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COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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ERNEST EDESEL,  
JUDY LAMB,  
APPELLANTS / PLAINTIFFS

v.

PATRICK GILL,  
BARBARA BOWMAN,  
DEREK LAMOUREUX,  
AMBERLEE D'APPOLLONIO,  
AND JOHN DOES (1-10),  
RESPONDENTS / DEFENDANTS

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APPEAL FROM KISTAP COUNTY SUPERIOR COURT,  
THE HON. WILLIAM C. HOUSER, PRESIDING  
Cause No. 18-2-00098-18

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BRIEF OF APPELLANT

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## I. INTRODUCTION & RAP 10.4(d) MOTIONS<sup>1</sup>

### A. OVERVIEW AND TWO REPRESENTATIVE CLAIMS.

This case involves nuisance and trespass causes of action against the landlords and tenants of a duplex drug house. One nuisance claim (the “pot grow” claim) arose from marijuana grown on the ground and in buckets at a residential backyard without any federal, state, county, or city business permits or licenses inside the City of Bremerton. The legalization of marijuana has fueled the growth of legal and illegal pot grow operations. See, verified David Herzog Report at CP 915-931, see specially, two news articles cited and reproduced by Mr. Herzog.

The dispute between the parties began in June 2016, when Ernest Edsel, and his wife, Judy Lamb, moved to Kitsap County and took possession of their residence inside the City of Bremerton. On 10 January 2018, after two years of documenting and complaining about the unlawful activities of their neighbors, appellants Edsel and Lamb (hereinafter collectively “Plaintiffs Edsel”) filed the Kitsap County Superior Court action that gives rise to this appeal. CP 1-26, 190-215.<sup>2</sup>

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1 RAP 10.4(d): “A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits.”

2 As in *MJD Properties v. Haley*, 189 Wn.App. 963, 358 P.3d 476 (2015), Plaintiffs Edsel litigated this action and appeal *pro se* like WA State attorney Jeffrey Haley in his ultimately successful nuisance action over a neighbor’s driveway light and view-blocking tree. At the 11 May 2018 hearing on motion of Plaintiffs Edsel, the court ordered Ms. Lamb to be substituted by her husband. CP 179-87 (motion); CP 188-89 (order).

Landlords, from Seattle, are Patrick Gill and Barbara Bowman, husband and wife. Tenants are Amber D'Appollonio and Derek Lamoureux, each a tenant of the landlords, at their respective duplex unit in Bremerton (hereinafter all collectively known as "LanTen").

Plaintiffs Edsel submitted evidence to the trial court throughout the litigation with respect to all of their claims. For example, the assigned judge had, on the record, testimony from Ernest Edsel and three (3) third-party witnesses (Herzog; Estrada; Osorio) about a substantial commercial pot grow at LanTen's backyard. CP 904, 915-917, 932-935, 936-938. The tenants themselves admitted growing marijuana, but in smaller amounts. See, the voluntary February 2018 declarations of the Tenants at CP 998, 1003.

In addition to the verified David Herzog Report, CP 915-931, Judge Houser, the assigned trial court judge, also had expert reports with respect to invasive vegetation claims that arose from the well-documented and repeatedly photographed field of noxious English Ivy weed growing at LanTen's backyard and on the walls of the drug house duplex. The expert reports documented the damages that such invasive vegetation caused to the residence of Plaintiffs Edsel, including said vegetation plugging the storm water drain pipes, which sent backed-up water into the basement. CP 590-697 (see specially, in CP 591-697, ¶¶ 1, 2(a-c), and 3 at p. 2-5 of Plaintiffs' Verified Response to Defendant's

Motion to Allow Discovery After Court's Deadline; and see, Exhibits "A," "B," and "C" attached to said Response, filed 14 January 2019, which reports are hereinafter collectively referred to as "English Ivy Reports").

Except for the David Herzog testimony and expert witness report, which the trial court disregarded on the technicality of surplus *pro-forma* language of RCW 9A.72.085, all of the testimony and expert witness reports described above in the previous two paragraphs were mentioned and relied upon by Judge Houser in the summary judgment proceedings. See, e.g., page 2, fn. 2, of the summary judgment order of 21 March 2019. CP 1280. The court had previously reviewed and considered the English Ivy Reports by the expert witness contractors when the court ruled, on 26 March 2019, that said reports were not protected work product. CP 1285-86.

Moreover, throughout the litigation, tenants and landlords asserted the affirmative defense of "coming to the nuisance" as to *all* nuisances (Landlords, CP 311-25; Tenants, 495-502), while failing to produce or offer any evidence or other proof of any federal, state, county, or city permit, license, or exemption for any nuisance, including the marijuana "pot grow" nuisance, not even in their March 2018 and February 2019 summary judgment motions. CP 130-49, 778-824, and 825-49.

The existence of the marijuana “pot grow” has never been in dispute, only the amount and type of the unlicensed pot grow. See, February 2018 declarations of the Tenants. CP 998 and 1003. Nevertheless, as with all of the other claims of Plaintiffs Edsel supported by genuine issues of material fact, the trial court on, 21 March 2019, granted summary judgment on the pot grow nuisance for Landlords Gill and Bowman (hereinafter collectively known as “Landlords”) and Tenants D’Appollonio and Lamoureux (hereinafter collectively known as “Tenants”).

**B. 1. SUMMARY OF THE APPEAL: first, de novo review of a defective May 2018 partial summary judgment** [See, Error # 2, 3, 4, 5 in Assignments of Error]. This appeal involves LanTen’s two partial summary judgment motions (CP 130-49; CP 295-301) seeking to dismiss claims in a First Amended Complaint that no longer existed. Plaintiffs Edsel thus relied on a response date for the two partial summary judgment motions other than the 11-day response period of CR 56(c). The trial court then issued a clearly erroneous and defective order on 25 May 2018 (CP 306-08) claiming that it was considering the responses of Plaintiffs Edsel, while also striking them at the same time. The court’s order failed to expressly, directly, and clearly resolve multiple factual and legal issues, despite Plaintiffs Edsel briefing the court of the need for clarity, resolution, and the need to amend the

defective order. See, Plaintiffs Edsel Motion to Clarify, Motion to Reconsider, and Supporting Declarations. CP 326-457.<sup>3</sup>

Although the trial court supposedly, on **25 May 2018**, dismissed some of the claims in the First Amended Complaint pursuant to Landlords' partial summary judgment motion, the Landlords nevertheless submitted their answer (CP 311-25) on **25 May 2018**, to all such "dismissed" claims that were still averred and set forth in the Second Amended Complaint, which had been duly-filed and served, per the trial court's approval, on **16 May 2018** (CP 190-215). The parties therefore kept litigating such claims by implied consent.<sup>4</sup>

As more fully described in the "Argument" section of this brief, pursuant to Error # 2-5, and the issues thereunder, Plaintiffs Edsel submit that the partial summary judgment order and the subsequent attorney fee order must be reversed.

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<sup>3</sup> The 25 May 2018 partial summary judgment order supposedly dismissed the drug house nuisance, the noise trespass, and real estate contractual claims, despite testimony and evidence, including pictures concerning drug house activities in, at, or near LanTen's duplex, such as their transient invitees or guests leaving raw sewage, used needles, and used condoms on common areas subject to Covenants Conditions & Restrictions (hereinafter "CCRs"), and Common Area Maintenance Agreements (hereinafter "CAMAs"), that are duly-recorded on the chain of title for, and on the deeds to, the LanTen duplex and the residential property of Plaintiffs Edsel.

<sup>4</sup> In *Will v. Frontier Contractors, Inc.*, 121 Wn.App. 119, 131-32, 89 P.3d 242 (Div. 2, 2004), this court held that, after a partial summary judgment dismissal, a breach of contract claim was litigated by the implied consent of the parties after an amended complaint put the defendants on notice that the claim was being asserted.

**B. 2. SUMMARY OF THE APPEAL: second, *de novo* review of a March 2019 summary judgment** [See, Error # 6-13 in Assignments of Error]. In addition to to the above-described claims, Plaintiffs Edsel had other nuisance and trespass claims against LanTen for damages, including damages for personal discomfort and annoyance under *Tiegs v. Watts*, 135 Wn.2d 1, 15, 954 P.2d 877 (1998), that resulted from the following LanTen activities: (a) the pot grow; (b) the constant burning of garbage and other combustibles; (c) invasive vegetation; (d) vibration noise from unlicensed and non-permitted motocross events.

Plaintiffs Edsel, in their Second Amended Complaint, and in their motions, responses, evidence, and testimony, set forth specific facts concerning the four above-described LanTen activities and how the the four activities respectively resulted in:

(a) impairment of the use and enjoyment by Plaintiffs Edsel of their residential property, diminution in the value of said property, and their well-founded and reasonable discomfort and annoyance, which included a fear for their personal safety as a result of an illegal, unlicensed backyard pot grow attracting more crime, specially when Tenant Derek Lamoureux is a felon convicted of a violent robbery. CP 196 (§ 24 at p. 7 of the Second Amended Complaint);

(b) the invasion of offensive smells, and noxious smoke and soot, into the residence of Plaintiffs Edsel, including the interior living spaces and the duct-work for heating, ventilation, and air conditioning (“HVAC”), as well as their lungs, breathing passages, and airways, from the constant burning of garbage and other combustibles at LanTen’s backyard;

(c) the invasion of the noxious weed English Ivy from LanTen’s backyard into the residential property of Plaintiffs Edsel, including invasion of the the storm water drain pipes, which were plugged with said invasive vegetation, sending backed-up storm water into the basement of Plaintiffs Edsel; and,

(d) the invasion of noise vibrations from noisy and bothersome unlicensed motocross activities at LanTen’s backyard.

On 21 March 2019, the trial court dismissed all such claims in CR 56 summary judgment despite: (a) testimony and evidence from Plaintiffs Edsel, eyewitness, and expert witnesses; (b) the court’s discovery order not allowing Plaintiffs Edsel since 25 May 2018 to prove their causes of action by recovering their own documents and images from the Landlords and Farmers Insurance for the critical time period of 2016 and 2017.

As more fully described in the “Argument” section of this brief, pursuant to Error #6-13, and the issues thereunder, Plaintiffs Edsel

submit that the summary judgment order and the subsequent attorney fee order must be reversed.<sup>5</sup>

**C. FIRST RAP 10.4(d) MOTION** [See, Error # 1 in Assignments of Error]. The motion arises from a dispositive discovery error by the trial court under *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 400-402, 706 P.2d 212 (1985) that justifies vacating (or reversing) the dismissal of the action and remanding the action to the trial court (for production of documents from Landlords) before a decision on the merits by this court of appeals. In support of this RAP10.4(d) motion, Plaintiffs Edsel submit, in APPENDIX ONE of and to this brief, pertinent facts and legal authority necessary to rule upon this motion. And see, the “Argument” section (§ IV.A.) of this brief concerning Error # 1, which legal argument is herein restated and wholly incorporated by reference.

On 18 May 2018, Plaintiffs Edsel filed two Motions to Compel discovery from LanTen (for production of documents concerning Farmers Insurance and for re-entry to inspect, along with supporting declarations). CP 216-258. Among other documents sought from the landlords, Plaintiffs Edsel sought production of copies of their own documents, which Plaintiff Ernest Edsel had given to the landlord’s

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<sup>5</sup> If summary judgment is vacated or reversed, then LanTen are not prevailing parties entitled to attorney fees.

insurance company, Farmers Insurance. CP 216-38. These documents included pictures of the unlawful activities of LanTen in 2016 and 2017 as well as communications with LanTen warning them of their unlawful activities. Originals of the documents were destroyed when storm water backed up into the basement of Plaintiffs Edsel as a result of a vegetation plug from LanTen's invasive English Ivy noxious weed. Despite clear legal standards governing discovery, such as *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 400-402, 706 P.2d 212 (1985), the trial court, on 25 May 2018, denied Plaintiffs Edsel Motion to Compel Production. CP 304-05. And see, Appellant's Motion to Amend the Notice of Appeal, filed 7 May 2019 with this court (*granted* by Commissioner Bearse).

Appellant's Motion to Amend the Notice of Appeal, and appendix, are herein restated and wholly incorporated by reference as part of this brief. True and correct copies of said motion and appendix, and the court's letter ruling of 9 May 2019, are enclosed as APPENDIX ONE of and to this brief.

After the court denied Plaintiffs Edsel discovery motions on 25 May 2018, protracted and very expensive litigation ensued as a result of Plaintiffs Edsel being left without their own documents, including photographs, to prove their case and which documents concern

LanTen's activities in connection with all of the nuisance and trespass causes of action.

In light of the trial court's error under *Heidebrink*, and the controlling caselaw set forth in the "Argument" section (§ IV.A.) of this brief with respect to Error # 1, this court of appeals must therefore also decide whether to vacate (or reverse) the trial court's partial summary judgment order of 25 May 2018, the summary judgment of 21 March 2019, CP 1279-84, and the subsequent attorney fee order of 1 May 2019, CP 1532-37. Accordingly, Plaintiffs Edsel move for such decision and order vacating (or reversing) said orders and remanding the action back to the trial court for production of documents from Landlords.

**D. SECOND RAP 10.4(d) MOTION** [See, Error # 10 in Assignments of Error]. The motion arises from the trial court granting summary judgment, on 28 March 2019, despite the fact that the Landlord's attorney, Mr. Shawn Butler, made a dispositive Judicial Admission on behalf of his clients (and against their interest) at the summary judgment hearing of 15 March 2019 [**Error # 10**].

Trial courts do not like to hold attorneys responsible for their damaging Judicial Admissions. These admissions take place in opening statements, closing arguments, in briefs, at hearings, and during bench conferences. Although lawyers' admissions can and do send clients to

prison or cost them millions of dollars, courts still need to dispose of more cases where an attorney has made a judicial admission. See, Ediberto Roman. “*Your Honor What I meant to State was...*”: A Comparative Analysis of The Judicial and Evidentiary Admission Doctrines As Applied To Counsel Statements in Pleadings, Open Court, and Memoranda of Law.” 22 PEPP.L.REV. 981 (1995).

In support of this RAP 10.4(d) motion, Plaintiffs Edsel submit, in APPENDIX THREE of and to this brief, pertinent facts, including a court reporter’s transcript (CP 1420-21), and cited authority that are necessary to rule upon this motion. See, CP 1266-78 and CP 1289-1422. The cited authority, including *Key Design v. Moser*, 138 Wn.2d 875, 983 P.2d 653, opinion amended in part, 993 P.2d 900 (1999), is herein restated and incorporated by reference. For the court’s convenience, with respect to such pertinent facts and authority, enclosed is APPENDIX THREE of and to this brief, which appendix consists of CP 1394-1422, a true and correct copy of Plaintiffs Edsel Amended Motion to Amend or Alter the Court’s 21 March 2019 order; see specially, Exhibit “REC-3” to said motion.<sup>6</sup>

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<sup>6</sup> Without notice to any party, the trial court struck the hearing for, and denied, the timely-filed Plaintiffs Edsel Motion for Jury Trial and to Strike Summary Judgment Motions, which had been duly-noted on the court’s hearings calendar. See, APPENDIX TWO of this brief.

On 15 March 2019, Landlords' counsel made the judicial admission for his clients at the summary judgment hearing. CP 1420-21. Mr. Butler was not reciting any legal principle that applied to the court or to Plaintiffs Edsel (or to a jury). Nor is Mr. Butler authorized to speak for anyone other than his clients. He spoke for and on behalf of his clients. His clients are thus personally bound by the admission.<sup>7</sup>

Tenants' counsel made no objection and lodged no exceptions. CP 1420-21.

Then, Landlords' counsel had several opportunities to withdraw or otherwise explain his admission (or mistake) when Plaintiffs Edsel filed multiple papers with the court about the Judicial Admission, starting four days later on 19 March 2019 (CP 1274-76), and then on 27-28 March 2019 (CP 1289-1422). Meanwhile, Tenants continued in their failure to object to Landlords' admission or to submit any exceptions to the Landlords' admission, such as "Tenants do not accept as true the allegations of Plaintiffs Edsel."

An attorney's admission is binding on the client if unequivocal and made within the scope of the attorney's authority. 22 PEPP.L.REV.,

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<sup>7</sup> As set forth in the court reporter's transcript of the hearing, at lines 11-12 on page 29, Mr. Butler in his rebuttal statement declared that: "***But for purposes of this motion, we're accepting as true Mr. Edsel's allegations.***" (emphasis added).

at 982, citing *In re Eagson Corp.*, 37 B.R. 471, 482 (Bank. E.D. Pa. 1984).

And, an attorney's admission is binding even when wholly contradicted by the evidence and his own client's testimony. 22 PEPP.L.REV., at 982, citing *Missouri Housing Development Commission v. Bice*, 919 F.2d 1306, 1314 (1990)(attorney's short written answer, admitting that the client signed a loan guaranty, binds the client despite all of the evidence and the client's testimony to the contrary).

After an attorney makes a judicial admission, the client cannot explain away the judicial admission or otherwise try to limit or narrow the final and full consequences of the admission. *State v. Goodin*, 67 Wn.App. 623, 633-34, 838 P.2d 135 (1992).<sup>8</sup>

For more than 100 years, since the U.S. Supreme Court case of *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261, 262-63, 26 L.Ed. 539 (1881), courts have recognized the binding effect of counsel's statements made in open court, beginning with an attorney's opening statement before a New York state jury. *Oscanyan*, 103 U.S. 261, 262-63 (directed verdict was proper based on a short statement

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<sup>8</sup> The criminal conviction in *Goodin* was affirmed after a defense attorney stipulated that the client's drug activity was within 1,000 feet of a school bus stop, which admission could not be retracted or ignored when the defendant later challenged, on appeal, the enhancement statutes of WA State.

made by plaintiff's counsel as to the plaintiff's effort while an officer of the Turkish government).<sup>9</sup>

In *Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 264-65, 266-67 (4th Cir. 2004), the court refused to allow a business defendant to explain away or withdraw inconsistent statements and assertions made in summary judgment motions and oral arguments during an ERISA case arising under the Employee Retirement Income Security Act, 29 U.S.C. § 1104.<sup>10</sup>

“[J]udicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, *but beyond the power of evidence to controvert them.*” *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983) quoting *Hill v. Federal Trade Comm.*, 124 F.2d 104,

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9 The Supreme Court in *Oscanyan* specifically held that: “*If a doubt exists as to the statement of counsel, the court will withhold its directions, as where the evidence is conflicting, and leave the matter to the determination of the jury.*” *Oscanyan*, at 263 (emphasis added). “Here there were no unguarded expressions used, nor any ambiguous statements made. The opening counsel was fully apprised of all the facts out of which his client's claim originated, and seldom was a case opened with greater fulness of detail.” *Oscanyan*, 103 U.S., at 264.

10 The *Meyer* trial and appellate court, 372 F.3d, at 264-65, rejected Berkshire's attempts to limit, narrow, or control the consequences of its arguments, treated as a judicial admission, that Berkshire was an ERISA fiduciary *only* for purposes of removal to federal court, where Berkshire then proceeded to inconsistently and vigorously argue and litigate that it was not an ERISA fiduciary in U.S. District Court and before the Fourth Circuit.

106 (5th Cir. 1941) (emphasis added). Clearly, summary judgment must be reversed when landlords have admitted the truth of all allegations by Plaintiffs Edsel in their second amend complaint and their motions and responses.

A “judicial admission” has long been defined ... as a deliberate, clear, and unequivocal formal act done in the course of a judicial proceeding which amounts to a waiver of proof by the opposing party and binds the declarant to an essential contrary fact embraced in his theory of recovery or defense.” David J. Beck, *Evidence*, 31 Sw L.J. 323, 336 (1977)(survey of Texas law on evidence).

The Texas Supreme Court decision of *Griffin v. Superior Ins. Co.*, 161 Tex 195, 338 S.W.2d 415, 419 (1960) has been adopted by federal and state courts, including *Jonibach Management Trust v. Wartburg Enterprises, Inc.*, 750 F.3d 486, 491 (5th Cir. 2014), *Conagra v. Nierenberg*, 301 Mont. 55, 71, 7 P.3d 369, 380 (Mont. 2000), and *Thomas v. Prewitt*, 355 So.2d 657, 661 (Miss. 1978).<sup>11</sup>

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<sup>11</sup> The Montana Supreme Court in *Conagra*, 301 Mont. 55, 71, 7 P.3d 369, 380 adopted the Texas five-part rule for testing the sufficiency of a claimed judicial admission: “(1) that the declaration relied upon was made during the course of a judicial proceeding, (2) that the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony, (3) that the statement was deliberate, clear and unequivocal, (4) that giving of conclusive effect to the declaration will be consistent with public policy, and (5) the testimony must be such as relates to a fact upon which a judgment for the opposing party may be based.” citing *Griffin v. Superior Insurance Company*, 161 Tex. 195, 338

An attorney's two-sentence statement in closing argument was treated as a judicial admission in his client's conviction for willful failure to file tax returns in *United States v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991).<sup>12</sup>

A defense attorney's statement during oral argument, concerning an intoxicated WA State driver, with a suspended WA State driver's license, inside McChord Air Force Base, south of Tacoma, in Pierce County, was treated as a judicial admission in *U.S. v. Wilmer*, 799 F.2d 495, 499, 500, 502 (9th Cir. 1986)(the defendant was tried under WA State law as to driving under the influence and driving with a suspended WA State license in a federal military base).<sup>13</sup>

An attorney's judicial admission includes a negligent blunder, which severely harms their client, such as two sentences in a lawyer's

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S.W.2d 415, 419 (1960). The court also provided that a judicial admission was not effective if it was "subsequently modified or explained so as to show that [the litigant] was mistaken.", 338 S.W.2d at 418 quoting *Stanolind Oil & Gas Co. v. State* (1940), 136 Tex. 5, 145 S.W.2d 569, 570.

12 The 2-sentence statement consisted of the attorney merely saying: "The defense is not suggesting that returns were filed for 1983 and '84, which the Internal Revenue Service would consider to be valid documents. The defendant submits rather that the government's evidence fails to show that protest documents were not filed for 1983 and 1984."

13 "During oral argument Wilmer's counsel stated as follows: 'As to the other two charges, that is DWI and driving under suspension, I am fully willing to give them all the elements at this point of their case as far as intoxication, as far as having a suspension, everything except driving.'" *Wilmer*, 799 F.2d., at 502 (9th Cir. 1986).

closing argument statement that were a judicial admission sufficient to establish injury and proximate cause in a negligence case where the lawyer answered his own rhetorical question. *Childs v. Franco*, 563 F.Supp. 290, 291-92 (E.D. Pa. 1984).<sup>14</sup>

The court in *United States v. Cravero*, 530 F.2d 666, 671 (5th Cir., 1976) upheld a criminal perjury conviction after defense counsel, during a bench conference, made a judicial admission as to his client's perjury during his informal response to a judge's comment with respect to another witness committing perjury when defense counsel stated: **"All I'm saying is that the man is a perjurer. That is what you are saying and we all agree."** (emphasis added).

A judicial admission cannot be contradicted in a motion for summary judgment, See, *Schmahl v. A.V.C. Enterprises, Inc.*, 148 Ill.App.3d 324, 331, 499 N.E.2d 572, 577 (1st Dist. 1986). Nor can it be contradicted by an affidavit or testimony from the party that made the judicial admission. See, *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 71 Ill.App.3d 562, 568, 390 N.E.2d 60 (1979).

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<sup>14</sup> "Ladies and gentlemen, I say to you, yes, she sustained some pain because she had to go to the doctor--go to the hospital and be treated following the accident. Yes, she probably had some discomfort thereafter, but how much?" *Childs*, at 291-292).

In *Perez-Mejia v. Holder*, 663 F.3d 403, 407, 409-10, 412 (9th Cir. 2011), the court affirmed a deportation order when the defense attorney verbally admitted his client's California conviction for felony possession of cocaine for sale; the government no longer had to prove that the defendant was removable or that there was sufficient evidence of a state felony conviction.

Last, but not least, in *Mulkiteo Retirement Apts v. Mulkiteo Investors*, 176 Wn.App. 244, 255, 310 P.3d 814 (2013), the court ruled that a party cannot take back a judicial admission on appeal after the party made the judicial admission through its attorney (in an answer) at trial court proceedings.

Therefore, pursuant to *Mulkiteo*, at 255, and all other cited authority, the Landlords and Tenants cannot withdraw or otherwise take back the Landlords' judicial admission on appeal. The admission at the trial court proceeding was expressly made for the Landlords by the one and only person who can speak for them, forever binding them.

Plaintiffs Edsel are entitled to an order or decision: (a) reversing the trial court's summary judgment orders and attorney fee order; and, (b) remanding the action back to Kitsap County Superior Court for a jury to decide the issue of damages.

## II. ASSIGNMENTS OF ERROR AND ISSUES

**A. ERROR (# 1) IN DENYING DISCOVERY.** The trial court erred, on 25 May 2108, when it denied Plaintiffs Edsel Motion to Compel Production of documents concerning Farmers Insurance. [*Error # 1*].

**ERROR # 1 ISSUES:** Did the trial court err when it disregarded the legal standard of *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 400-402, 706 P.2d 212 (1985) and related controlling caselaw? Are litigants entitled to an order compelling production of copies of their own documents from the opposing side when the originals have been destroyed through no fault of the moving party (and when an insurance company was given copies of such documents by a litigant who is not a client of such an insurance company)?

Are traditional notions of fair play and substantial justice achieved under CR 1, 26, and 34, when a court denies a discovery motion for production of copies of a litigant's own documents that are needed to prove elements of their causes of action in summary judgment (and before a jury)?<sup>15</sup>

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<sup>15</sup> CR 1: "These rules govern the procedure in the superior court in all suits of a civil nature whether ... cases at law or in equity.... They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Are litigants denied their WA State constitutional guarantee of a jury, under Const. art. I, § 21, when a trial court denies discovery as previously described?<sup>16</sup>

**B. ERROR (# 2, 3, 4, 5) IN GRANTING PARTIAL SUMMARY JUDGMENT IN 2018.** The trial court erred when it dismissed, on 25 May 2018, with a CR 56 partial summary judgment, the drug house nuisance, the noise trespass, and the real estate contractual claims of Plaintiffs Edsel. [**Error # 2**]. The court further erred when it denied the 4 June 2018 Motions of Plaintiffs Edsel to Clarify [**Error # 3**] and to Reconsider [**Error #4**] said partial summary judgment. And, the court erred by resolving issues of fact in a summary judgment motion. [**Error # 5**].

**ERROR # 2, 3, 4, AND 5 ISSUES:** On de novo review, are Plaintiffs Edsel entitled to a decision from this court reversing the trial court's partial summary judgment order and remanding the drug house nuisance, noise trespass, and real estate contractual claims back to the trial court?

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<sup>16</sup> Const. art. I, § 21: "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

And, did the trial court err when it granted a motion for partial summary judgment on a First Amended Complaint that no longer existed, per the court-approved filing of a Second Amended Complaint, and which partial summary judgment order the court later refused to clarify, alter or modify after considering such timely motions by Plaintiffs Edsel with respect to the confusing and incomplete partial summary judgment order drafted by counsel for LanTen?

Also, did the trial court err when it struck, as untimely, and without allowing Plaintiffs Edsel any time to respond to Tenant's Motion to Strike the Response of Plaintiffs Edsel to LanTen's Motions For Partial Summary Judgment with respect to a complaint that no longer existed; in other words, what Civil Procedure time period applied for a response from Plaintiffs Edsel?

Did the 11-day response period of CR 56(c) for a summary judgment motion apply in this case given that the motions for summary judgment sought to dismiss causes of action in a complaint that had been amended and no longer existed?<sup>17</sup>

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<sup>17</sup> CR 56(c) reads in relevant part: "The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing."

Or, did the 2-day response period for a non-summary judgment CR 6(d) motion apply pursuant to KCLCR, Kitsap County Superior Court Local Civil Rule 7(b)(1)(A)?<sup>18</sup>

**C. ERROR (# 6-12) IN GRANTING SUMMARY JUDGMENT IN 2019.** The trial court also erred:

- on 1 March 2019 [**Error # 6**] when it denied Plaintiffs Edsel timely Motion for Extension of Time for expert medical testimony needed on the smoke/burning claims to respond to LanTen’s motions for summary judgment and on when it excluded said medical testimony in its 21 March 2019 summary judgment order [**Error #7**];
- on 21 March 2019 when it dismissed, with a CR 56 summary judgment, all remaining nuisance and trespass claims [**Error # 8**];
- on 21 March 2019 when it acted as a jury resolving issues or questions of fact, specially with respect to credibility of testimony [**Error # 9**];
- on 28 March 2019 when it struck/denied without a hearing or notice the Plaintiffs Edsel Motions to Strike the LanTen CR 56 summary judgment motions and for Jury Trial pursuant to the Judicial Admission of the Landlord’s attorney at the summary judgment hearing of 15 March 2019 [**Error # 10**]; and,

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<sup>18</sup> KCLCR 7(b)(1)(A): “Any responsive materials shall be served and filed with the Clerk of Court by 12:00 noon two days prior to the time set for the hearing or trial.”

- on 29 March 2019 when it denied Plaintiffs Edsel Motion to Amend or Alter [**Error #11**] and Motion for Reconsideration [**Error # 12**] with respect to the 21 March 2019 summary judgment order.

**ERROR # 5, 6, 7, 8, 9, 10, 11 AND 12 ISSUES:** On de novo review, are Plaintiffs Edsel entitled to an order from this court reversing the trial court's summary judgment order and remanding the drug house pot grow nuisance, noise vibration nuisance and trespass, burning/smoke nuisance and trespass, and the invasive English Ivy nuisance and trespass claims back to the trial court?

Did the trial court err in denying and then excluding medical expert testimony by Plaintiffs Edsel's family doctor on the the impact that LanTen's burning and smoke have on the health of Plaintiffs Edsel, specially Judy Lamb, who suffers from medically diagnosed breathing issues that require smoke-free air and supplementary oxygen?

Did the trial court err in granting summary judgment, and denying Plaintiffs Edsel Motion to Strike the LanTen's summary judgment motions, after counsel for Landlords, at the summary judgment hearing, made a prejudicial judicial admission against his clients interest, a judicial admission to which counsel for Tenants failed to raise any objection or exception?

Did the trial court err in the summary judgment proceeding by assuming the role of a jury in resolving issues or questions of fact, including the credibility of testimony, specially in a case where the LandTen Defendants had sole and exclusive possession of information concerning the activities that gave rise to the lawsuit?

Did the trial court err in excluding and not considering the eyewitness and expert testimony of David Herzog in his verified documentation concerning the marijuana grow, the invasive vegetation, the burning, and other activities of LanTen because his verified declaration, made under penalty of perjury, did not contain surplus pro-forma language under RCW 9A.72.085?

Did the trial court err in excluding and not considering the eyewitness and expert testimony of David Herzog in his verified documentation concerning the invasive vegetation, the burning, and other activities of LanTen because his verified declaration allegedly did not set forth a “place” or location of where he made his verified declaration, under penalty of perjury, despite the fact that the David Herzog sworn declaration clearly sets forth the street address of a duly-licensed and practicing attorney in Texas?

**D. OTHER ERROR (# 13).** The trial court erred on 1 May 2019 when it granted LanTen’s Motion For Attorney Fees [**Error # 13**].

**ERROR # 13 ISSUES.** Did the trial court err when it granted attorney fees to LanTen despite Error # 1 – 12?

**ERROR # 13 ISSUES (cont.)** Did the trial court err when it granted attorney fees to LanTen despite the fact that Plaintiffs Edsel prevailed in equity by forcing LanTen to abate, or discontinue, the pot grow, drug house, noise, and burning/smoke nuisances as of mid-2018, even to the point of LanTen finally removing and destroying in early 2019 the noxious English Ivy weed growing on LanTen's property, including the exterior walls of the LanTen duplex?

### **III. STATEMENT OF THE CASE**

Soon after Plaintiffs Edsel file their action for nuisance and trespass in Kitsap County Superior Court, CP 1-26, The Honorable William C. Houser is assigned as judge. CP 30. From then on, he is the only judge who considers the record and all matters filed, submitted, and argued in the litigation. CP 30-1537.

In several discovery disputes with Tenants, and in response to the LanTen partial summary judgment motions, Plaintiffs Edsel identify all of their eyewitness and expert witnesses. CP 31-46, 105-129, 285-292, 523-586; see also, Plaintiffs Edsel Disclosure of Witnesses. CP 588.

Plaintiffs Edsel submit evidence and testimony, CP 47-104, with respect to LanTen's drug house nuisance and breach of real estate contracts, including evidence and testimony with respect to drug house guests and invitees living in cars on the street, defecating in public, and leaving used needles, condoms, and garbage on a common area that is subject to CCRs and CAMAs, which have been duly-recorded on the chain of title for, and on the deeds to, the LanTen duplex and the residential property of Plaintiffs Edsel.

However, as previously described, Plaintiffs Edsel do not have photographs of Drug House activities, and other nuisances, from 2016-2017, that they handed over to Farmers Insurance, including the pot grow operation in buckets at LanTen's backyard with images of Tenants and Landlords, car oil dumped in common areas by Tenants, garbage burning/smoke and motocross activities by LanTen, and images of unknown individuals entering and leaving LanTen's duplex property, while also living in vehicles and dumping raw sewage as well as used needles, condoms, and empty druggie bags into the common area subject to CCRs and CAMAs.

In the verified and undisputed response of Plaintiffs Edsel to Tenants' motion for protective order, Plaintiffs Edsel inform the court that requested entry to inspect and test the interior of the duplex units, and Tenants' cars, for illegal drugs is moot given the alteration and

clean-up of the units, and other spoliation of evidence, by the Tenants before the hearing on the Tenants' discovery motion. CP 32-34.

On 27 March 2018, LanTen Defendants file motions for partial summary judgment as to the First Amended Complaint of Plaintiffs Edsel. CP 130-49.

On 2 May 2018, Plaintiffs Edsel file a Second Motion to Amend Complaint, CP 150-78, and a Motion to Substitute (Plaintiff Edsel for his wife Judy Lamb), CP 179-87. The trial court grants both motions on 11 May 2018. CP 188-89.

On 16 May 2018, Plaintiffs Edsel file their court-approved Second Amended Complaint. CP 190-215. The LanTen Defendants, however, do not amend their 27 March 2018 motions for partial summary judgment, CP 130-149, to dismiss any claims in the Second Amended Complaint of Plaintiffs Edsel.

On 16 May 2018, Plaintiffs Edsel file their Motion to Compel Production from Landlords, CP 216-230, along with a supporting declaration, CP 231-38. After backed-up storm water in the storm water drain pipes destroyed the originals in the basement, Plaintiffs Edsel seek production of copies of those documents, including photographs and communications with LanTen, that Plaintiffs Edsel previously provided to Farmers Insurance (adjuster Mr. McFee),

pursuant to insurance claims that Landlords had made, *before* this litigation began, with Farmers Insurance against Ernest Edsel.<sup>19</sup>

Pursuant to CR 6 and KCLCR 7(b)(1)(A)[“Any responsive materials shall be served and filed with the Clerk of Court by 12:00 noon two days prior to the time set for the hearing or trial.”], Plaintiffs Edsel file their response to LanTen motions for partial summary judgment, and not under the 11—day period of CR 56(c) because the LanTen motions do not seek partial summary judgment on any claims set forth in the only complaint then in existence, the Second Amended Complaint.

The trial court grants a partial summary judgment, CP 306-08, which Plaintiffs Edsel timely move to clarify and reconsider, CP 326-457. The trial court denies such motions. CP 503-04.

Plaintiffs Edsel identify and designate all witnesses, including expert witnesses who witnessed activities, of Landlords and Tenants, that give rise to the Second Amended Complaint. CP 523-586, 588. Landlords do the same. CP 589. Tenants have no expert witnesses.

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<sup>19</sup> As set forth in the original and amended complaints of Plaintiffs Edsel (*see*, ¶ 10 at p. 3, CP 192), the Landlords retaliated against Plaintiff Edsel with unsuccessful proceedings brought before the WA State Bar, Bemerton Municipal Court, and Kitsap County District Court, Small Claims, for his complaining about their nuisance activities. LanTen retaliation included the small claims lawsuit over his spraying biodegradable substances on his residence’s backyard to control the invasive English Ivy noxious weed growing from LanTen’s property into the backyard and retaining wall of his residence.

The parties then litigate numerous discovery issues, CP 458-94, 505-13, 516-18, 523-587, which culminate with Plaintiffs Edsel finding out that Tenants' counsel failed to disclose that he had accepted representation of a third-party who is suing Tim Smythe, one of the expert witnesses of Plaintiffs Edsel, while Tenants' counsel is also using Percival Gragasin, another expert witness of Plaintiffs Edsel, to testify against Mr. Smythe and his company. CP 722-69, 773-77.

Tenants counsel's use of the expert witnesses of Plaintiffs Edsel triggers a CR 26(b)(6) notice from Plaintiffs Edsel. The CR 26(b)(6) notice is litigated through Tenants' "clawback" motion and LanTen's attempts to subpoena depositions of expert witnesses of Plaintiffs Edsel. CP 698-718, 719-21, 773-777; and see, Plaintiffs Edsel motions to quash and modify discovery of expert witnesses. CP 722-69.

The trial court grants the "clawback" and protective order motions of Tenants, while also granting the Plaintiffs Edsel motions to quash and modify (but denying work product protection to expert witness reports). CP 1285-88.

Landlords move to extend discovery past the trial court's ordered case schedule (CP 522), which Plaintiffs Edsel object to with respect to the expert witnesses. CP 590-697. The court grants the motion for Landlord's extended discovery, but later denies, CP 881-82, Plaintiffs Edsel timely motion to extend time to respond to LanTen

motions for summary judgment in light of delays not under the control of Plaintiffs Edsel in obtaining medical testimony from Dr. Helen Shaha, the family doctor of Plaintiffs Edsel at Kaiser Permanente, a very large healthcare provider with extensive and lengthy corporate procedures for such testimony. CP 850-876, 878-80.

Landlords and Tenants move for summary judgment, CP 778-849. Plaintiffs Edsel respond. CP 883-1265. On 15 March 2019, the trial court holds the summary judgment hearing that triggers the judicial admission. CP 1266-76, 1289-95. The trial court files its summary judgment order on 21 March 2019. CP 1279-84.

Plaintiffs Edsel timely file Motions to Amend/Alter and to Reconsider the summary judgment order. CP 1296-1422. The trial court denies them, CP 1423-25.

The trial court hears LanTen motions on attorney fees, CP 1426-1503, and the response of Plaintiffs Edsel, CP 1504-1520, and grants an attorney fee order, CP 1532, after timely Notice of Appeal is filed by Plaintiffs Edsel, CP 1521-31. Designation of Clerk's Papers is timely filed, CP 1541-46, and an amended Designation is filed on 13 June 2019, CP 1547-54, when the original Designation of Clerk's Papers cannot be fulfilled by the clerk.

#### **IV. ARGUMENT**

**A. FIRST ERROR: the trial court erred when it denied the Plaintiffs Edsel Motion to Compel Production.**

The standard of review for the trial court's order denying the Plaintiffs Edsel Motion to Compel is de novo.<sup>20</sup>

Moreover, as in this case, disputes over the application of attorney-client privilege and the work product doctrine are always reviewed de novo when a trial court's order is based solely on a paper record. *Morgan v. City of Fed. Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009) quoting *Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998); *In re Firestorm*, 129 Wn.2d 130, 135, 916 P.2d 411 (1996).<sup>21</sup>

Deference is only possible when the trial court actually makes factual findings. Otherwise, "the appellate court [can] not exercise any degree of deference to a trial court's finding, as no such finding even

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<sup>20</sup> Whether a trial court applied the correct legal standard is a question of law that is reviewed de novo. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 13, 330 P.3d 168 (2014)(Madsen, J. concurring). If the correct legal standard was applied, appellate courts then generally review a trial court's denial of a motion to compel for an abuse of discretion. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn.App. 168, 183, 313 P.3d 408 (2013).

<sup>21</sup> See, *United States v. Graf*, 610 F.3d 1148, 1157 (9th Cir. 2010) ("A district court's conclusion regarding whether statements are protected by an individual attorney-client privilege is a mixed question of law and fact which this court reviews independently and without deference to the district court. We also review de novo the district court's rulings on the scope of the attorney-client privilege. The district court's factual findings are reviewed for clear error."); *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997).

exist[s].” *Bryant v. Joseph Tree*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992).

Even if the trial court’s ruling in this case was entitled to some form of deference, the court’s misapplication of the law is an abuse of discretion under *Dix v. ICT Grp., Inc.*, 160 Wash. 2d 826, 833, 161 P.3d 1016 (2007) because the denial results in a harmful, prejudicial error that prevents Plaintiffs Edsel from: (a) adequately opposing a motion for summary judgment; (b) fully proving their case before a jury; (c) successfully prosecuting an appeal. Such error is contrary to traditional notions of fair play and substantial justice. And, it ultimately denies Plaintiffs Edsel their WA State constitutional guarantee of a jury trial, which they demanded and paid for. CP 1, 190, 519-20.

The trial court’s only rationale in denying production of the requested documents was that Landlords Gill and Bowman enjoy the umbrella of “protected work product” because they are insured by contract with Farmers Insurance. CP 304-05. Thus, the only legal conclusions the trial court explicitly made in support of its ruling are plainly and clearly wrong and are nothing less than prejudicial, harmful error to Plaintiffs Edsel who were unable to discover their own records, which they had disclosed to Farmers Insurance before the start of their litigation.

The trial court's 25 May 2018 order denying the Plaintiffs Edsel discovery motion is contrary to the legal standard set forth in *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 400-402, 706 P.2d 212 (1985), wherein the Supreme Court's holding made perfectly clear that, in this action, Landlords Gill and Bowman can only protect matters and documents that are exclusively between or concerning: (a) Farmers Insurance and its contractually insured clients, Landlords Gill and Bowman; or, (b) said Landlords and their attorneys.

The trial court also erred because failed to conduct the *Harris v. Drake*, 152 Wn.2d 480, 487, 99 P.3d 872 (2004), test to determine whether work product privilege should be applied to Tenants D'Appollonio and Lamoureux: (1) when did the work product privilege attach? (2) when did Tenants D'Appollonio and Lamoureux claim such privilege?

The trial court's erroneous evidentiary ruling was prejudicial because it discontinued the full ability of Plaintiffs Edsel to prove their case in summary judgment (or before a jury). Therefore, the trial court's discovery order must thus be reversed, as required by *Driggs v. Howlett*, 193 Wn.App. 875, 903, 371, P.3d 61 (2016) citing *Brown v. Spokane County Fire Prot. Dist No. 1*, 100 Wn2d 188, 196, 668 P.2d 571 (1983), and cited in *Figuroa v. Mariscal*, WA Supreme Court No. 95827-1, page 10, \_\_\_\_ Wn.2d \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_ (2019) .

“Indeed, *Heidebrink* requires examination of the relationship of the parties in each case.” *Figuroa v. Mariscal*, WA Supreme Court No. 95827-1, page 12, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2019) citing *Harris v. Drake*, 152 Wn.2d 480, 489, 99 P.3d 872 (2004).

Under *Heidibrink*, at 400-402, Plaintiffs Edsel are entitled to discover, from Farmers Insurance and its insured Landlords Gill and Bowman, the following documents: (a) the copies of documents and photograph images that Plaintiffs Edsel provided to Farmers Insurance; and, (b) documents and images concerning Tenants Lamoureux and D’Appollonio (including those created or published by them or, sent to or received from said Tenants).

**B. ERROR # 2 - # 5 IN GRANTING PARTIAL SUMMARY JUDGMENT IN 2018.**

A summary judgment order is reviewed de novo.<sup>22</sup>

All facts asserted by a nonmoving party in summary judgment, and supported by affidavits or other proper evidentiary material, must be taken as true; it is not the function of the trial court to resolve factual issues. *Bond v. State*, 62 Wn.2d 487, 491-92, 383 P.2d 288 (1963).

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<sup>22</sup> In de novo review, the appellate court performs the same inquiry as the trial court and considering facts and reasonable inferences in the light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Appellate courts also review de novo all trial court rulings made in conjunction with a summary judgment motion, including rulings excluding portions of declarations. *Cornish College of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn.App. 203, 215, 242 P.3d 1 (2010).

The trial court erred when it granted partial summary judgment, CP 302-03, that it then would not clarify or reconsider. See, pertinent facts and authority set forth in: (a) Plaintiffs Edsel response to the LanTen motions for partial summary judgment (CP 259-268); (b) Edsel declarations (CP 269-84), expert witness McDonald declaration (CP 285-92); (c) motions to clarify and to reconsider (CP 326-427), and, (d) declarations in support of motions to clarify, reconsider (CP 428-57).

First, the trial court erred in granting partial summary judgment when it would not allow Plaintiffs Edsel to obtain discovery and production from Landlords of their own documents containing evidence to show drug house nuisances and motocross noise trespass. [See, Error # 1 and argument in support thereof].

Second, the trial court erred in granting partial summary judgment despite the verified and undisputed testimony of Plaintiffs Edsel with respect to the Tenants altering, destroying, and removing drug evidence from their duplex and vehicles before the hearing on the Tenants' discovery motion. CP 32-34.

Third, in light of the above-described facts and circumstances the court erred when it disregarded well-established law in WA State that summary judgment should *not* issue “when material facts are particularly within the knowledge of the moving party.” *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963); *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 661-62, 240 P.3d 162 (2010); *Riley v. Andres*, 107 Wn.App. 391, 395, 27 P.3d 618 (2001).

When it comes to a drug house and its landlords, tenants, guests, and invitees, it is unlikely, if not in the realm of impossible, that any plaintiff would be able to collect anything more than what Plaintiffs Edsel managed to submit to the court.

Thus, the drug house nuisance claims (for the common area) should have gone to a jury, specially in light of well-established WA State law holding that in cases where the summary judgment proponent has material facts within their knowledge, the matter should proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying before a jury. *Brown v. Brown*, 157 Wn.App. 803, 820, 239 P.3d 602 (2010); *Arnold v. Saberhagen Holdings*, 157 Wn.App. at 662; *Mich. Nat'l Bank v. Olson*, 44 Wn.App. 898, 905, 723 P.2d 438 (1986); *Felsman v. Kessler*, 2 Wn.App. 493, 496-97, 468 P.2d 691 (1970).

Fourth, a legal business activity, such as the Landlords' leasing of a duplex to Tenants, becomes a per se nuisance when the business violates Kitsap County Code, Title 17 - Zoning, that regulates nuisance activities, to-wit: "land uses that produce noise, smoke, dirt, dust, odor, vibration, heat, glare, toxic gas, or radiation which is materially deleterious to *surrounding people, properties, or uses*" such that "[a]ny use ... in violation of this title is unlawful, and a public nuisance" and "any violation of this title ... shall constitute a nuisance, per se." *Kitsap County v. Kitsap Rifle & Revolver Club*, 184 Wn.App. 252, 276-77, 337 P.3d 328 (2014), *review denied*, 183 Wn.2d 1008 (2005)(emphasis added), respectively citing KCC 17.455.110 (now KCC 17.105.110), KCC 17.530.030 (now KCC 17.610.030), and KCC 17.110.515.<sup>23</sup>

Fifth, Plaintiffs Edsel showed that the noise vibration from the LanTen's motocross activities at the Landlords' leased property business posed "an interference with the right to exclusive possession of property." *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677,

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<sup>23</sup> Although KCC Title 17 only applies to unincorporated land in Kitsap County per KCC 17.100.020, Bremerton Municipal Code, BMC Title 20, Land Use, incorporates the entire Kitsap County Code zoning code as its own zoning law for properties and activities within the City of Bremerton, which is the *situs* of the activities by Landlords and Tenants giving rise to Plaintiffs Edsel causes of action. See, BMC 20.40.160(a) ["PROHIBITED USES. (a) No use that is illegal under local, state, or federal law shall be allowed in any zone within the City."].

690, 709 P.2d 782 (1985) quoting *Borland v. Sanders Lead Co.*, 369 So.2d 523, 529 (Ala. 1979).<sup>24</sup>

Last but not least, the WA Supreme Court case defining governmental adverse possession trespass by SeaTac International Airport in *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wash.2d 6, 548 P.2d 1085, 1089 (1976) does not apply to Plaintiffs Edsel or their noise causes of action, least of all when Plaintiffs Edsel noise (and nuisance) trespass claims arise from an unlicensed, no-permit private motocross operated at the LanTen property in violation of the previously described zoning and nuisance laws of the City of Bremerton and Kitsap County, which designate such unlawful activities as a per se nuisance.<sup>25</sup>

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24 Plaintiffs Edsel in their response, and declarations, showed the *Bradley* requisite elements, as follows: (1) an invasion of property affecting an interest in exclusive possession, (2) an intentional act (by Tenants in driving the motorcycles and Landlords in leasing property to Tenants for such activities), (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest, and (4) actual and substantial damages. *Bradley*, 104 Wn.2d at 692-93. (emphasis added). Plaintiffs Edsel must only show that the invasion of noise vibration "affected" their possessory interest, not that it expelled them from the residence or forced them to live elsewhere.

25 *Highline* does not apply because the Plaintiffs Edsel noise causes of action are not based on a claim of trespass and nuisance arising from the adverse possession of their residence by a governmental entity operating a major international airport.

The court in *Highline* only held that noise trespass and nuisance are not actionable in WA State if it involves noise from federally-licensed airplanes landing at a federal-, state-, and county-licensed airport that the *Highline* plaintiffs were well aware of before they took a possessory interest in property that was in, under, or near airplane

**C. ERROR (#6 - # 12) IN GRANTING SUMMARY JUDGMENT IN 2019.**

The trial court erred when it denied Plaintiffs Edsel motion for extension of time to obtain Dr. Shah's testimony (CP 850-880), granted summary judgment, CP 1279-84, and when it denied, CP 1423-25, timely Plaintiffs Edsel motions for jury trial and to strike (CP 1266-76, 1289-95), to amend/alter (CP 1296-1324, 1394-1422), and to reconsider (CP 1325-91). See, pertinent facts and authority set forth in: Plaintiffs Edsel motion for extension of time (CP 850-880); and, Plaintiffs Edsel Responses (CP 883-1061; 1062-1239) and Indexes (CP 1240-1265) to Landlords and Tenants summary judgment motions; and see, Plaintiffs Edsel motion for extension of time (CP 850-880), Plaintiffs Edsel motions for jury trial and to strike (CP 1266-76, 1289-95), to amend/alter (CP 1296-1324, 1394-1422), and to reconsider (CP 1325-91).

**1. The trial court erred when it failed to apply the *Zamora*, *Key Pharmaceuticals*, and *Celotex* legal standard.** It is not enough for a defendant to win a CR 56 summary judgment motion by merely attaching affidavits or sworn declarations to the motion; the moving party has the burden of proof to conclusively show that there are absolutely no genuine issues of material fact whatsoever. *Zamora v.*  

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*"landing/take off" flight paths at SeaTac International Airport.*

*Mobil Oil Corp.*, 104 Wn.2d 199, 208-209, 704 P.2d 584 (1980)(the defendant's summary judgment affidavits did not conclusively establish the absence of proximate cause; the defendant's affidavits only proved that their natural gas was odorized pursuant to industry standards and government regulations, not that the gas was adequately odorized to warn of a leak that led to an explosion); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); *Perrin v. Stensland*, 158 Wn.App. 185, 192, 240 P.3d 1189 (2010)[there must be absolutely no factual disputes for a summary judgment to be granted, quoting *Craig v. Lundy*, 95 Wn.App. 715, 717, 976 P.2d 1248 (1999), *review denied*, 139 Wn.2d 1016, 994 P.2d 844 (2000): "**where there are no factual disputes, the case is ripe for summary judgment**"](emphasis added).<sup>26</sup>

In the instant action, Landlords and Tenants failed their burden of proof. To prevail, they had to show that Landlords **never** permitted or participated in the following activities **and** that Tenants **never**

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<sup>26</sup> See, *Jolly v. Fossum*, 589 Wn.2d 20, 24, 365 P.2d 780 (1961) citing *Preston v. Duncan*, 55 Wn.2d 678, 682-683, 349 P.2d 605 (1960) (trial court in *Jolly* reversed after granting summary judgment against a plaintiff who filed no affidavits or other documentation in response to a summary judgment motion, which was erroneously granted because the defendants failed to set forth uncontroverted evidence under their control with respect to key issues of the defendants' intent and knowledge).

engaged in or permitted said activities: (a) growing marijuana on the property; (b) burning garbage and other combustibles on the property or, that if such burning took place, then the wind always and only blew smoke and soot away from the residence of Plaintiffs Edsel; (c) operating a motocross or, if such activity took place, then it was an all-silent, no-vibration motocross; (d) allowing or encouraging invasive English Ivy weed to grow at, in, or near the LanTen property, not even in the yard or walls of the duplex, or the drainage pipes that Mr. Butler sent pictures to Plaintiffs Edsel demanding they be removed out of Landlords' backyard for extending several feet into Landlord's property.

And, to prevail in summary judgment, Landlords and Tenants needed to but failed to show that: (a) invasive English Ivy never existed or grew at the yard, retaining wall, and/or storm water drainpipes located in the residence of Plaintiffs Edsel; (b) raw sewage, guests or invitees living in vehicles, used condoms and needles, or standing polluted water were never located, photographed, or seen on, at, or near Landlords' property or the common areas subject to CCRs and CAMAs that are duly-record on deeds for Landlords' property and the residence of Plaintiffs Edsel.

**2. The trial court erred when it failed to apply the *Bond* legal standard.** The trial court clearly erred under the *Bond*

requirement when it failed to treat *all facts asserted by a nonmoving party in summary judgment, and supported by affidavits or other proper evidentiary material, as true; without the trial court resolving factual issues*. *Bond*, 62 Wn.2d, at 491-92, 383 P.2d 288 (1963) (emphasis added).

In this case, the trial court utterly and completely failed to treat all facts asserted by the nonmoving Plaintiffs Edsel in their summary judgment responses, and their declarations or other proper evidentiary material, as true. Instead the trial court treated all such facts as false with the trial court also acting as a jury to resolve all questions of fact and other factual issues for Landlords and Tenants, such as whether Ernest Edsel saw and photographed marijuana growing in buckets or if he and his three witnesses (Estrada; Osorio, Herzog) were confused about other types of plants growing at LanTen's property, whether Plaintiffs Edsel observed and photographed used condoms, used needles, and other activities of guests and invitees of the Tenants or if they were guests and invitees of other neighbors, whether the Landlords and/or Tenants were able to burn garbage and other combustibles without producing smoke or soot (or whether the wind always blew smoke and soot away from the residence of Plaintiffs) or whether four dozen marijuana plants had ever been actually observed on LanTen's property by Ernest Edsel and witnesses Estrada, Osorio,

and Herzog. See, Exhibit “REC-4” (38-page transcript of the summary judgment hearing) to Plaintiffs Edsel CR 59(a) Motion for Reconsideration, CP 1325-91, where counsel for Landlords and Defendants spent their time:

(a) planting denigrating comments with Judge Houser that smeared witnesses Estrada, Osorio, and Herzog as nothing more than illiterate Indians from Guatemala, or ignorant, uneducated illegal aliens who don’t speak English or Spanish (p. 5-6 and 21-22 of the transcript, CP 1359-60 and 1375-76);

(b) posing artful and clever but wholly improper questions and arguments as to whether the facts asserted by Plaintiffs Edsel and their witnesses are true—all in complete apposition to *Bond*, 62 Wn.2d, at 491-92, 383 P.2d 288 (1963), without Judge Houser ever instructing or warning counsel for Landlords and Tenants at the summary judgment hearing that he had to take all facts asserted by Plaintiffs Edsel and their witnesses as true. See, CP 1355-1388.

**3A. The trial court erred excluding proffered testimony of Dr. Shaha and Mr. Herzog.** Appellate courts review de novo all trial court rulings made in conjunction with a summary judgment motion, including rulings excluding portions of declarations. *Cornish College*, 158 Wn.App., at 215, 242 P.3d 1 (2010). In this case, de novo review extends to the trial court’s decision to exclude the proffered

declarations of Dr. Helen Shaha, the medical expert, and Mr. David Herzog, the expert witness (and eyewitness) testifying and reporting on the English Ivy and marijuana grow operation.

**3B. Dr. Helen Shaha, family doctor and examining physician of Plaintiffs Edsel.** The trial court erred when it denied, on 1 March 2019 [**Error # 6**], the Plaintiffs Edsel timely Motion for Extension of Time for expert medical testimony needed on the smoke/burning claims to respond to LanTen's motions for summary judgment and on when it excluded said medical testimony in its 21 March 2019 summary judgment order [**Error #7**].

First, the court had already granted, on 25 January 2019, a very generous extension of time to Landlords and Tenants for their last minute depositions of expert witnesses of Plaintiffs Edsel. See, CP 590-697. Second, no prejudice or harm was cited by the court, or shown by LanTen, as to what prejudice would accrue to anyone if Plaintiffs Edsel extension of time was granted. Third, summary judgment only requires the non-moving party to identify a witness and what the witness will testify about to the court or jury. See, *Keck v. Collins*, 184 Wn.2d 358, 368-69, 374, 357 P.3d 1080 (2015), where the trial court was reversed for abuse of discretion when it refused to accept and consider a second and third "untimely" medical affidavit under the *Burnet* analysis required by *Keck*, at 362; *Burnet v. Spokane*

*Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997); *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013).<sup>27</sup>

Thus, the proffered testimony of Dr. Shaha (Exhibit “R-103” to the summary judgment responses of Plaintiffs Edsel, CP 883-1239, were legally sufficient, even more so when Plaintiffs Edsel finally obtained and filed Dr. Shaha’s declaration, Exhibit “A” to Plaintiffs’ Verified Response to Defendants’ Attorney Fee Motions, CP 1504-1520, with respect to the devastating impact that the burning/smoke had on Plaintiffs Edsel, specially Judy Lamb who suffers from respiratory distress and needs supplemental oxygen (tanks).

**3C. The trial court erred when it excluded the testimony and verified expert witness report of David Herzog.** The trial court expressly refused to consider the sworn declaration of expert witness, and eyewitness, David Herzog despite well-established law holding that, when considering a CR 56 summary judgment, the court must

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<sup>27</sup> The nonmoving party does **not** have to produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 328, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(emphasis added). Justice White, in his concurring opinion, held that a motion for summary judgment is defeated when the nonmoving party names a witness with knowledge as to a material fact and the moving party cannot show that the possible testimony raises no genuine issue of material fact. *Celotex*, 477 U.S., at 328. *See, Discover Bank v. Lemley*, 180 Wn.App. 121, 135-36, 320 P.3d 205 (2014)(when deciding a summary judgment motion, a trial court must consider a reference to an affidavit in another motion).

treat the nonmoving party's affidavits and evidence as true, even an unauthenticated letter. *Reed v. Davis*, 65 Wn.2d 700, 708, 399 P.2d 338 (1965).

The David Herzog documentation is more than legally sufficient for summary judgment purposes. First of all, the very first page of the written documentation and verified declaration of David Herzog, clearly sets forth: (a) his address and location (at Texas attorney Marisol Lopez's offices in Garland, Texas (Dallas County)); and, (b) the fact that he is testifying and submitting facts in this litigation, which he expressly referred to by case number of Kitsap County Superior Court in WA State.

Second, given that David Herzog expressly declared that he was making his interstate statements under "penalty of perjury," he expressly subjected himself to federal perjury laws, 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury), Texas perjury laws, Tex. Penal Code § 37.02-.03, and Washington State perjury laws, RCW 9A.72.020-.030.

Third, the David Herzog documentation can be treated as an expert witness report because it satisfies all requirements for an expert report. See, Thomas V. Harris, *A Practitioner's Guide To The*

*Management And Use Of Expert Witnesses In Washington Civil Litigation*, 3 U. OF PUGET SOUND L. REV 159, 172 (1979).<sup>28</sup>

Fourth, the David Herzog documentation of the nonmoving party does not have to be evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S., at 324, 328, 106 S.Ct. 2548, (1986); and see, Justice White's concurring opinion in *Celotex*, at 328 (motion for summary judgment is defeated when the nonmoving party names a witness with knowledge as to a material fact and the moving party cannot show that the possible testimony raises no genuine issue of material fact).

Fifth, under CR 56, the Herzog verified declaration fully satisfies the basic requirements of an admissible affidavit in that: (a) it is made on personal knowledge; (b) is supported by admissible facts; (c) it is made by an individual who is competent to testify as to the

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<sup>28</sup> In addition to Herzog's qualifications, experience, observations, research, and eyewitness statements, the verified David Herzog documentation contains all four sources of information that an expert witness is required to disclose when issuing an expert's report or when providing expert testimony or opinion: "(1) the nature of the input, both oral and written, provided to the expert both by opposing counsel and by other experts; (2) a chronological, step-by-step account of all the work the expert has performed on the particular case; (3) a discussion of the materials he has reviewed and how those materials have influenced his opinion; and (4) a listing of any further work, review, experiments or tests in which he might engage prior to the time of trial." See, Thomas V. Harris, *A Practitioner's Guide To The Management And Use Of Expert Witnesses In Washington Civil Litigation*, 3 U. OF PUGET SOUND L. REV 159, 172 (1979).

matters in the declaration. *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 128, 140, 331 P.3d 40 (2014) citing *Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 412, 533 P.2d 107 (1976).

Sixth, under CR 56 and ER 901, this appeals court, Division Two, held that an out-of-state document (such the Herzog documentation) can be authenticated (as an expert witness report) as long as there is “some evidence which is sufficient to support a finding that the evidence in question is what the proponent claims it to be.” *State v. Payne*, 117 Wn.App. 99, 106, 69 P.3d 889 (2003) citing *U.S. v. Jimenez Lopez*, 873 F.2d 769, 772 (5th Cir. 1989)(a verified declaration in *Payne*, along with signatures, handwriting, and case numbers, was sufficient to authenticate a Canadian criminal record when the declarant in Canada verified, without a notary, that the criminal case’s transcript was “true and correct”).

Indeed, this appeals court, Division Two, has held that a recorded oral statement that is merely made under penalty of perjury before a police officer is sufficient under the Rules of Evidence without needing to include the RCW 9A.72.085 legalese and formality of a declarant verifying or certifying “under the laws of the state of

Washington.” *State v. McComas*, 186 Wn.App. 307, 309, 318-319 (2015).<sup>29</sup>

Seventh, and lastly, the verified Herzog documentation from Texas and Plaintiffs Edsel’s reliance upon it in WA State are subject to the U.S. CONST. ART. IV, § 1, which requires that the “Full faith and credit” be given in WA State to the public acts, records, and judicial proceedings of every other state, including Texas, whose laws are expressly cited in the verified Herzog declaration, its creation, and its validity.

**D. ERROR [#13]: the trial court erred in granting LanTen’s Motions For Attorney Fees.**

The trial court erred when it granted attorney fees to LanTen. First of all, while LanTen may have prevailed in law, the undisputed testimony of Plaintiffs Edsel shows that they actually prevailed in equity because there was no more marijuana pot grow at LanTen’s

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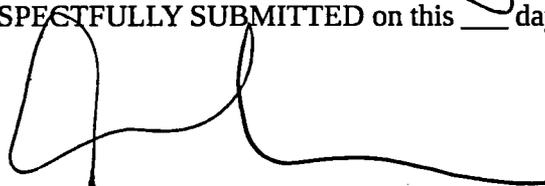
<sup>29</sup> In *State v. Nelson*, 74 Wn.App. 380, 385, 389-90, 874 P.2d 170 (1994), the court held that a crime witness’s signed declaration within a police affidavit, made without an oath or attestation of truthfulness before a notary, was sufficient as long as the document set forth that the signer had “read and understood” the written police “Smith” affidavit. The court held that the witness’s signed statement, which lacked the RCW 9A.72.085 wording of “true under penalty of perjury ... under the laws of the state of Washington” was sufficient as long as the witness voluntarily made the statement under minimal guarantees of truthfulness (a talk with a detective and a prosecutor about the statement). *Nelson*, 74 Wn.App., at 389-90. See also, *State v. Thach*, 126 Wn.App. 297, 305, 307-09, 106 P.3d 782 (2005)(a similar decision by this court of appeals, Division 2).

property in 2018 (and 2019) and all other nuisances ended or abated as of mid-2018. See, lines 1-9, at CP 1506, the verified Response of Plaintiffs Edsel to LanTen's motions for attorney fees. And see, the Edsel and Herzog Declarations in CP 883-1061 and CP 1062-1239, wherein said witnesses proffered undisputed testimony on how Landlords finally began to remove the invasive English Ivy from their property, including English Ivy growing up and into the northwest walls of Landlords' duplex building. The attorney fee order would also have to be reversed or vacated if the court reverses, vacates, or remands the summary judgment orders.

#### V. CONCLUSION

Plaintiffs Edsel are entitled to a decision or order reversing or vacating the trial court orders for summary judgment and attorney fees. The action must be remanded for jury trial.

RESPECTFULLY SUBMITTED on this 5 day of July 2019.

  
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FILED  
COURT OF APPEALS  
DIVISION II

2019 JUL -5 PM 2: 17

STATE OF WASHINGTON

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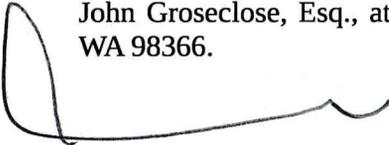
### PROOF OF SERVICE

Sworn Certificate of Service

On this 5 day of July, 2019, in Kitsap County, WA State, pursuant to RAP 17.4 and 18.5, the undersigned, under penalty of perjury and upon personal knowledge, declares that he served or caused to be served a true and correct copy of the foregoing paper(s) upon all Defendants by mailing said copy via 1st Class, U.S. Mail, postage prepaid [or next day confirmed USPS or Fedex courier delivery], as follows (without the contents of Appendix One and Three, which have previously been served upon counsel named below):

**Respondents Gill and Bowman** thru attorney Shawn Butler, Esq., at 1001 4th Ave, Ste # 4200, Seattle, WA 98154-1154;

**Respondents Lamoureux and D'Appollonio** thru attorney, John Groseclose, Esq., at 1155 Bethel Avenue, Port Orchard, WA 98366.



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No. 53461-4-II

COURT OF APPEALS, DIVISION TWO

OF THE STATE OF WASHINGTON

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ERNEST EDSSEL, ET AL.,	)	
APPELLANT	)	APPENDIX ONE
	)	
v.	)	TO
	)	
PATRICK GILL, ET AL.,	)	APPELLANTS' BRIEF
RESPONDENTS.	)	

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- II. Appellants' Motion to Amend Notice of Appeal, 7 May 2019  
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- III. Appendix to Appellants' Motion to Amend Notice of Appeal  
[28 pages]

APPENDIX ONE, APPELLANTS' OPENING BRIEF



Washington State Court of Appeals  
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

May 9, 2019

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**CASE #: 53461-4-II: Ernest M. Edsel and Judy Lamb v. Patrick Gill, et al.**  
**Case Manager: Jodie**

Counsel:

On the above date, this Court entered the following notation ruling:

**A RULING BY COMMISSIONER BEARSE:**

Appellant's Motion to Amend the Notice of Appeal is granted. Amended Appeal is due on May 22, 2019.

Very truly yours,

Derek M. Byrne  
Court Clerk

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No. 53461-4-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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ERNEST EDSEL, )  
APPELLANT )  
APPELLANT'S MOTION )  
v. )  
TO AMEND )  
PATRICK GILL, )  
BARBARA BOWMAN, )  
DEREK LAMOUREUX, )  
AMBERLEE D'APPOLLONIO, )  
AND JOHN DOES (1-10), )  
RESPONDENTS. )  
NOTICE OF APPEAL

1. IDENTITY OF MOVING PARTY: Ernest Edsel, Appellant,  
asks for the relief designated in Part 2. Appellant moves on his own  
behalf and as Plaintiff Judy Lamb (pursuant to the trial court's 11 May  
2018 substitution order).

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1           2. STATEMENT OF RELIEF SOUGHT: Appellant Edsel  
2 seeks, pursuant to RAP 5.3(h), an Amended Notice of Appeal to  
3 include additional parts of a trial court decision, an order that denied  
4 discovery and which order was entered on 25 May 2018. See, p. 1-2 of  
5 the attached Appendix, which contains a true and correct copy of said  
6 order that denied Appellant Edsel's Motion to Compel.

7           In further support of this motion, true and correct copies of the  
8 Edsel Motion to Compel, and Sworn Declaration in Support thereof,  
9 are enclosed in the attached Appendix.

10           3. FACTS RELEVANT TO MOTION: On 18 April 2019,  
11 Appellant Edsel filed a timely notice of appeal concerning the 21  
12 March 2019 summary judgment dismissal of Appellant's causes of  
13 action with respect to the following unlicensed and unlawful activities  
14 under WA State law: a marijuana grow operation; a drug house; a  
15 motocross; burning of garbage and other toxic substances; and,  
16 invasive vegetation.

17           Appellant Edsel timely brings this motion early and *before* he  
18 designates Clerk's Papers within the 30-day window of RAP 9.6 (on or  
19 before 18 May 2019).

20           Appellant Edsel seeks to include in his Notice of Appeal the  
21 trial court's 25 May 2018 order that denied Plaintiff-Appellant Edsel's  
22 16 May 2018 Motion to Compel Discovery of requested Farmers

1 Insurance documents, including Appellant Edsel's photograph images,  
2 concerning his claims with respect to the Respondents' marijuana grow  
3 operations, drug house nuisance, motocross noise nuisance,  
4 burning/smoke nuisance, and invasive vegetation nuisance and  
5 trespass. A copy of the trial court order denying discovery is found at  
6 p. 1-2 of the attached Appendix.

7 Plaintiff-Appellant's motion at the trial court sought insurance  
8 discovery from Farmers Insurance insured parties, Defendant-  
9 Respondents Gill and Bowman, with respect to documents and images,  
10 including photographs, that Plaintiff-Appellant Edsel had provided to  
11 Farmers Insurance, before commencing this litigation, in connection  
12 with his claims as to Respondents' marijuana grow, drug house, noise,  
13 burning, and invasive vegetation. The requested documents and images  
14 also concern such claims in relation to Defendant-Respondents  
15 Lamoureux and D'Appollonio, tenants of Defendant-Respondents Gill  
16 and Bowman. *See, e.g.,* ¶ 6, at p. 4 of the discovery Motion to Compel,  
17 at page 6 of the attached Appendix. *See also,* ¶ 10, at p. 4 of the  
18 supporting Sworn Declaration, at page 21 of the attached Appendix.

19 The trial court denied the discovery motion although Farmers  
20 Insurance does not have any contractual relationship with Appellant  
21 Edsel. Nor does Farmers Insurance have any contractual relationship  
22 with Respondents D'Appollonio and Lamoureux.

1           Moreover, Appellant Edsel and Respondents D'Appollonio and  
2 Lamoureux are not attorneys for Farmers Insurance or Respondents  
3 Gill and Bowman. Documents created or published by Edsel,  
4 Lamoureux, or D'Appollonio are not privileged attorney work product  
5 for Farmers Insurance or Respondents Gill and Bowman.

6           And, before the trial court heard Appellant Edsel's 16 May  
7 2018 Motion to Compel insurance discovery, Appellant Edsel had  
8 already informed the assigned judge, The Hon. William Houser, on 24  
9 April 2018, that evidence and other documents in support of Plaintiffs'  
10 causes of action had been damaged and destroyed in his basement files  
11 by water backing up from the Defendant-Respondents' invasive  
12 vegetation plugs in the drainpipe(s). *See*, page 26-27 of the attached  
13 Appendix, marked section of ¶ 15B, at p. 12-13 of Plaintiff Edsel's 24  
14 April 2018 Verified Response to Motion to Compel by Defendants  
15 Lamoureux and D'Appollonio ("Defendants' destruction or spoliation  
16 of Plaintiffs' evidence in the water-damaged basement that resulted  
17 from Defendants' invasive vegetation"). *And see*, the marked first,  
18 second, and seventh paragraphs on page 28 of the attached Appendix, a  
19 true and correct copy of Exhibit "A" to said Verified Response (a copy  
20 of a 23 March 2018 letter to opposing counsel).

21           4. GROUNDS FOR RELIEF AND ARGUMENT: RAP 5.3(h)  
22 allows Appellant Edsel to amend his notice of appeal "to include ...

1 additional parts of a trial court decision.”

2 And, RAP 2.2(a)(3) allows Appellant Edsel to appeal “**Any**  
3 written decision affecting a substantial right in a civil case that in effect  
4 determines the action and prevents a final judgment or discontinues the  
5 action.” (emphasis added).

6 Judge Houser’s 25 May 2018 order denying Plaintiff’s  
7 requested discovery is contrary to *Heidebrink v. Moriwaki*, 104 Wn.2d  
8 392, 400-402, 706 P.2d 212 (1985), wherein the Supreme Court’s  
9 holding made perfectly clear that, in this action, Respondents Gill and  
10 Bowman can only protect matters and documents that are exclusively  
11 between or concerning: (a) Farmers Insurance and its contractually  
12 insured clients, Defendant-Respondents Gill and Bowman; or, (b) said  
13 Respondents and their attorneys.

14 Under *Heidibrink*, at 400-402, Appellant Edsel is entitled to  
15 discover, from Farmers Insurance and its insured Respondents Gill and  
16 Bowman, the following documents: (a) the copies of documents and  
17 photograph images that Appellant Edsel provided to Farmers  
18 Insurance; and, (b) documents and images concerning Respondents  
19 Lamoureux and D’Appollonio (including those created or published by  
20 them or, sent to or received from said Respondents).

21 Review of the order denying discovery will therefore resolve  
22 the substantial rights of all of the parties in this action.

1           Review of the order denying discovery will also resolve the  
2 following important legal issues presented in this appeal under CR 26  
3 and *Heidebrink*, 104 Wn.2d 392, 400-402:

4           *FIRST*, do CR 26 and *Heidebrink* protect an insured defendant  
5 from the plaintiff's discovery of copies of documents and photograph  
6 images that the plaintiff turned over to the defendant's insurance  
7 company before the commencement of litigation?

8           *SECOND*, do CR 26 and *Heidebrink* protect an insured  
9 defendant from a plaintiff's discovery of copies of documents and  
10 images that the plaintiff turned over to the defendant's insurance  
11 company and which original documents and images were later  
12 permanently damaged and lost to the plaintiff as a result of water  
13 damage?

14           *THIRD*, to what extent, if any, do CR 26 and *Heidebrink*  
15 protect an insured defendant from a plaintiff's discovery of documents  
16 and images concerning co-defendants who are *not* attorneys of the  
17 insured co-defendant and *not* subject to or in any insurance contractual  
18 relationship with the insured defendant's insurance company?

19           In the present case, Appellant Edsel and Respondents  
20 Lamoureux and D'Appollonio are not insured parties in an insurance  
21 contract with Farmers Insurance. Nor are they attorneys of Farmers  
22 Insurance or Respondents Gill and Bowman. Nevertheless, the trial

1 court disregarded the controlling law of *Heidebrink*, 104 Wn.2d, at  
2 400-402, when Judge Houser denied Appellant Edsel's discovery as to  
3 copies of documents and images that Appellant Edsel had provided to  
4 Farmers Insurance and which original documents were then destroyed  
5 by water damage and thus no longer available for Plaintiff-Appellant  
6 Edsel to use in responding to and defeating summary judgment  
7 motions filed by all of the Defendant-Respondents.

8 Appellant Edsel had no other source for those documents,  
9 including photograph images, that are essential to prove his causes of  
10 action, specially those that arise from the marijuana grow operations,  
11 the drug house, the burning, and other nuisance activities of the  
12 Respondents. *See*, page 26-27 of the attached Appendix, marked  
13 section of ¶ 15B, at p. 12-13 of Plaintiff Edsel's 24 April 2018 Verified  
14 Response to Motion to Compel by Defendants Lamoureux and  
15 D'Appollonio ("Defendants' destruction or spoliation of Plaintiffs'  
16 evidence in the water-damaged basement that resulted from  
17 Defendants' invasive vegetation"). *And see*, marked ¶¶ 1, 2, and 7 on  
18 page 28 of the attached Appendix, a copy of Exhibit "A" to said  
19 Verified Response (a 23 March 2018 letter to opposing counsel).

20 The trial court's order denying Plaintiffs' discovery in effect  
21 determined and discontinued Plaintiffs' action by impairing or  
22 eliminating Appellant Edsel's ability to use his own and other

1 documents and photograph images from Farmers Insurance to fully  
2 respond to summary judgment motions dismissing his causes of action.

3 Appellant Edsel will thus argue on appeal that the trial court  
4 abused its discretion by disregarding *Heidebrink v. Moriwaki*, 104  
5 Wn.2d 392, 400-402, when Judge Houser treated Defendant-  
6 Respondents Lamoureux and D'Appollonio and Appellant Edsel as  
7 being insured parties under contract with Farmers Insurance when they  
8 are not and never have been insured by or under contract with Farmers  
9 Insurance. After all, Appellant Edsel and Respondents Lamoureux and  
10 D'Appollonio do not have a Farmers Insurance "**contractual**  
11 **agreement with the party interviewing them**" as required by  
12 *Heidebrink*, 104 Wn.2d, at 400 (emphasis added).

13 Furthermore, Plaintiff-Appellant Edsel and Defendant-  
14 Respondents Lamoureux and D'Appollonio are not attorneys for  
15 Farmers Insurance or for Defendant-Respondents Gill and Bowman.  
16 Therefore, there is no privileged work product from Appellant Edsel,  
17 or Respondents Lamoureux and D'Appollonio, to be protected from  
18 discovery as required by *Coburn v. Seda*, 101 Wash.2d 270, 274, 677  
19 P.2d 173 (1984) and *In re McGlothlen*, 99 Wash.2d 515, 522, 663 P.2d  
20 1330 (1983).

21 After water damage led to the loss or destruction of documents  
22 and images that concern and prove his causes of action, Appellant

1 Edsel was entitled, through discovery, to recover copies of all such  
2 documents and images that he had provided to Farmers Insurance  
3 pursuant to: (a) the “clearest case for ordering production ... when  
4 crucial information is in the exclusive control of the opposing party.”  
5 *Heidebrink*, at 401; and, (b) the “unique” nature of such material that  
6 “cannot be duplicated ... by later interviews or depositions.”  
7 *Heidebrink*, at 401-402.

8 Pursuant to *Heidebrink*, Appellant Edsel was and is entitled, at  
9 a minimum, to discovery from Respondents Gill and Bowman, and  
10 their insurer, Farmers Insurance, of all records and images, including  
11 photographs, that: (a) Appellant Edsel provided to Farmers Insurance  
12 before commencing this litigation; and, (b) were to or from, or  
13 authored or published by, Respondents Lamoureux or D’Appollonio.

14 Accordingly, for all of the forgoing reasons, Appellant Edsel is  
15 entitled to an amended notice of appeal that includes the trial court’s  
16 order of 25 May 2018 denying Plaintiff’s requested discovery.

17  
18  
19 RESPECTFULLY SUBMITTED on this 7 day of May, 2019.

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23 

24 ERNEST M. EDSSEL, ESQ.  
25 WA STATE BAR # 32274/ APPELLANT PRO SE  
26 307 E. 30th St., Bremerton, WA 98310  
27 Tel. 360-373-2910

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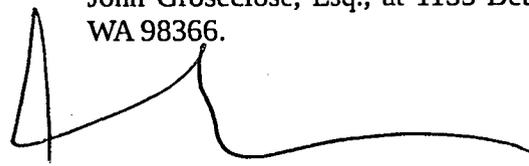
**PROOF OF SERVICE**

Sworn Certificate of Service

On this 6 day of May, 2019, in Kitsap County, WA State, pursuant to RAP 17.4, the undersigned, under penalty of perjury and upon personal knowledge, declares that he served or caused to be served a true and correct copy of the foregoing paper(s) upon all Defendants by mailing said copy via 1st Class, U.S. Mail, postage prepaid [or next day confirmed USPS or Fedex courier delivery], as follows:            ✓

**Respondents Gill and Bowman** thru attorney Shawn Butler, Esq., at 1001 4th Ave, Ste # 4200, Seattle, WA 98154-1154;

**Respondents Lamoureux and D'Appollonio** thru attorney, John Groseclose, Esq., at 1155 Bethel Avenue, Port Orchard, WA 98366.



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ERNEST M. EDSSEL, ESQ.  
WA STATE BAR # 32274  
Appellant Pro Se  
307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

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No. 53461-4-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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ERNEST EDSSEL, )  
                  APPELLANT )                   **APPENDIX**  
                  )                   **TO**  
v.                   )                   **APPELLANT’S MOTION**  
                  )                   **TO AMEND**  
PATRICK GILL, )                   **NOTICE OF APPEAL**  
BARBARA BOWMAN, )  
DEREK LAMOUREUX, )  
AMBERLEE D’APPOLLONIO, )  
AND JOHN DOES (1-10), )  
                  RESPONDENTS. )

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Copy of 24 April 2018 Edsel Verified Response to  
Lamoureux and D’Appollonio Motion to Compel ..... 26-27  
Copy of Exhibit “A” to said Verified Response ..... 28

RECEIVED AND FILED  
IN OPEN COURT

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MAY 25 2018

KITSAP COUNTY CLERK  
ALISON H. SONNTAG

The Honorable William C. Houser

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR COUNTY OF KITSAP

ERNEST M. EDSEL, an individual,

Plaintiff,

vs.

PATRICK GILL, an individual, BARBARA  
BOWMAN, an individual, DEREK  
LAMOUREUX, an individual, AMBERLEE  
D'APOLLONIO, an individual, and JOHN  
DOES (1-10),

Defendants.

NO. 18-2-00098-18

ORDER DENYING PLAINTIFF'S  
MOTION TO COMPEL PRODUCTION

~~[PROPOSED]~~

THIS MATTER having come before the Court upon Plaintiff's Motion to Compel Production, and the Court having reviewed the motion and supporting declaration of Ernest Edsel, as well as the following documents:

1. Defendants Lamoureux and D'Appollonio's Response to Plaintiff's Motion to Compel
2. Defendants Gill and Bowman's Response in Opposition to Plaintiff's Motion to Compel
3. Declaration of Shawn Butler in Support of Response to Motion to Compel Production

ORDER DENYING PLAINTIFF'S MOTION TO  
COMPEL PRODUCTION - 1

HELSELL  
FETTERMAN  
Helsell Fetterman 18-2-00098-18  
1001 Fourth Avenue ORDYMT 104  
Seattle, WA 98 Order Denying Motion Petition  
3182723  
206.292.1144 WWW



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and considered the documents filed and/or submitted herein, having considered argument of counsel, and being otherwise fully advised in the premises, the Court finds that

- 1. Plaintiff's motion is not well-grounded in fact or law.
- 2. \_\_\_\_\_
- 3. \_\_\_\_\_

IT IS NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

- 1. Plaintiff's Motion to Compel Production is DENIED.
- 2. The issue of Attorneys' fees and costs is reserved for further hearing by the Court.
- 3. \_\_\_\_\_
- 4. \_\_\_\_\_

IT IS SO ORDERED.

DATED this 25<sup>th</sup> day of May, 2018.



\_\_\_\_\_  
The Honorable William C. Houser  
Superior Court Judge

Presented by:

**HELSELL FETTERMAN LLP**



By: \_\_\_\_\_

Shawn Butler, WSBA No. 45731  
Attorney for Defendants Patrick Gill and Barbara Bowman  
1001 Fourth Avenue, Suite 4200  
Seattle, Washington 98154  
T: (206) 292-1144  
[sbutler@helsell.com](mailto:sbutler@helsell.com)

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL PRODUCTION - 2

**HELSELL  
FETTERMAN**  
Helsell Fetterman LLP  
1001 Fourth Avenue, Suite 4200  
Seattle, WA 98154-1154  
206.292.1144 [WWW.HELSELL.COM](http://WWW.HELSELL.COM)

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RECEIVED FOR FILING  
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MAY 16 2018  
ALISON H. SONNTAG

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KITSAP COUNTY

2018 MAY 16 PM 1:43  
KITSAP COUNTY CLERK  
ALISON H. SONNTAG

EDSEL, ET AL.,  
PLAINTIFFS

NO. 18-2-00098-18  
[JUDGE HOUSER]

v.

GILL, ET AL.,  
DEFENDANTS.

PLAINTIFF'S MOTION  
TO COMPEL PRODUCTION

PLAINTIFF Ernest Edsel moves for the court to compel production of eight (8) requested *Farmers Insurance* documents.

Plaintiff separately submits a Sworn Declaration in Support of this Motion.

Attached as Exhibit "1" to this motion is a true and correct copy of relevant and marked portions of Plaintiff's discovery request of 29 January 2018.

Plaintiff shows, for good cause under CR 37(a), as follows:

ERNEST M. EDSSEL, ESQ.  
WA STATE BAR # 32274  
Plaintiff Pro Se  
307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

Appel  
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**I. PERTINENT FACTS & CIRCUMSTANCES  
AS TO THE REQUESTED  
FARMERS INSURANCE  
DOCUMENTS**

6 1. **DOCUMENT REQUESTS SERVED ON BOWMAN & GILL:** On 29  
7 January 2018, Plaintiff duly served Defendants Gill and Bowman (hereinafter “Landlord  
8 Defendants”) with a CR 26 and 34 Request for Production of Documents. *See*, the attached  
9 Exhibit “1” (a true and correct copy of relevant portions at pages 1, 5-6, and 14 of said  
10 discovery request of 29 January 2018).

11 2. **PLAINTIFF’S DOCUMENT REQUEST # 2:** Plaintiff’s Document Request  
12 # 2 at pages 5-6 of Plaintiff’s 14-page request specifically requested:

13 *“Each and every document . . . by any vendor or third party . . .*  
14 *from 1 January 2015 to the present . . . that . . . mentions,*  
15 *concerns or refers to”* the Defendants’ duplex rental property  
16 that is the subject of this litigation (and, to “*any tenant . . . occupant . . .*  
17 *guest”* of said property at 311 E. 30th Street) [emphasis added].

18 *See*, marked sections of page 5 of Plaintiff’s Document Request found at Exhibit “1”, which  
19 is attached to this motion.

20 3. **PLAINTIFF’S DOCUMENT REQUEST # 3:** Plaintiff’s Document Request  
21 # 3 specifically requested the above-described documents with respect to Tenant Defendants  
22 Lamoureux and D’Appollonio. *See*, marked sections of page 6 of Plaintiff’s Document  
23 Request found at Exhibit “1”, which is attached to this motion.

24 4. **LANDLORD DEFENDANTS FAILED TO PRODUCE FARMERS**  
25 **INSURANCE DOCUMENTS.** Pursuant to Plaintiff’s discovery requests, Defendants Gill  
26 and Bowman produced some documents, such as a recorded deed and electronic court

Appeal  
p4

1 recordings/transcripts of their failed Small Claims litigation against the undersigned in *Gill v.*  
2 *Edsel*, Kitsap County District Court Case No. 17SC00241; however, the Landlord Defendants  
3 failed to produce in this litigation the Farmers Insurance claims (and policies covering such  
4 claims) that Landlord Defendants Gill or Bowman filed with Farmers Insurance in 2017  
5 against Plaintiff (or with respect to Plaintiff, the property at 311 E. 30th Street in Bremerton,  
6 and/or Tenant Defendants Lamoureux and D'Appollonio). *See*, Plaintiff's Sworn Declaration  
7 submitted separately in Support of this Motion.

8 Plaintiff generously allowed further additional time for Landlord Defendants Gill and  
9 Bowman to supplement their production of documents after they failed to produce the  
10 Farmers Insurance claims and policies. Despite having received more than plenty of time to  
11 find and produce the Farmers Insurance documents, the Landlord Defendants Gill and  
12 Bowman failed to produce them. Then, during a series of 14 May 2018 telephone  
13 conferences, their attorney flip-flopped on what was requested and what would be produced.  
14 *See*, Plaintiff's Sworn Declaration submitted separately in Support of this Motion.

15 5. **FARMERS INSURANCE CLAIM & POLICY:** Landlord Defendants and  
16 the undersigned Plaintiff Edsel relied upon the above-described Farmers Insurance policy or  
17 policies, and claims thereunder, when they each submitted evidence and testimony referring  
18 to and mentioning said Farmers Insurance policies and claims during oral argument at the  
19 above described District Court proceeding. In particular, Landlord Defendant Gill testified  
20 and submitted evidence that:

21 *"June 25; I've filed a claim with Farmers."* [emphasis added].

22 *See*, Exhibit "A" attached to Plaintiff's separately submitted Sworn Declaration, which is a  
23 true and correct copy of the second page of written evidence that Landlord Defendants Gill  
24 and Bowman submitted to the District Court in their failed Small Claims litigation against the

1 undersigned. *See also*, Plaintiff's Sworn Declaration submitted separately in Support of this  
2 Motion.

3       6.     **THE FARMERS INSURANCE CLAIM (AND EVIDENCE) IS**  
4 **DIRECTLY RELATED TO EVIDENCE AND CLAIMS IN THIS ACTION:** As more  
5 fully described in the previous paragraph, Defendant Gill filed or made a claim with Farmers  
6 Insurance on or about 25 June 2017 against Plaintiff Edsel (or concerning Plaintiff Edsel, the  
7 property at 311 East 30th, or Tenant Defendants Lamoureux and D'Appollonio).

8       Shortly after Defendant Gill filed or made his June 2017 claim, Farmers Insurance  
9 contacted the undersigned Plaintiff about the claim. Plaintiff Edsel provided Farmers  
10 Insurance with detailed information, including drawings and pictures, as to all of the illegal  
11 and unlawful activities and conduct of all four Defendants and which activities and conduct  
12 are set forth in the amended complaint. *See*, ¶ 10 at page 4 of Plaintiff's Sworn Declaration  
13 Submitted in Support of this Motion.

14       Thus, the undersigned Plaintiff needs to discover documents with respect to: (1) the  
15 investigation or review that Farmers Insurance conducted into the above-described  
16 information that Plaintiff Edsel provided Farmers Insurance in 2017; and, (2) reports,  
17 statements, drawings, images, opinions, and decisions that Farmers Insurance published,  
18 created, wrote, used, considered, or relied upon when covering or denying the June 2017  
19 claim by Defendant Gill.

20       In order to successfully prosecute this litigation, *Plaintiff is entitled to discover **IF***  
21 *and **WHY** Farmers Insurance denied Defendant Gill's insurance claim or claims*, specially  
22 if Farmers Insurance based its decision to deny the claim (or cancel or revoke the insurance  
23 policy or coverage) pursuant to the unlawful activities of the Defendants that: (1) Plaintiff  
24 brought to the attention of Farmers Insurance; and, (2) give rise to this action.

1 Plaintiff's discovery into the June 2017 Farmers Insurance claim by Defendant Gill  
2 will produce evidence that will answer the following questions that are reasonably calculated  
3 to lead to the discovery of admissible evidence as to whether or not Farmers Insurance has  
4 evidence concerning the following issues:

5 First, did Farmers Insurance deny the 25 June 2017 claim by Defendant Gill because  
6 of the the dangerous and illegal hazards set forth in Plaintiff's *Drug House nuisance* causes  
7 of action (including the illegal and dangerous "medical marijuana" grow operation)?

8 Second, did Farmers Insurance deny the claim because of the fire, safety,  
9 environmental, and biological hazards that arise from the Defendants' *Common Area*  
10 *Nuisance* and *Breach of CCRs and Common Area Maintenance Agreements*, as set forth in  
11 the amended complaint (and Plaintiff's Motion for Joinder of Plaintiffs)?

12 Third, did Farmers Insurance deny the 25 June 2017 claim because of the fire and  
13 safety hazards that are related to the unlicensed operation of vehicles per the Defendants'  
14 *Noise nuisance and trespass*, as set forth in the amended complaint?

15 Fourth, did Farmers Insurance deny said claim because of the fire hazards, and  
16 property damage, that arise from the Defendants' *invasive vegetation nuisance and trespass*  
17 (such as the destructive water intrusion that took place in the concrete slab of the basement at  
18 Plaintiff's residence when the Defendants' invasive vegetation plugged the drain pipes)?

19 Thus, upon information and belief, the requested Farmers Insurance documents  
20 contain notes, comments, opinions, pictures, images, drawings, observations, conclusions,  
21 and decisions by Farmers Insurance employees, agents, adjusters, or investigators with  
22 respect to the four above-described subject matters that are critical for Plaintiff to prosecute  
23 this litigation.

24 In other words, Farmers Insurance is a witness to Plaintiff's causes of action.

Appeal  
p 7

1 At the very least, Farmers Insurance employees, agents, adjusters, or investigators  
2 have or possess evidence or knowledge that is directly related and relevant to Plaintiff's  
3 causes of action.

4 7. **APPLICABLE RULES OF DISCOVERY:** By reason of the foregoing facts  
5 and circumstances, Plaintiff is entitled to a court order to compel production of Farmers  
6 Insurance documents and records pursuant to:

7 (a) CR 26(b)(1,2)[*scope of discovery*];

8 (b) CR 34(b)(3)(E)[*a motion to compel remedy for a party's failure to produce*  
9 *requested documents and electronically stored information, including pictures or images*];

10 (c) CR 37(a)[*motion to compel remedy*].

11 8. **EIGHT (8) DOCUMENTS TO PRODUCE:** By reason of the foregoing  
12 facts and circumstances, Landlord Defendants have to produce all documents, records, and  
13 images, from 1 January 2015 to the present, with respect to the following eight matters or  
14 documents:

15 (a) **DOCUMENT OR MATTER #1:**

16 Farmers Insurance agreement(s) or policy(ies), or other insurance company  
17 policies and agreements, that concern Landlord Defendants and the property  
18 located at 311 E. 30th Street (including but not limited to insurance contracts  
19 for fire, casualty, and other insurance coverage that concern said property);  
20

21 (b) **DOCUMENT OR MATTER # 2:**

22 the June 2017 insurance claim ("*June 25; I've filed a claim with Farmers.*")  
23 [emphasis added]) that Defendant Gill testified about, and submitted into  
24 evidence, during the Small Claims litigation before Kitsap County District  
25 Court on 27 December 2017;  
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(c) DOCUMENT OR MATTER # 3:  
any denial by any company with respect to insurance coverage concerning  
Landlord Defendants and the property located at 311 E. 30th Street, including  
but not limited to a denial or other decision concerning the above-described 25  
June 2017 claim by Defendant Gill

(d) DOCUMENT OR MATTER # 4:  
any cancellation or termination of insurance coverage with respect to the 311  
East 30th Street property and Defendants Gill or Bowman;

(e) DOCUMENT OR MATTER # 5:  
communications between the Landlord Defendants (or Tenant Defendants  
Lamoureux or D'Appollonio) and Farmers Insurance (or any other insurance  
company or insurance adjuster or investigator) that concern Plaintiff or the  
East 30th Street property;

(f) DOCUMENT OR MATTER #6:  
any report, letter, picture, image, drawing, or other document by any insurance  
company, adjuster, or investigator concerning the 311 E. 30th Street property,  
Plaintiff Edsel, and/or Tenant Defendant Lamoureux (or D'Appollonio);

(g) DOCUMENT OR MATTER #7:  
any insurance agreement or policy concerning Landlord Defendant Gill or  
Bowman under which any person may be or is liable to satisfy part or all of a  
judgment in this action (or to indemnify or reimburse Landlord Defendants for  
payments made to satisfy a judgment in this litigation);

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(h) DOCUMENT OR MATTER #8:  
any document affecting or concerning the above-described judgment liability coverage (such as denying coverage, extending coverage, or reserving rights), including but not limited to documents that concern any insurance company agreeing or refusing to pay for the attorney(s) representing Landlord Defendants (or Tenant Defendants Lamoureux and D'Appollonio).

8. THE EIGHT INSURANCE DOCUMENTS ARE DISCOVERABLE: The above-described eight (8) matters or documents are discoverable because they:

- (a) were sought in Plaintiff's Document Request # 2 and # 3;
- (b) are not privileged; and,
- (c) are reasonably calculated to lead to the discovery of admissible evidence as to whether or not Farmers Insurance (or any adjuster, investigator, or other insurance company) has information concerning the Plaintiff's claims and/or the defenses of all four Defendants.

**WAIVER:** Moreover, on 27 December 2017, at the Small Claims trial before Kitsap County District Court, Defendant Gill waived any discovery objections as to documents related to his June 2017 insurance claim when he interposed, and entered into the record, his June 2017 claim with Farmers Insurance as part of his case against the undersigned Plaintiff. See, Exhibit "A" attached to Plaintiff's Sworn Declaration Submitted in Support of this Motion.

And, Plaintiff Edsel brought up, as his defense, the matter of:  
(a) the four Defendants' illegal and so-called "medical marijuana" grow operation;  
(b) the invasive vegetation nuisance and trespass claims now before this court.

See, Plaintiff's Sworn Declaration submitted separately in Support of this Motion.

Clearly, the June 2017 insurance claim is relevant to and inextricably bound to Plaintiff's claims in this action.

Appeal  
p. 10

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**II. PERTINENT LAW AS TO REQUESTED FARMERS INSURANCE DOCUMENTS**

9. **REQUESTED DOCUMENTS ARE CR 26(b)(1) DISCOVERABLE:**

Landlord Defendants must produce the eight (8) above-described matters or documents because CR 26(b)(1) provides that:

*“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”* [emphasis added]

10. **REQUESTED INSURANCE AGREEMENTS ARE RULE 26(b)(2)**

**DISCOVERABLE:** Furthermore, CR 26(b)(2) specifically extends discovery to insurance agreements, policies, and claims that concern the ability of Landlord Defendants Gill and Bowman to satisfy a judgment in this litigation with an insurance agreement, policy, or claim:

*“A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.”*

11. **PLAINTIFF IS ENTITLED TO A CR 37 (a) DISCOVERY ORDER:**

When it comes to enforcing a CR 26 and 34 Request for Production of Documents, CR 34

Appeal  
p. 11

1 (b)(3)(E) clearly states that: "For any failure to make discovery under this rule, the requesting  
2 party may move for an order as provided under rule 37."

3 CR 37(a) provides for a discovery order compelling production from this court, where  
4 the action is pending, as follows: "A party, upon reasonable notice to other parties and all  
5 persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the  
6 court in the county where . . . the action is pending, for an order compelling discovery. . . ."

7 Plaintiff is clearly entitled to an order compelling production of the eight (8) requested  
8 Farmers Insurance documents or matters.

9 12. **AWARD OF EXPENSES:** CR 37(a)(4) further provides for an award of  
10 expenses of a CR 37 Motion to Compel Discovery, as follows:

11 "If the motion is granted, the court shall, after opportunity for hearing,  
12 require the party or deponent whose conduct necessitated the motion  
13 or the party or attorney advising such conduct or both of them to pay  
14 to the moving party the reasonable expenses incurred in obtaining the order,  
15 including attorney fees, unless the court finds that the opposition to the motion  
16 was substantially justified or that other circumstances make an award of  
17 expenses unjust.

18  
19 "If the motion is denied, the court shall, after opportunity for hearing, require  
20 the moving party or the attorney advising the motion or both of them to pay  
21 to the party or deponent who opposed the motion the reasonable expenses  
22 incurred in opposing the motion, including attorney fees, unless the court  
23 finds that the making of the motion was substantially justified or  
24 that other circumstances make an award of expenses unjust.

25  
26 "If the motion is granted in part and denied in part, the court may apportion  
27 the reasonable expenses incurred in relation to the motion among the  
28 parties and persons in a just manner."

29  
30 Plaintiff is entitled to an award of not less than \$ 435 in expenses incurred by Plaintiff  
31 for copy costs, next day USPS delivery costs, and fees for Plaintiff's legal assistant to help  
32 prepare, review, research, and file this motion. *See*, Plaintiff's Sworn Declaration submitted  
33 separately in Support of this Motion.

Appeal  
p. 12



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KITSAP COUNTY

EDSEL, ET AL.,  
PLAINTIFFS,

v.

NO. 18-2-00098-18

GILL, ET AL.,  
DEFENDANTS.

REQUEST FOR PRODUCTION  
OF DOCUMENTS AND ENTRY  
UPON LAND AND PROPERTY

TO: DEFENDANT PATRICK GILL and DEFENDANT BARBARA BOWMAN  
2315 NE 86th St., Seattle, WA 98115

PLAINTIFF Ernest M. Edsel, pursuant to Rule 26 and 34, WA Rules of Civil Procedure, requests: (1) *production of documents* from the above-referenced Defendants in order for Plaintiff to inspect, copy, test, photograph, record, measure, or sample the following items in said Defendants' joint or individual possession, custody, or control: documents, electronically stored information, or things including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, either directly or, if necessary, after translation or conversion by the responding party into a reasonably usable form, or to inspect and copy, test, or sample any things which constitute or contain matters within the scope of rule 26(b) and which are in the possession, custody or control of one or both of said Defendants; and, (2) *entry onto designated land and other property* possessed or controlled by one or both of said Defendants so that said Plaintiff may inspect, measure, survey, photograph, test, or sample the property or any designated object, process or operation on it, as follows:

A. INSTRUCTIONS: [1] Produce the requested items or material no later than 45 days after service of the summons and complaint upon you. The words "you" and "your" mean Defendant Patrick Gill (or Defendant Barbara Bowman) and any individual or person, including but not limited to any agent(s), partnership(s), or other unassociated business entity(ies), who is (are) subject to the control or command of Defendants Patrick Gill (hereinafter "Gill") or Barbara Bowman (hereinafter "Bowman"). The word "document"

ERNEST M. EDSSEL, ESQ.  
WA STATE BAR # 32274  
Plaintiff Pro Se  
307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

*Append p 14*

*Ex "1"  
p 1 of 4*

1 other evidences or records of indebtedness, any payments, or any bank checks or other  
2 financial instruments by, between, concerning, mentioning, or referring to said Tallie Jones.

3

4 2. Each and every document, including but not limited to any invoice, form,  
5 permit, or statement from, to, or by any vendor or third party, (including but not limited to  
6 utility companies and government agencies), any bank deposit, any monthly bank statement,  
7 any any letter or correspondence, any image, or any lease or rental agreement, arrangement,  
8 dealing, or understanding [including cannabis sales or delivery ledgers, account slips,  
9 notebooks, or other records] that was in any manner archived, published, created, stored,  
10 received, or sent by any person from 1 January 2015 to the present and which document(s)  
11 mentions, concerns, or refers to:

12 (a) the property (hereinafter "Bowman 311 Property") that includes a residential  
13 duplex (with addresses as Unit "A" and Unit "B" of 311 E. 30th St., Bremerton, WA 98310)  
14 inside the City of Bremerton at 311 E. 30th Street, which property is also known or described  
15 as: (i) Kitsap County Assessor Tax Parcel ID # 112401-2-070-2005; or, (ii) Lot B of Kitsap  
16 County Short Plat No. 6-77 according to short plat recorded 22 July 1977 under Recording  
17 No. 7707220134, in Kitsap County, State of Washington; or,

18 (b) any tenant or lessee (or sub-tenant or sub-lessee), occupant, co-habitant,  
19 roommate, family member or relative, guest, invitee, licensee, or any other individual (adult  
20 or minor) living, residing, or spending any amount of time in any manner at said Bowman  
21 311 Property from 1 January 2016 to the present, and which persons include but are not  
22 limited to the following Defendants in this action:

- 23 (i) Derek Lamoureux;  
24 (ii) Amberlee D'Appollonio.

Ex 11/11  
P 2 of 4

Amberlee 1/15

1 3. Documents to be produced for the above-described Plaintiff's Request # 2  
2 include but are not limited to documents that contain, mention, or refer to any information or  
3 data with respect to any renter, background, credit, income, leasing, or criminal history (or  
4 any rental, renter, or other application) from, by, concerning, or mentioning:

5 (a) Derek Lamoureux or any current or former relative (including but not limited  
6 to Anthony Lamoureux), family member, sub-tenant or sub-lessee, occupant, cohabitant,  
7 roommate, guest, invitee, or licensee of Derek Lamoureux or any other individual (adult or  
8 minor) associated with or doing business in any manner with Derek Lamoureux;

9 (b) Amberlee D'Appollonio or any current or former relative, family member,  
10 sub-tenant or sub-lessee, occupant, cohabitant, roommate, guest, invitee, or licensee of  
11 Amberlee D'Appollonio or any other individual (adult or minor, including but not limited to  
12 Anthony Lamoureux) associated with or doing business in any manner with Amberlee  
13 D'Appollonio.  
14

15 4. Documents to be produced for the above-described Plaintiff's Request # 2  
16 include but are not limited to any invoice, any bank check register, any ledger, any monthly  
17 bank statement, any letter or correspondence, any image, or any agreement, dealing,  
18 arrangement, or understanding that in any manner mentions, concerns, or refers to any vendor  
19 or third party, such as the garbage service known as Waste Management, who has performed  
20 any work at or for Bowman 311 Property, including but not limited to any person or  
21 individual who from 1 January 2015 to the present: (a) performed any type of yard work,  
22 interior or exterior repairs, services (including pest control services), or landscaping at or on  
23 Bowman 311 Property; or, (b) cut, trimmed, or removed all or part of a tree at said property in  
24 2017.

Σ x 11/21  
p. 3 of 4

Appel p. 16

1 (g) any motorized vehicle, including but not limited to dirt bikes and motorcycles.

2  
3 RESPECTFULLY SUBMITTED on this 29th day of January, 2018.

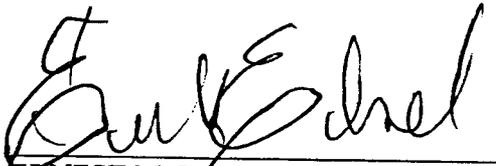
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5  
6 ERNEST M. EDSEL, ESQ.  
7 WA STATE BAR # 32274  
8 Plaintiff Pro Se  
9 307 E. 30th St., Bremerton, WA 98310  
10 Tel. 360-373-2910  
11

12  
13  
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15 Certificate of Service

16  
17 On this 29th day of Jan, 2018, pursuant to Rule 5, WA Rules of Civil  
18 Procedure, the undersigned, under penalty of perjury and upon personal knowledge, declares  
19 that he served a true and correct copy of the foregoing paper upon all Defendants by mailing  
20 said copy to the Defendants' residential street addresses set forth in ¶¶ 3-6 of the complaint  
21 by 1st Class, U.S. Mail, postage prepaid.  
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p. 17

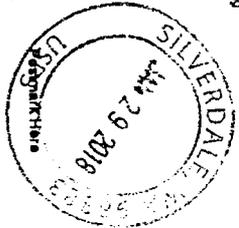
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29 ERNEST M. EDSEL, ESQ.  
30 WA STATE BAR # 32274  
31 Plaintiff Pro Se  
32 307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

PS Form 3817, April 2007 PSN 7530-02-000-9065

UNITED STATES POSTAL SERVICE  
Certificate of Mailing  
This Certificate of Mailing provides evidence that mail has been presented to USPS® for mailing. This form may be used for domestic and international mail.  
To: Patrick Celli, 1300  
2315 WE 30th St  
Seattle WA 98310  
From: Ernest M. Edsel  
307 E 30th St  
Bremerton WA  
360-373-2910

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To pay for postage here meter postage here

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RECEIVED FOR FILING  
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ALISON H. SONNTAG

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KITSAP COUNTY

EDSEL, ET AL.,  
PLAINTIFFS

NO. 18-2-00098-18  
[Judge Houser]

v.

GILL, ET AL.,  
DEFENDANTS.

PLAINTIFF'S SWORN DECLARATION  
IN SUPPORT OF PLAINTIFF'S MOTION  
TO COMPEL PRODUCTION

2018 MAY 16 PM 1:43  
KITSAP COUNTY  
SUPERIOR COURT

COUNTY OF KITSAP  
STATE OF WASHINGTON

PLAINTIFF Ernest Edsel, under penalty of perjury, being competent to testify and more than 18 years of age, declares, pursuant to Washington State laws and upon personal knowledge, as follows:

1. I have practiced law for more than 30 years. My legal career began as a law clerk at the Enforcement Division of the U.S. Securities & Exchange Commission ("SEC").

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ERNEST M. EDSSEL, ESQ.  
WA STATE BAR # 32274  
Plaintiff Pro Se  
307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

PLAINTIFF'S SWORN DECLARATION IN SUPPORT OF  
PLAINTIFF'S MOTION TO COMPEL PRODUCTION - p. 1

Appeal  
p. 18

1           2.     I personally drafted the CR 26 and CR 34 Request for Production of  
2 Documents that was duly served on 29 January 2018 upon Defendants Gill and Bowman. I  
3 relied upon my 30 years of legal experience when drafting such discovery request, including  
4 Document Request # 2 and # 3, which give rise to Plaintiff's Motion to Compel Production.

5           It has been my personal experience in the legal profession that these type of requests  
6 are typically used in the regular course of complex litigation, including civil investigations,  
7 and enforcement actions, of the SEC.

8           3.     Document Request # 2 and # 3 were specifically drafted and designed to  
9 include the eight (8) Farmers Insurance documents that are more fully described in Plaintiff's  
10 Motion to Compel Production.

11          4.     On Monday, 14 May 2018, I engaged in a discovery conference telephone call  
12 in the morning with Mr. Shawn Butler, counsel for Landlord Defendants Gill and Bowman. I  
13 asked him if the electronic records were all that his clients had produced under my discovery  
14 request. Mr. Butler stated that was the case.

15          5.     When I informed Mr. Butler that the requested Farmers Insurance agreement  
16 or policy was missing, Mr. Butler stated that I needed to submit separate requests and that he  
17 would then supplement by producing an insurance agreement with respect to liability  
18 coverage for a judgment in this action. In Mr. Butler's opinion, Request # 2 and # 3 did not  
19 request any insurance document(s). I informed him that I disagreed since the requests clearly  
20 included Farmers Insurance documents.

21          6.     Mr. Butler then rescinded the offer to supplement when I informed him that I  
22 also wanted the following documents under my Document Request # 2 and # 3:

1 (a) all other insurance agreements or policies, including fire, property, or casualty  
2 from any company with respect to Landlord Defendants Gill and Bowman and their 311 E.  
3 30th St. property;

4 (b) the insurance claim that Defendant Gill filed on or about 25 June 2017 with  
5 Farmers Insurance against me (or concerning me, the 311 E. 30th St. property, and/or  
6 Defendant Lamoureux (or D'Appollonio);

7 (c) documents, including communications between Defendant Gill (or Bowman)  
8 and Farmers Insurance, that concern:

9 (i) the insurance claim that Defendant Gill filed on or about 25 June 2017  
10 with Farmers Insurance against me (or concerning me, the 311 E. 30th  
11 St. property, and/or Defendant Lamoureux (or D'Appollonio);

12 (ii) a denial of said claim and/or termination or cancellation of coverage.

13 7. Mr. Butler made clear that his clients would only produce insurance  
14 agreements with respect to insurance coverage that pays them in case of a judgment in this  
15 action (or otherwise indemnifies them for such liability). I informed him I would therefore  
16 need to file a motion to compel.

17 8. Mr. Butler then called me back about two hours later. He kindly informed me  
18 that, in order to narrow down the discovery issues in dispute, he was going to mail me an  
19 insurance agreement with respect to coverage on the property (along with a "reservation of  
20 rights" letter).

21 9. Mr. Butler made clear that Defendants Gill and Bowman would not produce  
22 any more documents, specially documents with respect to:

23 (a) the above-described June 2017 claim that Defendant Gill filed with Farmers  
24 Insurance;

Appeal  
11/20

1 (b) communications between Farmers Insurance and Defendant Gill (or Bowman),  
2 including a denial by Farmers Insurance of the June 2017 claim.

3 10. I am entitled to the eight (8) requested Farmers Insurance documents because I  
4 alerted Farmers Insurance to all of the unlawful and illegal conduct and activities that are set  
5 forth in Plaintiffs' amended complaint (nuisances, trespasses, and breach of CCRs and  
6 Common Area Maintenance Agreements).

7 Shortly after Defendant Gill filed or made his above-described June 2017 claim, I was  
8 contacted by Farmers Insurance. I provided the above-described information about the  
9 Defendants' unlawful and illegal conduct in great detail to Mr. Jim McFee, an agent,  
10 employee, adjuster, or investigator of Farmers Insurance. The information included drawings  
11 and pictures.

12 I therefore have factual grounds and legal reasons to believe that Farmers Insurance:

13 (a) independently investigated and reviewed such information from me; and,

14 (a) used such information to deny the June 2017 claim (and/or Farmers Insurance  
15 used such information to revoke or otherwise cancel or modify coverage).

16 11. Because of the above-described facts and circumstances, the undersigned  
17 Plaintiff needs the court to consider and rule upon Plaintiff's Motion to Compel Production  
18 because Landlord Defendants Gill and Bowman will always object to and refuse to produce:

19 (a) the 25 June 2017 claim of Defendant Gill described above in ¶ 6(a);

20 (b) communications between Defendant Gill (or Bowman) and Farmers Insurance  
21 or other insurance companies, adjusters, or investigators and which documents and  
22 communications include notes, letters, images, drawings, field reports, adjuster reports,  
23 opinions, conclusions, and decisions concerning:

24 (i) the June 2017 claim and its denial (or final decision thereunder);

appended  
p. 21

1 (ii) cancellation or termination of any insurance agreement or coverage.

2 12. Pursuant to Plaintiff's discovery requests, Defendants Gill and Bowman  
3 produced a few documents, such as: tenant payment information; a Statutory Warranty Deed  
4 for 311 E. 30th Street; and, other electronic documents in a CD-ROM (less than 100 pages).  
5 These documents included electronic court recordings/transcripts of their failed Small Claims  
6 litigation against the undersigned in *Gill v. Edsel*, Kitsap County District Court Case No.  
7 17SC0024.

8 13. The above-described production of documents by Landlord Defendants failed  
9 to include the Farmers Insurance claims (and policies covering such claims) that Landlord  
10 Defendants Gill or Bowman filed with Farmers Insurance in 2017 against me (or with respect  
11 to me, the property at 311 E. 30th Street in Bremerton, and/or Tenant Defendants Lamoureux  
12 and D'Appollonio).

13 14. I generously allowed more time for Landlord Defendants Gill and Bowman to  
14 supplement their production of documents after they failed to produce the Farmers Insurance  
15 claims and policies. Despite having received more than plenty of time to find and produce the  
16 Farmers Insurance documents, the Landlord Defendants did not produce them.

17 15. During oral argument at the above-described District Court proceeding,  
18 Landlord Defendants and the undersigned Plaintiff relied upon the above-described Farmers  
19 Insurance policy or policies, and claims thereunder, when we each submitted evidence and  
20 testimony referring to and mentioning said Farmers Insurance policies and claims

21 16. During said trial, Landlord Defendant Gill testified and submitted evidence  
22 that: "***June 25; I've filed a claim with Farmers.***" [emphasis added].

1           See, the attached Exhibit "A", which is a true and correct copy of the second page of  
2 written evidence that Landlord Defendants Gill and Bowman submitted to the District Court  
3 in their failed Small Claims litigation against the undersigned.

4           17. Defendant Gill filed the above-described claim with Farmers Insurance on or  
5 about 25 June 2017 against me (or concerning me, the property at 311 East 30th, or Tenant  
6 Defendants Lamoureux and D'Appollonio).

7           18. During the 27 December 2017 trial at Kitsap County District Court, and in  
8 connection with the Landlord Defendants' allegations in the Small Claims litigation over the  
9 undersigned's alleged spraying of "poison", I brought up, as a defense, the matter of:

10           (a) the four Defendants' illegal and so-called "medical marijuana" grow operation;

11           (b) the invasive vegetation nuisance and trespass claims now before this court.

12           19. Given the facts and circumstances of this litigation, it is my expert and good  
13 faith opinion that, in order to successfully prosecute this litigation, I need to discover IF and  
14 WHY Farmers Insurance denied Defendant Gill's insurance claim or claims, specially if  
15 Farmers Insurance based its decision to deny the claim (or cancel or revoke the insurance  
16 policy or coverage) pursuant to information that I provided to Farmers Insurance with respect  
17 to the Defendants' illegal conduct and activities, which are set forth in the amended  
18 complaint.

19           20. In order for me to successfully litigate this case, to make fully informed  
20 Plaintiff motions for summary judgment (or partial summary judgment), to fully respond to  
21 and accurately answer Defendants' discovery requests, and to fully respond in an informed  
22 manner as to the Defendants' pending Motion for Partial Summary Judgment, I must be  
23 allowed to discover information that is in the possession or knowledge of Farmers Insurance  
24 and its agents, employees, adjusters, or investigators.



## Pat's Timeline

I have good tenants in 311 East 30<sup>th</sup>.

In unit 'A' is Josh Dodge and Amber Doppollanio. They are raising Shylor? Their little girl. They have been there since Jan. 5, 2014.

In unit 'B', the unit Mr. Edsel is attacking, is Anna and Derek Lamoureux. They have three children listed on the rental agreement, Anna, Maria, and Deanna who *used to be small but are growing. They've been there since Sept. 8, 2008.*

June 16, 2017; Received a certified letter from Mr. Edsel.

We went to West Seattle and joined the Rental Housing Association.

Brett (my wife) wrote Mr. Edsel a response letter.

She also started working on a complaint to the Washington Bar Ass.

June 17; I went to 311 East 30<sup>th</sup>. There is no grow operation there.

I made connect with the Kitsap County Sheriff.

A Sheriff made connect with Mr. Edsel and explained to him if he had an issue he could call the Sheriff's office.

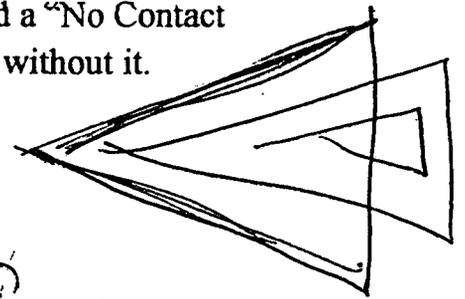
June 24: 5:30 pm Derek called me informing me that Mr. Edsel is spraying a chemical over the fence on to 311 East 30<sup>th</sup>. The chemical flowed into the open window of the bedroom where the children were.

*Brett and I took the 6:45 ferry to Bremerton.*

We made contact with the Kitsap County Sheriff.

An officer made contact with Mr. Edsel and informed him he couldn't spray chemicals on someone's property. He also told me if I had a "No Contact Order" I could have Mr. Edsel arrested, but he could do nothing without it.

June 25; I've filed a claim with Farmers.



Ed 4A4 appeal p.25  
- solo page -

1 involved in the pending action and reasonably calculated to lead to the discovery of  
2 admissible evidence. Just for that reason alone, their Motion to Compel must be denied.

3 15. **CR 26(g)(1-3).** The interrogatories of the Tenant Defendants also violate the  
4 provisions of CR 26(1,2,3) which respectively require that their document requests and  
5 interrogatories: (a) be warranted by existing law or a good faith argument for the extension,  
6 modification, or reversal of existing law; (b) not be interposed for any improper purpose,  
7 such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;  
8 and (c) not be unreasonable or unduly burdensome or expensive, given the needs of the case,  
9 the discovery already had in the case, the amount in controversy, and the importance of the  
10 issues at stake in the litigation.

11 15A. **CR 26(g)(1-3) and Judy Lamb.** Despite the requirements of CR 26(g)(1-3),  
12 the Tenant Defendants seek interrogatories and document requests from Judy Lamb through a  
13 Motion to Compel that does not set forth any facts or law to justify: (a) setting aside the  
14 December 2017 sale, transfer, and assignment of all her claims to the undersigned Plaintiff;  
15 (b) forcing her to answer interrogatories or provide documents in light of her serious medical  
16 conditions; (c) forcing her to answer interrogatories and provide documents without showing  
17 why she is the only person in Washington State who can provide such testimony or evidence  
18 when her husband and many others can disclose such testimony or evidence, including City  
19 of Bremerton and co-Defendants Gill and Bowman.

20 15B. **CR26(g)(1-3) and Plaintiff Edsel.** Likewise, despite the requirements of CR  
21 26(g)(1-3), the Tenant Defendants seek interrogatories and document requests from Plaintiff  
22 Edsel through a Motion to Compel that does not set forth any facts or law to justify: (a)  
23 setting aside the December 2017 sale, transfer, and assignment of all Judy Lamb claims to the  
24 undersigned Plaintiff; (b) forcing him to answer interrogatories or provide documents in light

1 of Defendants' destruction or spoliation of Plaintiffs' evidence in the water-damaged  
2 basement that resulted from Defendants' invasive vegetation; (c) forcing him to answer  
3 interrogatories and provide documents without showing why he is the only person in  
4 Washington State who can provide such testimony or evidence when many others can  
5 disclose such testimony or evidence, including ADT security systems, City of Bremerton, and  
6 co-Defendants Gill and Bowman.

7 **15C. CR 26(g)(1-3) Prohibits Witness Harassment.** Vexatious harassment by the  
8 Tenant Defendants and their counsel is patently obvious when they seek discovery of  
9 Plaintiffs' Social Security numbers after the Defendants themselves objected to producing  
10 their own Social Security numbers in their Motion for Protective Order on the grounds of  
11 privacy, relevance, and fears of "identity theft" (even though Plaintiff Edsel never asked for  
12 such data in his discovery requests for those very same reasons).

13 Plaintiffs have more than abundant reason not to disclose Social Security information  
14 or any other information identifying any witnesses who can or will have their identity stolen  
15 or be otherwise intimidated or harassed by the Defendants and their counsel given: (a) the  
16 well-documented campaign of the Landlord and Tenant Defendants to harass and intimidate  
17 Plaintiff Edsel with false and vexatious claims before the WA State Bar, Kitsap County  
18 District Court, Bremerton Municipal Court, and Bremerton Police, (b) the felony conviction  
19 of Defendant Lamoureux and his friendship and association with the violent transient at  
20 David Findlow's drug house at 309 E. 30th Street; (c) previous threats by Defendant  
21 Lamoureux, Defendant Gill, and Defendant D'Appollonio's boyfriend to arrest and deport  
22 Plaintiff and his landscapers (although Plaintiff was born in New York); (d) the lack of  
23 obvious means of support of Defendant Lamoureux per his refusal to identify where he is  
24 "employed."

TO: John Groseclose, Esq.  
FR: Ernest Edsel, Esq.

23 March 2018

1st Class, U.S. Mail

Dear John:

Per your discovery requests I have several hundred pages plus images/pictures for delivery to you; however, I am missing a lot of documents that were kept in boxes in the basement. For example, the ADT security system contracts, etc.

Several document boxes on the concrete slab got wet and moldy as a result of the backflow of water that resulted from the plugged drain pipe down by the retaining wall/property line. These had to be thrown away.

Other document boxes on shelves were moved by the contractor to a narrow crawlspace on the north side of the basement in order for the concrete slab to be ripped out on the south side.

I cannot get to those boxes since they are behind a wall of heavy furniture and other large items. And, there's a deep and wide-open trench where the slab will be poured in front of the wall of furniture. The slab area is a construction zone that has yet to be completed; nor is it safe for me to go in there.

The replacement concrete slab has yet to be poured and it must be dry before that wall of furniture gets moved such that the contractor can pull the boxes for me to access the documents.

After unexpected delays, the pour date is finally set for sometime during the next 2-3 weeks; it will take another 3-4 days to dry (or a few more per temperature, humidity, and weather conditions).

We need the missing documents to fully and correctly answer, and respond to, interrogatories. We also need them to recall certain facts, events, and circumstances needed for our response to the document requests and interrogatories.

I will immediately let you know if the concrete pour date is delayed in any manner. If that is the situation, then I will send you a partial response to the document requests (noting the missing documents) along with the above-described documents and images (some hard copy; some digital on a thumb drive).

Also, I just confirmed again with Shawn Butler that 19 April 2018 is the date for the entry/inspection at 10:00 AM. Please let me know if there's any issue/problem with that day/time.

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U.S. POSTAL SERVICE	CERTIFICATE OF MAILING
MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE-POSTMASTER	
Received From: <u>EM Edsel</u>	
<u>307 E 30th St</u>	
<u>Bremerton WA 98310</u>	
One piece of ordinary mail addressed to:	
<u>John Groseclose / GStovall</u>	
<u>1155 Bethel Ave</u>	
<u>Burien WA 98306</u>	

Affix fee here in stamps or meter postage and post mark. Inquire of Postmaster for current fee.

MAR 23 2018

Ex "A"  
Solo page  
Appeal p. 28



KITSAP  
**CASE SUMMARY**  
**CASE NO. 18-2-00098-18**

**ERNEST M EDSEL et al**  
vs  
**PATRICK GILL et al**

§	Location:	<b>Kitsap</b>
§	Judicial Officer:	<b>Houser, William C</b>
§	Filed on:	<b>01/10/2018</b>
§	JIS/SCOMIS Case Number:	<b>18-2-00098-1</b>
§	SCOMIS Judgment Number:	<b>19-9-01380-7</b>
§		<b>19-9-01381-5</b>
§		

CASE INFORMATION

**Statistical Closures**  
03/21/2019 Judgment/Order/Decree Filed

**Case Type: PRP Property Damages**

**Case Status: 04/18/2019 On Appeal**

**Case Flags: Jury Trial 12  
Pre-Assigned**

<b>DATE</b>	<b>CASE ASSIGNMENT</b>
-------------	------------------------

**Current Case Assignment**

Case Number	18-2-00098-18
Court	Kitsap
Date Assigned	01/10/2018
Judicial Officer	Houser, William C

PARTY INFORMATION

**Plaintiff**      **EDSEL, ERNEST M**

*Lead Attorneys*

**Pro Se**

*et al*

**Defendant**      **BOWMAN, BARBARA**

**Butler, Shawn  
Retained**

206-689-2166(W)

*et al*

<b>DATE</b>	<b>EVENTS &amp; ORDERS OF THE COURT</b>	<b>INDEX</b>
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01/10/2018	 Case Information Cover Sheet	Index # 1
01/10/2018	 Complaint <b>FOR DAMAGES AND OTHER RELIEF: NUISANCE; TRESPASS; BREACH OF CONTRACT; DRUG HOUSE NUISANCE</b>	Index # 2
02/02/2018	 Affidavit Declaration Certificate Confirmation of Service <b>SUMMONS, COMPLAINT</b> Party: Defendant GILL, PATRICK; Defendant BOWMAN, BARBARA	Index # 3
02/02/2018	 Amended Complaint <b>FOR DAMAGES AND OTHER RELIEF: NUISANCE; TRESPASS; BREACH OF CONTRACT; DRUG HOUSE NUISANCE</b>	Index # 4
02/02/2018	 Notice of Appearance Party: Attorney Horton, David P; Defendant DAPPOLLONIO, AMBERLEE	Index # 5

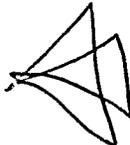
KITSAP  
**CASE SUMMARY**  
**CASE NO. 18-2-00098-18**

Party: Attorney Groseclose, John Daniel; Defendant LAMOUREUX, DEREK; Defendant DAPPOLLONIO, AMBERLEE

03/14/2019	 Correspondence <i>/PLAINTIFFS' INDEX GUIDE TO PLAS' TEN RESPONSE EXHIBITS FILED ON MAR 5 2019</i>	Index # 177
03/15/2019	<b>CANCELED Presentation of Order</b> (1:30 PM) (Judicial Officer: Houser, William C ;Location: Courtroom 269) <i>RE: 2/15/19 RULING</i> <i>Duplicate Hearing</i> <b>03/08/2019 Reset by Court to 03/15/2019</b>	
03/15/2019	<b>CANCELED Summary Judgment</b> (1:30 PM) (Judicial Officer: Houser, William C ;Location: Courtroom 269) <i>D'APPOLIONIO AND LEMOUREAUX</i> <i>Duplicate Hearing</i>	
03/15/2019	<b>Summary Judgment</b> (1:30 PM) (Judicial Officer: Houser, William C ;Location: Courtroom 269) <i>GILL AND BOWMAN FOR DISMISSAL</i> Resource: Court Reporter Court Reporter, FTR Resource: Clerk Turbyfill, Becky Events: 02/15/2019 Note for Motion Docket	
	<b>MINUTES</b>  Motion Hearing (Judicial Officer: Houser, William C ) <i>COURT TAKES UNDER ADVISEMENT</i> Held; COURT TAKES UNDER ADVISEMENT <i>Held</i>	Index # 178
03/15/2019	 Motion Hearing (Judicial Officer: Houser, William C ) <i>COURT TAKES UNDER ADVISEMENT</i>	Index # 178
03/15/2019	 Index <i>TO PLAINTIFFS' RESPONSE EXHIBITS</i>	Index # 179
03/19/2019	 Motion <i>FOR JURY TRIAL ON DAMAGES ONLY AND TO STRIKE DEFENDANTS CR 56 SUMMARY JUDGMENT MOTIONS</i> Party: Plaintiff EDSEL, ERNEST M	Index # 180
03/19/2019	 Declaration Affidavit <i>IN SUPPORT OF MOTION</i> Party: Plaintiff EDSEL, ERNEST M	Index # 181
03/19/2019	 Note for Motion Docket <i>03/29/2019 @ 1:30 W/WCH.</i> Party: Plaintiff EDSEL, ERNEST M	Index # 182
03/20/2019	 Note for Motion Docket <i>*AMENDED* 03/29/19 1:30PM WCH (#182)</i> Party: Plaintiff EDSEL, ERNEST M	Index # 183
03/21/2019	 Courts Decision (Judicial Officer: Houser, William C ) <i>ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT</i>	Index # 184
03/21/2019	Case Resolution Dismissal Without Trial	

KITSAP  
**CASE SUMMARY**  
**CASE NO. 18-2-00098-18**

03/21/2019	Case Resolution Dismissal Without Trial	
03/25/2019	 Response <i>TO MOTION FOR JURY TRIAL AND MOTION TO STRIKE SM JD MOTIONS</i> Party: Attorney Groseclose, John Daniel; Defendant LAMOUREUX, DEREK; Defendant DAPPOLLONIO, AMBERLEE	Index # 185
03/26/2019	 Order Denying Motion Petition (Judicial Officer: Houser, William C ) <i>PLAINTIFF'S DESIGNATION OF WORK PRODUCT FOR THE PLAINTIFF EXPERT REPORTS</i>	Index # 186
03/26/2019	 Order Granting Motion Petition (Judicial Officer: Houser, William C ) <i>FOR PROTECTION ORDER AND/OR QUASH PLAINTIFF'S DISCOVERY REQUESTS</i>	Index # 187
03/27/2019	 Declaration Affidavit <i>/SUPPLEMENTARY PLA EDESEL SWORN DECLARATION IN SUPPORT OF PLAS' MOTION FOR JURY TRIAL ON DAMAGES ONLY, AND MOTION TO STRIKE</i> Party: Plaintiff EDESEL, ERNEST M	Index # 188
03/28/2019	 Motion <i>TO AMEND OR ALTER THE COURT'S 21 MARCH 2019 ORDER</i> Party: Plaintiff EDESEL, ERNEST M	Index # 189
03/28/2019	 Note for Motion Docket <i>04/19/19 1:30PM WCH (DENIED/STRICKEN 3/29/19 WCH)</i> Party: Plaintiff EDESEL, ERNEST M	Index # 190
03/28/2019	 Motion for Reconsideration Party: Plaintiff EDESEL, ERNEST M	Index # 191
03/28/2019	 Note for Motion Docket <i>05/03/19 1:30PM WCH (DENIED/ STRICKEN 3/29/19 WCH)</i> Party: Plaintiff EDESEL, ERNEST M	Index # 192
03/29/2019	<b>CANCELED Motion Hearing (1:30 PM)</b> (Judicial Officer: Houser, William C ;Location: Courtroom 270) <i>PLAINTIFF'S MOTIONS FOR JURY TRIAL ON DAMAGES ONLY AND TO STRIKE DEFENDANTS' CR56 MOTION FOR SUMMARY JUDGMENT</i> <i>Dismissed</i>	
03/29/2019	 Motion <i>/AMENDED MOTION TO AMEND OR ALTER THE COURT'S 21 MARCH 2019 ORDER</i> Party: Plaintiff EDESEL, ERNEST M	Index # 193
03/29/2019	 Courts Decision (Judicial Officer: Houser, William C ) <i>/ORDER ON RECONSIDERATION AND MOTION TO AMEND OR ALTER</i>	Index # 194
04/02/2019	 Motion <i>FOR ATTORNEY FEES</i> Party: Attorney Groseclose, John Daniel; Defendant LAMOUREUX, DEREK; Defendant DAPPOLLONIO, AMBERLEE	Index # 195
04/02/2019	 Notice of Hearing <i>04/19/2019 @ 1:30 W/WCH. DEFENDANTS' MOTION FOR ATTORNEY FEES</i>	Index # 196





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2019 MAR 29 PM 1:59

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KITSAP COUNTY

EDSEL, ET AL.,  
PLAINTIFFS

NO. 18-2-00098-18  
[JUDGE HOUSER]

v.

PLAINTIFFS' AMENDED CR 59(h) MOTION TO  
AMEND OR ALTER THE COURT'S  
21 MARCH 2019 ORDER

GILL, ET AL.,  
DEFENDANTS.

*In re: Judicial Admission by Defendants*

PURSUANT TO CR 56, 59(h), and the 15 March 2019 *judicial admission by Mr. Shawn Butler, attorney for Landlord Defendants Gill and Bowman*, which was made on the record during the 1:30 PM hearing on the Defendants' CR 56 Summary Judgment motions before Judge Houser, Plaintiffs are entitled to the amending or altering of the court's 21 March 2019 order and "Decision on Defendants' Motions for Summary Judgment." Pursuant to CR 56 and 59(h), an order amending or altering said 21 March 2019 order/decision is proper based upon the March 15, 2019 judicial admission by Mr. Butler that his client Defendants Gill and Bowman are "*accepting as true Mr. Edsel's allegations.*"

ERNEST M. EDSSEL, ESQ.  
WA STATE BAR # 32274  
Plaintiff Pro Se  
307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

1           This amended motion is exactly the same as the original motion but for the correction  
2 of minor errors of inclusion and omission found in the original motion at: ¶¶ A and B of this  
3 page 2; ¶ 7, on page 4; and, ¶ 19, on page 7.

4           In support of this motion, Plaintiffs submit:

5

6           A.     *Plaintiffs' Motion for Jury Trial on Damages Only, and Motion to Strike*  
7 *Defendants' CR 56 Summary Judgment Motions*, filed on 19 March 2019, two days before the  
8 court signed and filed and entered its 21 March 2019 order and decision that is the subject of  
9 this motion to alter or amend. See, **Exhibit REC-1**, a true and correct copy of said motion;

10

11           B.     *Plaintiff Edsel Sworn Declaration* in support of the above-described motion,  
12 which sworn declaration was also filed on 19 March 2019, two days before the court signed  
13 its 21 March 2019 order and decision that is the subject of this motion to alter or amend. See,  
14 **Exhibit REC-2**, a true and correct copy of said declaration;

15

16           C.     *Supplementary Plaintiff Edsel Sworn Declaration* in support of the above-  
17 described motion, which supplementary sworn declaration was filed on 27 March 2019. See,  
18 **Exhibit REC-3**, a true and correct copy of the supplementary declaration with a copy of  
19 relevant portions of the court reporter's transcript of the 15 March 2019 hearing wherein  
20 Defendants made their judicial admission;

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22           The above-described motion, declarations, and transcript are herein restated and  
23 wholly incorporated by reference.

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**I. PLAINTIFFS ARE ENTITLED TO  
AN ALTERED OR AMENDED ORDER**

1. The WA State Supreme Court held in *State ex rel. Bond v. State*, 62 Wn.2d 487, 490, 383 P.2d 288 (1963) that: “The purpose of a summary judgment is to avoid a useless trial. It permits the trial court to cut through formal allegations and grant relief when it appears from **uncontroverted facts**, set forth in affidavits, depositions, admissions on file or in the pleadings, that there are no genuine issues as to any material fact. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 604 (1960). However, whenever there is a genuine issue as to any material fact a trial is necessary. *Hughes v. Chehalis School Dist. No. 302*, 61 Wn.2d 220, 222, 377 P.2d 642 (1963); *Jolly v. Fossum*, 59 Wn.2d 20, 365 P.2d 780 (1961)” (emphasis added).

2. In seeking a summary judgment, the moving party always has the burden of proving, by **uncontroverted facts**, that no genuine issue as to any material fact exists. *State ex rel. Bond v. State*, 62 Wn.2d 487, 490, 383 P.2d 288 (1963) citing *Preston v. Duncan*, supra; *Jolly v. Fossum*, supra; *Hughes v. Chehalis School Dist. No. 302*, supra; *Jorgensen v. Massart*, 61 Wn.2d 491, 378 P.2d 941 (1963)(emphasis added).

3. Pursuant to CR 56, Plaintiffs are clearly entitled to an order amending or altering the court’s 21 March 2019 order and “Decision on Defendants’ Motions for Summary Judgment” because Landlord Defendants Gill and Bowman made a judicial admission that concedes as true all factual allegations by Plaintiffs, as more fully described below.

The Landlord Defendants’ judicial admission directly **controverts** all facts that all four Defendants had a burden of proving in their summary judgment motions pursuant to CR 56 and the above-cited caselaw.

1                                   **II. ALL FACTS ARE CONTROVERTED AS A RESULT OF**  
2                                   **LANDLORD DEFENDANTS' JUDICIAL ADMISSION**  
3

4           4.       On 15 March 2019, at the hearing on Defendants' summary judgment  
5 motions, Mr. Butler, on behalf of Landlord Defendants Gill and Bowman, made a judicial  
6 admission, conceding as true, all of Plaintiffs' factual allegations, including Plaintiffs'  
7 allegations as to damages.

8           5.       As set forth in the court reporter's transcript of the hearing, at lines 11-12 on  
9 page 29, Mr. Butler in his rebuttal statement declared that: "**But for purposes of this motion,**  
10 **we're accepting as true Mr. Edsel's allegations.**" (emphasis added). See, page 29 of the  
11 transcript attached to Exhibit REC-3, the supplementary sworn declaration.

12          6.       According to *The Random House Dictionary of the English Language, Second*  
13 *Edition, Unabridged*, at page 11, the root word "accept" definition of "accepting" as used by  
14 Mr. Butler means: "**2. to agree or consent to; accede to**" (emphasis added).

15          7.       Furthermore, a review of the entire transcript reveals that Mr. Groseclose,  
16 attorney of Defendants D'Appollonio and Lamoureux, never objected to said declaration by  
17 Mr. Butler. Nor did Mr. Groseclose otherwise oppose it. See, e.g., Exhibit REC-4, a copy of  
18 the entire transcript, attached to Plaintiffs' Motion for Reconsideration.

19          8.       Indeed, as set forth in the transcript, at lines 3-4 on page 31, when asked by  
20 Judge Houser to speak on the record for Tenant Defendants D'Appollonio and Lamoureux  
21 after Mr. Butler's rebuttal statement, Mr. Groseclose in his rebuttal statement declared, "**I**  
22 **don't -- I don't have anything to add.**" (emphasis added).

23          9.       Accordingly, the Tenant Defendants consented to the Landlord Defendants'  
24 judicial admission when the Tenant Defendants waived any objections to said admission.

1           10.     A judicial admission has been described as “a formal act, done in the course of  
2 judicial proceedings, which waives or dispenses with the production of evidence, by  
3 conceding for the purposes of litigation that the proposition of fact alleged by the opponent is  
4 true.” 4 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1058, at 27 (Chadbourn rev. ed.  
5 1972) [hereinafter 4 WIGMORE]. **Judicial admissions include verbal statements by counsel  
6 appearing before a court, whether at a hearing or at trial.** 9 JOHN H. WIGMORE,  
7 WIGMORE ON EVIDENCE § 2594, at 832-33 (1981 & Supp. 1991)[hereinafter 9 WIGMORE].

8           11.     “In fact, admissions are . . . formal concessions in the pleadings in the case or  
9 stipulations.” JOHN W. STRONG, ET AL., 2 MCCORMICK ON EVIDENCE § 254, at 449 (4th ed.  
10 1992) [hereinafter MCCORMICK]. And, such formal stipulations and concessions “by a party  
11 or its counsel have the effect of withdrawing a fact from issue and dispensing wholly with the  
12 need for proof of the fact.” MCCORMICK, § 254, at 449.

13           12.     “In other words, a fact that is judicially admitted is no longer a fact at issue in  
14 the case — the party making the judicial admission has conceded to it.” 9 WIGMORE, § 2590,  
15 at 822-23.

16           13.     The Judicial Admissions Doctrine is well-established in WA State, both in civil  
17 and criminal cases. **“A stipulation to facts is an express waiver conceding for the purposes  
18 of trial that the facts are true and there is no need to prove the facts.”** State v. Wolf, 134  
19 Wn.App. 196, 199, 139 P.3d 414 (2006) (quoting Key Design, Inc. v. Moser, 138 Wn.2d 875,  
20 893-94, 983 P.2d 653 (1999), a real estate lawsuit which involved the doctrine not being  
21 applied to the Statute of Frauds)(emphasis added).

22           14.     **“Whether to stipulate to facts is a tactical decision and an attorney can  
23 decide whether a stipulation is appropriate.”** State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d  
24 286 (1995); State v. Goodin, 67 Wn.App. 623, 633, 838 P.2d 135 (1992).

1           15.     Furthermore, common law and Rules of Evidence, both federal and state,  
2 including WA State's ER 801(d)(2), recognize that a factual statement made by an attorney  
3 can be used as an admission of the party that the attorney represents. 4 WIGMORE § 1058, at  
4 26 (statements by an opponent may be admissible against him); 2 MCCORMICK § 244, at 520;  
5 2 MCCORMICK § 254, at 447-49; WA State ER 801(d)(2)("Statements Which Are Not  
6 Hearsay. A statement is not hearsay if-- (2) Admission by Party-Opponent. The statement is  
7 offered against a party and is (i) the party's own statement, in either an individual or a  
8 representative capacity or (ii) a statement of which the party has manifested an adoption or  
9 belief in its truth, or (iii) a statement by a person authorized by the party to make a statement  
10 concerning the subject, or (iv) a statement by the party's agent or servant acting within the  
11 scope of the authority to make the statement for the party, or (v) a statement by a  
12 coconspirator of a party during the course and in furtherance of the conspiracy.).

13           16.     Indeed, "*trial attorneys stand in the place of their clients and may perform*  
14 *acts which the client might perform in person. Hence there is scarcely any limit to the*  
15 *admissions which they may make.*" 2 JONES, EVIDENCE § 358, at 673 (5th ed. 1958 & Supp.  
16 1971)(emphasis added); *and see, Laird v. Air Carrier Engine Serv. Inc.*, 263 F.2d 948, 953  
17 (5th Cir. 1959)("an attorney has wide authority in the conduct of litigation. He is chosen to  
18 *speak for the client in court. When he speaks in court, whether it be on a formal trial or in*  
19 *an informal pretrial, he speaks for and as the client.*")(emphasis added).

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1                   **II. CR 59(h) REQUIRES THE COURT'S ORDER/DECISION**  
2   **TO BE ALTERED OR AMENDED**

3  
4           17. CR 59(h) provides that: "A motion to alter or amend the judgment shall be  
5 filed not later than 10 days after entry of the judgment."

6           18. The Defendants' motions for summary judgment, and supporting papers, never  
7 stated or conceded that all factual allegations by Plaintiffs were admitted by the Defendants  
8 to be true. It was not until the 15 March 2019 hearing when Mr. Butler, the attorney for  
9 Landlord Defendants, made a rebuttal statement at the very end of the hearing that included  
10 and introduced such a judicial admission as to all factual allegations of Plaintiffs.

11           19. Accordingly, such judicial admission requires that the court's 21 March 2019  
12 order be amended to altered to **deny** Defendants' summary judgment motions because **all**  
13 **facts that they had to prove with uncontroverted facts under CR 56 were and are**  
14 **directly controverted by the Landlord Defendants' judicial admission during their**  
15 **rebuttal statement at the 15 March 2019 hearing** on said motions for summary judgment.

16           Thus, by reason of Mr. Butler's judicial admission, and pursuant to Key Design, Inc.  
17 v. Moser, 138 Wn.2d, at 893-94, all factual allegations by Plaintiffs are true and they stand as  
18 controverted CR 56 facts that also prove each and every cause of action without a jury  
19 needing to decide liability. Plaintiffs only need to have a jury decide damages, as set forth in  
20 the attached 19 March 2019 motion. See, the attached **Exhibit REC-1**.

21  
22           RESPECTFULLY SUBMITTED on this 29 day of March, 2019.

23  
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26           \_\_\_\_\_  
27           ERNEST M. EDSEL, ESQ.  
28           WA STATE BAR # 32274/ Plaintiff Pro Se  
29           307 E. 30th St., Bremerton, WA 98310  
              Tel. 360-373-2910

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Sworn Certificate of Service

On this 29 day of March, 2019, in Kitsap County, WA State, pursuant to Rule 5, WA Rules of Civil Procedure, the undersigned, under penalty of perjury and upon personal knowledge, declares that he served or caused to be served a true and correct copy of the foregoing paper upon all Defendants by:

mailing said copy via 1st Class, U.S. Mail, postage prepaid [or next day confirmed USPS or Fedex courier delivery], as follows:

**Defendants Gill and Bowman** thru attorney Shawn Butler, Esq., at 1001 4th Ave, Ste # 4200, Seattle, WA 98154-1154;

**Defendants Lamoureux and D'Appollonio** thru attorney, John Groseclose, Esq., at 1155 Bethel Avenue, Port Orchard, WA 98366.

[note: exhibits not included as they were previously served on said counsel]



---

ERNEST M. EDSEL, ESQ.  
WA STATE BAR # 32274  
Plaintiff Pro Se  
307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

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**PLAINTIFFS' EXHIBIT:** REC-1

KITSAP COUNTY SUPERIOR COURT  
CASE NO. 18-2-00098-18  
[JUDGE HOUSER]

**PLAINTIFFS' EXHIBIT:** REC-1

PLAINTIFFS' EXHIBIT(S) ATTACHED

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dlw/d Gravel @ 11:57 AM

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KITSAP COUNTY

EDSEL, ET AL.,  
PLAINTIFFS

NO. 18-2-00098-18  
[JUDGE HOUSER]

v.  
  
GILL, ET AL.,  
DEFENDANTS.

PLAINTIFFS' MOTION FOR JURY TRIAL  
ON DAMAGES ONLY, AND  
MOTION TO STRIKE DEFENDANTS' CR 56  
SUMMARY JUDGMENT MOTIONS

*In re: Judicial Admission by Defendants*

PURSUANT TO the 15 March 2019 *judicial admission by Mr. Shawn Butler, attorney for Landlord Defendants Gill and Bowman*, that was made on the record during the 1:30 PM hearing on the Defendants' CR 56 Summary Judgment motions before Judge Houser, and pursuant to CR 11, Plaintiffs are entitled to: (1) an order setting a jury trial on damages only; and, (2) an order striking the summary judgment motions of Landlord Defendants and the Tenant Defendants D'Appollonio and Lamoureux. Such orders are based upon Mr. Butler's declaration that his clients "*admit all allegations*" of Plaintiffs because Plaintiffs have no damages.

ERNEST M. EDSSEL, ESQ.  
WA STATE BAR # 32274  
Plaintiff Pro Se  
307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

1 By reason of the judicial admission by the defendants on 15 March 2019, Plaintiffs  
2 are ready for their requested 6-person jury to hear the damages portion of Plaintiffs' causes of  
3 action and which proceedings should require no more than a 1-day trial. Judicial economy  
4 also requires such an order. So does WA State's constitution and pertinent caselaw thereunder.

5 In support of this motion, Plaintiffs submit the Sworn Declaration of Ernest Edsel,  
6 submitted separately, and a Legal Memorandum submitted herein with this motion.

7 Furthermore, in support of this motion, on 15 March 2019, the undersigned Plaintiff  
8 ordered the audio-recording of said hearing, and, on, 18 March 2019, requested court reporter  
9 Ms. Bell to prepare a transcript of such hearing. As soon as the court reporter turns over the  
10 transcript, Plaintiffs will submit a supplementary exhibit copy of such transcript.

11

12

#### I. JUDICIAL ADMISSION BY THE DEFENDANTS

13 1. A judicial admission has been described as "a formal act, done in the course of  
14 judicial proceedings, which waives or dispenses with the production of evidence, by  
15 conceding for the purposes of litigation that the proposition of fact alleged by the opponent is  
16 true." 4 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1058, at 27 (Chadbourn rev. ed.  
17 1972) [hereinafter 4 WIGMORE]. **Judicial admissions include verbal statements by counsel**  
18 **appearing before a court, whether at a hearing or at trial.** 9 JOHN H. WIGMORE,  
19 WIGMORE ON EVIDENCE § 2594, at 832-33 (1981 & Supp. 1991)[hereinafter 9 WIGMORE].

20 2. "In fact, admissions are . . . formal concessions in the pleadings in the case or  
21 stipulations." JOHN W. STRONG, ET AL., 2 MCCORMICK ON EVIDENCE § 254, at 449 (4th ed.  
22 1992) [hereinafter MCCORMICK]. And, such formal stipulations and concessions "by a party  
23 or its counsel have the effect of withdrawing a fact from issue and dispensing wholly with the  
24 need for proof of the fact." MCCORMICK, § 254, at 449.

1           3.        “In other words, a fact that is judicially admitted is no longer a fact at issue in  
2 the case — the party making the judicial admission has conceded to it.” 9 WIGMORE, § 2590,  
3 at 822-23.

4           The Judicial Admissions Doctrine is well-established in WA State, both in civil and  
5 criminal cases. “*A stipulation to facts is an express waiver conceding for the purposes of*  
6 *trial that the facts are true and there is no need to prove the facts.*” State v. Wolf, 134  
7 Wn.App. 196, 199, 139 P.3d 414 (2006) (quoting Key Design, Inc. v. Moser, 138 Wn.2d 875,  
8 893-94, 983 P.2d 653 (1999), a real estate lawsuit which involved the doctrine not being  
9 applied to the Statute of Frauds)(emphasis added).

10           “*Whether to stipulate to facts is a tactical decision and an attorney can decide*  
11 *whether a stipulation is appropriate.*” State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286  
12 (1995); State v. Goodin, 67 Wn.App. 623, 633, 838 P.2d 135 (1992).

13           4.        Furthermore, common law and Rules of Evidence, both federal and state,  
14 including WA State’s ER 801(d)(2), recognize that a factual statement made by an attorney  
15 can be used as an admission of the party that the attorney represents. 4 WIGMORE § 1058, at  
16 26 (statements by an opponent may be admissible against him); 2 MCCORMICK § 244, at 520;  
17 2 MCCORMICK § 254, at 447-49; WA State ER 801(d)(2)(“Statements Which Are Not  
18 Hearsay. A statement is not hearsay if-- (2) Admission by Party-Opponent. The statement is  
19 offered against a party and is (i) the party’s own statement, in either an individual or a  
20 representative capacity or (ii) a statement of which the party has manifested an adoption or  
21 belief in its truth, or (iii) a statement by a person authorized by the party to make a statement  
22 concerning the subject, or (iv) a statement by the party’s agent or servant acting within the  
23 scope of the authority to make the statement for the party, or (v) a statement by a  
24 coconspirator of a party during the course and in furtherance of the conspiracy.”).

1           5.     Indeed, *“trial attorneys stand in the place of their clients and may perform*  
2 *acts which the client might perform in person. Hence there is scarcely any limit to the*  
3 *admissions which they may make.”* 2 JONES, EVIDENCE § 358, at 673 (5th ed. 1958 & Supp.  
4 1971)(emphasis added); and see, Laird v. Air Carrier Engine Serv. Inc., 263 F.2d 948, 953  
5 (5th Cir. 1959)(*“an attorney has wide authority in the conduct of litigation. He is chosen to*  
6 *speak for the client in court. When he speaks in court, whether it be on a formal trial or in*  
7 *an informal pretrial, he speaks for and as the client.”*)(emphasis added).

8           6.     Moreover, Mr. Butler’s clients, Landlord Defendants Gill and Bowman, were  
9 in the court when Mr. Butler made the judicial admission, as was Mr. Groseclose, who was  
10 arguing for Tenant Defendants Lamoureux and D’Appollonio as their attorney of record.  
11 None of them objected to Mr. Butler’s judicial admission. Thus, they expressly or impliedly  
12 consented to, endorsed, or ratified the judicial admission.

13           7.     Furthermore, a judicial admission as to liability is a well-known pre-emptive  
14 tactic of defendants who strategically employ such an admission in order to reduce or  
15 eliminate their exposure to damages that a jury will consider. A “colorless admission by the  
16 opponent may sometimes have the effect of depriving the party of the legitimate moral force  
17 of his evidence . . . .” WIGMORE ON EVIDENCE, 3rd Ed. § 2591.

18           8.     Plaintiffs in this action accept the Defendants’ judicial admission and thus  
19 demand jury trial on damages only. The legitimate moral force of the judicial admission by  
20 the Defendants speaks for itself — they have admitted to being engaged in the following  
21 unlawful conduct: a drug house nuisance; a marijuana grow nuisance; an invasive vegetation  
22 nuisance and trespass; a burning/smoke nuisance; and, a noise nuisance. The Defendants only  
23 real and remaining dispute with Plaintiffs is their defense that Plaintiffs suffered no damages  
24 or nominal damages.

1           **II. PLAINTIFFS' RIGHT TO JURY TRIER OF FACT ON DAMAGES**

2           9. Pursuant to the Defendants' judicial admission, Plaintiffs are entitled to an  
3 order for a jury to hear the damages portion of their causes of action. After all, WA State's  
4 constitution guarantees that, "The right of trial by jury shall remain inviolate." Const. art. I, §  
5 21.

6           10. The measure of economic and non-economic damages is a question of fact  
7 within the jury's province. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 644-646, 771 P.2d 711  
8 (1989), citing among others, at 646, James v. Robeck, 79 Wash.2d 864, 869, 490 P.2d 878  
9 (1971), "To the jury is consigned under the constitution the ultimate ... power to weigh the  
10 evidence and determine the facts--and the amount of damages in a particular case is an  
11 ultimate fact."

12  
13   **III. CR 11 REQUIRES STRIKING**  
14   **DEFENDANTS' CR 56 MOTIONS**  
15   **FOR SUMMARY JUDGMENT**  
16

17           11. In light of the Defendants' judicial admission as to "all allegations" by  
18 Plaintiffs, all such facts are "***no longer a fact at issue in the case — the party making the***  
19 ***judicial admission has conceded to it.***" 9 WIGMORE, § 2590, at 822-23 (emphasis added).

20           12. Despite the judicial admission, the Defendants have failed to withdraw their  
21 CR 56 summary judgment motions. In other words, Defendants want the court to play  
22 favorites by forcing Plaintiffs into an inherently prejudicial and biased "heads we win, tails  
23 you lose" system of justice whereby the court gives Defendants the dual benefit of the court  
24 considering a CR 56 dismissal and, if that is denied, then a damages-only jury trial. The court  
25 must summarily deny and terminate the Defendants' sophisticated but highly abusive and  
26 prejudicial "heads we win, tails you lose" litigation tactic.

PLAINTIFFS' MOTION FOR JURY TRIAL ON DAMAGES ONLY,  
AND, TO STRIKE DEFENDANTS' CR 56 MOTIONS - p. 5

1           13.     In light of the judicial admission by Mr. Butler on 15 March 2019, the  
2 Defendants' CR 56 summary judgment motions signed by Mr. Butler and Mr. Groseclose, are  
3 not motions and legal memorandum that are in compliance with CR 11(a), which requires  
4 that their CR 56 motions and legal memorandum be:

5           “(1) *well grounded in fact*;

6           “(2) ... warranted by existing law or a good faith argument for the extension,  
7 modification, or reversal of existing law or the establishment of new law; ...

8           “(3) ... not interposed for any improper purpose, such as to harass or to cause  
9 unnecessary delay or needless increase in the cost of litigation;” (emphasis added).

10           Such “improper purpose” includes the Defendants’ clever but abusive “heads we win,  
11 tails you lose” litigation tactics described above in paragraph 12 with respect to Defendants  
12 leaving their CR 56 motions pending before the court, while also demanding that a jury only  
13 consider damages if the court denies the CR 56 motions.

14           14.     Furthermore, in light of the judicial admission, the Defendants’ CR 56  
15 summary judgment motions signed by Mr. Butler and Mr. Groseclose, are clearly not motions  
16 and legal memorandum that are in compliance with the fourth mandatory provision of CR  
17 11(a), which requires that all of the Defendants and their two attorneys *not assert*:

18           “(4) denials of factual contentions that are no longer warranted on the evidence....”

19           15.     Plaintiffs are thus entitled to a court order that strikes the Defendants’ CR 56  
20 motions. Plaintiffs are also entitled to a court order that imposes “upon the person who signed  
21 it, a represented party, or both, an appropriate sanction, which may include an order to pay to  
22 the other party or parties the amount of the reasonable expenses incurred because of the filing  
23 of the pleading, motion, or legal memorandum, including a reasonable attorney fee.”

24

1 IV. CONCLUSION

2 16. Landlord Defendants Gill and Bowman, through their attorney of record, made  
3 a judicial admission as to *all allegations* by Plaintiffs at the hearing for their CR 56 summary  
4 judgment motions on 15 March 2019. Said defendants were in court; so was the attorney of  
5 record for the Tenant Defendants; and, none of them objected to said admission. Thus, the  
6 Defendants' CR 56 summary judgment motions must be stricken as they are factually  
7 groundless and without any legal merit. Plaintiffs are entitled to a jury trial for the damage  
8 portion of their causes of action. The measure of economic and non-economic damages is a  
9 question of fact within the jury's province.

10  
11 RESPECTFULLY SUBMITTED on this 19 day of March, 2019.

12  
13   
14 \_\_\_\_\_  
15 ERNEST M. EDSEL, ESQ.  
16 WA STATE BAR # 32274  
17 Plaintiff Pro Se  
18 307 E. 30th St., Bremerton, WA 98310  
19 Tel. 360-373-2910  
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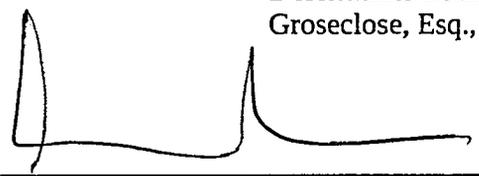
Sworn Certificate of Service

On this 19 day of March, 2019, in Kitsap County, WA State, pursuant to Rule 5, WA Rules of Civil Procedure, the undersigned, under penalty of perjury and upon personal knowledge, declares that he served or caused to be served a true and correct copy of the foregoing paper upon all Defendants by:

mailing said copy via 1st Class, U.S. Mail, postage prepaid [or next day confirmed USPS or Fedex courier delivery], as follows:

**Defendants Gill and Bowman** thru attorney Shawn Butler, Esq., at 1001 4th Ave, Ste # 4200, Seattle, WA 98154-1154;

**Defendants Lamoureux and D'Appollonio** thru attorney, John Groseclose, Esq., at 1155 Bethel Avenue, Port Orchard, WA 98366.



ERNEST M. EDSEL, ESQ.  
WA STATE BAR # 32274  
Plaintiff Pro Se  
307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

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**PLAINTIFFS' EXHIBIT:** REC-2

KITSAP COUNTY SUPERIOR COURT  
CASE NO. 18-2-00098-18  
[JUDGE HOUSER]

**PLAINTIFFS' EXHIBIT:** REC-2

PLAINTIFFS' EXHIBIT(S) ATTACHED

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MAR 19 2019

ALISON H. SONNTAG

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KITSAP COUNTY

EDSEL, ET AL.,  
PLAINTIFFS

NO. 18-2-00098-18

v.

GILL, ET AL.,

PLAINTIFF EDSEL SWORN DECLARATION  
IN SUPPORT OF PLAINTIFFS' MOTION  
FOR JURY TRIAL ON DAMAGES ONLY,  
AND MOTION TO STRIKE

DEFENDANTS.

COUNTY OF KITSAP  
STATE OF WASHINGTON

PLAINTIFF Ernest Edsel, under penalty of perjury, being competent to testify and more than 18 years of age, declares, pursuant to Washington State laws and upon personal knowledge, as follows:

1. I was at the 15 March 2019 hearing on Defendants' CR 56 motions before Judge Houser. The court reporter was not present due to illness. A recording was made.

ERNEST M. EDSSEL, ESQ.  
WA STATE BAR # 32274  
Plaintiff Pro Se  
307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

1           2.       During the 15 March 2019 hearing at 1:30 PM on Defendants' CR 56 motions,  
2 Mr. Butler declared that his clients will "admit all allegations" of Plaintiffs because Plaintiffs  
3 have no damages.

4           3.       Mr. Butler's clients, Landlord Defendants Gill and Bowman, were in the court  
5 when Mr. Butler made the judicial admission, as was Mr. Groseclose, who was arguing for  
6 Tenant Defendants Lamoureux and D'Appollonio as their attorney of record. None of them  
7 objected to Mr. Butler's judicial admission.

8           4.       Plaintiffs accept such judicial admission and demand their requested 6-person  
9 jury to hear the damages portion of Plaintiffs' causes of action.

10          5.       On 15 March 2019, I ordered the audio-recording of said hearing after court  
11 staff announced shortly before 1:30 PM that the court reporter was not available due to illness  
12 and that only court recordings would take place; then, on, 18 March 2019, once the audio  
13 recording was available for transcription, I requested one of Kitsap County Superior Court's  
14 duly-authorized court reporters, Ms. Gloria Bell, to prepare a transcript of such hearing.

15  
16 SO DECLARED IN KITSAP COUNTY ON THIS 19 DAY OF March, 2019

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20 ERNEST M. EDESEL, ESQ.  
21 WA STATE BAR # 32274 / Plaintiff Pro Se  
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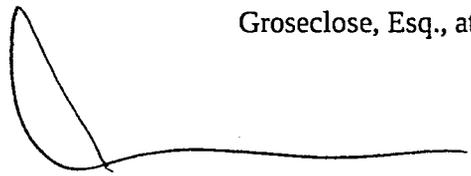
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Sworn Certificate of Service

On this 19 day of March, 2019, in Kitsap County, WA State, pursuant to Rule 5, WA Rules of Civil Procedure, the undersigned, under penalty of perjury and upon personal knowledge, declares that he served or caused to be served a true and correct copy of the foregoing paper upon all Defendants by mailing said copy via 1st Class, U.S. Mail, postage prepaid [or by next day confirmed USPS or Fedex courier delivery], as follows:

**Defendants Gill and Bowman** thru attorney Shawn Butler, Esq., at 1001 4th Ave, Ste # 4200, Seattle, WA 98154-1154;

**Defendants Lamoureux and D'Appollonio** thru attorney, John Groseclose, Esq., at 1155 Bethel Avenue, Port Orchard, WA 98366.



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ERNEST M. EDSSEL, ESQ.  
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307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

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**PLAINTIFFS' EXHIBIT:** REC-3

KITSAP COUNTY SUPERIOR COURT  
CASE NO. 18-2-00098-18  
[JUDGE HOUSER]

**PLAINTIFFS' EXHIBIT:** REC-3

PLAINTIFFS' EXHIBIT(S) ATTACHED

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MAR 27 2019

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KITSAP COUNTY  
SUPERIOR COURT  
2019 MAR 27 AM 11:35

ALISON H. SONNTEG

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KITSAP COUNTY

EDSEL, ET AL.,  
PLAINTIFFS

NO. 18-2-00098-18

v.

SUPPLEMENTARY  
PLAINTIFF EDSEL SWORN DECLARATION  
IN SUPPORT OF PLAINTIFFS' MOTION  
FOR JURY TRIAL ON DAMAGES ONLY,  
AND MOTION TO STRIKE

GILL, ET AL.,

DEFENDANTS.

COUNTY OF KITSAP  
STATE OF WASHINGTON

PLAINTIFF Ernest Edsel, under penalty of perjury, being competent to testify and more than 18 years of age, declares, pursuant to Washington State laws and upon personal knowledge, as follows:

1. Attached is a true and correct copy of relevant portions of the court reporter's transcript of the 15 March 2019 hearing on Defendants' CR 56 motions before Judge Houser.

ERNEST M. EDSSEL, ESQ.  
WA STATE BAR # 32274  
Plaintiff Pro Se  
307 E. 30th St., Bremerton, WA 98310  
Tel. 360-373-2910

1 The true and correct copy of said transcript is attached as Exhibit "J.A."

2 2. Based on my recollection and notes of the 15 March 2019 hearing, I  
3 previously testified that Mr. Butler declared that his clients will "*admit all allegations*" of  
4 Plaintiffs because Plaintiffs have no damages. Mr. Butler's judicial admission is actually  
5 broader than I reported since Mr. Butler also conceded Plaintiffs' allegations as to damages.

6 3. As set forth in the transcript, at lines 11-12 on page 29, Mr. Butler in his  
7 rebuttal statement declared that: "**But for purposes of this motion, we're accepting as true**  
8 **Mr. Edsel's allegations.**" (emphasis added). See, page 29 of the transcript. I have reviewed  
9 the entire transcript and note that Mr. Groseclose never objected to said declaration by Mr.  
10 Butler.

11 4. According to *The Random House Dictionary of the English Language, Second*  
12 *Edition, Unabridged*, at page 11, the root word "accept" definition of "accepting" as used by  
13 Mr. Butler means:

14 "2. to agree or consent to; accede to" (emphasis added).

15 5. I further note for the record that Mr. Butler only has authority to speak for, and  
16 thus bind, Landlord Defendants Gill and Bowman. However, as set forth in the transcript, at  
17 lines 3-4 on page 31, when asked by Judge Houser to speak on the record for Tenant  
18 Defendants D'Appollonio and Lamoureux after Mr. Butler's rebuttal statement, Mr.  
19 Groseclose in his rebuttal statement declared, "**I don't -- I don't have anything to add.**"  
20 (emphasis added).

21 6. On 20 March 2019, Defendants' counsel were actually served a copy of  
22 Plaintiffs' Motion for Jury Trial on Damages Only, and to Strike Defendants' CR 56  
23 Summary judgment Motions (with Edsel Supporting Sworn Declaration), at 9:49 AM (Mr.  
24 Butler) and 11:57 AM (Mr Groseclose). I therefore note for the record that, since 20 March

1 2019, Defendants' counsel have been able to order and obtain their own copy of: the audio  
2 recording, of the 15 March 2019 hearing, from the court; and, the transcript from Ms. Gloria  
3 Bell (finally prepared on 25 March 2019).

4  
5 SO DECLARED IN KITSAP COUNTY ON THIS 27 DAY OF March 2019

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8  
9 ERNEST M. EDSSEL, ESQ.  
10 WA STATE BAR # 32274 / Plaintiff Pro Se

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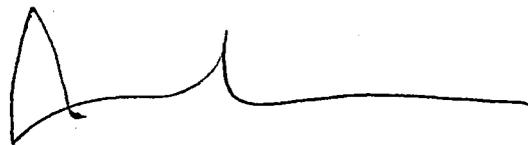
Sworn Certificate of Service

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18 On this 27 day of March, 2019, in Kitsap County, WA State, pursuant to  
19 Rule 5, WA Rules of Civil Procedure, the undersigned, under penalty of perjury and upon  
20 personal knowledge, declares that he served or caused to be served a true and correct copy of  
21 the foregoing paper upon all Defendants by mailing said copy via 1st Class, U.S. Mail,  
22 postage prepaid [or by next day confirmed USPS or Fedex courier delivery], as follows:

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**Defendants Gill and Bowman** thru attorney Shawn Butler, Esq., at  
1001 4th Ave, Ste # 4200, Seattle, WA 98154-1154;

**Defendants Lamoureux and D'Appollonio** thru attorney, John  
Groseclose, Esq., at 1155 Bethel Avenue, Port Orchard, WA 98366.

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33  
34 ERNEST M. EDSSEL, ESQ.  
35 WA STATE BAR # 32274 / Plaintiff Pro Se  
36 307 E. 30th St., Bremerton, WA 98310  
37 Tel. 360-373-2910

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KITSAP

ERNEST EDSSEL, )  
 )  
 ) Petitioner, )  
 )  
 vs. ) No. 18-2-00098-18  
 )  
 BARBARA BOWMAN, AMBERLEE )  
 D'APPOLLONIO, PATRICK GILL, )  
 DEREK LAMOUREUX, )  
 ) Respondents. )

TRANSCRIPT OF PROCEEDINGS  
Summary Judgment  
(Stenographically Transcribed via Digital Recording)

15 March 2019

Before the Honorable William C. Houser,  
a Kitsap County Superior Court Judge,  
sitting in Department 4 thereof.

APPEARANCES

FOR THE PETITIONER: ERNEST EDSSEL  
Self-represented Litigant

FOR THE RESPONDENTS BOWMAN/GILL:  
SHAWN BUTLER  
Helsell Fetterman LLP

FOR THE RESPONDENT LAMOUREUX:  
JOHN D. GROSECLOSE  
GS Jones Law Group, P.S.

TRANSCRIBED BY:

GLORIA C. BELL, CCR, 3261  
Official Court Reporter  
360.337.7177

Ex "JA."  
page 4

1           So Your Honor has more than enough direct  
2 evidence or evidence to make an inference that these are  
3 all issues of fact that need to go before a jury. They're  
4 valid. The case has merit. It has to be heard before a  
5 jury. There's nothing here, as a matter of law, that only  
6 a judge can decide, Your Honor.

7           Thank you.

8           MR. BUTLER: I should have said this at the  
9 beginning, but it's in my materials. You know, of  
10 course, my clients deny everything.

11           But for purposes of this motion, we're  
12 accepting as true Mr. Edsel's allegations. You know,  
13 Mr. Gill is a retired bus driver, Ms. Bowman works for  
14 the Seattle Public Libraries. They rent this house.  
15 There is no conspiracy.

16           This -- this jury instruction that was just  
17 handed to you deals with comparative fault. It has  
18 nothing to do with the case at issue. This is  
19 though -- what Mr. Edsel has done in this response,  
20 he's put forward a whole bunch of materials that have  
21 no bearing on his claims.

22           Mr. Groseclose was absolutely right, this case  
23 is about the burden. He has to burden to come forward  
24 with evidence to show his claims. He doesn't have any  
25 evidence. He has his supposition and his opinion.

EX  
"J.A.  
p24c

1 his response.

2 THE COURT: Mr. Groseclose, anything more?

3 MR. GROSECLOSE: I don't -- I don't have  
4 anything to add. Mr. Edsel's response really doesn't  
5 change my presentation in any way.

6 I -- I do think that the Court needs to review  
7 and look at the late filed materials and why that  
8 occurred. Look at the analysis of whether that's done  
9 in an intentional way. Look at whether it's neglectful  
10 or inexcusable neglect. Look at the previous orders in  
11 the case.

12 Whether it's done for strategic reasons or  
13 not, I think that the reported declaration of  
14 Mr. Herzog differs greatly from -- on the August 6th  
15 disclosure, my clients have obtained several orders to  
16 compel answers and discovery responses. The discovery  
17 deadline has passed.

18 When people talk about prejudice or the lack  
19 of prejudice, I do understand that I have the ability  
20 to juggle my schedule and do various things. And --  
21 and sometimes maybe the word "prejudice" is overused.

22 But Mr. Herzog's declaration, as an example if  
23 the Court were to admit it, it varies greatly from what  
24 was provided in August of last year. It's in violation  
25 of the orders to compel. It's in violation of the

