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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HEATHER F LUKASHIN, Defendant, Appellant

v.

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

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

HONORABLE CHRISTINE A. POMEROY, JUDGE

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

REPLY BRIEF OF APPELLANT HEATHER F LUKASHIN, PRO SE

Appellant:

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A. INTRODUCTION

Capital One, in its Respondent's Brief, fails to address many of the important issues, arguments, and assignments of error raised by Lukashin in her Appellant's Brief, including but not limited to how an affidavit dated almost a year prior could possibly properly identify alleged business records (per RCW 5.45.020) that the Plaintiff's counsel admitted in open court were procured much later; why the Plaintiff was not required to comply with the requirement of CR 56(e) which clearly states, in part that

"Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

and provide a copy of the "Customer Agreement" referred to in the Affidavit; why it was proper for Plaintiff's counsel to plagiarize an entire section from an unpublished *Plumb* opinion in its reply brief to the Motion for Summary Judgment while also bringing it up for the first time in open court during January 06, 2012 hearing without any prior notice to Lukashin; and why the amount of the judgment, based on a copy of a 2008 alleged billing statement, which was considerably different from the amount stated in the Affidavit and prayed for in the Complaint, together with the fact that a complete set of billing statements leading to the date of the Plaintiff's affidavit was not provided, did not create an issue of a material fact as to the amount of indebtedness (even when

considering the evidence in light most favorable to Capital One, and not Lukashin, as the Court should have, per *Ryan*).

Capital One's Respondent's Brief also repeatedly refers to alleged billing statements and specific transactions in support of its argument and claims, which is inapposite, as these alleged business records have not been properly identified.

Capital One further misrepresents the alleged admission by Lukashin as to "having a **Capital One** credit card account ending in 8703" (Respondent's Brief, p. 5, at 1-2, emphasis added); furthermore, it should not even be arguing it because of a judicial admission by Capital One's counsel (RP 41).

Astoundingly, Capital One's Respondent's Brief, by selectively quoting RCW 5.45.020 on p. 8, effectively misrepresents the meaning of the statute by completely omitting the requirement for "...the custodian or qualified witness" to testify "to its identity and the mode of its preparation...". Capital One cannot argue in good faith that such testimony, specifically regarding the copies of alleged billing statements introduced for the first time with the summary judgment motion, was ever offered to the trial court, yet it does argue that the alleged copies of the billing statements are admissible, notwithstanding the facts of the case, relevant law and court rules.

Based on the analysis of the Respondent's Brief, relevant facts, court rules, and case law, Lukashin believes and therefore asserts that, taking in its entirety, the Respondent's Brief is meritless and thus should be stricken by this Court as frivolous, and Lukashin should be awarded sanctions (CR 11, RCW 4.84.185 or any other basis deemed appropriate by this Court), in addition to the sanctions prayed for earlier in the Appellant's Brief.

B. STATEMENT OF THE CASE

Lukashin wishes to incorporate by reference the Statement of the Case from the Appellant's Brief.

C. ARGUMENT

1. Capital One misrepresents alleged admission by Lukashin in its Respondent's Brief; also, Capital One should not even be arguing the alleged admission because of its own judicial admission.

Capital One refers to alleged admission by Lukashin as early as page 1 of its Reply Brief, stating: "Lukashin admitted to having the credit card account ending in 8703." (emphasis added) and further stating, on p. 2 of its Reply Brief, that "In Lukashin's answer to the complaint, Lukashin admitted to having a Capital One credit card account ending in 8703. CP 26-30" (emphasis added). However, a quick examination of the relevant section of the Answer reveals the exact wording:

"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 27, at 14-18)

Thus, it is clear that there has been NO admission that Lukashin had "the" account or had a "Capital One" credit card account. Furthermore, numbered paragraph III of Capital One's Complaint makes no mention that the "certain credit card account" referred to therein was issued by Capital One, so admitting having an account bearing a number ending in 8703 was NOT the same as admitting to having a Capital One credit card account ending in 8703, as the Respondent's Brief would have one believe.

In addition, reviewing the wording of CR 8(b), which states, in part, that:

"If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial."

it is clear that Lukashin's wording of her Answer has the effect of a denial.

The admission that Lukashin did make in her Answer does not extend to an admission that she did have the specific account referenced by the Plaintiff, which Capital One's counsel conceded on the record:

"... the defendant acknowledged that she had an account with 8703, Your Honor, the last four which happens to be this, so they acknowledge that. **They do not acknowledge that they**

actually have this account, which would be enough.” (RP 41, at 16–21, emphasis added)

It is well established that counsel’s judicial admissions are binding on the party.

See, for example, *In re Disciplinary Proceeding Against Lynch*, 789 P. 2d 752,

Washington Supreme Court (1990), (especially footnote 5), RCW 2.44.010

Authority of Attorney, and the recent U.S. Supreme Court case *Christian Legal*

Soc. Chapter v. Martinez, 130 S. Ct. 2971 (2010) which stated, in part:

Litigants, we have long recognized, “[a]re entitled to have [their] case tried upon the assumption that ... facts, stipulated into the record, were established.” *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447, 25 S.Ct. 456, 49 L.Ed. 826 (1905).[7] This entitlement is the bookend to a party’s undertaking to be bound by the factual stipulations it submits.

[...]

But factual stipulations are “formal concessions... that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission ... is conclusive in the case.” 2 K. Broun, *McCormick on Evidence* § 254, p. 181 (6th ed.2006) (footnote omitted). See also, e.g., *Oscanyan v. Arms Co.*, 103 U.S. 261, 263, 26 L.Ed. 539 (1881) (“The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.”)

In the instant action, Mr. Filer, representing Capital One, made a factual

statement during summary judgment motion arguments in open court ,

conceding that “**They do not acknowledge that they actually have this**

account...” (RP 41, at 19–20, emphasis added). Thus, Capital One is bound by

that judicial admission of a fact and may not brief this issue on appeal, as this Court of Appeals, Division II, very clearly indicated during the oral arguments (mp3 recording of which is available on the Court's website) in the *Noonan v. Thurston County* (2012) case, in which an unpublished opinion was filed by this Court on May 30, 2012. In the recording, there is plenty of discussion of this very issue. For example, at around time index 2:40, a judge inquires: "Do you have a case that's saying if you concede on the record you're not bound by it?" Later, starting at about 7:53, a Court of Appeals judge states, while revisiting the issue:

You must understand our shock at seeing them briefed on appeal. Does counsel not understand that if you concede and say: "I don't have those claims", and the Court accepts it, you don't have those claims, and you can't put life back into them at the Court of Appeals? [...]

Law that applies at this point to the binding of the client to the attorney comments on the record. (partial transcript, based on the mp3 file available)

Therefore, it seems clear that Capital One is precluded from arguing that Lukashin admitted having the specific account in question, and it still needed to make the showing required by *Bridges/Ryan* standard, which burden it fell very short of meeting.

2. The trial court erred when explicitly relying on the alleged admission by Lukashin to deny the motion for reconsideration, since there was a judicial admission by Capital One's counsel to the contrary already in the record.

As stated earlier, U.S. Supreme Court case, *Christian Legal Soc. Chapter v. Martinez*, 130 S. Ct. 2971 (2010) clearly established that:

Litigants, we have long recognized, "[a]re entitled to have [their] case tried upon the assumption that ... facts, stipulated into the record, were established." *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447, 25 S.Ct. 456, 49 L.Ed. 826 (1905).[7] This entitlement is the bookend to a party's undertaking to be bound by the factual stipulations it submits.

In this case, Lukashin has consistently denied that she admitted to having the specific account in question; combined with the judicial admission of Mr. Filer (RP 41), the trial court was bound by an effective stipulation by both parties that there was NO admission by Lukashin. Therefore, the trial court improperly relied on the alleged admission, disregarding an effective stipulation by the parties on record and seemingly misinterpreting the type and/or scope of the admission that was actually made by Lukashin in her Answer. Thus, the denial of the motion for reconsideration was made on untenable grounds and should be vacated by this Court.

3. Capital One argues that the Williams Affidavit itself was admissible, but Lukashin has already acknowledged that; however, ONLY the Affidavit, and nothing else constituted admissible evidence.

Lukashin does not dispute that the Williams Affidavit, by itself, was admissible. However, since none of the alleged copies of the billing statements were explicitly mentioned in the Affidavit, and all alleged statements with

specific consumer-initiated transactions or payments were obtained only subsequent to the date of the Default Judgment hearing, per Mr. Filer's judicial admission in open court [RP 14, 16], Capital One may not argue in good faith that the alleged copies of the billing statements were admissible, since the RCW 5.45.020-required attestation cannot and does not cover the documents that were sought to be produced only after the Williams Affidavit was signed.

Furthermore, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), U.S. Supreme Court held that:

“Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.” (emphasis added)

Thus, the Williams Affidavit itself may not be admissible under a “business records” exception to hearsay, since it “was calculated for use essentially in the court, not in the business.” *Id.*; yet Capital One failed to introduce any additional affidavits to address the issues raised by Lukashin, despite having an ample opportunity to do so. (Note: Fed. Rule Evid. 803(6) includes an attestation requirement similar to that of RCW 5.45.020).

Lukashin respectfully moves this Court to find that the entire line of arguments in the Respondent's Brief devoted to the admissibility of the alleged

business records, except for the Williams Affidavit, to be frivolous and strike it; and that CR 11 sanctions be imposed on Capital One and/or its counsel.

4. Capital One misrepresents the requirements of RCW 5.45.020 by selectively quoting the statute, ostensibly in an attempt to mislead this Court, which is a serious violation of the Rules of Professional Conduct, as our Supreme Court held in Ferguson (2011)

Our Supreme Court, IN RE PROCEEDING AGAINST FERGUSON, 246 P. 3d 1236 (2011) recently dealt with a very similar issue, stating, in part:

The hearing officer's conclusion appears to be, in part, a finding of fact that Ferguson's omission of relevant authority was purposeful. This finding is supported by the hearing officer's finding that Ferguson quoted the first sentence of the statute but omitted the second sentence that provided the notice requirement, without ellipses or any other indication of her omission. Such conduct is deceptive regardless of the likelihood that the court is aware of the law and will discover the deception. (emphasis added)

If you refer to p. 8 of the Respondent's Brief, Ms. Gurule, Capital One's counsel, states:

"Under the hearsay exception for business records, RCW 5.45.020 expressly states that the trial court may take into consideration any records that, '... in the opinion of the court, the sources of information, method and time of preparation were such to justify [the record's] admission.' Capital One's evidence is admissible under RCW 5.45.020 as a business record

exception to the hearsay rule.” (internal quotation marks changed, emphasis added)

It appears to Lukashin that Capital One’s counsel is trying to mislead this Court, consciously engaging in behavior similar to that which got attorney Ferguson suspended by the Supreme Court in 2011.

On p. 10, while arguing jointly the admissibility of affidavit and billing statements, Capital One does list the entire text of RCW 5.45.020, which is as follows:

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.

Lukashin requests the Court take judicial notice of the fact that the actual RCW 5.45.020 requires “competent evidence” to satisfy all of the following three prongs: 1) identification by a qualified witness; 2) being made in the regular course of business at or near the time of act, condition or event; and 3) being credible. Yet, Lukashin has consistently argued that the first prong, identification by a qualified witness, was never met for the voluminous alleged copies of billing statements ; thus, neither the trial court nor this Court has any basis to conclude that the alleged billing statements are accurate or admissible,

absent an additional sworn attestation by a representative of Capital One, which is not part of the record on review.

Lukashin requests the Court take judicial notice of the fact that Capital One was very careful not to mention the date of the Williams Affidavit in its Respondent's Brief. This date, in April 2010, is crucial in understanding that it was physically impossible for the Williams Affidavit to satisfy the first prong of RCW 5.45.020 for the billing statements introduced in late 2011 with the motion for summary judgment, especially since there was a judicial admission [RP 14, 16] that these statements were procured after the date of the Default Judgment hearing in November 2010, and, therefore, after the date of the Affidavit.

5. Capital One's arguments that books and records incorporate billing statements and that the records were "sufficiently trustworthy to justify admission" are meritless, as they are not supported by facts of this case or by the law

Continuing to maintain the meritless argument that the billing statements were properly admitted into evidence, on p. 10 of the Respondent's Brief, Capital One asserts that: "The affidavit refers to the books and records of Capital One, which incorporate the billing statements for the account." (emphasis added) Capital One does not cite to the record, as it needs to per RAP 10.3, to support the claim that billing statements for the account are

incorporated into “books and records”. As *McCullough* (2011) clearly showed, the fact that something could be true for all accounts (in that case, it was the clause about attorney fees in credit card agreement) does not establish this fact for the particular case (McCullough’s credit card agreement was never provided). Thus, since the Williams Affidavit does not specifically mention any billing statements, this Court should strike the emphasized assertion and this entire line of argument from the Respondent’s Brief per CR 12(f).

On p. 11 of its Brief, Capital One makes another claim unsupported by a citation to the record or relevant law, stating that: “...Capital One’s records on their face were sufficiently trustworthy to justify admission.”

Apparent trustworthiness , by itself, is insufficient, per RCW 5.45.020, to make business records competent evidence in the absence of proper identification by a custodian or a qualified witness, so this argument fails.

Furthermore, Lukashin has identified a Wall Street Journal article, in her brief in support of the motion for reconsideration, published the on December 23, 2011, *Debts Go Bad, Then It Gets Worse*, available at the following URL:

<http://online.wsj.com/article/SB10001424052970203686204577114530815313376.html>. This evidence serves to undermine the credibility of Capital One’s

“books and records”, since, according to the article:

It wasn't the first time the company went after its customers for debts that had been snuffed out in bankruptcy, even though the practice is illegal. A court-appointed auditor concluded earlier this year that Capital One pursued 15,500 "erroneous claims" seeking money previously erased by a bankruptcy-court judge.

Furthermore, a very recent, August 13, 2012 front-page New York Times article, *Problems Riddle Moves to Collect Credit Card Debt*, (available at the following URL: <http://dealbook.nytimes.com/2012/08/12/problems-riddle-moves-to-collect-credit-card-debt/>) dealt specifically with widespread problems related to evidence in debt-collection cases, including "robo-testimony", falsified credit card statements, and increased size of the debts by addition of erroneous fees and interest costs. Also, apparently, a former assistant VP at JPMorgan, which is also a national bank, stated that nearly 23,000 delinquent accounts had incorrect balances.

It is clear that the debt collection industry has certain well-recognized problems when it comes to actually offering proof, so taking the Capital One's records to be "sufficiently trustworthy to justify admission" without having such records being properly identified by a sworn statement of a qualified witness is likely to be significantly prejudicial to the opposing party.

Since Capital One was in full control of which alleged account statements to introduce, yet chose NOT to introduce the complete record from a zero balance leading to the balance alleged in the Affidavit, Lukashin or the

trial court would have no way of knowing whether the alleged balance had anything to do with the actual amount owed, even assuming for the moment that Capital One met its burden of proof as to the assent and personal acknowledgement of the account.

Thus, the trial court erred when admitting the copies of alleged billing statements into evidence, as the requirements of RCW 5.45.020 have not been satisfied.

6. References to specific charges and/or online ACH payments allegedly made by Lukashin are improper, since the alleged billing statements were not properly identified per RCW 5.45.020 and thus should be deemed inadmissible.

Respondent's Brief refers to several specific charges (a plane ticket and a car rental, on p. 2 and p. 4, for example) as well as "online ACH payments being made by Lukashin on the account for several years" (p. 11). However, since the alleged business records were not properly identified per RCW 5.45.020 and thus inadmissible, this Court should disregard or strike such references. Furthermore, the alleged "ACH payments" are just a notation – the record contains no evidence that it was Lukashin who made these payments or that these payments were actually made (since the business records were not properly identified and thus inadmissible). In addition, *Ryan* (2011) clearly held

that bare notations of alleged payments would not be sufficient, since this doesn't provide specific payment information (but a case where there were cancelled checks was easily distinguished).

7. Lukashin has not submitted any affidavits; yet, she was not required to, as Capital One has not met its burden under CR 56(e) and/or Bridges/Ryan standard.

Capital One correctly notes that Lukashin has not submitted any affidavits. However, Ms. Gurule, the author of Capital One's Respondent's Brief, is also listed as an attorney for respondent in the *Citibank v. Ryan (2011)* case, so she should be eminently aware that the *Ryan* court held:

“...we conclude that the rule of Bridges applies to the adequacy of the bank's initial proof of assent to the cardholder agreement, and does not depend on the nature of the purported cardholder's response. See *Seven Gables*, 106 Wash.2d 1, 13, 721 P.2d 1 (nonmoving party's duty to respond with specific factual claims arises once moving party has produced adequate affidavits).”

[...]

“As for the supposed proof that Ryan made payments on the account, however, it is clear from Bridges that the bare notation of supposed payments on the account statements Citibank provided is not sufficient. The monthly account statements in Bridges similarly listed payments purportedly made on the account but were still insufficient to prove the defendants' personal acknowledgment of the debt in the absence of cancelled checks or similar materials”

As Lukashin has conclusively shown that the alleged billing statements were not properly identified pursuant to RCW 5.45.020 and thus inadmissible, it's clear that Capital One fell very short of meeting the *Bridges/Ryan* standard.

Reviewing *Bridges* and *Ryan* opinions, both of these cases included affidavits from bank employees (three different employees in *Bridges* and one employee in *Ryan*), plus additional documents, including an unsigned credit card agreement and some account statements/records attached to affidavits. Note that in *Bridges*, the bank's affidavit apparently contained a statement that "the attached account records were true and correct copies made in the ordinary course of business" (emphasis added) – an attestation that has been glaringly missing in the instant action regarding the copies of alleged billing statements.

Capital One also argues that Lukashin has not submitted an affidavit "denying that she made purchases on the credit card account" or "denying that she made payments on the credit card accounts" or "explaining that the amount owed is incorrect" or "stating that the amount owed was paid in full" (Respondent's Brief, p. 13). However, this is the same flawed argument that the Court of Appeals, Division I, has rejected in *Ryan* (2011):

"Citibank first contends that *Bridges* is limited to circumstances where the alleged cardholder specifically and affirmatively denies any use of the card in its materials responding to a motion for summary judgment. Citibank cites no language from *Bridges* supporting this interpretation of its holding, but argues

that such a limitation should be implied from the facts in Bridges. The problem with this argument, however, is that it is not supported by the facts as set forth in the Bridges opinion. While Citibank asserts, without citation, that the defendants in Bridges specifically denied use of the credit card in their responsive materials, the actual language of the opinion described the defendants' materials as consisting of the same type of arguments criticizing the bank's proof as Ryan presented in this case."

As to the CR 56(e) requirements, Capital One again seems to have provided a misleading citation to the "relevant part" of the court rule on p. 9 of the Respondent's Brief. The very next sentence in CR 56(e), which was omitted by Ms. Gurule, Capital One's counsel, states:

"Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."
(emphasis added)

Capital One does not dispute, as it cannot, that the "Customer Agreement" referred to by the Williams Affidavit was NOT attached to the Affidavit. Yet, it argues, while not supporting its argument with any legal authority whatsoever or citing to the record on review, that "all of the material terms of the customer agreement were included in Ms. Williams affidavit and the billing statements." (Respondent's Brief, p. 9), ostensibly urging this Court to consider the Affidavit itself and the alleged billing statements to be a "substitute" for the Customer Agreement. This argument fails for a number of reasons.

First of all, without knowing what the “Customer Agreement” was, it would be impossible for the Court or anyone to verify if that statement was true.

Second of all, it seems that the counsel is testifying here, which is not appropriate. Even if the admissible evidence contained a sworn statement about “all of the material terms”, Capital One would still not meet the requirement of CR 56(e), since the word “shall” is traditionally taken to mean “must”. No “Customer Agreement” mentioned in the Affidavit – no compliance with CR 56(e) requirement as written. The trial court clearly erred when it did not require Capital One to strictly comply with CR 56(e), and this was prejudicial to Lukashin, since one of the fundamental factors in selecting a litigation strategy was the reliance on the “rules of the game” being enforced.

Third, as previously shown by Lukashin, alleged copies of billing statements are not admissible; thus, any alleged terms and conditions contained therein should be disregarded by this Court.

Fourth, the Court of Appeals for the 9th Circuit rejected a similar argument in *McCullough* (2011), where the law firm sought attorney fees on the basis of an alleged agreement when the McCullough-specific agreement was never provided:

“Before the district court, JRL presented a credit card agreement purportedly belonging to McCullough. JRL now

admits that the agreement was not McCollough's and does not contest the district court's exclusion of the evidence.

JRL contends that it presented evidence that attorney's fees are permitted under all cardmember agreements, even if it was not able to obtain McCollough's specific agreement. JRL argues that its failure to produce a cardmember agreement applicable to McCollough was not fatal, and that the issue should have gone to the jury for its determination as to whether McCollough's agreement contained such a provision.

[7]The district court correctly concluded that JRL failed to meet its burden to show a genuine issue for trial because it presented no admissible evidence of a contract authorizing a fee award."

To summarize, Capital One does not dispute that a copy of the "Customer Agreement" mentioned in the Williams Affidavit was never provided, and its argument that it should not be required to provide a copy of the Customer Agreement fails in consideration of the plain meaning of the word "shall" as used in CR 56(e). In fact, Lukashin believes and therefore asserts that this particular argument of Capital One is frivolous and should be stricken from the Respondent's Brief per CR 12(f), and that Capital One and/or Ms. Gurule should be sanctioned under CR 11.

8. All of Lukashin's motions for sanctions may be reviewed by this Court.

Capital One addressed only the CR 56(g) motion and the first CR 11 motion for sanctions by Lukashin in its Brief, arguing that the former is not appealable (p. 3), while citing to the record that the trial court has not find any reason to impose CR 11 sanctions. However, in *Teter v. Deck* (2012), our

Supreme Court held that, after discussing the four Alcoa criteria for a court to properly grant a new trial: "It would be onerous to require a party to also move for mistrial to preserve a claim for error based on misconduct". In a similar vein, in the instant action, "(1) the conduct complained of is misconduct, (2) the misconduct is prejudicial, (3) the moving party objected to the misconduct ..., and (4) the misconduct was not cured by the court's instructions. 140 Wn. 2d at 539" (Teter v. Deck (2012), portion omitted). Since the four Alcoa criteria would be met were this Court to find, as it should, any prejudicial misconduct by Capital One or its counsel during the trial court proceedings, summary judgment should be vacated and case remanded back to the Superior Court.

Furthermore, per RAP 2.2(a), it seems that none of the decisions of the trial court related to sanctions were appealable directly to this Court, and it is because of Capital One's misconduct (not originally mailing the summary judgment motion to the correct address; also, was there a duty to notify the court that the service by mail did not occur if Suttell & Hammer received the "return service" it requests on the envelopes with its logo) that the original MSJ date of December 02, 2011 (when CR 56(g) motion was heard) was re-noted to 01/06/2012, moving that decision outside the 30-day period Capital One refers to. Moreover, under RAP 9.12, in deciding summary judgment, this Court may address all evidence and issues called to the attention of the trial court.

9. Reference to the *Plumb* case during oral arguments was inappropriate, prejudicial, and misleading

In its Brief, Capital One failed to address the *Plumb* case issues raised in the Appellant's Brief. This Court, during June 28, 2012 oral arguments for Case No. 420783, In Re Estate of Capps, clearly indicated (at around 5:32–5:39 time index of the recording) regarding use of a legal reference, that:

“If you did not serve the opposing counsel with it, you can't argue it, but you can file a statement of additional authorities later”

As is clear from Lukashin's arguments in motions filed subsequent to January 06, 2012, *Plumb* case was easily distinguishable, and could have been effectively addressed by Lukashin in open court, but only if Capital One provided advance notice it intended to argue it. Thus, the trial court erred when it overruled an explicit objection [RP 43] allowing Mr. Filer to argue a case without providing advance notice to Lukashin, and it was certainly misleading (*Plumb* is easily distinguishable) and prejudicial to Lukashin, as she was not provided with a meaningful opportunity to respond to this reasoning.

10. Once misconduct is found, sanctions must be imposed.

Both *Fisons* (1993), which Capital One cites in its brief in the standard of review section, and *Eller* (2010), which Lukashin brought to the trial court's attention, support the claim that sanctions must be imposed if requisite findings

are made. Lukashin assigns error to the trial court's refusal to find misconduct on multiple occasions (Mr. Filer's plagiarizing from the *Plumb* opinion while not identifying the source and thus precluding Lukashin from being able to prepare a rebuttal, arguing that the dated affidavit properly identified alleged business records, etc.), and respectfully requests that this Court reverse the appropriate decisions by the trial court, make a finding of misconduct, and remand these issues back to the trial court for imposition of appropriate sanctions.

11. This Court should use its power under CJC 2.15 to inform the appropriate authority regarding the conduct of both Mr. Filer and Ms. Gurule.

Lukashin has already argued that Mr. Filer committed multiple violations of RPCs in her filings with the trial court. In addition, Lukashin has shown above that Ms. Gurule have likely committed violations of RPC (specifically RPC 8.4(c) and (d)) by selectively quoting and purposefully omitting relevant authority – which our Supreme Court deemed a violation of RPC in *Ferguson* (2011), as well as RPC 3.1, 3.3, 3.4, and 4.1 by advancing what Lukashin believes are meritless arguments and making factual statements unsupported by the record.

Furthermore, Ms. Gurule signed Capital One's Motion for Summary Judgment [CP 47-148] on October 24, 2011, which motion contained a copy of the Affidavit purporting to properly identify the alleged business records; the

motion also sought “interest thereon at the rate of 26.1000% per annum” [CP 47], which Capital One, in the absence of a contract, was not entitled to; as well as failed to disclose directly adverse legal authority in the Legal Authority section [CP 48, at 10–11], which would be either *Bridges* or *Ryan* in this case, contrary to RPC 3.3(a)(3) requirement.

12. Justice is in Jeopardy in Washington for unrepresented litigants in civil cases; such litigants would have no chance at all of having their matters fairly heard if misconduct by opposing attorneys is tolerated.

On June 15, the day after Lukashin mailed her Appellant’s Brief, our Supreme Court filed its Order No. 25700-A-1005 regarding the adoption of new APR 28 to address a well-known problem, stating, in part:

Our adversarial civil legal system is complex. It is unaffordable not only to low income people, but, as the 2003 Civil Legal Needs Study documented, moderate income people as well. [...] Every day across this state, thousands of unrepresented (pro se) individuals seek to resolve important legal matters in our courts. Many of these are low income people who seek but cannot obtain help from an overtaxed, underfunded civil legal aid system. Many others are moderate income people for whom existing market rates for legal services are cost-prohibitive... [...] We know that there is a huge need for representation in contested cases where court appearances are required. We know further that pro se litigants are at a decided disadvantage in such cases, especially when the adverse party is represented. (portions omitted, emphasis added)

As Lukashin argued in her Appellant’s Brief, it does not make financial sense for an individual to secure services of an attorney to defend against “small claims” cases like the instant action, since the legal fees such individual

would be expected to pay independent of the outcome of the case (per the “American Rule”) are comparable to or even higher than the amount of the claim, and debt collectors know this. Thus, a pro se litigant in a “small claims” debt collection action would realistically only have the choice of either conceding the case or defending it on her own. This puts such an individual “at a decided disadvantage” *Id.*, and since the Supreme Court did not mention misconduct, the disadvantage it referred to seems to come solely from lack of understanding of the law and proper procedures.

In the instant action, Lukashin vigorously defended the case, pointing out legal requirements and alleged misconduct by the opposing party/counsel, only being able to get \$150 in compensation from Capital One for continuing status conferences without notification to Lukashin, as well as reduce the alleged debt by about a third compared to the amount listed in the Affidavit and the Motion for Summary Judgment, at a price of spending an inordinate amount of time learning the rules and relevant legal authority, composing and filing various documents, and so on. Yet, she did get a judgment entered against her, despite a multitude of problems and instances of misconduct that she brought to the attention of the trial court.

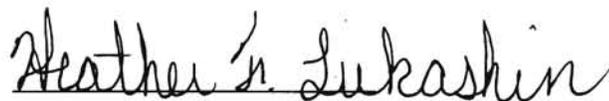
Since up to 95% of such collection cases end up with a default judgment, according to the New York Times article, how many individuals sued in Washington for the debts they allegedly owe to parties represented by

attorneys have judgments entered in the amounts that they do not actually owe, based on insufficient or incomplete records? How many others who do appear in their actions have no chance at all, even if they do have valid claims or defenses? This Court has an opportunity to clearly state that misconduct against pro se parties shall not be tolerated and that it shall bear identical financial consequences (at the very least) as the misconduct against parties represented by counsel.

D. CONCLUSION

Lukashin has addressed key claims and contentions raised by Capital One in its Brief, showing that they are without merit; thus, Lukashin respectfully requests that this Court strike the Respondent's Brief and award Lukashin terms in the amount of \$500 or as determined by this Court for having to respond to the meritless Brief; Lukashin further respectfully requests all of the relief prayed for in the Appellant's Brief, incorporated herein by reference. In addition, Lukashin respectfully requests that this Court use its power under CJC 2.15 to inform an appropriate disciplinary authority should it find misconduct and should the misconduct identified warrant it.

Dated this 16th day of August, 2012. Respectfully submitted,



Heather F Lukashin, pro se Appellant

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COURT OF APPEALS DIVISION II		
HEATHER F LUKASHIN <p style="text-align: right;">Appellant,</p> <p style="text-align: center;">vs.</p> CAPITAL One Bank (USA), N.A <p style="text-align: right;">Respondent.</p>	<p style="text-align: right;">COURT OF APPEALS NO. 43115-7-II</p> <p style="text-align: right;">DECLARATION OF MAILING</p>	

Pursuant to RCW 9A.72.085, I certify that on the 16th day of August, 2012, I caused to be deposited in the United States mail, postage prepaid, the following documents in the above-captioned matter addressed to the parties herein as indicated below:

REPLY BRIEF OF APPELLANT HEATHER F LUKASHIN, PRO SE

Malisa L. Gurule SUTTELL & HAMMER, P.S. PO BOX C-90006, Bellevue, WA 98009	<input checked="" type="checkbox"/> U.S. Mail
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Dated and signed in Olympia, Washington this 16th day of August, 2012.

Heather F. Lukashin

Heather F Lukashin, pro se Appellant

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