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NO. 51331-5-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

JAMES FOTINOS,

Appellant.

v.

CRAIG J. KALICH and JULIET D. KALICH, Husband and Wife, and
COLDWELL BANKER KLINE and ASSOCIATES, a Washington
Corporation, and LOREN HOWARD, an individual,

Respondents.

BRIEF OF RESPONDENT COLDWELL BANKER KLINE AND
ASSOCIATES

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I. INTRODUCTION

Defendant-respondent Coldwell Banker Kline & Associates (“Coldwell Banker”) asks this court to affirm the Lewis County Superior Court’s entry of judgment in its favor.

In this action, plaintiff-appellant James Fotinos (Mr. Fotinos) alleges that several misrepresentations were made during the purchase of his home located at 957 SW 20th St, Chehalis, Washington 98532 (the “Property”). He has sued the sellers, the Kalichs, the inspector, Loren Howard, and his real estate brokerage firm, Coldwell Banker, for the alleged actions of Martha Hunt, the Coldwell Banker real estate agent involved in the transaction.

The superior court did not abuse its discretion, which is the applicable standard of review, by refusing to consider Mr. Fotinos’s opposition to the summary judgment after he (1) failed to meet the CR 56(c) response deadline, (2) failed to meet the extension deadline of August 22, 2017, and (3) attempted to hand his opposition briefing and declarations to the judge on the day of hearing when the court took the bench and called the case for argument. The court’s actions were justified in light of plaintiff’s repeatedly failures to comply with the court rules, court orders, and the additional timeline afforded him by opposing counsel.

Further, the superior court properly exercised its discretion by denying Mr. Fotinos's Request for Reconsideration. Finally, even if this court finds that the trial court abused its discretion, Mr. Fotinos's claims fail as a matter of law because (1) Mr. Fotinos cannot establish the required element of justifiable reliance when he received the Home Inspection Report, and (2) Martha Hunt had no duty to disclose any facts of which she had no knowledge.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Coldwell Banker assigns no error to the superior court's decision.

Issues Pertaining to Assignments of Error

Coldwell Banker disagrees with Mr. Fotinos's Issues Pertaining to Assignments of Error. Coldwell Banker believes that the issues on appeal are more properly stated as follows:

Whether this court should affirm summary judgment dismissal of Mr. Fotinos's claims where:

1. Mr. Fotinos failed to file a response brief and evidence to establish an issue of material fact existed as to defendants' motions for summary judgment. The court did not accept his materials at oral argument because he (1) had 60 days' notice of the hearing date, and (2) received an eight day extension to file such a response;

2. The Trial Court exercised its broad discretion in denying Mr. Fotinos's Request for Reconsideration;
3. Mr. Fotinos failed to perfect his appeal; and
4. Mr. Fotinos cannot prove the elements of his claims against Coldwell Banker by the required clear, cogent, and convincing evidence.

III. STATEMENT OF THE CASE

- A. **Despite having 60 days' notice of the Hearing date, Mr. Fotinos failed to timely respond to the pending Motions for Summary Judgment under CR 56(c); Mr. Fotinos failed to request a continuance until after the CR 56(c) deadline had passed.**

On June 21, 2017, Joel Wright, counsel for Coldwell Banker wrote counsel for all parties and stated "I reserved a hearing date for August 25, 2017." CP 433. Mr. Fotinos was therefore on notice of the Motion for Summary Judgment for more than 60 days. Mr. Fotinos had the opportunity to object to this date, but did not do so.

On August 16, 2017, two days **after** the CR 56 deadline to serve and file any response, plaintiff's counsel emailed all counsel stating that he is unable to timely respond to the pending Motions for Summary Judgment. CP 440. On Friday, August 18, 2018, Mr. Jacobsen filed a Motion to Continue the Summary Judgment Hearing Date, with a hearing

noted for the same day. CP 444. His motion did not comply with the requirements of CR 56(f). CP 414-419.

B. Mr. Fotinos failed to timely respond to the pending Motions for Summary Judgment under the new extension ordered by Judge Toynbee that Mr. Jacobsen himself proposed.

At the August 18, 2017 Motion for Continuance, Judge Toynbee ordered that the response deadline be extended to Tuesday, August 22, 2017. August 18, 2017 RP 14. Mr. Jacobsen proposed this deadline:

Mr. Nelson: Your Honor, could we ask for a specific deadline for the briefs?

...

The court: Mr. Jacobsen: Tuesday? If they would accept them Tuesday by e-mail, I can do that.

Id. Despite this, Mr. Fotinos also failed to meet the deadline that he himself proposed and the court ordered. August 25, 2017 RP 3:21-22.

C. Mr. Fotinos failed to file a response brief.

Two days before the motion hearing, on August 23, 2017, Mr. Fotinos e-served Coldwell Banker with his Response Brief to Coldwell Banker's Motion for Summary Judgment. CP 463. The Response Brief was not filed on that date.

Mr. Fotinos states in his appellant brief that "Judge Lawler allowed Plaintiff's responsive briefings to be filed in his courtroom and did not strike them prior to making his decisions." App. Br. at 16. This is simply

not true. Mr. Fotinos did not file a response brief at all. He simply attempted to hand them to Judge Lawler at the beginning of the hearing on August 25, 2017:

The Court: ... So, I guess, Mr. Jacobsen, is there any response? Was there something ever filed?

Mr. Jacobsen: There is full responses, Your Honor. **We just hadn't filed them.** They were either - -

The Court: When?

Mr. Jacobsen: --completed yesterday or just the day before. And my only way to get them filed was to step away from making the other responses. So it's either get one filed and not respond to the other two or respond to all three and file them this morning.

The Court: **So are you saying you filed them this morning?**

Mr. Jacobsen: **They are ready to file right now.**

The Court: **You haven't filed them yet?**

Mr. Jacobsen: **No.**

August 25, 2017 RP, 3:8-22 (emphasis added). *See also id.*, pp. 12: 8-16, p. 13: 7-25.

Judge Lawler also did not "allow" Mr. Fotinos's responsive briefings to be filed. In fact, he stated the opposite:

The Court: Well, you know, I'm not going to get into that because how am I supposed to consider that because **nothing was filed ...**

Mr. Jacobsen: But, Your Honor, I knew it was coming from one party, not from three parties.

The Court: Well okay. But you didn't respond to any of them. I don't have –

Mr. Jacobsen: I responded to all of them.

The Court: Don't argue with me. Have a seat. I've heard enough. I'm going to grant the motions for summary judgment. And I really don't have any choice in this matter. The rules are very clear; and despite those rules, **you were given additional time and still not give any response.**

...

Whether it was difficult or no matter how hard you tried, what I'm left with is a case where there are motions for summary judgment and **there's no response to any of them.** And so, you know, maybe there were some defenses to some of these things. I don't know. **Nothing was filed.** So I'm going to grant the motions for summary judgment.

August 25, 2017 RP, p. 15:9-25; 16:1-16 (emphasis added).

In the responses he attempted to file, Mr. Fotinos did not renew his CR 56(f) request for a continuance.

D. The court properly denied Mr. Fotinos's Motion for Reconsideration.

Mr. Fotinos untimely moved for reconsideration of the court order granting summary judgment on September 5, 2017. CP 517-524, 547. On

reconsideration, Mr. Fotinos argued that Judge Toynbee ruled that he could file the response briefs “as soon as they could be filed.” CP 518 & 519. He also argued that he could establish the element of justifiable reliance. CP 523 & 524. The trial court denied the Motion for Reconsideration. CP 547.

E. Coldwell Banker filed its Motion for Summary Judgment and established a prima facie basis for dismissal.

Mr. Fotinos contractually agreed that he was not relying on any representations regarding the property from Ms. Martha Hunt, the broker from Coldwell Banker at issue. Mr. Fotinos was put on notice of all defects in the Home Inspection Report and the Seller Disclosure Statement. Mr. Fotinos did not inspect the property. For a more thorough review of the undisputed facts upon which our motion was based, see CP 128-143, the Statement of Facts in Coldwell Banker’s Motion for Summary Judgment.

F. Mr. Fotinos untimely filed his Appellate Brief.

This court gave Mr. Fotinos until February 12, 2018 to file an appellate brief that conforms to the content and form requirements set out in the Rules of Appellate Procedure. Mr. Fotinos filed his Appellate Brief on February 13, 2018, a day late.

IV. SUMMARY OF ARGUMENT

The Court should affirm the trial court's decision for four reasons. First, the trial court properly exercise its broad discretion by refusing to consider Mr. Fotinos's untimely response briefs because Mr. Fotinos missed the CR 56(c) deadline and then failed to file by the August 22, 2017 deadline extension that his counsel proposed. In fact, his opposition to the motions was not filed at the time of the oral argument. Second, the trial court properly exercised its broad discretion to deny reconsideration because the rules do not require a response and the reconsideration was not timely filed. Third, in the event the court reaches the merits of Mr. Fotinos's claims, all claims fail because, as a matter of law, (1) Mr. Fotinos cannot establish the required element of justifiable reliance, and (2) Ms. Hunt had no duty to disclose any facts of which she had no knowledge. Finally, since Mr. Fotinos failed to timely file his Motion for Reconsideration, the 30-day time period in which to file a Notice of Appeal began to run on the date of the hearing, August 25, 2017. Mr. Fotinos's September 29, 2017 filed Notice of Appeal is therefore late, and he failed to perfect his appeal. Therefore, this court does not have jurisdiction.

V. ARGUMENT

A. **Judge Lawler did not abuse his discretion by refusing to accept Mr. Fotinos's untimely motion and declarations.**

The court should affirm the trial court's decision to refuse to accept Mr. Fotinos's opposition brief and supporting evidence.

1. **Standard of Review.**

Coldwell Banker agrees with Mr. Fotinos that the trial court's decision to refuse to accept his untimely opposition brief and supporting evidence should be reviewed for an abuse of discretion. App Brief, pp. 8 & 9. *See, e.g., Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 499, 183 P.3d 283 (2008); *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 570, 157 P.3d 406 (2007), *rev. denied*, 162 Wn.2d 1022, 178 P.3d 1033 (2008); *Idahosa v. King County*, 113 Wn. App. 930, 937, 55 P.3d 657 (2002), *rev. denied*, 149 Wn.2d 1011, 69 P.3d 874 (2003). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds or reasons. *See, e.g., Allen*, 138 Wn. App. at 570.

2. **The trial court did not abuse its discretion by not considering Mr. Fotinos's unfiled responses.**

The trial court did not abuse its discretion by not considering Mr. Fotinos's unfiled responses. Mr. Fotinos received more than 60 days' notice of the summary judgment hearing, CP 433, which was repeatedly

called to the attention of the trial court. August 25, 2017 RP, pp. 4:1-3; 6:23-25; 7:1-8.

Counsel for Coldwell Banker routinely sends out letters informing all counsel of reserved hearing dates so that any counsel with a scheduling conflict can object and all parties can be accommodated. Mr. Jacobsen had known about his wife's pregnancy for months. At this time, Mr. Fotinos could have, but did not, object to the August 25, 2017 date. Mr. Fotinos could have, but did not, object to the hearing date when defendants filed and served their motions for summary judgment and supporting materials. Mr. Fotinos could have renewed his CR 56(f) continuance in his (unfiled) responses, but he did not.

“The trial court has considerable latitude in managing its court schedule to insure the orderly and expeditious disposition of cases.” *Idahosa*, 113 Wn. App. at 937; *see Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 71, 155 P.3d 978 (2007); *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995), *rev. denied*, 128 Wn.2d 1008, 910 P.2d 482 (1996). For summary judgment motions, the nonmoving party “may file and serve opposing affidavits, memoranda of law or other documentation **not later than 11 calendar days before the hearing.**” CR 56(c) (emphasis added). Per Judge Toynebee's August

18, 2017 order, this deadline was extended to **Tuesday, August 22, 2017**, four days before the hearing. August 25, 2017 RP 3:21-22.

Washington courts have repeatedly upheld trial courts' discretionary decisions to strike and not consider untimely oppositions to summary judgment. *See Idahosa*, 113 Wn. App. at 936-37; *Davies*, 144 Wn. App. at 500-01. In *Idahosa*, defendant filed a summary judgment motion. 113 Wn. App. at 934. The parties agreed that plaintiff would file her response by March 19, 2001, and for a hearing on March 23. *Id.* at 934-35. However, plaintiff did not file her response until March 21, two days after the agreed deadline and **two days** before the hearing. *Id.* at 935. The trial court granted the County's motion to strike her untimely response and to grant summary judgment. *Id.* The appellate court upheld this decision and emphasized that she missed the parties' stipulated deadline and "filed her response **only two days before the summary judgment hearing.**" *Id.* at 936 (emphasis added). Division Two confirmed that a trial court may make a discretionary decision to strike untimely briefing within the context of other events in the proceedings:

Similarly, in *Davies*, Division Three upheld a trial court's denial of the plaintiff's motion to submit an untimely response and affirmed, repeatedly emphasizing that CR 56 required any responding documents at least 11 days before the hearing. *Id.* at 498, 500. Citing *Idahosa* and other

Washington case law, the *Davies* court also confirmed that the decision to reject untimely documents was one within the trial court's discretion. *Id.* at 499. According to the court, absent a motion for continuance, the trial court was under no obligation to consider untimely materials, and once a party missed the deadline, CR 6(b)(2) required a showing of excusable neglect. *Id.* at 499-500.

Here, the facts are even stronger than those in *Idahosa* and *Davies*. Mr. Fotinos failed to file a timely response brief or supporting declarations. August 25, 2017 RP, 3:8-22. Mr. Fotinos's behavior is much more egregious than the appellant in *Idahosa*, where counsel's response was two days late, 113 Wn. App. at 936. In this case, Mr. Fotinos's brief was not filed **at all**. August 25, 2017 RP, 3:8-22. Even if the court considers counsel for Mr. Fotinos's physically handing his client's response to Judge Lawler **during the hearing**, this is still two days later than the appellant in *Idahosa*. August 25, 2017 RP p. 12:7:25.

Further, while the plaintiff in *Davies* moved for leave to file another response after the CR 56(c) deadline, which Division three stated was properly denied, 144 Wn. App. at 490, Mr. Fotinos was granted an extension that he himself proposed and then failed to file a timely brief. August 18, 2017 RP 14; August 25, 2017 RP 3:21-22.

The trial court clearly articulated on the record its rationale for

refusing to accept Mr. Fotinos's opposition briefing and declarations. The trial court emphasized that (1) the requirements of CR 56(c) are clear, and (2) Mr. Fotinos received an extension and still failed to timely submit a response, "The rules are very clear; and despite those rules, you were given additional time and still not give any response." August 25, 2017 RP, p. 16:1-3. Further, the court emphasized that it had had no time, at all, to read the response briefing and declarations due to their tardiness, stating

[W]hat I'm left with is a case where there are motions for summary judgment and there's no response to any of them. And so, you know, maybe there were some defenses to some of these things. I don't know. Nothing was filed.

Id., p. 16:12-15.

Under these circumstances in which Mr. Fotinos's attorney exhibited a clear pattern of dilatory behavior in missing the CR 56(c) deadline despite having two months' notice of the Motion Hearing, missing the August 22, 2017 deadline which he himself proposed, and failing to renew his request for a CR 56(f) Motion to Continue on the date of the hearing, this court should affirm the trial court's decision to not accept and not consider Mr. Fotinos's opposition brief or declarations on summary judgment.

In a summary judgment context, if the moving party shows the absence of a genuine issue of material fact, the non-moving party must set

forth facts showing that a genuine issue for trial exists. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 77 P.2d 182 (1989). The opposing party may not resist summary judgment by resting upon the pleadings, but must present evidence that shows the facts are in dispute. *Mackey v. Graham*, 99 Wn.2d 572, 576, 663 P.2d 490, *cert. denied*, 464 U.S. 894 (1983).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact, however, if the moving party shows there is no genuine issue for trial, the inquiry shifts to the party opposing summary judgment. *Id.* If the moving party is a defendant and meets this initial burden, “then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff ‘fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,’ then the trial court should grant the motion.” *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

Mr. Fotinos failed to submit any evidence whatsoever to establish to establish the existence of an essential element to his case. The trial court therefore did not abuse its discretion in granting summary judgment in defendants’ favor.

B. If this court affirms the decision to not consider Mr. Fotinos's untimely response brief and declarations, then RAP 2.5(a) and RAP 9.12 preclude him from arguing his opposition to summary judgment on appeal.

Washington appellate courts only consider evidence and issues called to the attention of the trial court on summary judgment. RAP 9.12; *Wash. Fed'n of State Employees v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993). Otherwise, the court would not truly engage in the same inquiry as the trial court. *Wash. Fed'n of State Employees*, 121 Wn.2d at 157.

Similarly, appellate courts generally do not consider arguments that a party makes for the first time on appeal. RAP 2.5(a); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992). This rule is grounded in basic notions of fairness to both the trial court and the opposing party. *Espinoza v. City of Everett*, 87 Wn. App. 857, 873-74, 943 P.2d 387 (1997), *rev. denied*, 134 Wn.2d 1016, 958 P.2d 315 (1998).

RAP 2.5(a) provides narrow exceptions for arguments and claims regarding (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a)(1-3); *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). Mr. Fotinos is making no such argument. There is no reason to allow him to make new arguments for the first time

on appeal.

In sum, in waiving his (two) opportunities to timely file an opposition to summary judgment, Mr. Fotinos also waived his chance to preserve arguments for this appeal. In the event that this court affirms the trial court's decision to not accept or consider Mr. Fotinos's response briefing, this court should affirm the court's order granting summary judgment without reaching the merits of his new arguments.

C. The trial court did not abuse its discretion in denying reconsideration.

CR 59 governs motions for reconsideration. The grant or denial of a motion for reconsideration is typically within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Lilly v. Lynch*, 88 Wn. App. 306, 321, 945 P.2d 727 (1997).

1. The trial court did not abuse its discretion.

There is no evidence at all that the trial court abused its discretion by denying reconsideration. Mr. Fotinos had 60 days' notice of the hearing date and did not object. He still missed the CR 56(c) deadline. The court granted him an extension. He still missed the extended deadline. There was therefore no genuine issue of material fact, and the trial court properly denied the reconsideration.

Mr. Fotinos's criticisms of the court's denying reconsideration are similarly misplaced. First, Mr. Fotinos emphasizes that his Motion for

Reconsideration was “uncontested,” App. Brief at 24, and that “Judge Lawler denied plaintiff’s Motion for Reconsideration before any defendant responded.” Notwithstanding the fact that Coldwell Banker was not served, the Lewis County Superior Court Rules do not require the opposing party to respond:

5. Motions for Reconsideration

...

B. The opposing party **may**, within ten (10) days after receipt of the motion, file and serve on the moving party, and the Judge or Commissioner making the ruling, pleading and documents in opposition.

LCLR 5(B) (emphasis added).

Second, Mr. Fotinos states the following in his Motion for Reconsideration:

Although he [Judge Toynbee] extended the response to Tuesday, Judge Toynbee did not make a ruling that Plaintiff could not file responses untimely if that was the best he could do. And Defendants were “just looking for a brief to be filed as soon as it [could] be filed,” as long as they could keep their hearing date. *Id.* And the responses were filed as soon as they could be filed.

CP 519. As discussed extensively above, this was not the ruling that Judge Toynbee made, and not the ruling that the trial court accepted. August 25, 2017 RP, p. 2:23-25; 3:1-2.

Finally, Mr. Fotinos criticizes the trial court’s purported decision to not consider the additional materials on reconsideration. However, this

is squarely against Washington law. While there is nothing in that rule that prohibits the submission of new or additional materials on reconsideration, the decision to do so is squarely within the trial court's discretion. *Martini v. Post*, 178 Wn. App. 153, 162, 313 P.3d 473 (2013), citing *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612 (1997).

D. Mr. Fotinos failed to timely file the Notice of Appeal because his Motion for Reconsideration was filed too late.

Lewis County Local Rule 7(A)(5) requires motions for consideration to be served and filed within ten days of entry of the judgment or order. LCR 7(5)(A). Mr. Fotinos filed his Motion for Reconsideration on September 5, 2017, which is eleven days after the August 25, 2017 hearing and granting of summary judgment. Mr. Fotinos also failed to serve Coldwell Banker with the Motion for Reconsideration. A notice of appeal must be filed within 30 days of entry the decision of the trial court that the filing party wants reviewed, RAP 5.2(a), so the appeal period began on August 25, 2017.

The 30-day time limit set forth in RAP 5.2 may be prolonged by the filing of a **timely** motion for reconsideration. RAP 5.2(a), (e). A motion for reconsideration is timely only where a party serves and files it within this 10-day time period. CR 59(b); *Schaefco, Inc. v. Columbia*

River Gorge Com'n, 121 Wn.2d 366, 367, 849 P.2d 1225 (1993). Mr. Fotinos neither timely served nor filed his motion. CP 517-524.

Because Mr. Fotinos's Motion for Reconsideration was untimely, it did not extend the 30-day appeal period past September 24, 2017, which is 30 days past the entering of judgment on Coldwell Banker's Motion for Summary Judgment. Mr. Fotinos filed his Notice of Appeal on September 29, 2017, five days past the September 24, 2017 deadline. Mr. Fotinos therefore failed to timely perfect an appeal.

When an appellant fails to timely perfect an appeal, the disposition of the case is governed by RAP 18.8(b). *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978). The rule, in pertinent part, states the following:

(b) Restrictions on Extension of Time. The appellate court will only in **extraordinary circumstances** and to prevent a **gross miscarriage of justice** extend the time within which a party must file a notice of appeal ... **The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.**

RAP 18.8(b) (emphasis added). Mr. Fotinos has no reason whatsoever for the failure to timely perfect an appeal. Therefore, Mr. Fotinos's appeal was never perfected, and this court lacks jurisdiction.

E. This Court should affirm the trial court's summary judgment order.

In the event the Court is inclined to consider the summary judgment, then this order may be affirmed on any basis supported by the record. *Electrical Workers v. Trig Electric*, 142 Wn.2d 431, 434-35, 13 P.3d 622 (2000).

The court should affirm the trial court's summary judgment order. First, Mr. Fotinos cannot prove justifiable reliance, an essential element of his Negligent Misrepresentation claim, because (1) he is bound by the terms of the REPSA and Seller Disclosure Statement, (2) charged with all information contained in the Home Inspection Report, the Seller Disclosure Statement, and the Attachment to Form 35, (3) there is no proof that Ms. Hunt had actual knowledge of the falsity of any alleged misrepresentation in the Seller Disclosure Statement, and (4) Ms. Hunt had no duty to disclose information of which she had no knowledge. Second, Mr. Fotinos has no claim for a Consumer Protection Act violation because he cannot prove all five required elements.

For a more thorough legal analysis of Mr. Fotinos's claims, see 144-155, the Legal Argument section of Coldwell Banker's Motion for Summary Judgment.

F. The court should ignore the portions of Mr. Fotinos's Appellate Brief that are not part of the record, non-binding on this court, or inapplicable to the recited issues.

Mr. Fotinos states that

Judge Toynbee extended the response deadline to Tuesday, August 22, 2017, but he did not make a ruling that Plaintiff could not file responses untimely "if that was the best he could do."

App. Br. at 17 (emphasis in original). This is incorrect.

As an initial matter, the cited quotation ("if that was the best he could do") appears nowhere in the August 18, 2017 Report of Proceedings. August 18, 2017 RP 12. Second, Judge Toynbee's ruled that Mr. Fotinos could file his brief untimely up to August 22, 2018. *Id.*

As Judge Lawler summarized

The Court: There was a hearing in front of Judge Toynbee to hear the plaintiff's request for a continuance of this hearing. He denied that but **did give plaintiff an extension of the deadline to file and placed that deadline of this Tuesday, three days ago, on August 22nd.**

August 25, 2017 RP, p. 2:23-25; 3:1-2 (emphasis added). Nothing at law or in the record supports Mr. Fotinos's position that he could simply file his response briefing at any time he wanted.

Second, in support of his position that summary judgment cannot be granted as a sanction to respond to a motion for summary judgment,

Mr. Fotinos cites non-binding federal case law from the eleventh and third and circuits, *Dunlap v. Transamerica Occidental Life Ins. Co.*, 858 F. 2d 629, 632, 11 Fed. R. Serv.3d 1318 (11th Cir. 1988), and *Anchorage Assocs. v. V.I. Bd. Of Tax Review*, 922 F.2d 168, 170, 18 Fed. R. Serv.3d 874 (3rd Cir. 1990). App. Brief at 36.

Third, in support of his position that Judge Lawler abused his discretion by rejecting his responsive briefing and thereby applying the incorrect legal standard, Mr. Fotinos cites *Felsman v. Kessler*, 2 Wn. App. 493, 498, 468 P.2d 69 (1970), and *Brown v. Park Place Homes Realty*, 48 Wn. App. 554, 559, 739 P.2d 1181, 1191 (1987), App. Brief at 27, which both pertain to accepting untimely affidavits, not briefing, and are therefore inapplicable. As discussed in *Idahosa* and *Davies*, a party is not at liberty to submit response briefs simply whenever he or she deems appropriate. *Idahosa*, 113 Wn. App. 930; *Davies*, 144 Wn. App. 483.

Fourth, Mr. Fotinos argues that Judge Lawler should be analyzed through the lens of what a “human being” would have done. App. Brief at 31-33. “Human being” is not a legal standard recognized by this court. The court should therefore ignore it.

Finally, Mr. Fotinos repeatedly states in his brief that his response brief was filed. As stated in § III. C. This is incorrect.

G. Coldwell Banker should be awarded its attorneys' fees.

Coldwell Banker requests an award of attorney's fees pursuant to RAP 18.1 and RAP 18.9(a). Rule 18.9(a) allows for terms against a party who "files a frivolous appeal, or fails to comply with these rules." RAP 18.9(a). Mr. Fotinos failed to perfect his appeal. Mr. Fotinos failed to submit a timely appellate brief, despite being given additional time by this court. Coldwell Banker should be awarded its attorneys' fees.

VI. CONCLUSION

This court should affirm the trial court's order and dismissal on summary judgment and award Coldwell Banker attorney fees and costs for a frivolous appeal. Mr. Fotinos violated CR 56(c) and then a clear court order when he failed to twice timely submit any response materials. Even if the court reaches the merits of this case, Mr. Fotinos's claims fail as a matter of law.

Mr. Fotinos failed to perfect his appeal. This court therefore lacks jurisdiction to entertain any appeal filed by Mr. Fotinos. This court can elect to dismiss the appeal as untimely. Alternatively, Coldwell Banker requests that this court affirm the trial court's order on summary judgment dismissing with prejudice plaintiff-appellee's case and award reasonable attorney fees and costs on appeal.

Respectfully submitted this 29th day of March, 2018.

LEE SMART, P.S., INC.

By:



Joel Wright, WSBA No. 8625
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Of Attorneys for Coldwell Banker

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on March 29, 2018, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA FIRST CLASS MAIL AND EMAIL

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DATED this 29th day of Seattle, 2018 at Seattle, Washington.



Susan M. Munn, Legal Assistant

LEE SMART

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