPC 3.3)

Moving to the next Equal Protection Clause violation, summary judgment review standards have been established by this Court in *Young v. Key Pharmaceuticals, Inc.*, 770 P. 2d 182 (1989)[16], including that, for a moving defendant, it is sufficient to show absence or insufficiency of evidence supporting an element that is essential to plaintiff's claim to prevail on summary judgment. *Manna Funding, LLC v. Kittitas County*, 295 P. 3d 1197, 1202 (2013). Division Two recognized this recently in several unpublished opinions, *Hale v. Bridge Builders, Inc.*, No. 43265-0-II (August 20, 2013), *Kitsap Bank v. Denley*, No. 43282-0-II (November 5, 2013)[17], *Wood v. Mason County*, No. 42110-1-II (March 19, 2013), and *Tavai v. Walmart Stores, Inc.*, No. 43099-1-II (August 13, 2013).

Essential elements of a contract are well-established. *Becker v. Washington State University*, 266 P. 3d 893, 899 (2011), citing to this

[16] This Court cited to this opinion very recently in *Cedar River, et. al. v. King County, et. al.*, No. 86293-1, slip op. (October 24, 2013), p. 14, noting that "Generally, plaintiffs bear the burden of proof on all elements of their claims." See also *Kofmehl v. Baseline Lake*, LLC, 305 P. 3d 23 (2013), reiterating summary judgment standard, and discussing cross-motions for summary judgment when there was a contract between the parties.

[17] This opinion, authored by Judge Worswick, includes the following citation: "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323.

Court's opinion in *DePhillips v. Zolt Const. Co.*, 136 Wash.2d 26, 959 P. 2d 1104 (1998), lists essential elements of a contract as "subject matter, parties, promise, terms and conditions, and price or consideration", holding further that:

> The party asserting the existence of such a contract, whether express or implied, bears the burden of proving each essential element, including the existence of a mutual intention. *Johnson v. Nasi*, 50 Wash.2d 87, 91, 309 P.2d 380 (1957). "[B]are assertions of ultimate facts and conclusions of fact are alone insufficient to defeat summary judgment." *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wash.App. 846, 852, 22 P.3d 804 (2001). (at 899–900, emphasis added)

Division Two explicitly recognized the *DePhillips*' essential elements in two unpublished opinions, *Culpepper v. First American Title Insurance Company*, No. 40219-0-II (July 19, 2011) and *Chi v. Maxcare of Washington, Inc.*, No. 41606-9-II (May 10, 2012)[18].

Yet, in the *Lukashin* opinion, Division Two was unperturbed that, by virtue of not providing the alleged Customer Agreement, Capital One utterly failed in its burden of proof as to essential elements of a contract (at the very least, the terms and conditions, and, generally, even the existence of an alleged written contract). The Williams Affidavit provided, at most, "bare assertions of ultimate fact and conclusions of fact" *Saluteen-Maschersky*, 105 Wash.App. at 852 (even assuming such statement are admissible), insufficient to prevent summary judgment.

[18] Judge Johanson authored this opinion, which affirmed the trial court's grant of summary judgment "[b]ecause Chi failed to establish a question of fact as to whether there was a written contract".

Elements to establish an actionable breach-of-contract claim are likewise well-established, including by Division Two's opinion in *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995), cited recently by *1031 Properties v. First American Title*, 301 P. 3d 500, 503 (2013), *Myers v. State*, 218 P. 3d 241, 243 (2009), and Division Two's *Fidelity and Deposit Co. of Maryland v. Dally*, 201 P. 3d 1040, 1044 (2009). "A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant." *Nw. Indep. Forest Mfrs.*, 78 Wash.App. at 712.

By failing to provide the alleged "Customer Agreement", Capital One made it impossible for anyone to discern if there was a contract, whether the contract imposed any specific duties, and thus whether any duties were breached. Thus, motion to dismiss should have been granted to Lukashin on her cross-motion for summary judgment considered by trial court on January 6, 2012. By failing to grant summary judgment in favor of Lukashin, the trial court erred, and this error should have been corrected by the Court of Appeals, presumed to be well-aware of the laws, especially those applicable to simple, "run-of-the-mill" cases like the instant action.

When addressing the admissibility of the alleged business records, both the trial court and the Court of Appeals were bound[19] by this Court's decision in *State v. DeVries*, 72 P. 3d 748, 750 (2003) (UBRA "does not create an exception for the foundational requirements of identification and authentication"). Division Two believed, it would "be the better practice to specifically identify, in the affidavit, the documents attached to the affidavit to avoid any confusion or misunderstanding, Lukashin cites to no authority to require such a reference" (Op., p. 9), even though it cited the language of RCW 5.45.020 verbatim on p. 8, which provided, in part, that "A record ... shall ... be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation...". A generalized language contained in the Williams Affidavit combined with lack of specific references to any documents submitted into the record ("Customer Agreement" specifically referred to by Williams was never submitted, but copies of alleged billing statements, never specifically referred to in the affidavit, were submitted) clearly contradicts this Court's holding in *DeVries* (2003) and thus Court of Appeals erred when it deemed alleged billing statements admissible.

Furthermore, this Court recently held, in *PE SYSTEMS, LLC v. CPI CORP.*, 289 P. 3d 638, 642 (2012) , that "...merely attaching a document

[19] *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 146 P. 3d 423, 430 (2013): "A decision by this court is binding on all lower courts in the state. *Fondren v. Klickitat County*, 79 Wash.App. 850, 856, 905 P.2d 928 (1995). When the Court of Appeals fails to follow directly controlling authority by this court, it errs. *State v. Gore*, 101 Wash.2d 481, 487, 681 P.2d 227 (1984)."

to a pleading does not necessarily make it admissible or establish that it may be otherwise considered as evidence."

Therefore, when Ms. Gurule attached about 100 pages of alleged billing statements to her motion for summary judgment, that, by itself, did not establish the statements' admissibility, especially in light of the fact that Ms. Gurule lacked personal knowledge of the "books and records" for the alleged Lukashin account and thus could not be "the custodian or other qualified witness" called for by RCW 5.45.020. Thus, the evidence was inadmissible, and, since "A court may not consider inadmissible evidence when ruling on a motion for summary judgment" *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 826, 872 P. 2d 516 (1994), the trial court erred when it explicitly considered the submitted alleged billing statements, and so did the Court of Appeals. Yet, Division Two recently recognized that very point in *Cano-Garcia v. King County*, 277 P. 3d 34, 49 (2012), also recognizing the presumption that "the trial court disregarded any inadmissible evidence". However, in the *Lukashin* case, if the alleged statements are disregarded, there remain only conclusory statements of ultimate fact in the Williams Affidavit, which, even if admissible, are insufficient to prevent summary judgment for Lukashin.

In analyzing the Williams Affidavit in light of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2538–2541 (2009), it does not qualify as a traditional official or business record, since the Affidavit was clearly produced for use at trial. The Williams Affidavit is testimonial, providing

conclusory statements regarding ultimate facts. Because they are out-of-court statements, they are hearsay and inadmissible to prove the truth of facts asserted. Thus, it appears, based on the above discussion, that Capital One boldly moved for summary judgment with NO admissible evidence, trial court erred in granting summary judgment in favor of Capital One and the Court of Appeals erred manifestly (and on a number of different issues of law) in affirming the trial court. In so doing, the Court of Appeals knowingly violated Lukashin's constitutional right to equal protection of the laws.

Therefore, this Court should accept review and remedy the Court of Appeals' violations of the Equal Protection Clause.

B. Several of the Court of Appeals' holdings in the *Lukashin* opinion are contrary to a number of this Court's opinions, as well as numerous published opinions of the Court of Appeals, including recent published opinions of Division Two itself.

This Court should accept review as the Court of Appeals failed to follow the precedent clearly established by this Court in the *Lukashin* opinion, as specifically illustrated above. Furthermore, this Court should accept review, as the Lukashin opinion conflicts with a number of recent published Court of Appeals opinions, including those by Division Two itself, as have been painstakingly documented above.

In addition, Division Two construed evidence and inferences therefrom in light most favorable to Capital One, not Lukashin, as it should have (see e.g. Op., pp. 12, 13), and failed to distinguish *Citibank South Dakota N.A. v. Ryan*, 160 Wn. App. 286, 247 P. 3d 778 (2011) (Ryan) and *Discover Bank v. Bridges*, 154 Wn. App. 722, 726, 226 P. 3d 191 (2010) (Bridges), since in both of those cases, plaintiffs introduced an unsigned cardmember agreement, which was not the case herein. Also, as a federal district court recently held in *Fratz v. Goldman & Warshaw, P.C.*, 2012 WL 4931469 (E.D.Pa.), Capital One could have faced a considerable difficulty in proving, on summary judgment, that a particular unsigned customer agreement is the agreement applicable to the alleged Lukashin account. Perhaps this is the reason why Capital One chose NOT to introduce the Customer Agreement, despite having ample time and opportunity to do so.

C. Petition involves issues of significant public interest, namely the standard of proof in a debt collection action based on alleged breach of contract, and propriety of reliance on attorneys' compliance with RPC 3.3 standards by courts and opposing (pro se) parties.

This Court should accept review as the Court of Appeals seems to have impermissibly sanctioned the trial court's relieving a plaintiff asserting a breach of contract from its duty to prove all essential elements of its claim, including the terms and conditions of the alleged contract, and from its duty, if choosing to rely on UBRA (RCW 5.45.020), to have the custodian

or qualified witness to testify to the identity and the mode of preparation of the specific business record attempted to be introduced into evidence.

Such holding, if sustained, and allowed to be discussed in trial courts, notwithstanding that *Lukashin* is an unpublished opinion, without fear of sanctions, by a party to "structure its argument" (Op., p. 13), will lead (or, perhaps, has already led) to gross miscarriage of justice, as it results in improper shifting of the burden of proof. After all, many people do not keep old account statements, and any claims of "I paid in full" would not be accepted at face value during summary judgment proceedings – see *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 721 P. 2d 1, 13, citing to *Dwinnell's Cent. Neon v. Cosmopolitan Chinook Hotel*, 21 Wn. App. 929, 587 P.2d 191 (1978), which held:

> An affidavit containing bare allegations of fact without any supporting evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment. The function of summary judgment is to permit the court to pierce the formal allegations of fact in pleadings when it appears that there are no genuine issues of fact. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 955, 421 P.2d 674 (1966). (emphasis added)

Thus, a party with better records (like a credit card issuer or debt collector) would be able, using the opinion in the instant action, pick and choose what amount it should "magnanimously accept" as a judgment.

Furthermore, if a person never had an account, but still get sued for it, the *Lukashin* opinion leaves such person NO viable defense (as simply denying, both in the answer and in a sworn affidavit, of ever having the

account will be insufficient to overcome a summary judgment per the opinion filed in the instant action and *Seven Gables*).

The *Lukashin* opinion, by virtue of sanctioning a plaintiff's "pick and choose" approach to which alleged billing statement balance it would "magnanimously accept" as due and owing, *de-facto* requires members of the general public in the State of Washington to keep at least the last billing statement of any credit card account they ever had for at least 6 years (statute of limitations). People who move frequently (e.g. members of the military) or people who have misplaced or lost their records (e.g. due to a fire or a flood) will be easy prey to unscrupulous debt collectors if the *Lukashin* opinion is allowed to stand.

In addition, Washington courts are able to consistently deliver just and fair adjudications of the cases before them, especially when one of the parties is unrepresented (pro se), only when all officers of the court, including attorneys for opposing parties, adhere to the appropriate rules of professional conduct. In Washington, RPC Title 3 imposes on all attorneys a duty of candor toward the tribunal.

This Court, in *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 355, 858 P. 2d 1054 (1993), observed, citing to Schwarzer, that "Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.", as well as attorneys' "correlative obligation to comply with the rules".

Attorneys Gurule and Filer had a clear obligation not to claim they have sufficient admissible evidence to prevail on summary judgment when they did not. Attorney Gurule had a duty to disclose the *Stratman* (2012) opinion and the correct *Folsom* (1998) de novo standard for review of evidentiary rulings in connection with summary judgment, after she advocated a wrong standard in her appellate brief. RCW 2.48.220(10) and (11) lists "gross incompetency" and "violation of the ethics of the profession". This Court has the ultimate authority in disciplining members of Washington State Bar and should protect the public from having to deal with licensed attorneys who do not wish to comply with the Rules of Professional Conduct and/or those whose "gross incompetence" effectively prevents them from complying with RPCs on a regular basis.

VI. CONCLUSION

This Court should accept review for the reasons articulated above and reverse the decision of the Court of Appeals filed September 10, 2013, remanding to trial court to enter summary judgment in favor of Lukashin.

Dated this 10th day of January, 2014.

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

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Supreme Court No. _____

Appendix A

UNPUBLISHED OPINION by the Court of Appeals, Division Two,

in Case No. 43115-7-II dated and filed September 10, 2013

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CAPITAL ONE BANK (USA), N.A., Respondent, v. HEATHER F. LUKASHIN, Appellant.	No. 43115-7-II UNPUBLISHED OPINION

JOHANSON, J. — Heather F. Lukashin appeals a summary judgment order in favor of Capital One Bank in a credit card collection action.[1] She argues that (1) the superior court improperly admitted account statements under RCW 5.45.020 and improperly relied on those records in granting Capital One summary judgment; (2) summary judgment was inappropriate because Capital One failed to provide sufficient proof of an enforceable credit card agreement; (3) the superior court's damages determination was improper; (4) the superior court erred in refusing to sanction Capital One or its counsel for misconduct; and (5) this court should impose

[1] Our commissioner issued a notation ruling allowing Igor Lukashin to appear "on behalf of the community composed of he and Ms. Lukashin." *See* Spindle.

sanctions to deter future misconduct by Capital One or its counsel. Finding no error, we affirm and decline Lukashin's invitation to sanction Capital One and its counsel.

FACTS

On October 18, 2010, Capital One sued Lukashin for unpaid credit card debt. When Lukashin failed to file a timely answer, Capital One moved for default judgment. In support of its motion for default judgment, Capital One attached an April 16, 2010 affidavit from Jamie Williams, a "Litigation Support Representative and an authorized agent of" Capital One. Clerk's Papers (CP) at 19.

In the affidavit, Williams stated that (1) she was familiar with Capital One's business records, (2) the records were made in the course of regularly conducted business activity either at or near the time of the events or by a computer or other digital means that created contemporaneous records, and (3) the content of the records was true and correct based on her personal knowledge of how Capital One maintained its records. Williams also stated that Lukashin had opened a Capital One account ending in the numbers 8703, that she had used that account to make purchases, and that she had breached the agreement by failing to make periodic payments as required. Williams further stated that the credit card agreement allowed for attorney fees and costs. The only document attached to the April 2010 affidavit was a copy of account 8703's July 25, 2009 to August 24, 2009 account statement (the August 2009 account statement) addressed to Heather Lukashin. This statement showed that as of August 24, 2009, Lukashin was six payments behind and that the outstanding balance, including finance and transaction charges, was $2,815.86.

The superior court struck Capital One's default judgment motion when Lukashin filed her answer. In her answer, Lukashin asserted a general denial. Although she admitted that she had a credit card with the last four digits of 8703, she asserted that she did not know whether this was the same account Capital One was referring to.[2] She also asserted several affirmative defenses.

Eleven months later, Capital One moved for summary judgment. Capitol One stated that it was supporting its motion with: (1) "Exhibit A: Client Affidavit as provided by Plaintiff," (2) "Exhibit B: Copies of Periodic Statements as provided by Plaintiff," (3) a "[d]eclaration of [p]laintiff's attorney," and (4) the "[r]ecords and files herein." CP at 44. Exhibit A was a copy of the same April 2010 affidavit Capital One had submitted with its default judgment motion, without a copy of the August 2009 account statement. Although not followed by a cover page indicating that they were exhibit B, Capital One also submitted account statements for account 8703 from September 2006 through November 2008; these statements were all addressed to Heather Lukashin.[3] The final statement, for the October 24, 2008 through November 24, 2008 period (the November 2008 account statement), showed an outstanding balance of $2,058.44.

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[2] Specifically, Lukashin stated: "The Defendant admits the allegation that the Defendant has had a certain credit card account bearing a number ending in 8703; however, the Defendant is without sufficient knowledge or information to form a belief as to whether the account referenced by the Plaintiffs is one and the same." CP at 28.

[3] Although the November 2006 and February 2008 account statements show that Lukashin made payments equal to the previous outstanding balances; these statements also included new charges, leaving substantial outstanding balances regardless of the payments. None of the account statements in the record show that the account had a zero balance at any time.

Lukashin responded by filing two motions to "strike or deny" the summary judgment motion,[4] a motion to dismiss the summary judgment motion, and various motions for sanctions against Capital One and/or its counsel. In these motions, Lukashin argued that (1) Capital One had failed to support its summary judgment motion with a "complete" set of account statements or a copy of any account agreement establishing that she was responsible for any debt[5]; (2) the documentation Capital One provided was insufficient because it did not show the account activity between November 2008 and August 2009, and it was possible that some of the charges were not authorized[6]; (3) the documents Capital One had included with its summary judgment motion were inadmissible under RCW 5.45.020 because they were submitted and/or discovered after the April 2010 affidavit[7] and were not mentioned specifically in the affidavit; (4) Capital One or its counsel had failed to disclose legal authority and "plagiariz[ed] " some of its argument

[4] CP at 142, 178.

[5] *See* CP at 146.

[6] Specifically, Lukashin asserted: "Furthermore, as several alleged billing statements provided indicate that the previous statement balance was paid in full, the entire alleged outstanding balance could be stemming from unauthorized transactions, for which the Defendant would not be responsible." CP at 181.

[7] At a December 2, 2011 hearing regarding whether Lukashin was entitled to compensation for Capital One's failure to appear at some preliminary hearings, Capital One asserted that at the time of a January 2011 hearing, it was "in the process of getting more documents because of recent case law which was made." Verbatim Report of Proceedings (VRP) (Dec. 2, 2011) at 16. Capital One also seemed to say it was gathering additional documents as late as April 1, 2011. Lukashin construed these statements as admissions that Capital One did not have the September 2006 through November 2008 account statements until well after the affidavit's April 2010 date.

from an unpublished case without disclosing the source[8]; and (5) Capital One or its counsel attempted to submit documents with the April 2010 affidavit that it did not obtain until after April 2010. The superior court denied these motions.

On December 19, 2011, Lukashin responded to the summary judgment motion. Citing *Citibank South Dakota N.A. v. Ryan*, 160 Wn. App. 286, 247 P.3d 778 (2011) (*Ryan*), and *Discover Bank v. Bridges*, 154 Wn. App. 722, 726, 226 P.3d 191 (2010) (*Bridges*), she argued that she did not have a duty to respond to the summary judgment motion with specific factual claims because Capital One did not present "'adequate affidavits'" to support its motion. CP at 293. She also argued that Capital One was required to present a copy of the "contract" and that it had failed to do this. CP at 294. In addition, she reiterated her argument from her previous motions that the April 2010 affidavit failed to state that it related to the account statements Capital One had submitted in support of its summary judgment motion.

Capital One replied that (1) the April 2010 affidavit was sufficient under CR 56(e), (2) it had established that the account statements were business documents under RCW 5.45.020, and (3) it had provided sufficient documentation to show that Lukashin had assented to and acknowledged the credit card agreement because she had made charges and payments on the credit card and had "acknowledge[d]" in her answer she had a credit card ending in 8703. CP at 309. Capital One also noted that Lukashin had not provided any affidavits or documentation contradicting Capital One's evidence.

[8] CP at 359; *see also* VRP (Jan. 27, 2012) at 57.

On January 6, 2012, the superior court heard the summary judgment motion.[9] At the hearing, Capital One stated that because it had failed to present any documentation of the account from November 25, 2008 through July 25, 2009, it was willing to rely on the amount due from the November 2008 account statement, rather than the June 2009 account statement. It also stated that it was willing to forgo any additional interest that may have accrued after the November 2008 statement. Lukashin argued, as she had in previous motions, that because the account statements Capital One had provided demonstrated that the Capital One account had been paid in full on two occasions, the balance on the November 2008 account statement "could have been paid" and that the later charges could have been unauthorized.[10] Verbatim Report of Proceedings (VRP) at 47. But she did not provide any documentation or an affidavit or declaration supporting these assertions.

During its argument, Capital One briefly mentioned *Capital One Bank v. Plumb*, noted at 165 Wn. App. 1008 (2011), an unpublished Division Three opinion that had a record similar to the one here. Over Lukashin's objection, the superior court allowed Capital One to mention *Plumb*. Although Capital One described *Plumb*, Capital One specifically stated that it

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[9] The court also addressed Lukashin's second motion to dismiss, a CR 11 motion, and a motion for sanctions under CJC 2.5. We discuss those motions above.

[10] She also presented argument related to her various affirmative defenses. Although Lukashin requests that we reverse the summary judgment order and remand "with instructions to dismiss under unclean hands or equitable estoppel doctrine," she presents no argument related to the affirmative defenses. Br. of Appellant at 4. Accordingly, these defenses are not at issue on appeal. RAP 10.3(a)(6); *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 505, 903 P.2d 496 (1995), *review denied*, 129 Wn.2d 1010 (1996).

understood that the case was not authority and that it was merely describing "the reasoning that other courts have used." VRP at 43.

The superior court found that Capital One's documentation was sufficient to establish a contract under *Bridges* and granted Capital One's summary judgment motion. The court awarded Capitol One (1) $2,058.44 in principal (the outstanding balance from the November 2008 statement, (2) no interest, and (3) $299.50 in costs.[11]

Lukashin moved for reconsideration. In her motion for reconsideration, she argued that the superior court erred in (1) allowing Capital One to discuss *Plumb*, (2) relying on Capital One's improperly presented and incomplete records, and (3) basing its award on the November 2008 statement's balance. She also discussed a Wall Street Journal article she had discovered that questioned the reliability of Capital One's records. The superior court denied the motion for reconsideration. Lukashin appeals.

ANALYSIS

I. ADMISSION OF ACCOUNT STATEMENTS

Lukashin first argues that the superior court erred in admitting and considering the account statements attached to Capital One's motion for summary judgment. She contends that Capital One has failed to show that these records were admissible under RCW 5.45.020, because (1) the April 2010 affidavit does not explicitly identify the records attached to the summary

[11] The superior court offset this award with a $150 penalty related to Capital One's failure to appear at a preliminary hearing.

judgment motion, and (2) the record shows that Capital One was gathering documentation well after April 2010. We disagree.

"We review a trial court's decision to admit or exclude business records for a manifest abuse of discretion." *Bridges*, 154 Wn. App. at 726 (citing *State v. Garrett*, 76 Wn. App. 719, 722, 887 P.2d 488 (1995)). "A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds." *Bridges*, 154 Wn. App. at 726 (citing *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007)).

RCW 5.45.020 provides:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

In her April 2010 affidavit, Williams stated that (1) she was familiar with the "manner and method by which Capital One maintains its normal business books and records, including *computer records of defaulted accounts*," CP 47 (emphasis added); (2) the records were made in the course of regularly conducted business activity either at or near the time of the events or by a computer or other digital means that created contemporaneous records; and (3) the content of the records was true and correct based on her personal knowledge of how Capital One maintained it records. Williams identified the records related to the affidavit as "computer records of defaulted accounts." CP at 47. She states that these records were "made in the course of regularly conducted business activity" and that they were created either "at or near the time [of] events" or "by a computer or other similar digital means, which contemporaneously records an

event as it occurs." CP at 47. Thus, on its face, the April 2010 affidavit satisfies RCW 5.45.020's requirements.

Lukashin argues, in effect, that the affidavit does not adequately identify the records as the records Capital One submitted in support of its summary judgment motion and that the record shows Capital One argued that the April 2010 affidavit supported the admission of these records even though it knew that these records were discovered or created well after Williams signed the affidavit. It is true that the records attached to the affidavit were not specifically referred to by name or date in the affidavit. And although it certainly seems to be the better practice to specifically identify, in the affidavit, the documents attached to the affidavit to avoid any confusion or misunderstanding, Lukashin cites to no authority to require such a reference. But, although not specific, Williams's affidavit provides sufficient information from which we can conclude that it is referring to the attached documents. Williams's affidavit stated that Lukashin had opened a Capital One account ending in the numbers 8703 and that she had used that account to make purchases. The attached documents are for an account in Lukashin's name ending in numbers 8703 and the documents show purchases, some in Lukashin's name specifically. Thus, we conclude that Williams's affidavit adequately describes the attached documents for the purposes of RCW 5.45.020.

Furthermore, although Capital One first submitted the April 2010 affidavit in support of its motion for default judgment with only the August 2009 account statement attached, there is nothing in the record showing that (1) the additional account statements were not also originally attached to the April 2010 affidavit and Capital One merely did not submit all of the documents with its motion for default judgment, or (2) Capital One discovered the additional account

statements after April 2010. Even though Capital One's counsel stated in a preliminary hearing that Capital One had been seeking additional documentation after April 2010, nothing in the record shows what records those were. It is pure conjecture that the documents attached to the affidavit supporting the summary judgment motion were not the documents Williams referred to in her affidavit. And, although the affidavit does not describe any documents with particularity, Lukashin does not cite any authority requiring such specific identification. Accordingly, Lukashin fails to show that the superior court abused its discretion in admitting these documents and this argument fails.[12]

II. EVIDENCE OF AGREEMENT

Citing *Bridges* and *Ryan*, Lukashin next argues that summary judgment was inappropriate because Capital One failed to provide sufficient proof of an enforceable credit card agreement. Again, we disagree.

We review summary judgment orders de novo, engaging in the same inquiry as the superior court. *Ryan*, 160 Wn. App. at 289.

> When reviewing a summary judgment order, we review the evidence in a light most favorable to the nonmoving party. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). Mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish such a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). In addition, the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). After the moving party submits adequate

[12] Lukashin also argues that the superior court erred when it decided the summary judgment motion based on inadmissible evidence. Because we hold that the superior court did not err in admitting these documents, this argument fails.

> affidavits, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclose that a genuine issue of material fact exists. *Seven Gables*, 106 Wn.2d at 13.

Bridges, 154 Wn. App. at 727.

Lukashin is correct that Capital One never produced a customer agreement. But she fails to establish that a customer agreement was the only way Capital One could establish its claim.

In *Bridges*, we stated, "To establish a claim, Discover Bank had to show that the Bridgeses mutually assented to a contract by accepting the cardmember agreement and personally acknowledged their account." 154 Wn. App. at 727. The deficiency in *Bridges* was the absence of any personalized acknowledgement of an agreement. *Bridges*, 154 Wn. App. at 727-28; *see also Ryan*, 160 Wn. App. at 293 (similarly requiring proof of personal "assent" to or "acknowledgement" of the cardholder agreement). Here, despite the fact Capital One did not produce any signed contract, agreement, or payment instrument, (1) Lukashin admitted in her answer that she had "a certain credit card account bearing a number ending in 8703," the same four digits as the Capital One card, CP at 28; and (2) although Lukashin never admitted this card was a Capital One card, several account statements clearly show that the Capital One card was used to charge an airline ticket and rental car for Heather Lukashin, and that regular on-line ACH payments were made. Unlike *Bridges* or *Ryan*, Lukashin's admission that she had a card ending in 8703 and these purchases, which were specifically tied to Lukashin, were sufficient to show that Lukashin personally acknowledged and assented to the terms of the credit card agreement. Accordingly, this argument fails.

III. AMOUNT OF JUDGMENT

Lukashin next argues that the superior court erred when it relied on the balance from the November 2008 account statement when setting the damages. She asserts that the superior court should not have relied on this amount because Capital One did not present a full set of account statements, she could have paid off the outstanding balance from the November 2008 account statement, and someone else could have made unauthorized charges on the account after she paid it off.

Capital One presented both the November 2008 account statement showing a $2,058.44 balance, and the August 2009 account statement showing a balance of $2,815.86, and stating that Lukashin had not made any payments for six months. Lukashin did not present any evidence, or even affirmatively allege, that she had made any payments on the account after November 28, 2008; she merely argued that she *could have* made payments that were not reflected because of the missing statements and that the August 2009 account statement *could have* included unauthorized charges. Although it was not Lukashin's responsibility to initially submit any proof, once Capital One submitted adequate affidavits to support its case, as was the case here, it was her responsibility to present sufficient specific facts to rebut Capital One's contentions and demonstrate that there was an issue of material fact. *Bridges*, 154 Wn. App. at 727 (citing *Seven Gables*, 106 Wn.2d at 13). Her bare assertion that there *could have* been other payments not reflected in the account statements because Capital One did not submit the account statements from December 2008 through July 2009, is not enough to create a question of fact. Accordingly, the superior court did not err in accepting Capital One's offer to resolve this case based on the balance in the earlier statement.

IV. Misconduct Claims

Lukashin next appears to argue that the superior court erred when it allowed Capital One to refer to *Plumb*, an unpublished case, in argument on January 6, 2012, and refused to impose sanctions for Capital One's counsel "plagiarizing" from the *Plumb* case in its December 30, 2011 reply to her response to the summary judgment motion. Br. of Appellant at 16; Reply Br. at 27. She also appears to challenge the superior court's denial of her January 17, 2012 CR 11 motion for sanctions based on this act and its refusal to reconsider this issue.

Lukashin cites no law requiring a superior court to impose CR 11 sanctions for a party's citing to or using a substantially similar analysis from an unpublished case. Furthermore, Capital Bank was not attempting to rely on the unpublished case as precedential authority, but, rather, used the unpublished case to help structure its argument, which was supported by appropriate citations. Accordingly this argument fails.[13]

Lukashin next appears to argue that the superior court erred in failing to sanction Capital One's counsel for her bad faith misrepresentation of the account statements attached to the summary judgment motion as the records referred to in the April 2010 affidavit. As discussed above, Lukashin has not shown that Capital One misrepresented the statements attached to its

[13] In her January 17, 2012 CR 11 motion, Lukashin cited to *Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Lane*, 642 N.W.2d 296 (2002). But that case addressed an attorney's plagiarism of a treatise and a request for 80 hours of attorney fees for work preparing the brief containing the plagiarized information, not an attorney's use of an unpublished legal opinion to structure an argument supported by other, legitimate citations. Accordingly, that case is inapposite.

summary judgment motion as being related to the April 2010 affidavit. Accordingly, this argument also fails.[14]

V. Request for Sanctions and Attorney Fees and Costs on Appeal

Lukashin asks us to impose sanctions sufficient to deter future misconduct should we determine that Capital One or its counsel engaged in misconduct. Because Lukashin has not demonstrated that Capital One or its counsel engaged in any misconduct, we deny this request.[15]

Finally, Lukashin requests costs and fees on appeal. A prevailing party may recover attorney fees on appeal if "applicable law grants to a party the right to recover reasonable attorney fees" and the party devotes "a section of its opening brief to the request for the fees." RAP 18.1(a), (b). Lukashin is not the prevailing party here. Furthermore, she merely requests attorney fees and costs without citation to authority or devoting a section of her brief to the request. Accordingly, we deny her request for fees and costs on appeal.

[14] To the extent Lukashin presents additional argument outside the scope of her opening brief in her reply brief, we do not consider it. RAP 10.3(c); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[15] To the extent Lukashin presents additional argument outside the scope of her opening brief in her reply brief, we do not consider it. RAP 10.3(c); *Cowiche Canyon*, 118 Wn.2d at 809.

We affirm.[16]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Worswick, C.J.

Tollefson, J.P.T.

[16] We have also considered Lukashin's amended statement of additional authorities citing several additional cases, evidentiary rules, and rules of appellate procedure. These additional citations primarily restate legal premises and rules that we have already considered and do not alter our opinion.

Supreme Court No. _____

Appendix B

ORDER DENYING MOTIONS of the Court of Appeals, Division Two, in Case No. 4311507-II dated and filed December 11 2013

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CAPITAL ONE BANK,

Respondent,

v.

HEATHER LUKASHIN,

Appellant.

No. 43115-7-II

ORDER DENYING MOTIONS

APPELLANT moves for reconsideration of the Court's **September 10, 2013** opinion. Appellant and Respondent move for publication of the Court's September 10, 2013 opinion, and Appellant moves for sanctions against the Respondent. Upon consideration, the Court denies the motions. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Johanson, Tollefson

DATED this 11th day of December, 2013.

FOR THE COURT:

Johanson, A.C.J.
ACTING CHIEF JUDGE

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Supreme Court No. _____

Appendix C

Lukashin's Motion to Publish the unpublished opinion filed by Division One in Case No. 69155-4-I, Curry v. Viking Homes, Inc. (November 18, 2013) dated November 21, 2013

No. 69155-4-I

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DEAN CURRY,

Appellant,

v.

VIKING HOMES, INC.,

Respondent

SNOHOMISH COUNTY SUPERIOR COURT CASE NO. 09-2-07715-9

NON-PARTY APPLICANT'S RAP 12.3(e) MOTION TO PUBLISH THE UNPUBLISHED OPINION FILED NOVEMBER 18, 2013

Non-party applicant seeking publication:

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1. IDENTITY AND INTEREST OF THE APPLICANT

Applicant Igor Lukashin, *pro se*, respectfully requests, pursuant to RAP Rule 12.3(e), that this Court publish its opinion filed November 18, 2013 in the instant action and available through the Washington Courts website[1].

The applicant's interest is as follows: the Lukashins have pending proceedings before Division Two of this Court, case no. 43115-7-II, *Capital One v. Lukashin*[2], where the Court, under very similar facts, reached a directly opposite conclusion by affirming the summary judgment in favor of plaintiff Capital One, where the plaintiff failed to ever produce the alleged contract while bringing an action based solely on a claimed breach of contract. Publication of the decision in the instant action directly benefits the Lukashins, since it then could be cited[3], as a recent authority, either to Division Two, or to Washington Supreme Court, or, if necessary, to the U. S. Supreme Court. Furthermore, as the Lukashins did challenge the evidence, including, explicitly, the failure to provide the alleged "Customer Agreement" on their cross-motion for summary judgment, publication of this opinion would virtually guarantee Division Two withdrawing its previously filed opinion and remanding with directions to grant summary judgment in favor of the Lukashins.

2. REASONS FOR BELIEVING PUBLICATION IS NECESSARY

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[1] http://www.courts.wa.gov/opinions/pdf/691554.pdf

[2] An unpublished decision was filed therein and is available at http://www.courts.wa.gov/opinions/pdf/D2%2043115-7-II%20%20Unpublished%20Opinion.pdf . Lukashins filed a timely motion for reconsideration; and on November 8, 2013, Division Two requested that the respondent, Capital One, file an answer; thus the Lukashin case is not moot.

[3] Lukashin is very familiar with the Washington prohibition to cite unpublished opinions of the Court of Appeals by virtue of the issues raised in *Capital One v. Lukashin*.

Lukashin believes that publication is necessary because the November 18, 2013 opinion clarifies the importance that plaintiff make a prima facie showing that it can provide admissible evidence to support all necessary elements of its claims once the defendant challenges sufficiency of such evidence; specifically, it mandates that in breach-of-contract cases, almost always the situation in consumer debt collection cases, 90% to 95% of which are resolved on default or summary judgments, alleged written contract must be provided[4].

While our Supreme Court recently reiterated the burden of proof standard in *Cedar River, et. al. v. King County, et. al.*, No. 86293-1, slip op. (Washington Supreme Court, October 24, 2013)[5], that opinion reviewed a judgment entered following "a six-week bench trial", so it may not be clear to some trial (and even appellate) judges, as the Lukashins' experience indicates, that failure to provide admissible evidence of a written contract in a breach-of-contract action, once challenged by the defendant on a summary judgment motion, is fatal to the plaintiff's claims.

In the instant action, Viking, in its Brief of Respondent, cited *Las v. Yellow Front Stores, 66 Wn. App. 197, 831 P.26 744* (1992)[6] for the proposition that challenging "sufficiency of the Plaintiff's evidence as related to his claims" (Resp. Br., p. 14) shifted the burden to Mr. Curry, which burden Mr. Curry was apparently unable to meet. Yet, in the Lukashin action, Suttell & Hammer attorneys, Mr. Filer and Ms. Gurule, representing Capital One, (presumably initially) successfully argued that they did not need to provide the

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[4] Of course, as illustrated well by the Memorandum Opinion dated October 16, 2012 in *Fratz v. Goldman & Warshaw, P.C.*, 2012 WL 4931469 (E.D.Pa.), once an alleged contract is provided, defendants in credit card collection cases could successfully challenge as to whether the contract provided is the applicable contract.

[5] Available at http://www.courts.wa.gov/opinions/pdf/862931.pdf . Burden of proof standard is discussed on p. 14 thereof.

[6] See discussion at 198, citing, in footnotes, to *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Young*, at 226; *Young*, at 225-26; and *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Customer Agreement that Lukashin allegedly defaulted under[7]. Thus, publishing this opinion would serve an important role in educating (or reminding) Washington attorneys and judges[8] that defendants may test sufficiency of the plaintiff's evidence at summary judgment stage, and that failure by plaintiffs to provide prima facie evidence for all required elements of their claims would result in courts' granting summary judgments in favor of defendants. Since the Lukashins presented their claim that the Customer Agreement needed to be provided to five (5) judges and three (3) attorneys, with all of them until now having taken a contrary position, it seems to be very indicative of the considerable need to publish this opinion to educate the bench and the bar as to this important element of summary judgment proceedings, especially since *Las v. Yellow Front Stores* was published over 20 years ago. The *Grimwood* (1988) opinion, which this Court cites on p. 7 of the Opinion and Respondent – on p. 12 of the Respondent's Brief, was published 25 years ago. And, even though this Court provided a similar discussion, citing *Las v. Yellow Front Stores* in a relatively recent published opinion, *Boguch v. Landover Corp.*, 224 P. 3d 795, 802 (2009), the treatment Lukashins received while defending their case indicates that, like in any learning experience,

[7] See http://www.courts.wa.gov/content/Briefs/A02/431157%20respondents.pdf for the position taken by Ms. Gurule, especially p. 9 (alleging, without citing to authority or record that billing statements and two-page affidavit contained all material terms of the Customer Agreement), and the purported need for Lukashin to "put forth any affidavits that set forth specific facts showing that there is a genuine issue for trial" (at 12, 13). To clarify, the Lukashins have consistently claimed that alleged billing statements were never properly identified or authenticated, thus lacking foundation, and should not have been admitted into evidence.

[8] The Lukashins have presented their claims that the Customer Agreement had to be provided to one Superior Court judge, a three-judge panel of the Division Two of this Court, as well as a federal judge (WD Washington, FDCPA/WCAA/WCPA lawsuit filed against Suttell & Hammer, Mr. Filer, and Ms. Gurule, currently pending in the 9th Circuit Court of Appeals), and three Washington-licensed attorneys (Mr. Filer, Ms. Gurule, and Mr. Fisher, the attorney representing Suttell defendants in the federal action).

repetition may be the key to improving awareness of participants of the legal system as to the applicable standards for defendants' summary judgment motions[9].

By providing such additional guidance to the trial courts, attorneys, and parties[10], this Court will bring about a more efficient use of the resources of the litigants and the judicial system as a whole, as illustrated by the Lukashins' case, which should have ended on January 6, 2012, by the Superior Court granting a summary judgment in favor of the Lukashins; yet, almost two years later, the Lukashins are still fighting to get state and federal courts to accept their position, validated by this Court's position in the instant action and, as it turns out, a string of previously published opinions, that no admissible evidence of a contract on cross-motions for summary judgment in a state debt collection proceeding alleging a breach of contract as a cause of action equates with a required summary judgment in favor of the debtor (and implicates FDCPA liability of debt-collector attorneys[11]).

3. OPINION LIKELY DETERMINES AN "UNSETTLED" QUESTION OF LAW

Lukashin believes the opinion determines an "unsettled" question of Washington law, inasmuch as both the Superior Court and the Division Two of this Court initially ruled against the Lukashins as related to cross-motions for summary judgment in a situation nearly identical to that of the instant action. While published opinions cited in footnote 9 hereof may suggest that the question of law is "settled", it is clearly not so when even a three-judge panel

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[9] The *Las* opinion is also cited by several other published opinions, including Division One cases *Heg v. Alldredge*, 99 P. 3d 914, 915 (2004), *Hauber v. County of Yakima*, 27 P. 3d 257, 262 (2001), Division Two cases *BUILDING INDUSTRY ASS'N v. McCarthy*, 218 P. 3d 196 (2009), *Fischer-McReynolds v. Quasim*, 6 P. 3d 30, 34 (2000), and Division Three case *Bird v. Walton*, 69 Wn. App. 366, 368, 848 P. 2d 1298 (1993). However, given the Lukashins' experience, a fresh reminder in a published opinion may well be in order.

[10] Including that simply challenging sufficiency of plaintiff's evidence in a motion for summary judgment shifts the burden of proof and could bring a defense judgment unless plaintiff provides prima facie evidence to meet all required elements of its claims.

[11] See e.g. *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F. 3d 939, 949-950 (9th Cir., 2011)

of this Court failed to recognize and apply that precedent (compare CR 54(c), "...every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings"; see also RAP 12.2)[12].

For the above reason, the Lukashins believe the Opinion determines a de-facto "unsettled" question of law, and, as such, worthy of being published.

4. OPINION CLARIFIES AN ESTABLISHED QUESTION OF LAW

Lukashin believes that, for the reasons stated above, the Court's unpublished opinion also clarifies the application of a defendant's sufficiency of evidence challenge and the shift in the burden of proof it leads to in summary judgment proceedings, thus providing needed guidance for trial courts, attorneys, and parties, and improving the overall efficiency of the judicial system.

5. OPINION IS OF GENERAL PUBLIC INTEREST OR IMPORTANCE

The public, especially the individuals sued in Washington in debt collection actions for modest amounts, which effectively eliminates the debtors' option of hiring an attorney because of the American Rule (attorney fees could be on the order of magnitude or even greater than the amount sued for), deserves a reminder and a recent precedential opinion clearly spelling out that debtors (and other defendants) can and should demand to see proof of all elements of breach-of-contract (or other) claims, and have the case dismissed on summary judgment if such proof is not provided. This understanding and reminder will also

[12] Our Supreme Court recently observed, in *Salas v. Hi-Tech Erectors*, 230 P. 3d 583, 587 (2010): "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."

likely curb abuses (Capital One requested about $3,330 of alleged debt, 26.1% interest rate, and $650+ in reasonable attorney fees in the complaint of the Lukashins' case, but the summary judgment it obtained was for only roughly $2,054, 12% interest rate, and $0.00 in attorney fees), since, were the Lukashins to cite (or Capital One's attorneys to disclose, pursuant to RPC 3.3(a)(3)) the *Las* opinion or any of its published progeny, the Superior Court would have had no choice but to dismiss, with prejudice, just like the trial court has done in the instant action, the breach-of-contract debt collection complaint in January 2012.

For the foregoing reasons, Lukashin respectfully requests that the Court GRANT his motion to publish the November 18, 2013 opinion in the instant action.

Respectfully submitted this 21st day of November, 2013.

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

Pursuant to RCW 9A.72.085, I certify that on the 21st day of November, 2013, I caused to be deposited in the United States mail, postage prepaid, a copy of this NON-PARTY APPLICANT'S RAP 12.3(e) MOTION TO PUBLISH THE UNPUBLISHED OPINION FILED NOVEMBER 18, 2013 in the above-captioned matter addressed to the parties herein as indicated below:

Edward C. Chung, WSBA #34292 Chung, Malhas, Mantel & Robinson, PLLC 600 1st Avenue, Suite 400 Seattle, WA 98104	Bruce Lorber, WSBA #43796 Lorber, Greenfield & Polito, LLP 1000 Second Avenue, Suite 1700 Seattle, WA 98104

RESPECTFULLY SUBMITTED this 21st day of November, 2013, at Olympia, Washington.

IGOR LUKASHIN

Supreme Court No. _____

Appendix D

The Williams Affidavit, submitted by Capital One in support of its summary judgment motion in trial court

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-222-

THURSTON COUNTY SUPERIOR COURT

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

v.

HEATHER F LUKASHIN
Defendant(s).

AFFIDAVIT

The undersigned, being duly sworn, makes the following oath:

1. I am over 18 years old and competent to make this affidavit. I am a Litigation Support Representative and an authorized agent of Plaintiff CAPITAL ONE BANK (USA), N.A. ("Capital One") for purposes of this affidavit. I am duly authorized to make this affidavit, and because of the scope of my job responsibilities, I am familiar with the manner and method by which Capital One maintains its normal business books and records, including computer records of defaulted accounts.

2. These books and records are made in the course of regularly conducted business activity (1) at or near the time the events they purport to describe occurred, by a person with knowledge of the acts and events, or (2) by a computer or other similar digital means, which contemporaneously records an event as it occurs. The contents of this affidavit are believed to be true and correct based upon my personal knowledge of the processes by which Capital One maintains its business books and records.

3. The books and records of Capital One show that Defendant(s) opened an account with Capital One for the purpose of obtaining an extension of credit. The aforementioned records show Capital One issued a credit card to HEATHER F LUKASHIN with account number [redacted]8703. Defendant thereafter retained the card and used or authorized the use of the account for the acquisition of goods, services, or cash advances in accordance with the Customer Agreement governing use of that account. Further, Defendant(s) has/have breached the Agreement by failing to make periodic payments as required thereby.

4. The books and records of Capital One show that Defendant(s) is/are currently indebted to Capital One on account number [redacted]8703 for the just and true sum of $3309.13 as of 03/27/2010, plus interest accruing from said date at an annual percentage rate in

accordance with the Customer Agreement, currently 26.10%, and that all offsets, payments, and credits have been allowed. The Customer Agreement entered into between the parties also authorizes Capital One to recover from Defendant(s) reasonable attorneys' fees and costs to the extent permitted by law.

5. I declare under the penalty of perjury that the foregoing is true and correct and if called as a witness I would competently testify, under oath, thereto.

Given under my hand on:

Dated: 4.16.10

Jamie Williams

County of Chesterfield, to wit:
Commonwealth of Virginia

SUBSCRIBED and sworn to before me, the undersigned Notary Public in and for the jurisdiction aforesaid, by Jamie Williams, who acknowledged before me his/her signature to the foregoing Affidavit.

GIVEN under my hand and seal this 16 day of April, 2010.

Notary Public

Notary Registration Number: _____

My Commission Expires: ____/____/20___

Commonwealth of Virginia
Antoinette Lasean Miller - Notary Public
Commission No. 7205918
My Commission Expires 04/30/2012

ANTOINETTE LASEAN MILLER
NOTARY PUBLIC
REG # 7205918
MY COMMISSION EXPIRES
04/30/2012
COMMONWEALTH OF VIRGINIA

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SUTTELL & HAMMER P.S.