Case No. 91348-0

SUPREME COURT OF THE STATE OF WASHINGTON

Donald R. Earl (Appellant)

v.

XYZPrinting, Inc. (Respondent)

APPELLANT'S BRIEF

Donald R. Earl (pro se)
3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604

TABLE OF CASES AND AUTHORITIES

RCW

COURT RULES

WASHINGTON CONSTITUTION

U.S. CONSTITUTION

I. INTRODUCTION

The main issue presented on review in this matter is one of first impression. RCW 2.28.030(2) unconditionally bars a judge from acting in a case unless present and sitting at the hearing. In the instant case, a judge from another county sought to conduct proceedings long distance, by phone. The appellant is also asking this Court to resolve inconsistent rulings at the Court of Appeal level regarding the time limits of CR 54(d). Summary Judgment was granted against the Plaintiff, in spite of the fact the Plaintiff's claims are exhaustively supported by admissible evidence that is undisputed by the Defendant/Appellee, XYZPrinting, Inc. The laws governing the claims are unambiguous and are the subject of well settled, binding precedent. In the absence of irregularities and error, the Plaintiff's Motion for Summary Judgment should have been granted.

This is a case that under any normal circumstances would have been resolved within a matter of months, after conducting rudimentary discovery. The Plaintiff/Appellant, "Mr. Earl" served Interrogatories and Requests for production on XYZPrinting, Inc. early in the case and intended to move for Summary Judgment on completion of discovery. XYZPrinting, Inc. refused to respond to the discovery requests. Mr. Earl moved for production of discovery, and Summary Judgment motions were filed by both parties. The degree to which any semblance of due process in this case has been utterly abandoned should shock the conscience of any

right thinking person. Rule of law has been replaced with color of law. If justice is to have any meaning, the abuses and errors must be redressed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in considering the Defendant's motion for an award of actual attorney fees after the expiration of the filing deadlines of CR 54(d) and RCW 4.84.185 and the error violated the Plaintiff's civil rights.

ISSUE 1: CR 54(d) requires the prevailing party to file a cost bill or motion for attorney fees and costs within 10 days of entry of judgment. By Law, RCW 4.84.185 motions must be filed within 30 days of entry of judgment. XYZPrinting, Inc. filed a motion for attorney fees and costs over two months after entry of judgment. Mr. Earl appealed the final judgment in the case and perfected the appeal prior to the motion being filed. No argument was made in the motion on the grounds it was filed late due to excusable neglect. Did the trial court err in considering the late filed motion and, did the error violate Mr. Earl's Article I, Section 3 right to due process and Article I, Section 10 right to open administration of justice without unnecessary delay?

ASSIGNMENT OF ERROR 2: The trial court's administrative practices following the filing of an affidavit of prejudice violated the Plaintiff's civil rights.

ISSUE 2: Jefferson County is a one judge county. When a RCW 4.12.050 affidavit is filed in Jefferson County, no effort is made to assign an alternate judge, or pro tempore judge to the case. Motions for a change of venue are typically denied. Civil motions may be heard by visiting judges, which are only available once every two months. When an exchange of judges is cancelled shortly before the scheduled hearing, the period between available hearing dates increases to four months or more. Briefs filed for consideration by a visiting judge for all cases to be heard during the session are typically delivered to the judge the day before the hearing. Do the administration practices of Jefferson County Superior Court when an affidavit of prejudice is filed violate Mr. Earl's Article I, Section 3 right to due process and Article I, Section 10 right to open administration of justice without unnecessary delay under the Washington Constitution and, due process, access to the courts and equal protection rights under the First, Fifth and Fourteenth Amendments to the U.S. Constitution?

ASSIGNMENT OF ERROR 3: The trial court erred in failing to comply with the requirement of RCW 2.28.030 which requires a judge

to be present and sitting at hearings held in open court and the judgment is void.

ISSUE 3: Civil motions were scheduled to be heard in open court, in Jefferson County, on November 10, 2014. Mr. Earl attended the hearing in person. No judge was present in the courtroom. A voice alleged to be that of Clallam County Superior Court Judge Christopher Melly could be heard intermittently through the court's conference call system. RCW 2.28.030(2) mandates a judge must be present and sitting at a hearing as a condition precedent to the exercise of judicial authority.

Is the order/judgment signed by Judge Melly void under RCW 2.28.030 because Judge Melly had no legal authority act on matters presented at an open session of court without being present and sitting at the hearing?

ASSIGNMENT OF ERROR 4: The trial court erred in denying the Plaintiff's Conditional Motion for Change of Venue and the decision violated the Plaintiff's civil rights.

ISSUE 4: Mr. Earl filed a conditional motion for change of venue in order to avoid prejudice and unnecessary delays in the event this case is remanded for further proceedings on appeal, which the trial court denied in its oral rulings, without signing an order to that effect. Did the trial court abuse its discretion in denying the motion and did the decision

violate Mr. Earl's Article I, Section 3 right to due process and Article I, Section 10 right to open administration of justice without unnecessary delay?

ASSIGNMENT OF ERROR 5: The trial court erred in failing to sanction egregious misconduct on the part of opposing counsel in violation of the Plaintiff's civil rights.

ISSUE 5: Counsel for XYZPrinting has engaged in numerous, documented examples of professional misconduct, including misstatements of fact and law, discovery violations, frivolous filings and fraud on the court. The trial court repeatedly refused to censure or sanction the complained of misconduct. Did the trial court err in refusing to sanction or censure misconduct by opposing counsel and, did the error violate Mr. Earl's Article I, Section 3 right to due process and Article I, Section 10 right to open administration of justice without unnecessary delay?

ASSIGNMENT OF ERROR 6: The trial court erred in imposing sanctions against the Plaintiff without notice, and without making any findings of facts or law to support an award of sanctions and the order violated the Plaintiff's civil rights.

ISSUE 6: On February 6, 2015 the trial court entered an award of sanctions against Mr. Earl in the amount of $25,443.60. The trial

court's stated reason for imposing sanctions was to retaliate against Mr. Earl for pursuing his right to appeal the trial court's entry of summary judgment against him. No motion has been filed in this case seeking sanctions against Mr. Earl, nor has Mr. Earl ever received any notice sanctions would be sought or for what reason. No findings of fact or conclusions of law supporting an award of sanctions appear in any signed order in this case. Did the trial court commit legal error in awarding sanctions without supporting findings of fact and law and, did the error violate Mr. Earl's Article I, Section 3 due process right to notice and an opportunity to be heard under the Washington Constitution and right to due process and equal protection under the First, Fifth and Fourteenth Amendments to the U.S. Constitution?

ASSIGNMENT OF ERROR 7: The trial court erred and acted without legal authority in seeking to force the Plaintiff to settle his lawsuit under pain of threats and the trial court's actions violated the Plaintiff's civil rights.

ISSUE 7: In oral rulings at the hearing of November 10, 2014, the trial court proposed a $600 settlement, conditioned on dismissal of Mr. Earl's action with prejudice. The trial court threatened Mr. Earl with sanctions if he did not accept the proposed settlement rather than pursue his due process rights in this matter. Did the trial court act without legal

authority in proposing a settlement under pain of retaliation and did the order violate Mr. Earl's Article I, Section 3 right to due process and access to the courts under the Washington Constitution and right to due process and equal protection under the First, Fifth and Fourteenth Amendments to the U.S. Constitution?

ASSIGNMENT OF ERROR 8: The trial court erred in failing to grant summary judgment in the Plaintiff's favor under conditions where the facts and law of the case showed the Plaintiff was entitled to the relief sought.

ISSUE 8: Mr. Earl's motion for summary judgment was fully supported by law and by a declaration supported by admissible evidence. The trial court gave no weight to any evidence presented by Mr. Earl and made conclusions of fact not supported by the record. On denying Mr. Earl's motion for summary judgment, did the trial court commit legal and factual error by engaging in impermissible weighing of facts, in making conclusions of fact not supported by the record, and in refusing to give any consideration to admissible evidence presented by Mr. Earl?

ASSIGNMENT OF ERROR 9: The trial court erred in refusing to allow the Plaintiff an opportunity to pursue discovery prior to entry of summary judgment against him and the order violated the Plaintiff's civil rights.

ISSUE 9: Mr. Earl was actively pursuing discovery at the time opposing counsel moved for summary judgment, and filed a motion to produce discovery, which was before the trial court at the same time as the motions for summary judgment. The trial court declined to consider Mr. Earl's motion to produce discovery and refused to allow Mr. Earl time to pursue discovery prior to entry of summary judgment against him. Did the trial court err in refusing to permit discovery prior to entry of summary judgment and, did the error violate Mr. Earl's Article I, Section 3 right to due process and access to the courts under the Washington Constitution and right to due process and equal protection under the First, Fifth and Fourteenth Amendments to the U.S. Constitution?

ASSIGNMENT OF ERROR 10: The trial court erred in signing a proposed order that did not comply with the notice requirements of CR 54(f), in violation of the Plaintiff's civil rights.

ISSUE 10: A proposed form of order signed by the trial court on February 6, 2015 was served on Mr. Earl two days earlier, on February 4, 2015. Mr. Earl did not waive notice of presentation. The form of order contains conclusory statements not supported by fact or law, and is silent on the disposition of Mr. Earl's then pending motions. Is the February 6, 2015 order void because the trial court had no legal authority to approve a proposed order that did not meet the notice requirements of CR 54(f), was

Mr. Earl prejudiced by the form of order and, did the order violate Mr. Earl's Article I, Section 3 due process right to notice and an opportunity to be heard under the Washington Constitution and right to due process and equal protection under the Fifth and Fourteenth Amendments to the U.S. Constitution?

ASSIGNMENT OF ERROR 11: The trial court erred in failing to enter a signed order on the Plaintiff's CR 59 Motion within 90 days of filing.

ISSUE 11: Mr. Earl timely filed a CR 59 motion for reconsideration after entry of summary judgment. Article IV, Section 20 of the Washington State Constitution requires that: "*Every cause submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof*". An unsigned memorandum opinion was filed, but no signed, actionable decision was ever entered to dispose of the motion. In failing to file a signed order on Mr. Earl's CR 59 motion for reconsideration, did the trial court violate Mr. Earl's Article I, Section 3 right to due process and Article I, Section 10 right to open administration of justice without unnecessary delay?

III. STATEMENT OF THE CASE

Mr. Earl filed his Complaint and Demand for Jury Trial on June 20, 2014, alleging four causes of action (CP 1-30), and filed a RCW

4.12.050(1) affidavit of prejudice on September 2, 2014 (CP 33). Mr. Earl served interrogatories and requests for production on the XYZPrinting, Inc.'s agent of record by mail on August 1, 2014 (CP 176).

Various motions were scheduled to be heard by a visiting judge by special set on October 17, 2014 @ 2:30 PM (CP 41). The special set was arranged so as to allow both parties 10 minutes per side on each of the pending motions, which consisted of a summary judgment motion filed by XYZPrinting, Inc. (CP 43-56), Mr. Earl's Cross Motion for Summary Judgment (CP 86-103), a motion to compel discovery filed by Mr. Earl (CP 216-227)) and interlocutory CR 11 motions in Mr. Earl's response briefs (CP 162-175 and CP 228-240). The interlocutory CR 11 motions contained in these two briefs identify 24 verified and undisputed examples of false statements of fact and law made by opposing counsel, Virginia Nicholson, which is part of a continuous pattern of professional misconduct and fraud on the court by XYZPrinting, Inc.'s counsel.

On October 15, 2014 the Plaintiff received an email message from the Clallam County Superior Court notifying him no visiting judge would be available to hear the pending motions in Jefferson County on October 17, 2014 (CP 305). The message proposed hearing the motions in Clallam County Superior Court. The Plaintiff replied as follows (CP 305):

"Dear Ms. Clevenger,

If it would be possible to continue the matter until a visiting judge is available in Jefferson County, that would be my preference. ***Too much of what needs to be covered depends on being present in person.*** It really isn't feasible to make a trip to Port Angeles on such short notice. I don't know the area and would be concerned unexpected traffic delays or foul weather might prevent or delay attendance. Under the circumstances, continuing the matter would be best and would also give the judge assigned to the case more time to review documents filed in the case, which are unfortunately substantial in volume.

Sincerely,

Donald R. Earl" (Emphasis added)

The Plaintiff received a phone call from the Jefferson County Superior Court's Administrator, Michelle Moore, the following morning, October 16, 2014, to discuss rescheduling the hearings, at which time the Plaintiff reiterated the need for a judge to be physically present at the hearing (CP 301). After discussing rescheduling with the parties, Ms. Moore sent out a confirmation letter later on the same day, by both email and regular mail, stating in part, "Parties will be in the Jefferson County Superior Court and the Clallam County Visiting Judge will either be here in person or will appear telephonically." (CP 270)

At or around 3:00 PM on Friday, November 7, 2014, the Plaintiff received a phone call from Ms. Moore informing him Clallam County Superior Court Judge, Christopher Melly, intended to conduct the hearing scheduled for the following Monday by phone. (CP 301)

The Plaintiff attended the hearing on November 10, 2014, in person, as scheduled. No judge was present in the courtroom (11/10/14 RP, p. 1, line 16). A male voice, alleged to be that of Christopher Melly, could be heard in the courtroom intermittently during the hearing. The voice tended to fade in and out, break off and start up again, at irregular intervals, making it difficult and sometimes impossible to understand what was being said. The Verbatim Report of Proceedings identifies 17 places in the transcript where Judge Melly's voice is inaudible (11/10/14 RP: p. 15, lines 11 & 27; p. 17, lines 22 & 24; p. 19, lines 9, 13, 18 & 23; p. 20, lines 10, 15, 18 & 22; p. 21, lines 8, 10 & 27; p. 24, line 14 and; p. 25, line 2).

The trial court allowed the parties ten minutes per side to argue XYZPrinting, Inc.'s Motion for Summary Judgment (11/10/14 RP, p. 2, line 14). Mr. Earl was not allowed time to argue his own Motion for Summary Judgment separately. The trial court denied Mr. Earl's CR 37 discovery motion without oral argument (11/10/14 RP, p. 21, line 22). On Mr. Earl's motions for sanctions, the trial court allowed XYZPrinting, Inc. time to argue against the motions, without hearing any argument from Mr. Earl (11/10/14 RP, p. 21, line 13). The trial court did not allow Mr. Earl an opportunity to respond to the trial court's sua sponte decision to impose CR 11 sanctions against him.

Mr. Earl had intended to focus oral argument on his Motion for Summary Judgment through the visual aid of the court's projection equipment, so as to concentrate the trial court's attention on the primary defect present in XYZPrinting, Inc. printers, i.e. the printer's inability to print solid objects. Being unable to do so because no judge was present in the courtroom, Mr. Earl began his oral argument as follows:

> "The first thing I would like to do is, let's see. I-- in the, uh, Declaration of Donald R. Earl in Support of Plaintiff's Cross-Motion for Summary Judgment, I'd like to draw the Court's attention to Exhibit G [(CP 140)], which is a photo showing kind of a star-shaped object. Do you have that?" (11/10/14 RP, p. 9, line 9)

Judge Melly replied, "*I do. But quite honestly, Mr. Earl, I've got so much paper here I would probably spend more time trying to find it. Why don't you just tell me what it is...*" (11/10/14 RP, p. 9, line 14).

Following arguments on summary judgment, Judge Melly sought to pressure Mr. Earl into accepting a settlement to which Mr. Earl was opposed. At p. 15, line 14 of the 11/10/14 RP, Judge Melly stated as follows:

> "So I'm going to suggest this as a way of resolving this. In light of the fact that I've just indicated I'm not going to grant the request for injunction. Mr. Earl you never made a request that I've been able to determine from the reams of paper that I've read, have you ever made a request to [S]tudica for a refund. Despite the fact that XYZ Printing had in a couple of their emails said request a refund. Request a refund. I don't see where that is done. And I see where you respond to that, thank you. They said they won't accept

anything that's opened. I'm going to suggest, suggest this as a resolution of the case. If XYZ could work with [S]tudica to get you your six hundred dollars back, because I assume that that's going to be a whole lot cheaper for them than to continue on with litigation in the matter, would-- and, and ***I didn't award costs or fees to anybody*** or (inaudible) on with the, summary judgment motion, and you did a non suit, which essentially says you're going to withdraw your lawsuit, would that be an acceptable solution to you? If you got your money back?" (Emphasis added)

Mr. Earl rejected Judge Melly's proposed settlement at p. 16, line 4.

At p. 16, line 10, Judge Melly continued to pressure Mr. Earl to accept a settlement, rather than appeal Judge Melly's rulings on summary judgment as follows:

"But if XYZ can work with [S]tudica because they're, they're working hand in hand to sell that product. If they could work with them, because I have to assume that at some point there's a, there's a, a monthly or a weekly, or biannual reconciliation of product sold, product purchased and, and [S]tudica takes off its license and sales commission and the rest gets forwarded out to XYZ. So, you know, their in communication on financial issues. So I have to assume that they have the ability to work to, that XYZ has the ability to work with [S]tudica to refund your money. Notwithstanding that it might be beyond the thirty days and it might have been an opened product. And if they could do that without the fifteen percent restocking fee would, would you take that?"

Mr. Earl again declined to accept the trial court's proposed settlement at page 16, line 23 of the 11/10/14 RP.

At p. 22, line 21, Judge Melly's efforts to force Mr. Earl to accept a settlement, rather than appeal his decisions, continued with the following exchange:

> "I was hoping, originally I was hoping to save you the sanctions that were originally requested by XYZ but if they're not requesting that at this junction, you know, I guess it's a non issue. But, uh, I really would hope Mr. Earl that, that you would take my suggestion to the extent that the defense is willing to go along with and work on a refund to you so that this can be brought to a, you know, a relatively peaceful conclusion without too much bloodshed going forward. Ms. Nicholson can I, can I extract a promise from
> you?
> MS. NICHOLSON: I, we, we are willing to refund Mr. Earl's purchase price. Yes, Your Honor. That would be…
> COURT: Okay. Mr. Earl, I… I'm sorry.
> MS. NICHOLSON: That would be contingent upon a, a non suit and a complete dropping of the case, obviously.
> COURT: Yeah. Understandable. I am hoping Mr. Earl that you will take that refund and run with it, uh, and bring this thing to a, you know, a peaceful conclusion. I think that-- well, you're going to have to decide whether you think there's any merit in the Court's ruling, or not. But I would certainly like the, the matter to be resolved amicably and with as little continuing court involvement as possible. Again, this was initially a six hundred dollar claim. And more paper and more time has been spent on this case than quite honestly I think is justified. But, you're going to have to make the decision on how you want to proceed."

This was the first mention of the possibility Mr. Earl might be subject to sanctions. There was no motion before the trial court for CR 11 sanctions against Mr. Earl. The trial court heard no argument for or against sanctions against Mr. Earl. At no time in any of the proceedings below has Mr. Earl received any notice that CR 11 sanctions would be sought or for

what reason. At the conclusion of the November 10, 2014, Judge Melly finally threatened to retaliate against Mr. Earl in the event Mr. Earl exercised his right to appeal, rather than accept Judge Melly's proposed settlement, as follows:

> "I will award costs and fees under CR 11, Mr. Earl. However, I will stay those if you accept the defense proposal for a non suit in exchange for a total refund of your purchase price. To the extent that you deny that then I will sign an order authorizing sanctions against you on CR 11… I am going to hold that in abeyance if you accept their offer for settlement and for non suit in exchange for a six hundred refund payment to you. It's your choice." (11/10/14 RP, p. 24, line 4)

Mr. Earl received an email on November 12, 2014 from Clallam County Superior Court Administrator, Lindy Clevenger, with an order signed by Christopher Melly attached, which was prepared by opposing counsel (CP 327-329). The form of order was never presented to the Plaintiff (11/10/14 RP, p. 24, line 23 to p. 24, line 5). The Plaintiff neither waived presentation nor approved the form of order. The order denied all of the Plaintiff's motions, granted the Defendant's motion for summary judgment and contained a provisional award of attorney fees and costs to the Defendant.

Mr. Earl timely filed a CR 59 Motion for Reconsideration (CP 275-299) on November 17, 2014, supported by Declaration (CP 300-311), which noted a total of 19 factual, legal and procedural errors warranting

reconsideration. XYZPrinting, Inc. filed a response (CP 314-317) on November 26, 2014, disputing only one of the 19 issues Mr. Earl raised in the Motion. Mr. Earl filed a Reply (CP 320-325) on December 1, 2014. An unsigned "Memorandum Opinion on Reconsideration" (CP 330-333) was filed on December 24, 2014, stating on the last page, "*Filed without signature at the direction of Judge Melly*" (CP 333). No signed order on the Plaintiff's Motion for Reconsideration has been entered in the case in the four and a half months since it was filed.

Mr. Earl timely filed a Notice of Appeal to Division II of the Court of Appeals on December 29, 2014 (CP 326) and perfected the appeal through filing a Designation of Clerk's Papers (334-338) and a Statement of Arrangements.

On January 16, 2015, over two months after the order on summary judgment was entered, XYZPrinting, Inc. filed a motion to set costs and fees (CP 341-347), which was scheduled to be heard by a Kitsap County visiting judge on February 6, 2015 (CP 339). On January 16, 2014, Mr. Earl notified opposing counsel that he would seek sanctions if the motion was not withdrawn (CP 367) and filed a response and interlocutory motion for CR 11 sanctions on January 30, 2015 (CP 358-370). In addition to the response, Mr. Earl also filed a CR 60 motion to vacate the order on summary judgment (CP 372-378) and a motion for a change of venue

conditioned on remand to the trial court for further proceedings on appeal (CP 379-383).

In XYZPrinting, Inc.'s motion to set costs and fees, opposing counsel falsely claimed the "Memorandum Opinion on Reconsideration" is a signed order (CP 343, line 15). At the hearing held on February 6, 2015 before Kitsap County visiting judge, Sally Olsen, Mr. Earl sought to draw the trial court's attention to the fact the memorandum opinion was not a signed order as follows:

> "One of the first things I think we should look at is the fact that the, the order entered on the Motion for Reconsideration is a memorandum opinion that is unsigned. In—and I may not be pronouncing it...-- *[Nicacio] v. Yakima Chief Ranches*, the Supreme Court ruled a memorandum of opinion is not an order. It is an expression of the Court's intention relative to the issue. The issue is not resolved until an order is entered. And that's quoting other authorities. So, to the extent that the defendant [relies] on the memorandum of opinion, there, there is, there is nothing to rely on there." (2/6/15 RP, p. 2, line 26)

On oral argument, counsel for XYZPrinting, Inc. reiterated the false claim as follows:

> "The arguments that he presents in his CR 60 motion are the same ones that he presented on the Order on Reconsideration, which was signed by Judge Melly." (2/6/15 RP, p. 6, line 17)

On rebuttal, Mr. Earl again sought to draw the trial court's attention to the ongoing pattern of misconduct by opposing counsel, in

part, as follows: "*once again opposing counsel states that the memorandum decision was signed, and it's not.*" (2/6/15 RP, p. 7, line 15)

The trial court declined to take judicial notice of the complained of misconduct as follows: *"I'm reviewing the file and the first thing the Court notes is that there is a signed order granting the defendant's summary judgment back in November 2014. So, contrary to your assertion sir, it's not a memorandum. It's not unsigned."* (2/6/15 RP, p. 8, line 5)

In deciding the motion for costs and fees, the trial court ruled it was appropriate to retaliate against Mr. Earl for pursuing his right to appeal as follows:

> "The next motion is defendant's motion regarding fees. Again, referring to the November 2014 Order Granting Summary Judgment. It indicates that an award of attorney's fees and costs is granted. It was only stayed pending Mr. Earl's acceptance of a refund of the purchase price and dismissal of the lawsuit. And in reviewing the file it appears, sir, you did not accept the proffered refund. And so it is appropriate at this time for the Court to grant the attorney's fees and costs, as requested." (2/6/15 RP, p. 8, line 14)

The trial court signed XYZPrinting, Inc.'s proposed order (CP 494-496) on February 6, 2015, awarding costs and fees in the amount of $25,443.60, which was served on Mr. Earl two days earlier, on February 4, 2015 (CP 485). Mr. Earl did not waive notice of presentation. The order is silent on the disposition of Mr. Earl's CR 60 motion, motion for change of venue, and interlocutory motion for CR 11 sanctions. To date, no signed

order disposing of those motions has been entered in the case. The order states, in part, as follows:

> "7. Plaintiff Donald Earl filed this litigation in bad faith.
> 8. Plaintiff Donald Earl's pleadings filed in this matter lacked a factual or legal basis.
> 9. Plaintiff Donald Earl failed to conduct a reasonable inquiry into the factual and legal basis of his pleadings." (CP 495)

No motion was before the trial court to make such findings. The trial court did not hear argument in support or opposition to such findings, and the trial court made no such findings in its oral rulings.

IV. ARGUMENT

ISSUE 1: Interpretation of CR 54(d)

CR 54(d) provides as follows:

> "(1) Costs and Disbursements. Costs and disbursements *shall* be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements *within 10 days after the entry of the judgment*, the clerk *shall* tax costs and disbursements pursuant to CR 78(e).
>
> (2) Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, *shall* be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion *must* be filed *no later than 10 days after entry of judgment*." (Emphasis added)

The operative language in the rule is "shall" and "must". In *Goldmark v. McKenna*, 172 Wn.2d 568 (2011), citing well settled law, this Court stated, *"'"shall" when used in a statute, is presumptively imperative*

and creates a mandatory duty unless a contrary legislative intent is shown." In *State v. Carson*, 128 Wn.2d 805 (1996), again citing settled law, this Court ruled in relevant part, *"When interpreting court rules, the court approaches the rules as though they had been drafted by the Legislature... Under general principles of statutory construction, when interpreting a rule, the court must give effect to the plain meaning of the rule's language."*

There must be some point in time when a reasonable person must ask: How many times and for how many years must our courts endlessly revisit the plain meaning of "shall" and "must" before it ceases to be a point of contention, and becomes an automatic basis for sanctions against those who refuse to comply with the mandates of rule and law? Mr. Earl would respectfully submit that not only has that point been reached, it has not been an issue on which reasonable minds could disagree for at least the past half century.

XYZPrinting, Inc. filed a motion to determine attorney fees over two months after the order on summary judgment was filed in the case. At that time, Mr. Earl had already filed a notice of appeal and perfected the appeal through filing a designation of clerk's papers and statement of arrangements. Mr. Earl opposed the motion on the basis that no findings of fact or conclusions of law have been entered in the case to support an

award of attorney fees and, that the motion was untimely pursuant to CR 54(d) (CP 358-370). The trial court rejected Mr. Earl's arguments without explanation and entered an order awarding XYZPrinting, Inc. actual attorney fees, without Loadstar adjustment, in the amount of $25,443.60. XYZPrinting, Inc. did not plead excusable neglect to explain its dilatory filing of the motion and the trial court made no findings of excusable neglect on its own initiative. No statute relevant to this case provides an alternate timeframe for filing a cost bill or motion under CR 54(d). The Summary Judgment order does not stipulate an alternate timeframe for filing a cost bill or motion under CR 54(d). In open court, at the hearing held on November 10, 2014, Mr. Earl repeatedly rejected the trial court's proposed settlement, in no uncertain terms. While Mr. Earl disputes the legality of the order in a separate section, to the extent XYZPrinting, Inc. might rely on the order, the ten day limit of CR 54(d) began to run when the order was entered on November 12, 2014. Even if some doubt might be raised regarding Mr. Earl's willingness to settle at that point, any such doubt was removed when Mr. Earl moved for reconsideration on November 17, 2014. Under the most reasonable construction of the circumstances in this case, the ten days began to run on November 12, 2014, making relief pursuant to CR 54(d) time barred beginning on November 25, 2014 (the tenth day fell on a Saturday). Under the most

lenient and liberal construction of the circumstances in this case, relief pursuant to CR 54(d) was available for ten days after the Plaintiff's Motion for Reconsideration was filed on November 17, 2014, and was time barred beginning on November 28, 2014. XYZPrinting, Inc. filed its CR 54(d)(2) motion on January 16, 2015.

Mr. Earl has asked this Court to resolve conflicts at the Court of Appeals level where in *O'Neill v. City of Shoreline*, 332 P.3d 1099 (2014), the Court of Appeals ruled the trial court had discretion to consider late filed CR 54(d)(2) motions, which conflicts with *Corey v. Pierce County*, 154 Wn. App. 752 (2010) and *Yow v. Dept. of Health Unlicensed Practice Program*, 147 Wn. App. 807 (2008) where the Court of Appeals applied a strict interpretation of the rule.

The 10 day time limit under CR 54(d)(2) is "*intended to prevent parties from raising trial-level attorney fee issues very late in the appellate process, sometimes after one or all appellate briefs have been submitted.*" (Karl B. Tegland, Washington Practice: Rules Practice § 54, Supp. 40 (5th ed. 2006 & Supp. 2010) (drafters' comment on 2007 amendment to CR 54(d)(2))).

In the instant case, Mr. Earl has been prejudiced by the exact circumstances the rule is intended to prevent. All of the work Mr. Earl did to perfect his appeal had to be redone to address the additional issues that

arose as a result of XYZPrinting, Inc.'s dilatory motion tactics. Litigants should have a reasonable expectation that rule and law will not be applied in an arbitrary or whimsical fashion. Litigants should have a reasonable expectation opposing parties will comply with the letter of rule and law to the same extent and manner with which they, themselves, are expected to comply. Litigants should also have a reasonable expectation they will not be exposed to the kind of prejudice rules and laws are intended to prevent.

Mr. Earl would respectfully submit that in the absence of the two exceptions allowed by the rule, the 10 day time limit of CR 54(d) should be subject to strict enforcement so as to ensure all litigants enjoy the same rights, remedies and protections under the rule and, that judicial discretion will not serve to undermine those rights.

ISSUES 2 and 4: Court procedures in Jefferson County after the filing of an affidavit of prejudice are unconstitutional and the Plaintiff was wrongfully denied a change of venue to avoid prejudice.

Article I, Section 10 of the Washington Constitution states, "*Justice in all cases shall be administered openly, and without unnecessary delay.*" CP 311 is a copy of the Jefferson County Superior Court civil motions calendar covering the period from August 22, 2014 to January 2, 2015. Of the 19 hearings held during that period, two were scheduled to be conducted by a visiting judge. Of the two hearings scheduled to be conducted by a visiting judge, the October 17, 2014

exchange was cancelled two days before the hearing, leaving the December 12, 2014 visiting judge conducted civil motion date as the only date available to litigants with affidavits of prejudice on file. Where any other litigant could have filed a civil motion on August 15, 2014, to be decided within one week, a litigant with an affidavit of prejudice on file, filing a civil motion on the same date, had to wait four months for a decision. On its face, the practice violates the Article I, Section 10 right to justice without unnecessary delay and the right of access to the courts.

In *Personal Restraint of Addleman*, 139 Wn.2d 751 (2000), this Court ruled, "*The right of access to the courts is rooted in the petition clause of the First Amendment to the United States Constitution.*" When a litigant only has access to one hearing in four months, out of 19 hearing dates otherwise available, it is indisputable that the litigant's right of access to the courts has been substantially infringed.

Furthermore, as with other issues in this case, the Code of Judicial Conduct serves as competent authority and guidance on the process that is due. CJC 2.5 provides as follows:

> "(A) A judge shall perform judicial and administrative duties, competently and diligently.
>
> (B) A judge shall cooperate with other judges and court officials in the administration of court business.
>
> COMMENT
>
> [1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation

reasonably necessary to perform a judge's responsibilities of judicial office.

[2] In accordance with GR 29, a judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs."

Mr. Earl believes he would be remiss were he to fail to recognize the fact that the filing of an affidavit of prejudice in one judge counties creates unique difficulties in the orderly administration of justice, which are not present in counties with two or more judges. With that said, however, Mr. Earl would nevertheless argue that merely because a thing is difficult, that should not serve as a rationale for abandoning any effort to implement feasible solutions to the greatest extent practical. For example, Article IV, Section 7 of the Washington Constitution provides a mechanism for assignment of cases to a judge pro tempore. Alternately, the most expeditious remedy available is a change of venue to a jurisdiction having sufficient resources available to ensure litigants have equal access to the courts and due process. In the absence of compelling

reasons to deny a change of venue, such as substantial prejudice to the opposing party or witnesses, granting a motion for change of venue should be virtually mandatory.

In the instant case, Mr. Earl moved for a change of venue to King County (CP 379-383). Mr. Earl is the only known witness residing in Jefferson County and opposing counsel's offices are located in King County. King County is the most convenient location for any out of state witnesses arriving in Western Washington by air and the Seattle area arguably has the largest pool of potential expert witnesses within Washington. In response to Mr. Earl's conditional motion for a change of venue (CP 466-470) opposing counsel offered no cognizable argument as to why transferring the case to King County would not be appropriate, arguing instead that in the event this case is remanded to the trial court for further proceedings, Mr. Earl should continue to be subjected to the same prejudice and delays that gave rise to this appeal in the first place.

The trial court orally denied Mr. Earl's then pending motions, including the motion for a change of venue (2/6/15 RP, p. 9, line 5), but never entered a signed order on those motions. In the event this Court remands the case to the trial court for further proceedings, the Court should find the denial of a change of venue constituted an abuse of discretion under these circumstances and order the case be immediately

transferred to King County before any further discretionary decisions are made in the case. Mr. Earl would also ask the Court to rule on the constitutionality of the administrative procedures in Jefferson County as they relate to litigants filing affidavits of prejudice, and provide guidance on what process is due in one judge counties under circumstances similar to those in the instant case.

ISSUE 3: The judgment is void because no judge was present and sitting at the hearing on summary judgment.

RCW 2.28.030 provides as follows:

> "A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he or she is a member in any of the following cases:
> (1) In an action, suit, or proceeding to which he or she is a party, or in which he or she is directly interested.
> (2) *When he or she was not present and sitting as a member of the court at the hearing of a matter submitted for its decision.*
> (3) When he or she is related to either party by consanguinity or affinity within the third degree. The degree shall be ascertained and computed by ascending from the judge to the common ancestor and descending to the party, counting a degree for each person in both lines, including the judge and party and excluding the common ancestor.
> (4) When he or she has been attorney in the action, suit, or proceeding in question for either party; but this section does not apply to an application to change the place of trial, or the regulation of the order of business in court.
> *In the cases specified in subsections (3) and (4) of this section, the disqualification may be waived by the parties*, and except in the supreme court and the court of appeals shall be deemed to be waived unless an application for a change of the place of trial be made as provided by law." (Emphasis added)

XYZPrinting, Inc. has previously argued Mr. Earl waived the requirement of subsection 2 that a judge must be present and sitting at the hearing, because he did not object at the time of the hearing. The plain language of the law makes clear the requirement may not be waived. Litigants may waive the requirements of subsections 3 and 4, but not 1 and 2. In *Whatcom County v. Bellingham*, 128 Wn.2d 537 (1996), this Court ruled, "*Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.*" If it was the legislature's intent to allow waiver of subsections 1 and 2, the language, "*In the cases specified in subsections (3) and (4) of this section, the disqualification may be waived by the parties*", would be rendered superfluous and meaningless. In *Vaughn v. Chung*, 119 Wn.2d 273 (1992), citing prior law, this Court stated, "*We have repeatedly stated that statutes must be read in their entirety, not in a piecemeal fashion.*"

RCW 2.08.150 provides as follows:

> "Whenever a like request shall be addressed by the judge, or by a majority of the judges (if there be more than one) of the superior court of any county to the superior judge of any other county, ***he or she is hereby empowered***, if he or she deem it consistent with the state of judicial business in the county or counties whereof he or she is a superior judge (and in such case it shall be his or her duty to comply with such request***), to hold a session of the superior court of the county the judge or judges whereof shall have made***

> ***such request, at the seat of judicial business of such county, in such quarters as shall be provided*** *for such session by the board of county commissioners*, and during such period as shall have been specified in the request, or such shorter period as he or she may deem necessary by the state of judicial business in the county or counties whereof he or she is a superior judge." (Emphasis added)

The visiting judge was neither ***at*** the seat of judicial business of Jefferson County, nor ***in*** the Jefferson County quarters provided. As with RCW 2.28.030, the plain language of the law mandates these are conditions precedent to empowerment of a visiting judge.

In *Arnold v. Laird*, 94 Wn.2d 867 (1980), citing prior law, the court ruled in pertinent part as follows:

> "The trial can be but in one place at a time, and that place is where the judge presides ***and*** the evidence is produced... a properly constituted court, [is] ***where all proper and necessary persons are in attendance***" (Emphasis and brackets added)

The evidence Mr. Earl intended to produce in support of summary judgment was in Jefferson County Superior Court. Judge Melly was someplace else. "All proper and necessary persons" were not in attendance.

All orders entered in the unlawfully conducted hearing are necessarily void as the visiting judge acted without any legal authority to conduct proceedings from afar, by phone. Mr. Earl has a right of access to the court, due process and equal protection of the laws. Our legislature's

mandate, which lies from our state's constitution, that visiting judges be physically present in the courtroom helps guard those rights. Mr. Earl's rights were violated by the manner in which the hearing was held. Mr. Earl was deprived of the ability to display and discuss visual exhibits. Mr. Earl was deprived of the right to obtain an accurate electronic record of the hearing because technical problems with the system used by the Court, and/or user error on the part of the visiting judge, caused significant portions of the Court's oral rulings and findings to be inaudible. Mr. Earl was deprived of the ability to observe the judge's level of attention and reactions. Even criminal rules recognize the importance of the public and the parties' right to observe those judges presiding over proceedings, at CrR 3.4(d).

Chief justices in the various counties may prescribe, by local rule, the manner in which technology may be implemented under the provisions of CR 7(b)(5), in compliance with ATJ. In Jefferson County Superior Court, the procedures for conducting conference calls may be found at LCR 7.12.3.1, which reads in pertinent part as follows:

> "(a) The CourtCall Telephonic Appearance Program ('CourtCall"), 1-888-882-6878, organizes a procedure for telephonic appearance ***by attorneys or pro se parties*** as a reasonable alternative to personal appearances *in appropriate cases and situations.* ***CourtCall is fully voluntary and no person is required to utilize CourtCall...***

(b) Hearings will be held on a specific calendar ***in the usual manner***...
(c) ***Hearings are conducted in open court***.... Attorneys or pro se parties remain on the court's speakerphonetelephone [sic] line and hear the same business ***that those present in the court may be hearing***." (Emphasis added)

Under the plain, unambiguous language of the rule, the option to utilize the technology is at the sole discretion of the *"attorneys or pro se parties"*, not that of a visiting judge. Hearings are to be conducted in *"the usual manner"*. It should be unnecessary to do more than state that conducting a hearing to be held in open court, in the absence of a judge being physically present in the courtroom is anything but *"usual"*. It is so decidedly unusual the Plaintiff has been unable to identify a single Washington case where any reviewing court has ever found it necessary to consider such a circumstance. Under the plain language of the rule, a visiting judge has no authority whatsoever to compel a party to present oral argument by phone conference -- as was the situation in the instant case. Participation by phone conference (CourtCall) is *"voluntary"* and *"no person is required"* to use it. The Plaintiff did not consent to its use. On the contrary, the Plaintiff exercised reasonable care in communicating the need for personal attendance to the administrative personnel of both courts during the course of making arrangements to hear the pending motions. The Plaintiff did not elect to participate by phone conference.

The Plaintiff was given no more than informal notice in the afternoon of the business day prior to the hearing that a phone conference had been mandated.

In *Dike v. Dike*, 75 Wn.2d 1 (1968), citing well settled law, this Court stated, "*A judgment, decree or order entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void.*"

In the absence of a judge being present and sitting at the hearing, the trial court lacked both personal jurisdiction over the Plaintiff and the inherent power to make any decision in this case whatsoever. Physical attendance is a prerequisite to empowerment. Citing the U.S. Supreme Court as authority in *Putman v. Wenatchee Valley Med. Ctr.*, PS, 166 Wn. 2d 974 (2009), this Court ruled in relevant part as follows:

> "*The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. The people have a right of access to courts; indeed, it is the bedrock foundation upon which rest all the people's rights and obligations.*" (Internal citations and quote marks omitted)

The decision to conduct summary judgment hearings by phone conference, with no judge present in the courtroom was made without legal authority. The visiting judge acted without any legal authority to conduct proceedings in this manner. The resulting order is a legal nullity

because the conditions precedent to empowerment and exercise of authority were not met.

ISSUE 5: The trial court violated the Plaintiff's due process rights in failing to sanction opposing counsel's egregious misconduct.

In Mr. Earl's response to XYZPrinting, Inc.'s motion for summary judgment, Mr. Earl lists 16 examples of false statements of fact and law related to opposing counsel's pattern of fraud on the court (CP 163-169). In the Plaintiff's motion to product discovery, Mr. Earl documents additional examples of professional misconduct on the part of Ms. Nicholson (CP 224-227). In Mr. Earl's summary judgment reply brief, Mr. Earl lists 7 more examples of misstatements of fact and law made by Ms. Nicholson (CP 231-233). The Plaintiff's response to Ms. Nicholson's motion for costs and fees details further examples of blatant misconduct. (CP 358-365). Ms, Nicholson states in her motion, "See Memorandum Opinion on Reconsideration ("Order Denying Reconsideration"), *signed* December 24, 2014." (CP 343, line 15, emphasis added). The "Memorandum Opinion on Reconsideration" is NOT signed (CP 333) and is NOT an "Order". Ms. Nicholson continued to perpetuate this fraud on oral argument, stating, "The arguments that he presents in his CR 60 motion are the same ones that he presented on the Order on Reconsideration, which was *signed* by Judge Melly." (2/6/15 RP, p. 6, line

17). Ms. Nicholson reiterated this fraud on oral argument as follows: "The arguments that he presents in his CR 60 motion are the same ones that he presented on the Order on Reconsideration, which was signed by Judge Melly." (2/6/15 RP, p. 6, line 17)

In *Physicians Ins. Exch. V. Fisons Corp.,* 122 Wn.2d 299 (1993), this court ruled, "*The purposes of sanctions orders are to deter, to punish, to compensate and to educate*." In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803), the U.S. Supreme Court ruled, "*The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.*"

In *John Doe v. Blood Center*, 117 Wn.2d 772 (1991), this Court ruled in relevant part as follows:

> "Plaintiff has a right of access to the courts...Our constitution mandates that justice in all cases shall be administered openly, and without unnecessary delay. That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rest all the people's rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations... ***The right of access is necessarily accompanied by those rights accorded litigants by statute, court rule or the inherent powers"*** (Emphasis added)

As with other issues in this matter, rules of conduct provide sound guidance on what process is due. If an attorney is barred from engaging

prohibited conduct, the opposing party has a right not to be subjected to such conduct.

RPC 3.1 provides in relevant part: "*A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous*". RPC 3.3 provides in relevant part: "*A lawyer shall not knowingly: "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;... offer evidence that the lawyer knows to be false... Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.*" RPC 3.4 provides in relevant part: "*A lawyer shall not: unlawfully obstruct another party's access to evidence... in pretrial procedure... fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party... the right of an opposing Party... to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed.*" RPC 8.4 reads in relevant part: "*It is professional misconduct for a lawyer to: violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;... commit a criminal act that reflects adversely on the lawyer's honesty,*

trustworthiness or fitness as a lawyer in other respects;... engage in conduct involving dishonesty, fraud, deceit or misrepresentation;... engage in conduct that is prejudicial to the administration of justice... knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;... commit any act involving moral turpitude, or corruption"

In Ms. Nicholson's reply (CP 384-387) in support of the motion for costs and fees, Ms. Nicholson asked the trial court to take judicial notice of cases Mr. Earl has been involved in, which have absolutely no bearing on, or relevance to, the instant case, and which grossly misrepresent the nature of those cases. On oral argument, Ms. Nicolson asked the trial court to retaliate against Mr. Earl for exercising his rights in unrelated litigation as follows: "And as to the CR 11 motions, Your Honor, I've submitted some, some documentation regarding Mr. Earl's litigation history and motion practice. This is something that I, I hope you take under consideration." (2/6/15 RP, p. 7, line 5)

In Personal Restraint of Addleman, 139 Wn.2d 751 (2000), this Court ruled in relevant part as follows:

> "The right of access to the courts is rooted in the petition clause of the First Amendment to the United States Constitution. We are asked to decide whether that right has been impaired by the ISRB's consideration of Addleman's litigiousness. Clearly, the ISRB may not retaliate against a prisoner to punish an exercise of

> constitutional rights. The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right. Retaliation is thus akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit. In a case specifically involving prisoner litigation, the Sixth Circuit has established a test for determining retaliation: (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken; and (3) there is at least a partial causal relation between the protected conduct and the action. We find this approach appropriate to apply here and adopt it in this situation.
>
> We do not require that the adverse action was caused solely by the ISRB's response to Addleman's protected conduct. A partial causal connection is all that is required. Addleman has established a partial causal connection by demonstrating that the ISRB knew of his litigation activities. We hold the ISRB may not retaliate for the exercise of a constitutionally protected right."

In *Murray v. GMAC Mortg. Corp.,* 434 F.3d 948 (7th Cir. 2006), the trial court found fault with the fact Murray and family had filed 50 lawsuits under the Fair Credit Reporting Act. The 7th Circuit rejected the trial court's reasoning as follows: "*What the district judge did not explain, though, is why "professional" is a dirty word. It implies experience, if not expertise. The district judge did not cite a single decision supporting the proposition that someone [whose] rights have been violated by 50 different persons may sue only a subset of the offenders. Neither does GMACM.*" Neither does Ms. Nicholson. In addition to Ms. Nicholson's flagrant violations of the Rules of Professional Conduct, her conduct appears to constitute Federal felonies under the provisions of 18 USC §

371, 18 USC § 2, 18 USC § 4, 18 USC § 3, 18 USC § 1512(b), 18 USC § 1513(e), and, 18 USC § 1343.

Ms. Nicholson's reprehensible conduct, and the extreme prejudice Mr. Earl has suffered as a result, clearly warrants harsh sanctions against Ms. Nicholson. The trial court's failure to curb misconduct of this magnitude amounts to little more than a frontal assault on Mr. Earl's right to due process and access to the courts.

ISSUE 6: Because the trial court's orders imposing sanctions against Mr. Earl violated Mr. Earl's due process right to notice and an opportunity to be heard, the sanction orders are void.

In Mathews v. Eldridge, 424 U.S. 319 (1976), The U.S. Supreme Court ruled as follows:

> ""Parties whose rights are to be affected are entitled to be heard." Against this interest of the State, we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that "[t]he fundamental requisite of due process of law is the opportunity to be heard." This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." (Internal citations omitted)

In *Mooney v. Holohan*, 294 U.S. 103 (1935), the U.S. Supreme Court ruled as follows:

> And, "conversely," the Attorney General contends that "it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence as he has that it can be said that due process of law has been denied." Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to

> say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which, in truth, is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is an inconsistent with the rudimentary demands of justice ***as is the obtaining of a like result by intimidation***. And the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, "whether through its legislature, through its courts, or through its executive or administrative officers."" (Emphasis added, internal citations omitted)

Mr. Earl was never given notice that sanctions would be sought or for what reason. Mr. Earl was never allowed an opportunity to be heard in opposition to the imposition of sanctions. No signed order in this case stipulates any fact or law supporting an award of sanctions.

In *Biggs v. Vail*, 124 Wn. 2d 193 (1994), this Court ruled in relevant part as follows:

> "In deciding whether the trial court abused its discretion, we must keep in mind that "[t]he purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system". CR 11 is not meant to act as a fee shifting mechanism", and," in imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order. The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or

the paper was filed for an improper purpose. In this case, there were no such findings. Accordingly, we must remand this case once again to the trial court to: (1) make explicit findings as to which filings violated CR 11, if any, as well as how such pleadings constituted a violation and (2) impose an appropriate sanction for any such violation, which may include the amount of Vail's attorney fees incurred in responding specifically to the sanctionable conduct."

As Mr. Earl did not receive notice that CR 11 sanctions would be sought or for what reason, and as Mr. Earl was never afforded an opportunity to be heard in opposition to sanctions, and because the trial court did not specify findings of fact or law supporting an award of sanctions in any signed order, the orders awarding sanctions against Mr. Earl are void.

ISSUE 7: The trial court acted without legal authority in attempting to force Mr. Earl to settle his lawsuit and unconstitutionally violated Mr. Earl's rights to due process, equal protection and access to the courts.

The Code of Judicial Conduct, rule CJC 2.6(B), reads in relevant part as follows:

"Consistent with controlling court rules, a judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but should not act in a manner that coerces any party into settlement.

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law...

> [3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality..."

At the most fundamental level, if attempting to coerce a litigant to accept a settlement constitutes judicial misconduct, litigants necessarily have a due process right to be free of such tactics. Before the trial court, on its own initiative, and without invitation by the parties, even began exploring prospects for settlement, Mr. Earl made clear his primary motive in pursuing this lawsuit was to obtain injunctive relief (11/10/14 RP, p. 12, line 23) stating:

> "Counsel for XYZ has complained that I, I could have settled this matter, and, indeed I could have. Unfortunately, I couldn't have settled this matter and obtained the injunctive relief that I am asking. To me the injunctive relief is, is the most important part of this case. I, I don't want to see any other customers being harmed by their practices the way they've harmed me. And I, I think it is both reasonable and just that, that injunctions be ordered to stop these people from, from not, not just one or two or three violations of the law, but we're talking about at least half a dozen violations of the law."

It is unclear why the trial court would propose a settlement less favorable than one already rejected by Mr. Earl, but even presuming the trial court's proposal (11/10/14 RP, p. 15, line 14) was made in good faith, Mr. Earl's clear, unqualified and unconditional rejection of the proposal should have ended further discussions along those lines. Not only did the trial court persist in badgering Mr. Earl to accept a settlement (11/10/14

RP, p. 16, line 10 and p. 22, line 21), when Mr. Earl adamantly persisted in preserving his due process rights in this matter, rather than cave in to the trial court's unconstitutional demands to the contrary, the trial court ultimately resorted to threats of retaliation (11/10/14 RP, p. 24, line 4). Not only did the trial court act without legal authority in structuring a judgment to permit retaliation against Mr. Earl in the event Mr. Earl appealed the trial court's rulings on summary judgment, the action constitutes a usurpation of powers vested exclusively in our courts of review. The authority to impose sanctions for filing a frivolous appeal is vested in the Supreme Court and Courts of Appeal under RAP 18.9. Trial courts have no authority to retaliate against litigants for pursuing their right to appeal decisions made by the trial court. It is hard to imagine a condition that would have a more chilling effect on the rights of Washington citizens to due process and access to the courts than permitting trial courts to retaliate against anyone appealing Superior Court judgments. Furthermore, it is worth quoting this Court's detailed analysis in *Scott v. Cingular Wireless*, 160 Wn.2d 843 (2006) at length, as this Court placed great weight on the importance of obtaining injunctive relief through private actions brought under the Consumer Protection Act. While *Scott* was primarily focused on class actions as a vehicle for private enforcement of the CPA, the Court's reasoning is equally applicable to

individual actions prosecuted by self represented litigants, on a shoestring budget, as such circumstances, in theory at least, puts justice within reach of any diligent citizen plaintiff willing to accept the burden of self representation, in the interest of the public good. Relevant portions of the Scott decision are attached at Appendix A.

Not only did the trial court act without legal authority in attempting to force Mr. Earl to accept a settlement, and furthermore, violated Mr. Earl's constitutional rights of access to the courts, equal protection of the laws and due process, under pain of retaliation if those rights were exercised, the proposed settlement, itself, is repugnant to the public interest and the laws of Washington State.

ISSUE 8: The facts, supported by admissible evidence, and laws governing the Plaintiff's claims, support granting summary judgment in the Plaintiff's favor.

"Summary judgment orders are reviewed de novo." *Stokes v. Polley,* 145 Wn.2d 341 (2001). "In reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court." *Cowiche Canyon Conservancy v.* Bosley, 118 Wn. 2d 801 (1992).

CR 56(h) reads as follows:

> "The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered."

RAP 9.12 reads as follows:

> "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel."

The order on summary judgment (CP 327-329) lists 14 documents considered by the trial court: Defendant XYZprinting, Inc.' s Motion for Summary Judgment (CP 43-58), Declaration of Yao Tsung Chang (CP 79-84), Declaration of Virginia R. Nicholson (CP 59-78), Plaintiff' s Cross Motion for Summary Judgment (CP 86-103), Declaration of Donald R. Earl (CP 104-160), Plaintiff' s Combined Response to Defendant' s Motion for Summary Judgment and Plaintiff's Cross Motion for CR 11 Sanctions Against Attorney Virginia R. Nicholson (CP 162-175), Declaration of Donald R. Earl (CP 176-215), Defendant XYZPrinting, Inc.' s Response to Plaintiff' s Cross Motion for Summary Judgment (CP 241-242), Plaintiff CR 37 Motion to Compel Production of Discovery and for CR 26 Sanctions Against Attorney Virginia R. Nicholson (CP 216-227), Plaintiff' s Reply to Defendant' s Response to Plaintiff' s Cross Motion for Summary Judgment and Second Cross Motion for CR 11 Sanctions (CP

228-240), Defendant XYZPrinting, Inc.' s Reply In Support of Its Motion for Summary Judgment (CP 244-248), Defendant XYZPrinting, Inc.' s Response to Plaintiff's CR 37 Motion to Compel Production (CP 249-256), Declaration of Virginia R. Nicholson (CP 257-262), Plaintiff' s Reply Brief Re: Plaintiff' s Motion for CR 11 Sanctions (CP 263-265), and, Plaintiff' s Reply Brief Re: Plaintiff' s CR 37 Motions (CP 266-269).

De novo review of the above listed filings will demonstrate Mr. Earl's motion for summary is exhaustively supported by fact and law throughout, that the Defendant failed to demonstrate any non frivolous legal theory in opposition to the motion and, that the facts in this case supporting summary judgment in Mr. Earl's favor are undisputed.

ISSUE 9: The trial court violated the Plaintiff's due process right to pursue discovery prior to entry of summary judgment against him.

In *John Doe v. Blood Center*, 117 Wn.2d 772, P.2d 370(1991), this Court ruled in relevant part as follows:

> "The court rules recognize and implement the right of access. The discovery rules, specifically CR 26 and its companion rules, CR 27-37, grant a broad right of discovery which is subject to the relatively narrow restrictions of CR 26(c). This broad right of discovery is necessary to ensure access to the party seeking the discovery. It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense. Thus, the right of access as previously discussed is a general principle, implicated whenever a party seeks discovery. It justifies the limited nature of the exceptions to broad discovery found in CR 26(c). Plaintiff, as the party seeking discovery, therefore has a significant interest in receiving it."

The trial court denied Mr. Earl's motion to compel discovery, without allowing oral argument (11/10/14 RP, p. 21, line 22). Mr. Earl objected on the grounds that evidence the trial court considered essential to defeat summary judgment was the very same evidence actively being sought on discovery (11/10/14 RP, p. 22, line 6). Incredibly, the trial court interrupted Mr. Earl in midsentence, offering the preposterous view that Mr. Earl had waived his right to discovery, in spite of the fact an active motion to compel discovery was before the trial court at the time (11/10/14 RP, p. 22, line 15).

The trial court's refusal to allow discovery prior to entry of summary judgment against the Plaintiff violated Mr. Earl's right to due process and access to the courts.

ISSUE 10: In failing to comply with the notice requirement of CR 54(f), the trial court violated Mr. Earl's right to due process and the improperly entered orders are void.

The record shows Mr. Earl received no notice of presentation of the Order on Summary Judgment dated November 10, 2014 (11/10/14 RP, p. 24, line 23). The record also shows Mr. Earl only had 2 days notice of presentation of the Order granting costs and fees (CP 485).

In *Burton v. ASCOL*, 105 Wn.2d 344 (1986), this Court ruled:

> "Finally, Allied Fidelity contends that the judgment entered against it is void because Allied Fidelity was not notified of the findings of fact, conclusions of law, and judgment. CR 54(f)(2) provides: "No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served a copy of the proposed order or judgment . . . Failure to comply with the notice requirement in CR 54(f)(2) generally renders the trial court's entry of judgment void."

Because the trial court failed to comply with the notice requirements of CR 54(f), the orders entered in this case are void.

ISSUE 11: Judge Melly violated Mr. Earl's Article IV, Section 20 right to a decision within 90 days.

Mr. Earl filed a CR 59 motion for reconsideration on November 17, 2014 (CP 275-299). Judge Melly entered a memorandum opinion dated December 24, 2014, which stated on the signature page "Filed without signature at the direction of Judge Melly" (CP 333). In the 5 months passed since the motion was filed, no signed order has been entered in the case.

In *DGHI Enters. v. Pacific Cities, Inc.*, 137 Wn. 2d 933 (1999), citing authority, this Court ruled, "*a memorandum opinion, having no greater force than an oral opinion, merely indicates the conclusion which the trial judge has then reached upon some or all of the questions presented for determination, the final decision to be entered still remaining within the mind of the court.*" (Internal quote marks omitted). In *Nicacio v. Yakima Chief Ranches, Inc.*, 63 Wn. 2d 945 (1964), this Court

ruled that, "*A memorandum opinion is not an order. It is an expression of the court's intention relative to the issue. The issue is not resolved until an order is entered.*"

Article IV, Section 20 reads in relevant part, "*Every cause submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof*". As the deadline for filing a signed order deciding Mr. Earl's motion for reconsideration elapsed two months ago, it is indisputable that Judge Melly violated Article IV, Section 20 and Mr. Earl's Article I, Section 10 right to justice without unnecessary delay.

V. REQUEST FOR COSTS AND FEES

Pursuant to RAP 14.2, RAP 18.1 and RCW 4.84 Mr. Earl requests costs and fees in the event Mr. Earl is the prevailing party. In *Cowiche Canyon Conservance v. Bosley*, 118 Wn. 2d 801, P.2d 549 (1992), citing settled law, this Court stated, "[The] appellate court has inherent jurisdiction to award attorney fees on appeal if statute allows attorney fees at trial... where statute in Consumer Protection Act allows recovery for attorney fees at trial, attorney fees on appeal recoverable." (Internal citations omitted)

IV. CONCLUSION

For the above reasons, the Plaintiff/Appellant, Donald R. Earl, respectfully prays this honorable Court vacate the trial court orders of November 10, 2014 and February 6, 2015 as void, find opposing counsel engaged in sanctionable misconduct and remand for determination of appropriate sanctions, grant the Plaintiff's summary judgment motion, refer instances of misconduct to the proper associations or committees for further review, award the Plaintiff costs and fees on appeal, and grant such further or alternate relief as this Court, in the exercise of its sound discretion, may deem to be equitable and just.

Dated: April 6, 2015
Respectfully submitted by:

Donald R. Earl (pro se)
3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604

APPENDIX A

Scott v. Cingular Wireless, 160 Wn.2d 843 (2006)

"An agreement that has a tendency to be against the public good, or to be injurious to the public violates public policy. An agreement that violates public policy may be void and unenforceable. Washington's CR 23 authorizes class actions and demonstrates a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice. Class actions . . . establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits. Accordingly, they improve access to the courts. As we have noted before, when consumer claims are small but numerous, a class-based remedy is the only effective method to vindicate the public's rights. Class remedies not only resolve the claims of the individual class members but can also strongly deter future similar wrongful conduct, which benefits the community as a whole. Judge Mosk understood this over 30 years ago:

Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial...

We turn to whether this class action waiver is unconscionable because it undermines Washington's CPA to the extent that it is injurious to the public. The CPA is designed to protect consumers from unfair and deceptive acts and practices in commerce. To achieve this purpose, the legislature requires that

the CPA be liberally construed that its beneficial purposes may be served.

Private enforcement of the CPA was not possible until 1971, when the legislature created the private right of action to encourage it. Private actions by private citizens are now an integral part of CPA enforcement. Private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce. Consumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests." (Internal citations and quote marks omitted)

CERTIFICATE OF SERVICE

I, Donald R. Earl, in compliance with RAP 5.4(b), hereby certify that on the 6th day of April, 2015, pursuant to the parties' mutual agreement to accept service of documents by electronic mail, I sent a copy of *"Appellant's Brief"*, *"November 10. 2014 Verbatim Report of Proceedings"* and *"February 6, 2015 Verbatim Report of Proceedings"* addressed to XYZPrinting, Inc.'s counsel of record, Virginia Nicholson, at the following email address: vnicholson@schwabe.com

Dated: December 29, 2014
Respectfully submitted by:

Donald R. Earl (pro se)
3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604