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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ERNEST EDSSEL, JUDY LAMB

APPELLANTS,

v.

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

RESPONDENTS.

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**BRIEF OF RESPONDENTS GILL & BOWMAN**

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## I. INTRODUCTION

Respondents Patrick Gill and Barbara Bowman are owners of a duplex in Bremerton, Washington, that they have rented to long-term tenants for many years. Those tenants include Respondents Derek Lamoureux and Amberlee D'Appollonio.

Appellant Ernest Edsel is a retired attorney and failed judicial candidate who more recently moved to Bremerton with his wife, Judy Lamb. Edsel and Ms. Lamb purportedly possess life estates, living at a property owned by their trusts. Upon moving to the property in June 2016, Edsel began a campaign to improve the house and property, remodeling and reconfiguring them. Not content to limit his efforts to the land he possesses, Edsel's improvement campaign expanded to encompass his neighborhood, and he took issue with the number of renters and an actual drug house (referred to by Edsel as the "Hong drug house"). Ultimately, he ended up complaining to the police, the fire department, and the City of Bremerton about the activities of Mr. Lamoureux and Ms. D'Appollonio. He complained about all manner of activity in the neighborhood and on the neighboring property, including *inter alia* a "marijuana grow operation," motocross events, an invasion of ivy, outdoor fires, and the maintenance and use of a private road he alleged was frequented by the dregs of humanity.

When Edsel could not get satisfaction from the authorities and from self-help, he turned to the judicial system. He brought a lawsuit, on behalf of he and his wife, against the Respondents. He later bought his wife's claims with 900 shares of Amazon stock. His claims included nuisance and trespass related to burning, noise, and vegetation. He also had a further nuisance claim for marijuana grown on the property. And he asserted a breach of contract claim and a nuisance claim associated with a private road that does not currently serve or abut his property. Not content to limit his legal campaign to the Respondents, he attempted to expand the circle of litigation to include most of his neighbors as defendants (many of whom he referred to as slumlords) or involuntary plaintiffs.

The trial court refused to allow Edsel to embroil more of his neighbors in litigation. The trial court then dismissed part of Edsel's lawsuit, including his claims for noise trespass, nuisance related to the private road, and breach of contract related to the private road. Later, the trial court dismissed the remainder of Edsel's claims and awarded Respondents' attorney fees based on RCW 4.84.185, CR 34, and CR 37.

Respondents Gill and Bowman ask that this Court affirm the trial court's orders, including those dismissing Edsel's claims, and put an end to this campaign against his neighbors.

## II. OBJECTIONS

As a preliminary matter, Respondents address several problematic aspects of Edsel’s brief and appellate strategy that eliminate broad swathes of his brief and arguments.

### A. **Rule 10.4 does not apply to the “motions” contained in Edsel’s Opening Brief.**

Edsel contends that his brief contains motions that, if granted, would preclude hearing this case on its merits. Opening Br. at 8-18. Edsel’s “motions” concern what he terms a “dispositive discovery error” and a “dispositive Judicial Admission.” Opening Br. at 8, 10. Under clear case law from this Court, RAP 10.4(d) does not apply and the motion is procedurally inappropriate.<sup>1</sup>

Under 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. The answer to a motion within a brief may be made within the brief of the answering party in the time allowed for filing the brief.” This Court has held that a party bringing such a motion must “show how such action would preclude the trial court from hearing th[e] case on the merits.” *Bishop v. Jefferson Title Co., Inc.*, 107 Wn. App. 833, 853, 28 P.3d 802 (2001). Alternately, a party can show that the appeal cannot be heard for

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<sup>1</sup> Edsel’s substantive arguments are separately addressed and refuted below in the Argument section. *See* Part V, *infra*.

reasons such as mootness, failure to cross-appeal, standing, or justiciability. *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 199-203, 11 P.3d 762, 27 P.3d 608 (2001).

Edsel has made no such showing under *Bishop* or *Amalgamated Transit Union Local 587* and his “motions” should be denied.

**B. Appellant’s attempt to incorporate arguments by reference violates RAP 10.4 and such arguments are deemed abandoned.**

Edsel attempts to incorporate by reference trial court briefs and material outside the brief on no less than six occasions:

- “Plaintiffs Edsel submit, in APPENDIX ONE of and to this brief, pertinent facts and legal authority necessary to rule upon this motion.” Opening Br. at 8.
- “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.” Opening Br. at 9.
- “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.” Opening Br. at 11.
- “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.” Opening Br. at 11 & n.6 (noting in a footnote, “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.”). Opening Br. at 11 & n.6.

- “The trial court erred . . . . See, pertinent facts and authority set forth in: . . . .” *Id.* at 35.
- “The trial court erred . . . . See, pertinent facts and authority set forth in: . . . .” *Id.* at 39.

Such attempts to incorporate by reference other material places Edsel’s Opening Brief well beyond the page limits set forth in RAP 10.4.

Under RAP 10.4(b), “A brief of appellant . . . should not exceed 50 pages.” Courts have consistently prohibited a party from using incorporation by reference to evade page limits either through reference to trial court briefs or through appended material. *See U.S. W. Commc’ns, Inc. v. Wash. Utils. & Transp. Comm’n*, 134 Wn.2d 74, 112, 949 P.2d 1337 (1997); *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 890, 251 P.3d 293 (2011); *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 652 n. 5, 20 P.3d 946 (2001); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). Attempting to incorporate material by reference indirectly through appendices is not appropriate either. *See Rose v. FMS, Inc.*, 32284-0-III, 2015 WL 6472396, at \*17 (Wash. Ct.

App. Oct. 27, 2015) (unpublished).<sup>2</sup>

Edsel should be fully aware of the decision in *Holland* and the need to supply meaningful legal authority and reasoned explanation within his appellate brief. *Holland* was cited to him the last time he was a pro se appellant before this Court. See *Siemer v. Edsel*, No. 30630-1-II, 2004 WL 1879839, \*1 & n.6 (2004) (unpublished) (“Moreover, [Edsel] does not support his constitutional arguments with meaningful legal authority or reasoned explanations, and thus we need not address them.”).

This Court should treat as abandoned Edsel’s arguments related to material that he has attempted to incorporate by reference. See *Holland*, 90 Wn. App. at 538. At a minimum, the Court should not consider any of that material as substantive arguments on the merits.

**C. Appellant has failed to designate in his notice of appeal and amended notice of appeal the judgments entered against him, and they will stand—regardless of the results of the appeal.**

Edsel has appealed a number of the trial court’s orders and decisions. Clerk’s Papers (“CP”) at 1538-39. However, he has not appealed from the judgments entered against him, which precludes effective review of the trial court’s attorney fee awards.

Under RAP 5.2(a), a notice of appeal must be filed within 30 days after entry of a decision of the trial court, including a judgment. See RAP

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<sup>2</sup> Pursuant to GR 14.1, this unpublished decision is being cited as nonbinding authority.

5.3(a). Appeal of a final judgment “brings up for review” certain decisions of a trial court. RAP 2.4(f). However, only certain types of designated decisions allow review of a final judgment not designated in the notice:

Except as provided in rule 2.4(b), the appellate court will review a final judgment not designated in the notice **only if** the notice designates an order deciding a timely motion based on (1) CR 50(a) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

RAP 2.4(c) (emphasis added).

Edsel has failed to designate the judgments entered against him for attorney fees in his notice of appeal and amended notice of appeal and he has failed to assign error to these judgments. *See* CP at 1538-39; Opening Br. at 24-25; *see also* CP at 1555-60.<sup>3</sup> As such, those judgments were not brought up on review and any appeal regarding attorney fees will be without any practical effect because these judgments against Edsel will remain in place.

### **III. RESTATEMENT OF THE CASE**

#### **A. Factual Background.**

Ernest M. Edsel is an attorney who was admitted to practice law in

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<sup>3</sup> This page range is an estimation. Respondents Gill and Bowman are filing a supplemental designation of Clerk’s Papers in conjunction with this Response Brief.

Texas and Washington. CP at 153 (¶1). Apparently, he believes that, while he practiced law, he gained expertise on a number of legal topics, and he is willing to opine upon these topics at length. CP at 63-64, 280, 353, 739, 988-89.

Edsel now lives in Bremerton, Washington. CP at 154 (¶2). He occupies a house at 307 East 30th Street that was purchased by trustees of trusts for him and his wife, Judy Lamb, where they have lived since June 2016. CP at 156 (¶¶ 11-12). Edsel has a life estate interest in the property, which is owned by Sandhurst Corp., a Texas corporate entity that is part of a trust, of which Edsel and his wife are beneficiaries. CP at 991.

The property where Edsel and his wife live abuts the property that Respondents Gill and Bowman own and that Respondents Lamoureux and D'Appollonio leased. *See* CP at 137; *see also* CP at 57. Edsel's neighbors include an IT technician for the Suquamish tribe and a Keno Supervisor/cashier at the Clearwater Casino. CP at 1041-42. The house Edsel's trustees chose for him is surrounded by properties rented out to tenants by landlords that he has referred to in court filings as "slumlords," including a neighbor he said rented out an "illegal basement" where all manner of activities occurred. CP at 97, 337; *see* CP 455 (describing the reference to his neighbors being "slumlords" as possibly an accident or a

Freudian slip).

According to Edsel, the house the trustees chose for him was also across the street from an actual drug house—a home he refers to as the “Hong drug house.” CP at 995, 1012; *see* CP at 12 (¶¶ 40-41). The house chosen by his trustees is also near a small private road (one that does not service his property) but that is used for access and parking for his neighbors—a private road that he complains had too many parked vehicles, fell into disrepair, did not properly channel water, and was a haven for drug dealers and drug users because it was “out of sight from police and neighbors.” CP at 12 (¶ 40), 70-71, 998-99, 1002, 1004-09; *see* CP at 819. Further, he alleged that one of his neighbors allowed someone to live out of a travel trailer on the private road and that various unsavory activities occur on the private road. CP at 995-99, 1001.

Edsel’s house has a deck with water views, and he has now remodeled the house to include luxury granite countertops, a fireplace, new flooring, and new and remodeled bathrooms.<sup>4</sup> CP at 289; *see* CP at 207 (¶ 60). He also removed all the grass from his backyard and created a Zen garden for himself. CP at 815; *see* CP at 194-95 (¶ 17). Edsel has invested in “more that \$90,000 in luxury improvements, upgrades, and

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<sup>4</sup> Edsel apparently expects certain creature comforts in his house, including weekly maid service, daily cooked meals for lunch and dinner, year-round landscaping services, and luxury furniture and furnishings. *See* CP at 962.

remodeling. CP at 960. Although he has not carried out the plan yet, Edsel wants to use the property for a “rotating bonsai collection,” to “collect and refurbish boats for [his] rotating collection, specially cigarette speed boats and all-wood vintage sailboats,” and to store his “family’s collection of kayaks, including sea kayaks.” CP at 989.

Edsel’s improvement campaign was not confined to the property he occupies—he sought to change the neighborhood his trustees had chosen for his house—and he resorted to self-help and calls to the authorities. He sprayed the neighboring property with chemicals and engaged in intrusive behavior, photographing his neighbors without their permission. CP at 810, 818, 820. He reported his neighbor’s property to the City of Bremerton for a tree top that had broken—which is not the subject of this lawsuit. *See* CP at 453-54, 457, 1002-03. He called the fire department when his neighbors had normal backyard fires that the fire department declined to extinguish or otherwise stop. CP at 1000-01; *see* CP at 815, 819-20. He called the police on his neighbors for a “marijuana grow operation” that police determined did not require any further action. CP at 813-14. Edsel also attempted to embroil most of his neighbors in litigation—whether they wanted to participate or not—by adding them all to this lawsuit in one fell swoop. CP at 93-104; *see* CP at 63-92.

After living at the property for only a year and a half, Edsel filed

this lawsuit against Respondents Gill and Bowman and their tenants, Respondents Lamoureux and D'Appollonio, on behalf of himself and his wife. CP at 1. In his lawsuit, Edsel asserted claims premised on nuisance, trespass, and breach of contract CP at 11-25 (¶¶ 39-87). Edsel's nuisance claim was based on allegations of a "drug house marijuana grow," burning, noise, use of a common area, and vegetation. CP at 13, 15-16, 18, 20-21, 24 (¶¶ 44, 52-53, 61, 71, 85). Edsel's trespass claim was based on allegations of burning, noise, and vegetation. CP at 16, 19, 25 (¶¶ 55, 64, 87). Edsel's breach of contract claim was premised on Edsel being a third-party beneficiary of a common area agreement that covers a private road adjoining the Gill-Bowman property. CP at 21-22 (¶¶ 72-74).

Edsel apparently purchased his wife's claims in the lawsuit in exchange for 900 shares of Amazon stock. CP at 898.

**B. Procedural Background.**

On January 10, 2018, Edsel filed the Complaint that named he and his wife as plaintiffs. CP at 1. On April 27, 2018, Respondents Gill and Bowman brought a motion for partial summary judgment to dismiss Edsel's claims for noise trespass, common area nuisance, and breach of contract. CP at 130. Respondents Lamoureux and D'Appollonio joined in the motion. *See* CP at 306.

On May 2, 2018, Edsel moved to substitute himself for his wife

and to amend the Complaint to “reflect a CR 17(a) substitution such that undersigned Ernest Edsel prosecutes Judy Lamb’s causes of action in his own name as the real party in interest pursuant to CR 17(a)” CP at 151; *see* CP at 179. The difference between the Complaint and the proposed Second Amended Complaint were limited:

- Judy Lamb’s name was removed from the caption. *Compare* CP at 1, *with id.* at 153.
- Judy Lamb’s identity as a plaintiff was removed, Edsel described the purchase of her claim, and references to “plaintiffs” were changed. *Compare* CP at 2, 4 (¶¶ 2, 12), *with id.* at 154, 156 (¶¶ 2, 12); *see* CP at 3-8, 10-25, 153-77.
- Allegations about Respondents Gill and Bowman’s address were removed. *Compare* CP at 2 (¶¶ 3-4), *with id.* at 154 (¶¶ 3-4).
- Reference to exhibits were changed. *Compare* CP at 7 (¶ 24), *with id.* at 159 (¶ 24).
- Typographical errors were corrected. *Compare* CP at 20 (¶ 67), *with id.* at 172 (¶ 67).
- And allegations about destruction of Edsel’s plants and property was added. *Compare* CP at 22, 24 (¶¶ 78, 84-85), *with* CP at 174-75 (¶¶ 78, 84-85).

Other than these minor changes, there were no other apparent changes from the Complaint to the Second Amended Complaint. *Compare* CP at 1-25, *with* CP at 153-78. No one, including Edsel, argued that the substitution and amendment would have any other effect on

Edsel's claims or the pending motion for partial summary judgment. *See* CP at 150-51, 179-86; *see also id.* 188-90. The trial court granted Edsel's motions, and he filed his Second Amended Complaint on May 16, 2018. CP at 188-89; *id.* at 190.

On May 16, Plaintiff also filed a motion to compel production of documents provided to Respondents Gill and Bowman's insurer. CP at 216-21. In his motion, Edsel took the position he was entitled "eight matters or documents" covering a wide range of topics that included documents from Respondent Gill and Bowman's insurer or that related to insurance that predated his possession of the property. CP at 221-23. He contended in that motion that, based on two broad requests, he was entitled to any and every document related to the Gill-Bowman property, anything related to Respondents Gill and Bowman's tenants, including Respondents Lamoureux and D'Appollonio, and anything in possession of Respondents Gill and Bowman's insurer. *See* CP at 228-29. Respondents Gill and Bowman opposed the Motion to Compel. *See* CP at 304.

On May 23, 2018, Edsel filed an untimely response to the Respondents' motion for partial summary judgment, contending that his response was timely because a motion for partial summary judgment is not subject to the requirements of CR 56(c). CP at 259. He also contended that he could bring a trespass action for noise and he had rights based on

the common area (i.e., the private road). CP at 260-67.

On May 24, 2018, Respondents Lamoureux and D'Appollonio moved to strike, on shortened time, Edsel's untimely response. CP at 293, 295-97.

On May 25, 2018, the trial court struck Edsel's response to the motion for partial summary judgment as untimely. CP at 302-03. It denied his motion to compel because it found that his motion was "not well-grounded in fact or law." CP at 305. And the Court granted the Respondents' motion for partial summary judgment and dismissed his claims for noise trespass, common area nuisance, and breach of the common area maintenance agreement. CP at 307. That same day, Respondents Gill and Bowman filed their Answer to Edsel's Second Amended Complaint.<sup>5</sup> CP at 311.

On June 4, 2018, Edsel filed a motion to clarify and for reconsideration. CP at 326. In that motion, Edsel argued that he needed discovery, that he had filed the Second Amended Complaint between the time that the motion for partial summary judgment was filed on April 27 and the trial court's May 25 order dismissing Edsel's claims, and that he could not comprehend various aspects of the trial court's decision. CP at

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<sup>5</sup> Respondents Lamoureux and D'Appollonio filed their Answer on June 13. CP at 495.

327-33. The trial court denied Edsel's motion. CP at 503.

On February 15, 2019, Respondents filed motions for summary judgment to dismiss Edsel's remaining claims. CP at 778, 825. Four days later, Edsel sought to delay the hearing on the motions to obtain the transcript from **his own deposition**, to obtain declarations from **his own realtor and physician**, and to obtain **his own evidence** that he allowed to be destroyed. CP at 851, 853-55; *see also* CP at 860-65. The trial court denied Edsel's motion. CP at 877, 881-82. On March 5, Edsel responded to the motions for summary judgment. CP at 883, 1062. On March 14 and 15, Edsel filed documents he referred to as indices. CP at 1240-64. On March 15, the hearing on the motions for summary judgment occurred. CP at 1354-90. On March 21, the trial court granted summary judgment and dismissed all of Edsel's remaining claims against all defendants. CP at 1279-83.

Following the hearing on summary judgment, Edsel filed a motion to strike the summary judgment motions, premised on the theory that counsel for Mr. Gill and Ms. Bowman made a judicial admission that required the summary judgment motions be struck. CP at 1266-67; *see* CP at 1382. After the trial court's order dismissing his claims was entered, Edsel then moved to amend or alter that order and again contended that there was a purported judicial admission. CP at 1296. Edsel also moved

for reconsideration and did so based—yet again—on the supposed judicial admission. CP at 1325. The trial court denied Edsel’s motions for reconsideration and to amend or alter. CP at 1424. The trial subsequently ruled that there had been no judicial admission:

Plaintiffs, in their Motion for Reconsideration, blatantly misrepresented the statements of counsel when they submitted documents claiming Landlords’ counsel made a judicial admission during oral argument for summary judgment. This same misrepresentation was made regarding the same statements from the Landlord’s counsel in three additional separate instances.

CP at 1534 (footnotes omitted).

The Respondents moved for and were granted their attorney fees.

CP at 1426, 1490, 1532-36.

This appeal followed. CP at 1521, 1538.

#### **IV. ISSUES PRESENTED**

1. Did the trial court properly exercise its discretion when it refused to treat a description of the summary judgment standard, made at oral argument, as a judicial admission?

2. Did the trial court properly exercise its discretion when it denied Edsel’s motion to compel?

3. Did the trial court err when it granted Respondents’ motions for partial summary judgment and summary judgment?

4. Should the trial court’s award of attorney fees stand?

## V. ARGUMENT

### A. Standards of Review.

A trial court's ruling regarding an admission is reviewed for an abuse of discretion. *See Peralta v. State*, 187 Wn.2d 888, 895 & n.4, 389 P.3d 596 (2017). "A trial court's denial of a motion to compel or a CR 56(f) motion for a continuance are reviewed 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).

An appellate court reviews a trial court's order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). A trial court must grant a motion for summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c).

However, whether to accept or reject an untimely affidavit is within the trial court's discretion, and a trial court's ruling on a motion to strike a declaration on summary judgment is reviewed under an abuse of discretion standard.<sup>6</sup> *Oltman v. Holland America Line USA, Inc.*, 163

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<sup>6</sup> Edsel states that "Appellate courts review de novo all trial court rulings made in conjunction with a summary judgment motion, including rulings excluding portions of declarations." Opening Br. at 35, 43. The case he cites for this proposition says nothing regarding the exclusion of declarations or portions thereof. *See Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 215, 242 P.3d 1 (2010). And the Washington Supreme Court has clarified that de novo review only applies to an

Wn.2d 236, 243, 247, 178 P.3d 981 (2008); *O’Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 521-22, 125 P.3d 134 (2004) (“Here, the O’Neills filed their supplemental declaration three days prior to the summary judgment hearing. It was within the trial court’s discretion to refuse to consider them timely filed.”); *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998) (citing *King Cty. Fire Prot. Dist. No. 16 v. Hous. Auth. of King Cty.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994)); *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987). Similarly, a trial court’s order on a motion for reconsideration, including on reconsideration of summary judgment dismissal, is reviewed for abuse of discretion. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.2d 729 (2005).

“Contentions not made to trial court in its consideration of a summary judgment motion need not be considered on appeal.” *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991). Ordinarily, an appellate court will not reverse on grounds not presented to the trial court and will not reverse when the trial court’s decision can be sustained on any theory, even if that theory might differ from the trial court’s decision. *Thompson v. Thompson*, 82 Wn.2d

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evidentiary ruling on admissibility—not on all rulings regarding evidence on summary judgment. See *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015).

352, 355, 510 P.2d 827 (1973); *Retail Clerks Local 629 v. Christiansen*, 67 Wn.2d 29, 31, 406 P.2d 327 (1965); *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994); *Concerned Coupeville Citizens*, 62 Wn. App. at 418. Finally, “[a]llegations of fact without support in the record will not be considered by an appellate court.” *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 513, 857 P.2d 283 (1993).

**B. The trial court did not abuse its discretion when it decided that a common description of the summary judgment standard recited at a hearing is not a judicial admission.**

Edsel contends the counsel for Respondents Gill and Bowman made a judicial admission when he stated at oral argument on summary judgment: “You know, of course, my clients deny everything. But for purposes of this motion, we’re accepting as true Mr. Edsel’s allegations.” Opening Br. at 10-18, 32-33; CP at 1382; *see id.* at 22-23, 30.

Courts have frequently used this exact same phrase to refer to facts submitted by a plaintiff in response to summary judgment after setting out the usual language that evidence is viewed in the light most favorable to the nonmoving party. *See, e.g., Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 250-51, 253, 258, 35 P.3d 1158 (2001) (Ireland, J., dissenting) (repeatedly describing evidence and mentioning the “viewed in the light most favorable” standard, and then concluding, “[a]ccepting

Snyder’s factual allegations as true and drawing all reasonable inferences therefrom in her favor should preclude summary judgment for the employer.”); *Seaman v. Karr*, 114 Wn. App. 665, 685, 59 P.3d 701 (2002) (“In reviewing the summary judgment dismissal of their emotional distress claims, we take the facts in the light most favorable to the Seaman. Accepting the Seaman’s factual allegations as true and drawing all reasonable inferences from them in their favor, we conclude . . . .” (internal citation omitted)); *Stansfield v. Douglas Cty.*, 107 Wn. App. 1, 9-10, 16, 27 P.3d 205 (2001) (“However, assuming these allegations are all true for purposes of summary judgment, none of these alleged acts arise to conduct that is atrocious, and utterly intolerable in a civilized community.” (internal quotation marks and citation omitted); *see also Koshelnik v. State*, 75032-1-I, 2016 WL 3456866, \*4, \*7 (Wash. Ct. App. June 20, 2016) (unpublished)<sup>7</sup> (“The trial court was already duty bound to accept the allegation that the interview caused anxiety as true for purposes of summary judgment.”). The words often left unsaid are that, on summary judgment, a court only takes “supported allegations of fact as true,” for the reason that an “adverse party may not rest upon the mere allegation . . . of his pleading.”” *Seaman*, 114 Wn. App. at 670 n.1, 679 (quoting CR

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<sup>7</sup> Pursuant to GR 14.1, this unpublished decision is being cited as nonbinding authority.

56(e)).

Edsel made much hay about this purported “judicial admission.” CP at 1266-72, 1275, 1290, 1296-1302, 1318, 1326-30, 1505. But counsel for Respondents Gill and Bowman did not admit the facts alleged by Edsel were true, which would be an actual judicial admission. *See* CP at 1382. And the trial court roundly rejected Edsel’s theory and did not view counsel’s statement as an admission, let alone an admission admitting all of the facts contained in Edsel’s Second Amended Complaint.<sup>8</sup> CP at 1534.

The Washington cases cited by Edsel do not compel a different result. In *Key Design Inc. v. Moser*, 138 Wn.2d 875, 887, 983 P.2d 653, 993 P.2d 900 (1999), the Washington Supreme Court held that admitting in a pleading what the legal description of a property was did not satisfy the statute of frauds for an inadequately described property in an earnest money agreement. In *State v. Goodin*, 67 Wn. App. 623, 632-34, 838 P.2d 135 (1992), the defendant’s attorney made a stipulation as a trial tactic to constitutionally challenge a statute, which the defendant later waived

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<sup>8</sup> Even if the trial court had treated counsel’s statement differently—which it did not—this Court would not be bound by such a conclusion because appellate courts are not bound by erroneous concessions on a legal issue such as the summary judgment standard. *See Christensen v. Grant Cty. Hosp. Dist. No. 1*, 114 Wn. App. 579, 589, 60 P.3d 99 (2002), *rev’d on other grounds*, 152 Wn.2d 299 (2004); *In re J.F.*, 109 Wn. App. 718, 732, 37 P.3d 1227 (2001); *State v. Haack*, 88 Wn. App. 423, 438, 958 P.2d 1001 (1997).

against advice of counsel, and the defendant then argued that his attorney's stipulation demonstrated ineffective assistance of counsel. Finally, in *Mukilteo Ret. Apartments, L.L.C. v. Mukilteo Inv'rs L.P.*, 176 Wn. App. 244, 257-59 & n.8, 310 P.3d 814 (2013), the court refused to allow a party to challenge, for the first time on appeal, the enforceability of a contract when both parties assumed the contract was enforceable up to and beyond trial and the defendant's Answer and Counterclaim were premised on enforceability—which was “more than a judicial admission.”

In all respects, Edsel's “judicial admission” theory must be roundly rejected, just as it was properly rejected by the trial court.

**C. The trial court did not abuse its discretion and properly denied Edsel's motion to compel, and the resolution of the motion to compel is irrelevant for purposes of summary judgment.**

Edsel seeks review of an order denying a motion to compel, in which he sought production of communications and materials provided to Respondent Gill and Bowman's insurer. Opening Br. at 8-10, 19-20, 31-34. Edsel does not comprehend the defects with his discovery requests, and the trial court properly denied his motion to compel.

A “discovery order of the trial court is reviewable only for an abuse of discretion,” and there is “no abuse of discretion unless no reasonable person would have decided the way the judge did.” *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 629, 818 P.2d

1056 (1991).

Edsel's arguments fail for many reasons. First, his requests were overbroad. *See* CP at 227-29. They were so overbroad that in his motion to compel he had to unpack the requests into at least eight very specific requests. CP at 221-23. Such broad requests were not reasonably calculated to lead to that information or even admissible evidence. Edsel's decision not to serve any of these specific requests in his first set of discovery requests did not give him a right to compel discovery.

Further, even if Edsel had specifically requested this information, such a request would have violated the combined work product and attorney client privilege protections. *See Heidebrink v. Moriwaki*, 104 Wn.2d 392, 400, 706 P.2d 212 (1985). In particular, Edsel had made a demand and threatened a lawsuit, Respondents Gill and Bowman's tenants had complained that Edsel had sprayed a substance on the property that entered the home owned by them and rented by their tenants, and he subsequently filed a lawsuit—all of which triggers work product and attorney client privilege because each could lead to a legal claim. *See* CP at 1057, 1059. And the other material he thought should be produced included his own materials that he could have testified about or obtained from other sources (but he did not even bother to identify what material he needed that he could not otherwise obtain)—making any error harmless

because he would suffer no prejudice. *See* CP at 219; *see also* *Barriga Figueroa v. Prieto Mariscal*, 193 Wn.2d 404, 415, 441 P.3d 818 (2019). Moreover, Edsel could not meet the substantial need requirement to overcome work product protections for the non-privileged materials.<sup>9</sup> *See Heidebrink* 104 Wn.2d at 402. Nothing Edsel sought was excluded by the trial court in this order—the trial court only denied his motion. CP at 304-05.<sup>10</sup>

And even if Edsel could overcome these issues, he had no evidence that these materials were within the possession of Respondents Gill and Bowman. *See* CP at 219 (“Shortly after Defendant Gill filed or made his June 2017 claim, Farmers Insurance contacted the undersigned Plaintiff about the claim. Plaintiff Edsel provided Farmers Insurance with detailed information, including drawings and pictures, as to all of the illegal and unlawful activities and conduct of all four Defendants and which activities and conduct are set forth in the amended complaint.”). What Edsel sought

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<sup>9</sup> Edsel contends that the trial court failed to consider the work product analysis under *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004). Opening Br. at 44. However, Edsel has not supplied this Court with all of the briefing on his motion or the hearing transcript. Further, there is no evidence of the type of dual relationship (no-fault and liability insurance) that was present in *Harris* and that requires an in-depth analysis of the communications at issue. *See Barriga Figueroa v. Prieto Mariscal*, 193 Wn.2d 404, 414-15, 441 P.3d 818 (2019).

<sup>10</sup> Edsel’s citation to *Driggs v. Howlett*, 193 Wn. App. 875, 905, 371 P.3d 61 (2016) is of no moment—the trial court did not exclude the testimony of a witness in the Order, let alone a witness at trial. *See* CP at 304-05; *see also* Opening Br. at 33.

were materials in possession of a non-party—such discovery should be directed to the non-party. *See* CR 45.

The trial court properly considered all of these issues and denied Edsel’s motion. CP at 304-05.

**D. The trial court did not err when it properly granted Respondents’ Motion for Partial Summary Judgment and Motion for Summary Judgment.**

Edsel argues that the trial court should not have granted summary judgment based on five arguments regarding the motion for partial summary judgment and four arguments regarding the motion for summary judgment. *See* Opening Br. at 34-49. Edsel’s arguments, most of which focus on discovery or evidentiary matters, fail.

1. Noise trespass claims are not recognized in Washington.

Edsel contends that he established there was “noise vibration” that established a trespass. Opening Br. at 37-38. Washington has not adopted the theory that noise can constitute a trespass and Edsel cites no authority for the proposition.

No Washington court has held that a trespass claim can be premised on noise. *See Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle*, 87 Wn.2d 6, 18, 548 P.2d 1085 (1976). The Washington Supreme Court has not overruled or undermined its pronouncement in *Highline*. *See Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 924, 296 P.3d 860

(2013). And the Washington Supreme Court’s decision in *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 680, 691, 709 P.2d 782 (1985), did not alter its earlier analysis that noise does not support a trespass claim—instead, the Court held that trespass could occur where a smelter emitted airborne pollutants, including arsenic and cadmium, that the parties stipulated were “deposited on plaintiffs’ land.”

Edsel has cited no authority to support his contention that trespass by noise is a cognizable claim in Washington. The trial court properly rejected this claim.

2. A landlord is not liable for nuisances when a tenant’s activities were not contemplated at the time of lease execution.

Edsel contends that leasing a property to a tenant imposes strict liability for a landlord—i.e., a landlord is engaged in a “business” by renting real property and if that “business” leads to an alleged nuisance, the landlord is liable. Opening Br. at 37. Washington’s courts have never imposed such liability upon a landlord, and authority is to the contrary.

“A landlord is not liable for damage to adjoining landowners resulting from a tenant’s improper use of the leased premises, unless such improper use was contemplated by the parties when the lease was executed.” *Maas v. Perkins*, 42 Wn.2d 38, 43-44, 253 P.2d 427 (1953). Washington’s Residential Landlord Tenant Act is consistent with this

long-held pronouncement:

Each tenant shall pay the rental amount at such times and in such amounts as provided for in the rental agreement or as otherwise provided by law and comply with all obligations imposed upon tenants by applicable provisions of all municipal, county, and state codes, statutes, ordinances, and regulations, and in addition shall:

....

(1) Keep that part of the premises which he or she occupies and uses as clean and sanitary as the conditions of the premises permit;

(2) Properly dispose from his or her dwelling unit all rubbish, garbage, and other organic or flammable waste, in a clean and sanitary manner at reasonable and regular intervals, and assume all costs of extermination and fumigation for infestation caused by the tenant;

....

(5) Not permit a nuisance or common waste;

(6) Not engage in drug-related activity at the rental premises, or allow a subtenant, sublessee, resident, or anyone else to engage in drug-related activity at the rental premises with the knowledge or consent of the tenant. . . .

RCW 59.18.130.

The only situations where Washington cases have allowed a landlord to be sued for a nuisance have involved claims by the landlord's own tenants—not neighboring landowners. *See Wash. Chocolate Co. v. Kent*, 28 Wn.2d 448, 454, 183 P.2d 514 (1947). Similarly, a tenant can bring an action against another tenant for nuisance. *See, e.g., Grantham v. Gibson*, 41 Wash. 125, 126-27, 83 P. 14 (1905). But the default position of the law is that landlords are not liable for the acts of their tenants on the property, even when the injured party is on the property. *See Ward v.*

*Hinkleman*, 37 Wash. 375, 380-81, 79 P. 956 (1905); *see, e.g., Frobige v. Gordon*, 124 Wn.2d 732, 740-41, 881 P.2d 226 (1994).

Here, Edsel has brought claims premised on the acts of Respondent Gill and Bowman’s tenants. Such claims fail as a matter of law and dismissal of his claims against them were proper.

3. Edsel failed to come forward with admissible evidence that Respondents Lamoureux and D’Appollonio operated a “drug house.”

Edsel contends that the trial court improperly granted summary judgment because evidence of a “drug house” would be within the knowledge of the moving party and it would be “unlikely” or “impossible” for a nonmoving party to have such evidence. Opening Br. at 36. Edsel ignores that such evidence is often available—the police investigate and act when they have probable cause—and such a situation apparently occurred with Edsel’s other neighbors in the “Hong drug house.” Edsel failed to carry his burden and the trial court properly dismissed his “drug house” claim.

A plaintiff has the burden on summary judgment to come forward with admissible evidence to support his claims. *Howell*, 117 Wn.2d at 625. “Summary judgment is appropriate if a plaintiff fails to present sufficient evidence on all essential elements of the claim.” *Sherman v. Pfizer, Inc.*, 8 Wn. App. 2d 686, 694, 440 P.3d 1016 (2019).

Edsel did not come forward with evidence that anyone operated a “drug house” at the property owned by Respondents Gill and Bowman, let alone that they did. Edsel did not and does not point to any admissible evidence of arrests, findings, or any other determinations by the police that any of his imaginings or concerns were real. *See* Opening Br. at 36; CP at 1068. Edsel called the police on his neighbors for a “marijuana grow operation” that police determined did not require any further action. CP at 813-14. Police inspected the property. CP at 823. What the police found was that Respondent D’Appollonio had a medical authorization and attempted to grow at least two plants. CP at 813. Edsel had no evidence to support his claim, which apparently contrasts with the actual drug house he lived across from—complaints about the “Hong’s Drug House” resulted in the “Bremerton Police making numerous arrests.” CP at 995, 1012; *see* CP at 12-13 (¶¶ 40-42).

Here, Edsel did not come forward with evidence of a “drug house” for a good reason—the police investigated and did not take any further action. The trial court properly dismissed Edsel’s claims based on an alleged drug house at Respondent Gill and Bowman’s property.

4. The trial court understood and properly applied the summary judgment standard.

Edsel contends that the trial court misapplied the summary

judgment standard because Respondents were required to “conclusively show that there are absolutely no genuine issues of material fact whatsoever.” Opening Br. at 39-41. The trial court properly applied long-standing precedent and held Edsel to his burden to come forward with evidence to support his claims.

*Celotex* and Washington case law hold that the moving defendant’s burden on summary judgment is to show that there is a failure of proof on an essential element of the plaintiff’s case for which he has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The U.S. Supreme Court in *Celotex* expressly rejected Edsel’s view of summary judgment: “[W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent’s claim.” 477 U.S. at 323, 325. The Washington Supreme Court uses this standard. *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Thus, in Washington, a moving defendant may meet this burden by showing that there is an absence of evidence to support the nonmoving party’s case. *Young*, 112 Wn.2d at 225 (citing *Celotex*, 477 U.S. at 325). As the Washington Supreme Court noted,

[a]fter this showing is made, the burden shifts to the party with the burden of proof at trial, the plaintiff. The plaintiff must come forward with evidence sufficient to

establish the existence of each essential element of its case. If this showing is not made: “There can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”

*Young*, 112 Wn.2d at 225 (quoting *Celotex*, 477 U.S. at 322-23. Thus, a defendant’s contention that there is an absence of evidence is sufficient to put a plaintiff to his evidence. *Sherman*, 8 Wn. App. 2d at 694.

Edsel’s citation to *Zamora v. Mobil Corp.*, 104 Wn.2d 199, 208, 704 P.2d 584 (1985), does not aid his cause. *Zamora* pre-dated *Celotex*<sup>11</sup> and plaintiffs’ evidence was clear on its face that they had been injured—a fire broke out that was caused by a propane gas leak. 104 Wn.2d at 201, 207-08. The question presented by the defendant on summary judgment was whether compliance with odorization standards and regulations was an absolute shield to liability, and the defendant gas provider’s position was rejected. *See id.*

Edsel fundamentally misunderstands the summary judgment standard. The trial court correctly understood and applied the standard.

5. The evidence that Edsel submitted was insufficient to survive summary judgment.

Edsel contends that the trial court failed to treat his evidence as

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<sup>11</sup> The same is true of pronouncements in other cases cited by Edsel. *See, e.g., State ex rel. Bond v. State*, 62 Wn.2d 487, 490, 383 P.2d 288 (1963); *Jolly v. Fossum*, 59 Wn.2d 20, 24, 365 P.2d 780 (1961); *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960).

true. Opening Br. at 41-43. The reality is that Edsel's evidence was insufficient to support his claims.

This Court has thoroughly set forth the nuisance standard:

A nuisance is a substantial and unreasonable interference with the use and enjoyment of another person's property. Washington's nuisance law is codified in chapter 7.48 RCW. RCW 7.48.010 defines an actionable nuisance as "whatever is injurious to health . . . or offensive to the senses, . . . so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48.120 also defines nuisance as an "act or omission [that] either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in life, or in the use of property."

....

If particular conduct interferes with the comfort and enjoyment of others, nuisance liability exists only when the conduct is unreasonable. We determine the reasonableness of a defendant's conduct by weighing the harm to the aggrieved party against the social utility of the activity. . . .

A nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute or ordinance. However, a lawful activity also can be a nuisance. A lawful business is never a nuisance per se, but may become a nuisance by reason of extraneous circumstances such as being located in an inappropriate place, or conducted or kept in an improper manner.

*Kitsap Cty. v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 276-77, 337 P.3d 328 (2014) (citations and some internal quotation and editorial marks omitted). The Washington Supreme Court has long held that annoyance and fear of ill effects is not sufficient to establish that a use of property constitutes a nuisance. *State ex rel. Warner v. Hayes Inv. Corp.*,

13 Wn.2d 306, 309-10, 312, 125 P.2d 262 (1942).

Here, Edsel has not come forward with sufficient evidence necessary to support a nuisance claim on any basis. For example, there is no evidence from any neighbor that any of the noises, smoke, or marijuana plants he described disturbed them. *See, e.g., Kitsap Rifle*, 184 Wn. App. at 278.

Nor did Edsel come forward with sufficient evidence to support claims regarding safety or his other concerns that amounted to a nuisance—police responded to his complaints about marijuana, investigated, and took no action; firemen responded to his complaints about the fire on the property, investigated, and took no action; and the only evidence presented that the City of Bremerton had any issue with Respondent Gill and Bowman’s property was related to a broken tree top that was not the subject of Edsel’s lawsuit. *See CP at 457, 823, 1000-01; see, e.g., Kitsap Rifle*, 184 Wn. App. at 288. Even the physician for Edsel and his wife declined to conclude that any smoke from fires on the property caused any symptoms, illnesses, or delayed recovery. *See CP at 1510*. Edsel may have many fears and concerns, but such things do not support a nuisance claim without more.

Further, Respondent D’Appollonio had a Washington State Medical Marijuana Authorization form and attempted to grow two plants

but could have grown more. CP at 813, 1231-32. Even if she had grown more than was technically allowed, such an act does not constitute a special injury to Edsel. *See Motor Car Dealers' Ass'n of Seattle v. Fred S. Haines Co.*, 128 Wash. 267, 274, 222 P. 611 (1924) (holding that the criminal sale of cars on Sunday did not constitute a special injury for purposes of a cause of action for public nuisance). And when Respondents Gill and Bowman learned that Edsel thought there was an alleged "marijuana grow operation," they met with law enforcement, spoke with their tenants, and inspected the buildings. CP at 1058-59. Police even inspected the property. CP at 823.

Edsel also contended that ivy blocking his drains came from Respondent Gill and Bowman's property. CP at 890. However, the only competent evidence in the record was that the ivy originated from Edsel's property long before he moved in. CP at 788-90. Neither Edsel nor his landscapers were competent to testify regarding the original source of the ivy because none of them had any experience with the property before 2016. *See* CP at 950-51, 953-54. Thus, the ivy that he complained had blocked his drain and flooded his house came from his own property before he ever moved there.

And Edsel's own appellate brief underscores that he does not and did not know who allegedly left behind "used condoms [and] used

needles” on the private road and engaged in other activity, and he did not know whether they were “guests and invitees of the Tenants or if they were guests and invitees of other neighbors.” Opening Br. at 42. Even if Edsel had come forward with competent evidence that guests and invitees of Respondents D’Appollonio and Lamoureux left used condoms and a host of other awful things on the private road, the fact that something is “unsightly or offends the aesthetic sense of a neighbor, does not ordinarily make it a nuisance or afford ground[s] for injunctive relief.” *Mathewson v. Primeau*, 64 Wn.2d 929, 938, 395 P.2d 183 (1964).

In all respects, Edsel failed to come forward with sufficient evidence to support his claims of nuisance and trespass. The trial court properly granted summary judgment, dismissing his claims.

6. The trial court properly excluded Dr. Shaha’s unsigned declaration. To the extent a continuance should have been granted, any error was harmless.

Edsel contends that the trial court erred by excluding an unsigned declaration that he had drafted for Dr. Shaha (his and his wife’s physician) and by not granting him an extension to get a signed copy of the declaration. Opening Br. at 43-45. The trial court properly excluded the draft he submitted as inadmissible and any error related to a CR 56(f) continuance was harmless.

Under CR 56(c), supporting affidavits in response to a motion for

summary judgment may be submitted not later than 11 days before the hearing. *See* GR 13 (allowing submission of a compliant declaration in lieu of an affidavit). A trial court may allow submission of supplemental or additional affidavits even closer to the hearing date. *See* CR 56(e). And if truly unavailable, the trial court may order a continuance or deny summary judgment. *See* CR 56(f).

Here, Edsel filed a document he had drafted that was not an admissible affidavit or declaration—it was unsigned. *See* CP at 912-13. The trial court properly rejected the admission of an unsigned, undated document that he called a “declaration.” CP at 1283. Edsel did eventually submit Dr. Shaha’s declaration but not in response to summary judgment.<sup>12</sup> *See* CP at 1509-10. Dr. Shaha actually signed her declaration on February 26, 2019—a day after he filed his CR 56(f) motion, more than a week before Edsel filed his responses to summary judgment, and almost a month before the trial court entered its order granting summary judgment. *See* CP at 1510; *see also* CP at 865, 1062. Further, Dr. Shaha’s declaration did not help Edsel, which is presumably why he did not submit it: She refused to attribute any injury to Edsel or his wife to the actions of

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<sup>12</sup> Edsel did not refer to the executed declaration of Dr. Shaha in a cross-motion or any other pending or existing motion at the time he responded to the motions for summary judgment, and thus his reference to the *Discover Bank v. Lemley*, 180 Wn. App. 121, 136, 320 P.3d 205 (2014), is baffling. *See* Opening Br. at 45 n.27.

the Respondents. *See* CP at 1510 (striking out various portions of the declaration that would have causally connected injuries to the alleged smoke nuisance).

Edsel cites to *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015) and *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), in an attempt to support his contention that the trial court committed reversible error. *See* Opening Br. at 44. In *Keck*, the plaintiff actually filed a signed affidavit of his expert in response to summary judgment—it was merely late—and the earlier, timely-filed affidavit from the expert had already created a genuine issue of material fact for trial. 184 Wn.2d at 369, 372. Edsel’s contention that, on summary judgment, a non-moving party is only required to identify a witness and what he or she will testify to is not supported by the decision in *Keck*.<sup>13</sup> *Compare id.*, with Opening Br. at 44.

If somehow the trial court improperly excluded Dr. Shaha’s unsigned declaration (it did not), then any error was harmless because Dr. Shaha actually undermined Edsel’s claims. *See Jones v. City of Seattle*, 179 Wn.2d 322, 356-57, 360, 314 P.3d 380 (2013). Dismissal of Edsel’s claims should not be reversed on this ground.

7. David Herzog’s declaration did not meet the requirements

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<sup>13</sup> The other case Edsel cites does not support this proposition. *See Burnet*, 131 Wn.2d at 488.

for submission on summary judgment and was immaterial.

Edsel contends that the trial court improperly excluded David Herzog's declaration. Opening Br. at 45-49. The trial court properly excluded Herzog's declaration because it did not comply with RCW 9A.72.085. Further, even if the trial court improperly excluded the declaration, the exclusion was harmless because the declaration did not generate a dispute over a material fact.

RCW 9A.72.085 (1)(d) and GR 13 require that declarations state that they are "declared under the laws of the state of Washington." Herzog's declaration contains no such statement. *See* CP at 915-19. Absent compliance with Washington's statute and GR 13, Herzog's statements could have been contained in a sworn affidavit—Edsel did not choose this alternative option and statutory compliance was required if he wanted to submit the less formal declaration. Such a failure to refer to Washington law does not substantially comply with the requirements of RCW 9A.72.085. *See Bunch v. Lee*, No. 45810-1-II, 2015 WL 3541225, \*5 (Wash. Ct. App. June 4, 2015) (unpublished).<sup>14</sup>

Edsel cites *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 331 P.3d 40 (2014), contending that all a declaration needs to include is that it is made on personal knowledge, is supported by admissible evidence, and it shows

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<sup>14</sup> Pursuant to GR 14.1, this decision is being cited as nonbinding authority.

the witness is competent. *See* Opening Br. at 47-48. *SentinelC3* does not address the requirements of RCW 9A.72.085 and simply restates what is contained in CR 56(e). *See* 181 Wn.2d at 141. Although Rule 56(e) discusses affidavits on summary judgment, affidavits were originally required to be sworn under oath before a person, usually a notary public, who could take sworn statements. *See State v. Howard*, 91 Wash. 481, 486-87, 158 P. 104 (1916).

*SentinelC3*'s citation to *Bernal v. Am. Honda Motor Co., Inc.*, 87 Wn.2d 406, 553 P.2d 107 (1976), does not change the analysis<sup>15</sup> because the requirement that affidavits be sworn to did not change until the enactment of RCW 9A.72.085 in 1981, which eliminated the requirement for a sworn affidavit if it included the requirements under RCW 9A.72.085(1).<sup>16</sup> *See* GR 13 (implementing, for the court system, the changes created by RCW 9A.72.085). In the absence of compliance with the statutory requirements—only the form of the statement identified in the statute can be substantially complied with—the document must be a sworn statement. *See State v. McComas*, 186 Wn. App. 307, 318, 345 P.3d 36 (2015) (noting that other statements held admissible had “satisfied

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<sup>15</sup> Further, the trial court in *Bernal* also had the deposition testimony of the affiant, which would necessarily have been sworn testimony. *See* 87 Wn.2d at 410.

<sup>16</sup> And the parties in *Bernal* did not object to the form of the affidavits. *See* 87 Wn.2d at 412 n.2.

each requirement of RCW 9A.72.085”).<sup>17</sup> The Herzog declaration did not meet these requirements, it did not identify that it was sworn to under Washington law, and, as such, it is not admissible under RCW 9A.72.085. Further, Edsel did not submit a proper declaration from Herzog at any time before or after summary judgment. *See* CP at 915-19, 1274-75.

In his arguments, Edsel refers to sworn statements that were admitted in criminal cases. Opening Br. at 49 n.29. The court in *State v. Nelson*, 74 Wn. App. 380, 390, 874 P.2d 170 (1994), offhandedly noted that an affidavit satisfied the requirements of RCW 9A.72.085, but the full affidavit was not set forth in the opinion. More importantly, the cases referred to by Edsel concern statements by a victim that were recorded and that were admitted at trial as a prior inconsistent statement by a victim. *Id.* at 388; *see State v. Thach*, 126 Wn. App. 297, 307, 106 P.3d 782 (2005); *see also State v. Smith*, 97 Wn.2d 856, 857, 651 P.2d 207 (1982) (allowing admission, at trial, of a victim’s notarized statement).

As part of Washington’s criminal law and due process protections, a victim need not be sworn in to use the statement against the witness under ER 801(d)(1)(i), but the taking of the statement must satisfy a set of

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<sup>17</sup> Edsel’s contention that “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,’” is not consistent with what this Court wrote in its decision. *See* Opening Br. at 48-49.

factors in order to be admissible for the purpose of presenting the inconsistent statement. *See Thach*, 126 Wn. App. at 307-08. In all of the cases, the victim also testified, others testified to the giving of the contradictory statement, and the criminal defendant had the opportunity to cross-examine the witness regarding the statement at trial. *Id.* at 305-06. Thus, where a person gives a statement and then provides contradictory testimony at trial, that prior statement may be admissible in a criminal prosecution if it satisfies certain criteria.<sup>18</sup> *See id.* at 309. The criminal analysis associated with ER 801(d)(1)(i) has no role in Washington's civil case law regarding submissions in compliance with GR 13. *See, e.g., Scott v. Petett*, 63 Wn. App. 50, 56-57, 816 P.2d 1229 (1991); *Wilkerson v. Wegner*, 58 Wn. App. 404, 408 n.3, 793 P.2d 983 (1990).

Edsel also contends that an unauthenticated letter can be submitted on summary judgment and must be treated as true. Opening Br. at 46. But the case Edsel cites for this proposition, *Reed v. Davis*, 65 Wn.2d 700, 708, 399 P.2d 338 (1965), says nothing of the sort—the letter at issue in *Reed* was purportedly written by a party to the litigation and was sent to another party to the litigation, and the letter was not a declaration created

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<sup>18</sup> Further, in *Smith and Nelson*, the statements of the victim were notarized and were admitted not as standalone evidence to support a motion but were used at trial as substantive evidence. *Nelson*, 74 Wn. App. at 390; *Smith*, 97 Wn.2d at 858.

in response to a motion for summary judgment.<sup>19</sup> Here, Herzog was not a party opponent against whom his statements were sought to be admitted—here, he was Edsel’s purported expert witness and the evidence was being put forward by Edsel. *See* CP at 889, 915.

Recent Washington Supreme Court precedent makes clear that unauthenticated expert reports and other documents are not admissible and should not be considered on summary judgment.” *SentinelC3, Inc.*, 181 Wn.2d at 141 (“Neither the unsworn statements of the Respondents’ consulting expert nor the Hecker Report meet this standard. The Court of Appeals erred in holding otherwise.”). Similarly, although records may be authenticated by other records in combination with testimony, this is not a presumption and it is within the trial court’s discretion to deny the admission of a document that has not been properly authenticated. *See State v. Payne*, 117 Wn. App. 99, 110, 69 P.3d 889 (2003). Here, the trial court had an unsigned “expert report” that was attached to a declaration that was not made under Washington law, the purported expert had left Washington, the purported expert’s personal address was never supplied (only an address in Texas for a purported attorney was provided), and the expert was not made available for a deposition. CP at 460, 490, 527, 542-

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<sup>19</sup> Further, it is not clear from the decision in *Reed* whether the authenticity of the letter was even challenged.

43, 555, 567, 578, 915-20, 1526. The trial court did not abuse its discretion when it declined to consider Herzog's declaration and "report." *See* CP at 1282, 1526.

Even if the trial court should have admitted Herzog's declaration and "report," it did not raise material issues of fact. Herzog's declaration identifies June 2016 as the first date when he had contact with the ivy, but the ivy came from Edsel's property years earlier. CP at 915; *see* CP at 788-90. He states that there was marijuana growing on the property, which is undisputed—the only disagreement concerns quantity, which is immaterial. CP at 916; *see* CP at 813. And he contends that tires and buckets were put in a fire to harass him and his workers, and this alleged event has never been part of Edsel's claims. CP at 917; *see* CP at 14-15 (alleging that garbage is put in the fire "during the evening, after dusk").

In all respects, Herzog's declaration and "expert report" were not admissible but, even if they should have been admitted, the evidence supplied by Herzog was not material. The trial court's decision should not be reversed on this ground.

8. Edsel did not preserve issues of alleged spoliation for review.

Edsel contends that the trial court erred in granting summary judgment based on his statements that Respondents D'Appollonio and

Lamoureux destroyed “drug evidence” before the hearing on their discovery motion. Opening Br. at 35. Edsel did not assert that there had been spoliation of “drug evidence” in his response to the motion for partial summary judgment nor did he seek sanctions for this alleged activity.

Edsel did not argue to the trial court, in response to the motion for partial summary judgment, that the motion should be denied due to spoliation of evidence. *See* CP at 259-67. Even on reconsideration, he did not raise this argument to the trial court. *See* CP at 326-37. Although Edsel alleged that there was spoliation in response to a motion for protective order brought by Respondents, CP at 32-34; he does not assign error to the trial court’s decision on that motion and he did not bring a motion for sanctions premised on spoliation—let alone assign error to an order on such a motion).

Edsel’s offhand argument on appeal, which was not presented below or preserved for review here, should be summarily rejected.

9. The trial court’s denial of Edsel’s motion to compel does not affect the validity of its decision on partial summary judgment, and Edsel did not preserve this issue for review.

Edsel also argues that the trial court erred in granting partial summary judgment because there were documents he believes he should have received in discovery from Respondents Gill and Bowman. Opening Br. at 35. The trial court properly denied Edsel’s motion to compel but,

even if it had not, Edsel failed to preserve this issue for appeal.

“A party appealing a summary judgment because he has allegedly not been permitted to conduct adequate discovery must indicate what relevant evidence he expects the additional discovery would provide. In other words, he must prove that he has been prejudiced by the summary judgment order.” *Howell*, 117 Wn.2d at 627 “A party may not preclude summary judgment by merely raising argument and inference on collateral matters . . . .” *Id.* at 626-27. Instead, a party must “demonstrate that disclosure . . . would enable him to defend against the summary judgment motion.” *Id.* at 630.

As is discussed at length in Part V.C, *supra*, the trial court properly exercised its discretion and denied Edsel’s motion to compel. But even if the trial court had abused its discretion, Edsel is not entitled to relief on that ground alone.

Edsel did not assert that there was any discovery that he needed in order to respond to the motion for partial summary judgment. *See* CP at 259-67; *see also* CP at 327 (failing to identify the trial court’s resolution of the motion to compel as a basis for reconsideration). Further, between January 29 (when he propounded discovery requests) and May 14, 2018 (when he had a discovery conference), Edsel could have attempted to propound the discovery he said that he meant to request or he could have

asked the trial court to issue a subpoena for the records he thought were possessed by Farmers Insurance, a non-party. *See* CP at 221-23.

Edsel did not take these actions and did not indicate to the trial court what relevant evidence he expected additional discovery would provide him. Without doing so, he invited error and failed to preserve this issue for appeal.

**E. The trial court’s award of attorney fees should not be reversed because Edsel’s substantive challenge fails and his arguments are unsupported.**

Edsel argues that the attorney fee award should be reversed if the summary judgement orders are reversed and contends that fees were improperly awarded because he “prevailed in equity” because he says the nuisances he sought to stop ended. Opening Br. at 25, 49-50. Edsel did not obtain a temporary restraining order, preliminary injunction, or an injunction, he did not prevail on anything, and his arguments fail.

Edsel failed to assign error to or appeal from the judgments entered against him for the award of attorney fees, which precludes any effective relief. *See* Part II.C, *supra*. If this Court reaches his arguments on the award of attorney fees, those arguments fail.

As has already been argued in response, the trial court’s orders on summary judgment should be affirmed. *See* Parts V.D.1 to 9, *supra*. The trial court’s award of attorney fees should not be reversed on that ground.

The trial court awarded attorney fees broadly based on RCW 4.84.185 and based on CR 34 and CR 37 for discovery issues. CP at 1533. The awards were not premised on a prevailing party statute or whether or not Edsel prevailed in equity. Edsel offers no reasoned argument in support of reversing the trial court's awards and such conclusory arguments, unsupported by citation to authority, are insufficient to merit judicial consideration. *See State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). Further, Edsel did not prevail in equity—the trial court did not provide him any equitable relief such as a temporary restraining order, a preliminary injunction, or an injunction, and it did not issue the “sheriff warrants for abatement” that he had sought as relief. *See* CP at 25, 214.

Edsel's arguments on attorney fees, such as they are, should be rejected by this Court.

## VI. CONCLUSION

This Court should affirm the trial court's dismissal of Appellant Ernest Edsel's trespass, nuisance, and breach of contract claims. Edsel's claims against Respondents Gill and Bowman fail because landlords in Washington are not liable for the acts of their tenants, including for activities that constitute a nuisance, unless those activities were contemplated at the time the lease was executed. Edsel also asserts a

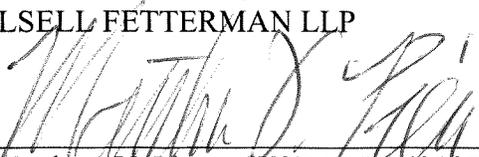
claim for trespass based on noise, which has not been recognized as a cognizable claim in Washington.

Further, the trial court correctly applied the summary judgment standard, requiring Edsel to come forward with evidence to support his claims. Edsel failed to support his claims with sufficient admissible evidence, requiring dismissal. The trial court's decisions on summary judgment are not affected by Edsel's arguments regarding denial of his motion to compel, the exclusion of Herzog's declaration, and the exclusion of Dr. Shaha's unsigned declaration.

Beyond the substance of Edsel's appeal, his appellate strategy procedurally violates various rules on appeal and impacts the scope of this appeal. The "motions" contained in Edsel's brief are not appropriate under RAP 10.4(d). Edsel improperly attempted to incorporate trial court briefing by reference. And Edsel failed to designate the judgments entered against him, precluding effective review of the trial court's attorney fee awards.

Respectfully submitted this 6<sup>th</sup> day of September, 2019.

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By 

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**CERTIFICATE OF SERVICE**

I hereby certify that I (1) cause to be filed with this Court this document; and (2) to be delivered via Washington State Appellate Courts'

Portal E-Service to below parties:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: September 6, 2019.



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Leili Moore, Legal Secretary

**HELSELL FETTERMAN LLP**

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