

64951-5

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Case No: I  
64951-5

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

MINI-DOZER WORK,  
WAYNE R. RICHARDSON,

Appellant,

Vs.

LINH NGUYEN PYUNG,

Respondent.

**RESPONDENT'S BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

In general, Respondent (hereafter “Defendant”) submits that the Assignments of Error in the Appellate Brief does not comply with the requirements of RAP 10.3 (a)(4), *Assignments of Error*, in that they are not a “concise statement of each error”, do not relate to and/or misstate the issue on appeal, or they present arguments about the merits of his case instead of addressing the procedural deficiency that is or that should be the crux of his appeal. The Defendant’s response to Appellant’s (hereafter “Plaintiff”) identified Assignments of Error are more fully addressed in the Argument section of this brief.

## **II. STATEMENT OF THE CASE**

Defendant does not believe that the Statement of the Case in Plaintiff’s opening brief, contains a fair and accurate statement of the facts and procedure to properly advise the court of the status of the case, or the reasons for the issuance of the Order of Dismissal. Rather, Plaintiff’s two sentence Statement of the Case explains why he filed his Complaint in the first place but does not explain the procedural problems which lead up to and resulted in the entry of the Order of Dismissal from which he appeals. Also, Plaintiff makes no reference to the record for any of his factual statements as required in RAP 10.3 (a)(5) and RAP 10.4(f).

Therefore, Defendant objects to the Statement of the Case Section of Plaintiff's brief and submits as Defendant's Statement of the Case the following:

Procedurally, this case was filed on 5/12/08 in King County Superior Court and had a scheduled trial date of October 26, 2009. Case Schedule, CP 13 – 17. Plaintiff's complaint included, among other claims, allegations that Defendant owes him for professional services rendered and retaining furniture that Defendant had allowed him to store at her house. Claim Scheme (sic) (hereafter "Complaint"), CP 1- 12. Defendant answered and counterclaimed for storage fees and for damages incurred by Defendant resulting from Plaintiff's unauthorized practice of law. Answer to Counterclaim, CP 28 - 40.

The trial judge assigned to the case was the Honorable Jay V. White. Defendant filed a Motion to Dismiss, which was noted for October 23, 2009. Order to Show Cause Why This Case Should Not Be Dismissed (hereafter "Order to Show Cause"), pp. 1 – 2, CP 56 -57. Plaintiff filed a response to Defendant's motion entitled: "Plaintiff's Motion to Deny Motion to Dismiss for Improper Service per LR 7(3)(a), LR 56 and CR 5(b)(2)" (CP 49 – 53), which the court found to be "convoluted". See

Order to Show Cause, p. 2. CP 57. Plaintiff noted this motion for January 22, 2010. Notice of Hearing, CP 67 – 68.

Upon review of the motions and the status of the case before trial, the trial judge determined that the case was not ready for trial as scheduled on October 26, 2009. Order to Show Cause, pp. 1 - 2, CP 56 - 57. Since the trial did not go forward as scheduled, and in dealing with the pending motions, Judge White issued an Order to Show Cause. Order to Show Cause, CP 56 - 57. The Order to Show Cause denied Defendant's motion to dismiss without prejudice and instructed both parties to file declarations "as to why all claims of both parties should not be dismissed". See Order to Show Cause, p. 2, CP 57. It also, gave notice to and warned both parties that, "Failure to comply will result in the dismissal of the non-complying party's case on January 15, 2010". (Emphasis original) Order to Show Cause, p. 2, CP 57.

Defendant complied by submitting a declaration. Order of Dismissal, p.1, CP 69. Plaintiff did not comply. Order of Dismissal, footnote 1, p, 1, CP 70. Instead of filing a declaration as ordered, Plaintiff filed a pleading entitled: "Answer Complying With Court Order to Show Service of Process Motion to Enter House at 18911 SE 144<sup>th</sup> St., Renton,

Wa 98059-8012. Sheriff to Confirm Personal Property Status” (hereafter “Answer Complying”). Order of Dismissal, p. 1, CP 69.

Judge White reviewed both the Defendant’s declaration and Plaintiff’s “Answer Complying”. See Order of Dismissal, p. 1, CP 69. After considering the pleadings and the entire court record, Judge White determined that neither party provided the court with sufficient reasons why the case should not be dismissed and he entered the Order of Dismissal that dismissed all of the claims and counterclaims of the respective parties and struck Plaintiff’s motion set for January 22. Order of Dismissal, CP 69 - 70. Plaintiff appeals the Order of Dismissal. CP 71 - 76.

For the convenience of the Court, attached as an Appendix hereto are: 1) Exhibit 1, the trial court’s Order to Show Cause, CP 56 – 57 and 2) Exhibit 2, the Order of Dismissal, CP 69 – 70.

### **III. SUMMARY OF ARGUMENT**

Based on the record before the trial judge and due to the state the case was in when he entered his order, Defendant submits that the Order of Dismissal that is the subject of this appeal was decided in the trial court’s exercise of judicial discretion. The trial court gave both parties an

opportunity to address the court's concern over the status of the case on his trial calendar, reviewed all the relevant pleadings, and then, given the status of the case, determined in his exercise of discretion that the case should be dismissed. Thus, the appealable issue is: was the trial court's decision an abuse of judicial discretion?

The Appellant's Brief, contains numerous fatal deficiencies both in substance and in form. For example, the Appellant's Statement of the Case does not identify facts or cite to the record on appeal which facts relate to his contentions or arguments. RAP 10.3(4). Also, Appellant's Brief does not comply with, among other things, the requirements of RAP 10.3(5), Argument, and RAP 10.4(f), Reference to the Record. Moreover, Plaintiff attached "Exhibits" to his brief that are not properly identified as part of the record on appeal, are not relevant to the issues on appeal and should not be considered by this Court.

Plaintiff/Appellant is a pro se litigant. A pro se party is bound by the same rules and procedures as is an attorney. However, even if one overlooks these flaws in his brief, Appellant does not clearly identify specific facts or offer any legal authority relative to the pertinent issues as to why he believes that the court based its decision on untenable grounds or was made for untenable reasons.

This appeal is completely without merit and is frivolous. Therefore, Defendant requests that she be awarded attorney's fees and costs on appeal for having to respond to this appeal.

#### IV. ARGUMENT

A. Pro Se Litigants are Bound by Same Rules as Attorneys.

Plaintiff is representing himself on appeal as a pro se litigant. A pro se litigant is bound by the same rules of procedure and substantive law as is an attorney. *In re Marriage of Olson*, 69 Wn.App. 621, 626, 850 P.2d 527 (1993). Thus, Appellant's Brief, including the Statement of the Case, Assignment of Errors, and Argument must all comply with the rules contained in the Rules of Appellate Procedure (RAP). Any noncompliance by the Plaintiff of the procedural or substantive requirements of an appeal should not be overlooked because he is a pro se litigant.

B. Appellant's Brief Does not Comply With RAP and Should not be Considered.

1. Parties are Bound by RAP.

Both parties in this case are bound by the rules contained in the RAP. Specifically, in submitting a brief for consideration, both appellant

and respondent must follow RAP 10. BRIEFS<sup>1</sup>. Defendant submits that Plaintiff's brief, when read as a whole, does not conform to the requirements of the Assignment of Error, Statement of the Case, and the Argument section of RAP and that it contains such significant violations of the rules that the brief itself, should not be considered, and, thus, Plaintiff's appeal should be dismissed.

## 2. Plaintiff's Introduction.

First, the "Introduction" section of Plaintiff's brief, is a rewording of the Plaintiff's Complaint and of his Response to Defendant's Motion to

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<sup>1</sup> The pertinent RAP are:

RAP 10.3(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate heading and in the order here indicated:

(3) Assignment of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(4) Statement of the Case. A fair statement of the facts, and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(5) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary.

(7) Appendix. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

RAP 10.4(f) Reference to Record. A reference to the record should designate the page and part of the record. Exhibits should be referenced to by number. The clerk's paper should be abbreviated as "CP"; exhibits should be abbreviated as "Ex"; and the report of proceedings should be abbreviated as "RP". Suitable abbreviations for other recurrent references may be used.

Dismiss and attempts to explain why his Complaint and Response, in his opinion, had merit.

While most of the “facts” Plaintiff recites are contained in his pleadings (Complaint, Answer, and pretrial motions), these are all contested facts that would have been resolved at trial, had there been a trial. Rebutting this section of the Plaintiff’s brief would require Defendant to try the case, which is not the purpose of this appeal. Thus, since the merits of his Complaint are not at issue, Defendant hereby objects to the “Introduction” of Appellant’s Brief and requests that this section be stricken and/or disregarded.

3. Plaintiff’s Argument Provides no Meaningful Analysis or Citation to Relevant Legal Authority.

Plaintiff’s Argument section of his brief contains **no citation to any legal authority** to support any of his relevant arguments. While Plaintiff seemed to identify an error as abuse of discretion in Assignment of Error No. 1, the Argument portion of the brief, made no citation to the record, made no argument and contained no citation to any legal authority to support his contention that the trial court abused its discretion. Thus, Plaintiff’s brief fails to comply with the minimum requirements of RAP 10.3(5) and 10.4(f). See Footnote 1, supra.

It has been held by our courts that, “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).” *Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 965 P.2d 290 (1998). Thus, without even a mention of abuse of discretion in the Argument section of his brief, Plaintiff not only failed to make a “meaningful” argument, but he, in fact, made no argument at all.

4. Plaintiff’s Abuse of Discretion Argument is Waived and is Deemed Meritless.

Furthermore, without argument or authority to support it, Plaintiff’s abuse of discretion assignment of error is waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); *State v. Gregory*, Wn.2d 537, 439 P.2d 223, 439 P.2d 223 (1968). Moreover, not only has Plaintiff waived an abuse of discretion argument, his failure to cite authority in support of a contention constitutes a concession that the argument is without merit. *State v. McNeair*, 88 Wn.App. 331, 340, 944. P.2d 1099 (1997).

5. Cases Cited by Plaintiff’s not Relevant.

Appellant's Brief cites only two court cases to support all of his arguments. Neither of these cases relates to an issue relevant to this appeal. The first cited case was *Guijosa v. Walmart*, 144 Wn.2d 907 (2001), which Plaintiff cited to support his argument that his Complaint pled more than five elements of a Consumer Protection Act claim. Appellant's Brief, p. 9. This argument relates to the merits of the Consumer Protection Act allegations in Plaintiff's Complaint and not to the issue of trial court discretion.

The other cited case in Plaintiff's brief was *Faust v. Albertson*, 166 Wn.2d 653 (2009), a CR 50 case which Plaintiff cited to support his contention that,

"The plaintiff/appellant complied with the pre trial (sic) order that qualifies as the moving party for the jury trial that he demanded and paid the court fee. The appellant asked for sanctions against the opponent that is in essence a demand for a directed judgment under CR 50. The respondent tried to dispose of the threat of a jury trial claiming misstatements and innuendoes against the moving party". Appellant's Brief, p. 9 - 10.

First, there is no citation to or finding in the record to evidence Plaintiff's unsupported allegation that Plaintiff "complied" with the pretrial order. Moreover, compliance with the pretrial order is not the issue; the issue is compliance with the Order to Show Cause. Second, Plaintiff's pretrial motion for sanctions does not automatically become "in essence" or otherwise, a motion during trial for a directed verdict. Third, the contention that Defendant's trial tactics and motions were improper is

not related to the issue of proper exercise judicial discretion in this case. Finally, there is nothing in the record on appeal of Plaintiff having filed, briefed or argued a CR 50 motion. CR 50<sup>2</sup> is a rule that a party can make a motion **during a trial by jury**, and since this matter did not get to a jury trial, this cited court rule is not even applicable to this appeal.

Moreover, the quote Plaintiff cites from the *Faust* case<sup>3</sup> does not support Plaintiff's argument as he framed it. In fact, instead of support his contention, the language from two of these cases would actually run counter to any of Plaintiff's arguments in his brief. Appellant's Brief, p.

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<sup>2</sup> CR 50 JUDGMENT AS A MATTER OF LAW IN JURY TRIALS; ALTERNATIVE MOTION FOR NEW TRIAL; CONDITIONAL RULINGS

(a) Nature and Effect of Motion. If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for reasonable jury to find or have found that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

<sup>3</sup> "In reviewing a ruling on a motion for judgment as a matter of law, we engage in the same inquiry as the trial court. *Shirley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996). One who challenges a judgment as matter of law "admits the truth of the opponent's evidence and all inferences, which can reasonably drawn [from it]." *Davis v. Early Construction Co.*, 63 Wn.2d 252, 254, 366 P.2d 958 (1963). We interpret the evidence "against the [original moving party in a light most favorable to the opponent." *Id.* A judgment as a matter of law requires the court to conclude, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the non-moving party." *Indus. Co. of Nw. v. Kallevig*, 114 Wn.2d 907, 915-916, 792 P.2d 520 (1990)."

10. Thus, while the Defendant does not submit that these cases are applicable as argued by the Plaintiff, under the cited cases, Plaintiff would be required to “admit the truth of the opponent’s evidence and all inferences which can reasonably drawn [from it]” and Plaintiff would have to show as a matter of law that there is no substantial evidence or reasonable inferences to sustain a verdict for the non-moving party, or in this case, the Defendant . . . *Davis v. Early Construction Co.*, 63 Wn.2d 252, 254, 366 P.2d 958 (1963); *Indus. Co. of Nw. v. Kallevig*, 114 Wn.2d 907, 915-916, 792 P.2d 520 (1990). Thus, if all inferences in contested issues are decided in favor of Defendant’s position, Plaintiff’s argument about the merits of his Complaint or even relating to abuse of discretion would be decided against the Plaintiff and in favor of the Defendant.

6. Plaintiff’s Citation to Court Rules and Statutes are not Relevant to Appealable Issues.

Plaintiff’s citation to authority also includes court rules, including: CR 5(b)(2), Service; CR11, Drafting of Pleadings, Motions, and Legal Memorandum; Sanctions; and CR 50, Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Ruling. Finally, Plaintiff cites as statutory authority for his arguments, RCW 18.27 (Registration of Contractors); RCW 19.86 (Unfair Practices Act); and

RCW 60.04 (Mechanic & Materialmen's Lien). Plaintiff made no cogent argument in the Argument section of his brief as to how any of these cited rules or statutes relate to an appealable issue.

The only other legal authority Plaintiff cites is contained not in the Argument section of his brief, but is instead in the "Conclusion" section. Appellate Brief, p. 10 – 11. He simply cited RCW 60.04.035 standing alone, without attaching this to any argument as to how or why he believes this supports any of his contentions. At best, this relates to Plaintiff's argument that his Complaint had merit, but not to the issue on appeal. Moreover, since this was a citation made without argument and without knowing what the cited statute was meant to support, this authority is irrelevant and should not be considered.

In short, Plaintiff fails to cite any relevant authority of any kind in support of his arguments on appeal. RAP 10.3(a)(5) requires the parties to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record". See Footnote 1, *supra*. Arguments that are not supported by pertinent authority or meaningful analysis need not be considered.

*Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); *State v. Elliot*, 114

Wn.2d 6, 15, 785 P.2d 440 (1990) (insufficiently argued claims); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (arguments not supported by adequate argument and authority). Thus, based upon the above cited authority, Respondent submits that Appellant's arguments were all unsupported by pertinent authority or meaningful analysis and should not be considered by this Court on appeal.

7. Exhibits not in Compliance With RAP Should not be Considered

Plaintiff attached as exhibits to his brief, a letter dated September 21, 2007, from Plaintiff to Defendant's attorney (Exhibit "A-1") and a proposed order that Plaintiff submitted with his motion response to Defendant's motion to dismiss. These are documents not properly identified or referenced in the record. Matters not identified as part of the record on appeal should not be included without permission of the Court. See RAP 10.3(a)(7), footnote 1, *supra*. Plaintiff did not properly seek or receive the Court permission for consideration of either of these documents nor did he sufficiently explain how these documents relate to an appealable issue. Defendant submits that neither document meets the criteria of inclusion under this rule. Thus, Defendant objects to their

inclusion in the record and requests that these exhibits not be considered by this Court.

Moreover, even assuming *arguendo* that the documents are part of the record on appeal and should be properly considered by the Court, neither document is relevant to the issue of why the trial court made its decision to dismiss the case. With respect to the letter exhibit, this “evidence” relates more to his arguments about the merits of his case and the alleged pre-litigation motivations of counsel and not to the issue of the court’s post-filing abuse of discretion. Likewise, the proposed order offered as an exhibit, an order never ordered or entered, has no relevance to any of the issues on appeal.

C. Proper Standard of Review Should be Abuse of Discretion

The instant appeal is of the trial court’s order of dismissal. The trial court, in his administration of a case on his court calendar, required the parties to submit declarations as to why the case should not be dismissed for missing the scheduled trial date. Order to Show Cause, pp.1 - 2, CP 56 - 57. The trial court after reviewing all of the pleadings and the entire record, including the parties’ submission in response to his Order to Show Cause, determined that that the parties did not submit sufficient reasons why the case should be continued and, in his discretion, dismissed

the case. Order of Dismissal, pp. 1 - 2, CP 69 - 70. Defendant maintains that these are decisions there were made within the proper and sound discretion of the trial judge.

1. Discretionary Rulings Should not be Overturned Without Clear Showing of Abuse.

On appeal of a discretionary ruling the Supreme Court has held that, “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion...” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 236, 88 P.3d 375, 380 (2004). Not only did Plaintiff fail to clearly identify how or why the trial court abused its discretion, but he also did not cite any evidence or legal authority in his Argument to support his proposition that there was an abuse of judicial discretion.

2. Abuse of Discretion Standard

The courts have held that the proper standard for determining abuse of judicial discretion is “whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion. *Cogle v. Snow*, 56 Wn.App. 499, 507, 784

P.2d 554 (1990). Once again, Plaintiff is unable to point to any supporting evidence in the record relating as to why the court ruled against him was an abuse of discretion, nor did he cite to any relevant legal authority to support his contention. Certainly, the orderly administration of a case on its trial schedule provides a tenable reason and a reasonable purpose for the court's exercise of discretion in the instant matter.

3. Plaintiff's Faulty and Inaccurate Assumptions and Conclusions.

Plaintiff's appeal is based on several faulty assumptions and/or conclusions that are inaccurate and not supported by the record on appeal. First, he erroneously concluded that the judge dismissed the case simply because he did not comply with the order to show cause to submit a declaration. Appellant's Brief, p. 7. Plaintiff also, wrongly assumes that his unsworn "Answer Complying" rebutted defendant's motion to dismiss and that, therefore, that a declaration was not necessary and that it was an abuse of discretion to require a declaration, when in Plaintiff's opinion, one was not needed. Appellant's Brief, pp. 7 - 8. Plaintiff also seems to argue that said Answer Complying would have complied and would have been a declaration but for the fact that he did not label his pleading a declaration. Appellant's Brief, p. 7. Plaintiff fails to recognize that the

procedural dismissal of the case was not based on the merits of his case or on his right to a jury trial.

First, the record on appeal clearly reflects that the trial court in its order specified that it considered **both** Defendant's declaration **and** Plaintiff's "Answer Complying". See Order of Dismissal, p. 1, CP 69. In other words, whether or not Plaintiff called his pleading a "declaration", the trial court nonetheless considered it in coming to a decision. While the court does note in a footnote that Plaintiff failed to comply with the order to show cause, the court specifies that it reviewed the pleadings submitted by both parties, which included Plaintiff's response to the order to show cause (Answer Complying) **and** "the entire court record". Order of Dismissal, Pp. 1 - 2, CP 69 – 70. Thus, the record does not support Plaintiff's argument that the dismissal was based on failure to submit a declaration.

Furthermore, Plaintiff's argument that he would have complied with the trial court's order to show cause by merely labeling his pleading as a declaration is legally and factually incorrect since that action would not have complied with what the judge required. A declaration is an unsworn statement but one that is given "under penalty of perjury under

the laws of the state of Washington”. RCW 9A.72.085<sup>4</sup>; See also Rules of General Applicability, GR 13. Thus, merely labeling his pleading a declaration would still not have been in compliance since it would not have been a declaration as ordered by the court since the pleading was still not given “under penalty of perjury”.

4. Appellant was Given Notice of Consequences for Failure to Comply With the Court’s Order.

Moreover, Plaintiff was aware or should have been aware based on the specific and underlined warnings in the Order to Show Cause, that noncompliance could result in court action including an order of dismissal. Order to Show Cause, P. 2, CP 57. Thus, failure to submit a declaration by itself as ordered by the trial court could have been justification to dismiss the case. However, since the record does not reflect this as the only reason for the dismissal, Plaintiff’s argument is not supportable on the record before the Court.

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<sup>4</sup> **RCW 9A.72.085. Unsworn statements, certification.** Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person’s sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceedings by an unsworn written statement, declaration, verification, or certificate, which (1) Recites that it is certified or declared by the person to be true under penalty of perjury; (2) Is subscribed by the person; (3) States the date and place of execution; and (4) States that it is so certified and declared under the laws of the state of Washington.

D. Response to the Merits of Plaintiff's Brief.

Without waiving any of Defendant's prior arguments about the defects in Plaintiff's brief as argued above, the following is a response to the specific Assignments of Error as identified by the Plaintiff.

1. Plaintiff's Assignment of Error No. 1. Plaintiff's Assignment of Error No.1., seems to be contained in Plaintiff's question: "Did the court abuse it's (sic) discretion for dismissing the plaintiff's demand for a Jury trial because he failed to present a declaration/affidavit in reply to a Court's order to Show Cause?". See Appellant's Brief, p. 7. The phrasing of this Assignment of Error is confusing since the Order of Dismissal was not a ruling on the Plaintiff's jury trial demand. Plaintiff explains his position by contending that the trial court's dismissal after receiving the list of exhibits was an appealable error because, "The Court had already stated the appellant had complied with the Order for Trial readiness by filing his list of exhibits to the court in a loose-leaf notebook. The respondent did not object to any exhibit as required by the Order for trial readiness." Appellate Brief, p. 7.

First, while the trial court did acknowledge receipt of the list of exhibits, it did not agree Plaintiff was in compliance with the case schedule. In fact, the court specified that, "In the meantime, plaintiff,

having otherwise failed to comply with the case schedule, delivered a notebook containing proposed exhibits for trial on October 19, 2009.” (Emphasis added.). Order to Show Cause, p. 2, CP 56. Furthermore, Defendant’s objection or failure to object to Plaintiff’s proposed witness list is not part of the record on appeal and is an unsupported, erroneous conclusion that is not relevant to this appeal.

As to the Plaintiff’s “issues presented” for what he identified as Error No.1, the identified issue seems to be: “No.1 did the court abuse it’s (sic) discretion by claiming the appellant must file a declaration along with the aforementioned motions cited in the introduction that effectively disposed of the respondent’s counter claims (sic)?” Appellant’s Brief, pp. 7 - 8. Plaintiff seems to assume as a proven fact, without citation or support in the record, that his responsive pleading “effectively disposed of the respondent’s counter claims (sic)”. Based on this erroneous and unsupported assumption, Plaintiff further assumes that requiring him to file a declaration with respect to a matter “disposed of” was unnecessary and, therefore, he concludes that the trial court’s order requiring him to submit an unnecessary declaration is an abuse of discretion. Appellant’s Brief, p. 7 – 8. Plaintiff seems to be confusing motions between the parties during litigation with the altogether separate court ordered requirements set out in the Order to Show Cause.

2. Plaintiff's Assignment of Error No. 2. Plaintiff's Error No. 2, is: "is/was the appellant entitled to Consumer Protection Act (chapter 19.86 RCW)?" Appellant's Brief, p. 8. This assignment of error improperly relates to the merits of Plaintiff's alleged cause of action and not the procedural aspects of whether or not dismissal was procedurally proper. Without a clearer statement of this assignment or error and without an argument on how the Consumer Protection Act requirements for a cause of action relates to the trial judge's discretionary decision, Defendant can only reserve the right to respond should Plaintiff be allowed to make a proper identification of this assignment of error. Otherwise, Defendant submits that this is not an appealable issue and that it is irrelevant to the issues argued herein and should be stricken.

3. Plaintiff's Assignment of Error No. 3. Plaintiff identified Error No. 3 as: "does an Order to Show Cause by the court transfer into a motion for a judgment as a matter of law?". Appellant's Brief, p. 8. If Plaintiff is referring to "judgment as a matter of law" under CR 50, then as previously argued, there was no jury trial yet started, no CR 50 motion, and, thus, judgment as as matter of law under CR 50 is not an appealable matter.

4. Plaintiff's Assignment of Error No. 4. Plaintiff identifies error No. 4 as, "if item 3 above is yes and the order to show cause was directed to the respondent, why would it be necessary for the appellant to make a declaration/affidavit with his motion to dismiss the respondent's motion?". Appellant's Brief, p. 8. Since the Order to Show Cause was directed to both Defendant and to the Plaintiff, this Assignment is not understandable as phrased. Plaintiff appears to misconstrue the reasons for the issuance of the order to show cause and the requirements contained therein and did not address these issues to the trial court and fails to address them in the his brief.

5. Plaintiff's Assignment of Error No. 5. The issue of Plaintiff's request for CR 11 sanctions against Defendant for alleged "purposeful delay to allow his client to dispose of the extorted furniture per his original plan set forth in his letters before the suit was served and filed?" is not properly before this Court on appeal. Appellant's Brief, p. 8. The decision to award attorney fees for frivolous lawsuits or against an attorney who does not make "reasonable inquiry" or whose arguments are not "well grounded in fact" and "warranted by existing law" is left to the trial court's discretion and will not be disturbed in absence of a clear showing of abuse. *Tiger Oil Corp., v. Department of Licensing, State of Washington*, 88 Wn.App. 925, 946 P.2d 1235 (1997). Because the case

was dismissed before trial on the merits and there was no pre-dismissal ruling on attorney's fees or sanctions, the only issue before this Court is the alleged judicial abuse of discretion.

Assuming *arguendo* that Plaintiff's CR 11<sup>5</sup> claim is an appealable issue, he makes no reference to facts on the record to support his contentions of frivolous pleadings submitted by the Defendant. Instead, Plaintiff contends that his allegations against the Defendant are supported by a letter that **he authored** that was dated **before** litigation was started. However, as previously argued, matters not properly referenced to the

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<sup>5</sup> CR 11. SIGNING AND DRAFTING OF PLEADINGS; MOTIONHS, AND LEGAL MEMORANDA; SANCTIONS.

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. ... The signature of a party or of an attorney constitutes a certificate that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on lack of information or belief. ... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanctions, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

record and that are not meaningfully argued, should not be considered.

RAP 10.3(4), (5); See also Respondent's Brief, p. 14 -15, *supra*.

However, even if it is an appealable issue and even if Plaintiff's offered exhibits to his brief are allowed, the exhibits themselves do not support a conclusion in Appellant's Brief that the defendant's attorney intentionally "delayed proceedings to allow his client to dispose of the extorted furniture". Appellant's Brief, p. 8. The letter is dated September 21, 2007, which is before the case was filed on May 12, 2008, and therefore, does not provide proof that such a pre-litigation letter delayed or effected litigation proceedings.

Moreover, this "proof" was drafted and signed not by the party against whom sanctions are sought **but was drafted and signed by the Plaintiff himself**. Since CR 11 relates to the "Signing and Drafting of Pleadings, Motions and Legal Memorandum; Sanctions", any pre-litigation matters, matters not involving filed litigation pleadings are clearly beyond the scope of this court rule. Thus, even if this can be considered a pleading for CR 11 purposes, Plaintiff, as the person signing the document, is the only one against whom sanctions can be brought.

**V. RESPONDENT'S REQUEST FOR ATTORNEY'S FEES  
UNDER RAP 18.1 AND 18.9(a)**

The intent of CR 11 is to deter frivolous pleadings. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 157 P.3d 431 (2007). With respect to appeals, the appellate court considers an appeal under RAP 18.9(a) Sanctions<sup>6</sup> to be frivolous based on the following principals: 1) that a civil appellant has a right to appeal, 2) all doubts as to whether the appeal is frivolous are resolved in favor of the appellant; 3) the record should be considered as a whole; 4) an appeal that is affirmed simply because the arguments are rejected is not for that reason alone frivolous, and; 5) an appeal is frivolous if there are no debatable issues on which reasonable minds might differ, and the appeal is so totally devoid of merit that there is was no reasonable possibility of reversal. *Carrillo v. City of Ocean Shores*, 122 Wn.App. 592, 94 P.3d 961 (2004); *In re Marriage of Tomsovic*, 118 Wn.App. 96, 74, P.3d 692(2003).

In the instant case, under the above case law criteria, Plaintiff's appeal is frivolous. Considering the record as a whole and resolving all doubts in favor of the Plaintiff, his appeal presented no debatable issues on which reasonable minds might differ. Moreover, since Defendant

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<sup>6</sup> RAP 18.9(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or failure to comply or to pay sanctions to the court.

presented no cogent argument and cited to no relevant authority this case is, by definition, meritless.

For example, in an appeal of a drug conviction, the court stated of the defendant that, “He does not argue that drug offenders with prior felony convictions are a semi-suspect class. Nor has he cited to authority to support such an argument. We deem that failure to make such an argument as a concession that such an argument has no merit. *State v. McNeair*, 88 Wn.App. 331, 340, 944. P.2d 1099 (1997). Since the issue on appeal is abuse of discretion and because Plaintiff made no meaningful argument and, therefore, presented a meritless appeal sanctions against the Plaintiff are warranted.

Therefore, Defendant/Respondent requests that Plaintiff/Appellant be subject to RAP 18.9(a) sanctions for filing a frivolous appeal and that Defendant be awarded her attorney’s fees and costs of appeal pursuant to RAP 18.1<sup>7</sup>.

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<sup>7</sup> **RAP 18.1 ATTORNEY FEES AND EXPENSES**

**(a) Generally.** If applicable law grants to a party the right to recover attorney fees for expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

**(b) Argument in Brief.** The party must devote a section of its opening brief for the fees or expenses, Requests made at the Court of Appeals will be considered as continuing

## **VI. MOTION TO STRIKE BRIEF AND DISMISS APPEAL**

As argued above, Plaintiff's Brief does not comply with the requirements of RAP 10.3 in that it: 1) does not set out a statement of facts and procedure with citation to the record for each factual statement; 2) does not cite to supporting or relevant authority; 3) does not make an argument relating to an appealable issue, and, 4) includes as an appendix materials not contained in the record. Therefore, because Plaintiff made no meaningful argument and cited no relevant authority with respect to the abuse of discretion assignment of error, and because, therefore, said assignment of error is waived and deemed meritless, pursuant to RAP 10.4(d) Motion in Brief, Defendant moves that: 1) the Appellant's Brief be stricken; 2) the Court rule that the Plaintiff's assignment of error of abuse of discretion is waived; 3) Plaintiff's argument and therefore, his appeal is meritless; 4) the appeal be dismissed with prejudice; and 5) Defendant be awarded her attorney's fees and costs of having to defend a frivolous appeal.

## **VII. CONCLUSION**

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requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief. ...

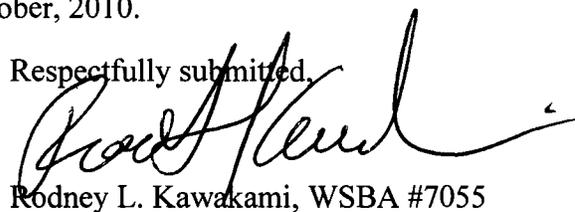
In his brief, Plaintiff failed to adequately identify or to cite to facts in his Statement of Fact as to why his appeal should be considered and he failed to properly relate any of his Statement of Facts to his Argument. His Argument does not provide the court with any citation to relevant legal authority that would support any of the appealable issues and, therefore, Plaintiff has waived his argument. Without citation to relevant legal authority, the Argument portion of his brief provides the Court with no meaningful argument and his entire Argument, as courts have determined, should be deemed meritless.

The court order that is the subject of this appeal is a discretionary ruling made by the trial court in the course of his administration of a case on his trial calendar. The decision should not be overturned unless there is a clear showing that the trial court abused its discretion. Plaintiff not only failed to meet the burden he had to show abuse of discretion, but he failed to clearly identify how and why there was an abuse of judicial discretion. The crux of this appeal is not whether or not Plaintiff's causes of action had merit as contended by the Plaintiff, but rather the issue before the Court is or should be whether or not there is sufficient support to demonstrate that the trial court abused its discretion.

This appeal has no reasonable chance of reversal and is a frivolous appeal. Defendant's motion should be granted and this appeal should be dismissed and the trial court's Order of Dismissal should be affirmed. The Defendant should be awarded her attorney's fees and costs of having to defend against a frivolous appeal.

DATED this 13th day of October, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rodney L. Kawakami", with a long horizontal flourish extending to the right.

Rodney L. Kawakami, WSBA #7055

