No. 91348-0

SUPREME COURT OF THE STATE OF WASHINGTON

DONALD R. EARL,

Appellant,

vs.

XYZPRINTING, INC.,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Mr. Earl purchased a $600 3D printer from XYZprinting via an online reseller. He quickly became dissatisfied with his purchase and immediately threatened to sue. Attempts by XYZprinting to assist Mr. Earl with his printer were rebuffed. Within a month of receiving his printer, Mr. Earl brought this lawsuit. He refused all generous settlement offers. Pursuing numerous ill-advised and baseless motions, Mr. Earl escalated his customer dissatisfaction to its current illogical proportion. Mr. Earl's hasty and aggressive litigation caused significant cost and expense. He properly lost on summary judgment because his claims were meritless. The Superior Court awarded fees and costs against him as a sanction. Mr. Earl now seeks this Court's time and attention to review no fewer than eleven assignments of error.

Mr. Earl's lawsuit and this appeal are vexatious. His assignments of error are unsupported and unconvincing. The reviewing court, be it the Supreme Court or the Court of Appeals, should affirm the Superior Court's judgments in this matter.

II. COUNTER-STATEMENT OF ISSUES

1. Whether the Superior Court had authority to set the amount of fees and costs at a later date after awarding fees on summary judgment?

2. Whether the Superior Court violated Mr. Earl's constitutional rights after Mr. Earl filed an affidavit of prejudice against Jefferson County's only Superior Court judge?

3. Whether the Superior Court had the authority to conduct hearings via telephone when the parties had notice and no party objected?

4. Whether the Superior Court abused its discretion when it denied a "conditional" motion to change venue when the motion sought no meaningful relief but was brought prospectively in the event this appeal is reversed and remanded?

5. Whether the Superior Court abused its discretion when it denied Mr. Earl's multiple motions for sanctions against opposing counsel when the record establishes no basis for sanctions against her?

6. Whether the Superior Court abused its discretion when it imposed sanctions against Mr. Earl upon XYZ's timely served and filed motion seeking such relief and where the findings include that Mr. Earl's litigation was brought in bad faith?

7. Whether the Superior Court abused its discretion or otherwise erred in offering to delay entry of final judgment and liquidation of the fees and costs awarded against Mr. Earl to allow the parties to conduct settlement negotiations?

8. Whether the Superior Court erred as a matter of law when it denied Mr. Earl's motion for summary judgment and granted summary judgment to XYZprinting when the parties agreed no disputed facts prevented determination as a matter of law and there was no evidence of breach of warranty, fraud, or violation of the Consumer Protection Act?

9. Whether the Superior Court abused its discretion when it refused to consider Mr. Earl's belated

Motion to Compel after awarding summary judgment to XYZprinting?

10. Whether Mr. Earl had sufficient notice under CR 54(f) of the Order on Summary Judgment?

11. Whether Mr. Earl is entitled to relief for the Superior Court's alleged failure to resolve his motion for reconsideration within 90 days, when the record shows that the Superior Court denied it within 37 days?

III. COUNTER-STATEMENT OF CASE

Mr. Earl purchased a Da Vinci 3D printer manufactured by XYZprinting from an online reseller. CP 1-30. Mr. Earl received his printer on May 20, 2014. CP 126-39. From this simple purchase, the initiation of this lawsuit occurred at lightning speed.

On May 30, Mr. Earl submitted a request for support to XYZprinting via XYZprinting's website. CP 126-39. Mr. Earl received a same-day polite response, advising him to update the firmware. *Id.* To this, Mr. Earl immediately threatened litigation, stating by email:

> As an aside, you REALLY should familiarize yourself with US warranty laws. Your warranty is in violation of so many laws, you would lose any class action lawsuit filed against you about ten minutes after it was filed. Or perhaps more accurately, you would lose on summary judgment after spending half a million dollars on attorney fees.

Id. XYZprinting responded the next day, apologizing for the issues Mr. Earl said he was encountering and requesting his phone number to address them. *Id.* Mr. Earl refused to provide a phone number and stated: "If

there is anything about the above that you don't understand, find someone who speaks English and have them explain it to you." *Id.*

The Customer Care employees of XYZprinting continued to try to work with Mr. Earl, who again threatened litigation, as follows:

> FAIR WARNING: IF YOU ATTEMPT TO REPAIR OR REPLACE THE MACHINE AND IT DOESN'T WORK, YOU BETTER BE PREPARED TO PROVIDE A FULL REFUND IF YOU DO NOT WANT TO BE FACING A LAWSUIT.

Id. (capital letters original). XYZprinting's warranty provides for repair or replacement; for refunds, purchasers must contact the reseller. CP 63-66.

Mr. Earl sent back his original printer to XYZprinting and received a replacement. CP 126-39. Mr. Earl next sent a message alleging that his replacement printer failed in the same way as his first printer. *Id.* XYZprinting explained that the returned printer did not appear to have any issues but simply required calibration; XYZprinting offered information on calibration. *Id.* Mr. Earl instead demanded a refund. *Id.* He then filed this lawsuit—within one month of receiving the original printer.

Mr. Earl resides in Jefferson County. He filed an affidavit of prejudice against Jefferson County Judge Keith C. Harper, whom Mr. Earl previously had sued. *See* Washington Supreme Court Case No. 875499 (June 2012 lawsuit by Mr. Earl against Judge Harper and the Jefferson County Superior Court). Because Judge Harper is the only superior court

judge in Jefferson County, the affidavit of prejudice required a visiting judge to hear the motions in this case.

XYZprinting moved for summary judgment. The motion originally was noted for October 17, 2014. CP 300-01, ¶¶ 2-3. On October 15, the Jefferson County Superior Court informed the parties that the hearing could not occur on October 17 in Jefferson County, but offered to give the matter a special setting in Clallam County on the same day. CP 305. Mr. Earl replied that his concern about potential traffic delays or foul weather prevented him from making the forty-seven-mile trip. *Id.*

Noting that the next visiting judge trade would be in December, Jefferson County offered to seek alternatives to waiting until December. *Id.* On October 16, 2014, a special set for November 10, 2014, was offered as follows: "Parties would appear in the Jefferson County Superior Court and the Clallam County judge would either appear in person or telephonically." CP 306-07. The hearing was then set for November 10, 2014, at 1:00 pm. *Id.*

Three weeks prior to the hearing, Mr. Earl was aware that the judge could appear telephonically. Mr. Earl admits that by November 7, 2014, three days prior to the hearing, he knew that Clallam County Superior Court Judge Melly would conduct the hearing telephonically and that XYZprinting would appear telephonically. CP 301-02, ¶¶ 5-6. Mr.

Earl made no objection regarding the hearing date, time, or telephonic appearances. At the hearing, Mr. Earl did not object to Judge Melly appearing telephonically. He did not question Judge Melly's identity, complain or note any difficulty in hearing the judge or counsel for XYZprinting. CP 391-461, ¶ 7. At no time did Mr. Earl raise any issue regarding difficulty understanding what was being said. *Id.* Mr. Earl argued the merits of his position.

Judge Melly ruled for XYZprinting. CP 487-88. Judge Melly informed Mr. Earl that he was awarding fees and costs as a sanction. Verbatim Report ("VR") November 10, 2014, 24:3-19; CP 487-88. This award is contained in the Order. CP 487-88. He explained also that he would stay such an order pending Mr. Earl's decision to accept a refund of his purchase price from XYZprinting to resolve the dispute. VR November 10, 2014, 24:3-19; CP 487-88.

Mr. Earl did not agree to settle. He moved for reconsideration and to vacate the summary judgment order. CP 275-99; CP 372-79. These motions were denied. CP 482-85; CP 491-94. Mr. Earl appealed to the Court of Appeals. CP 326-33. When it became clear Mr. Earl had no intention of resolving the dispute, XYZprinting filed a fee application to set the amount of reasonable fees and costs that Judge Melly had awarded during the summary judgment proceedings. CP 342-47. The Superior

Court set the amount of fees and costs. CP 482-85. This order includes the findings that Mr. Earl filed his litigation in bad faith, lacking a factual or legal basis, and failed to conduct a reasonable inquiry into the factual and legal basis of his pleadings. CP 482-85, findings of fact 7-9.

During this seven-month litigation, Mr. Earl filed the following numerous motions regarding his $600 printer:

- Plaintiff's Cross Motion for Summary Judgment;
- Plaintiff's Combined Response to Defendant's Motion for Summary Judgment and Plaintiff's Cross Motion for CR 11 Sanctions Against Attorney Virginia R. Nicholson;
- Plaintiff's CR 37 Motion to Compel Production of Discovery and for CR 26 Sanctions Against Attorney Virginia R. Nicholson;
- Plaintiff's CR 59 Motion for Reconsideration;
- Plaintiff's Conditional Motion for Change of Venue;
- Plaintiff's CR 60 and RCW 4.72 Motion to Vacate Summary Judgment; and
- Plaintiff's Cross Motion for CR 11 Sanctions
- Notice of Nonconsent (to entry of formal judgment)

IV. ARGUMENT

This unnecessary litigation and appeal has come at considerable cost to XYZprinting. Mr. Earl—steadfastly refusing to discuss even the possibility of settlement—continues his vexatious litigation through this appeal and argues eleven errors. None have merit. The law and the record support affirmance.

Mr. Earl fails to state the standard of review for all of his assignments of error. He fails to offer authorities that support his assignments of error. He often fails to describe facts that support his

arguments. In sum, Mr. Earl's Opening Brief contains deficiencies and is unpersuasive to meet his burden to win reversal.

1. As a matter of law, the Superior Court correctly set the amount of previously awarded fees and costs without applying the time limitations of CR 54(d).

Contrary to Mr. Earl's first assignment of error, no law or rule required XYZprinting to file its fee application to set the amount of fees and costs awarded on summary judgment within a specified time frame. *See Bevan v. Meyers*, 183 Wn. App. 177, 189, 334 P.3d 39 (2014). In *Bevan*, Division I explained the distinction relevant to CR 54(d) between raising a claim for attorney fees and presenting a fee application to set the amount of reasonable fees and costs. *Id.* The latter is "merely a request that the Superior Court calculate the amount of fees already authorized." *Id.* Here, XYZprinting claimed the right to fees and costs in its summary judgment materials and the Court granted that claim in the Order on Summary Judgment. CP 487-88. As *Bevan* explains, the fee application to set the amount of those fees is not subject to the ten-day requirement where the claim for fees already has been made and granted. *Bevan* is directly on point. Under *Bevan*, the assignment of error concerning the timing of the fee award under CR 54(d) must fail.

2. Mr. Earl's civil rights were not violated by the Superior Court's administrative practices

following his affidavit of prejudice, and his assignment of error does not entitle him to relief in these proceedings.

To support his second assignment of error, Mr. Earl argues that his constitutional rights were infringed by the delay in hearing his motions, including his motion for summary judgment—a delay that resulted when he filed an affidavit of prejudice against the sole judge in Jefferson County and the court assigned his motions to a visiting judge. Appellant's Brief, p. 25. Mr. Earl offers no authority or argument to support his assignment of error. The Court should reject it for this reason. Further, Washington law supports the procedures that occurred here. When a party files an affidavit of prejudice against a judge, the affidavited judge no longer has authority in a case; the orderly administration of justice thereafter may require more time as the court makes new arrangements for handling the case. *State v. Waters*, 93 Wn. App. 969, 974, 971 P.2d 538, 541 (1999) (Under the plain wording of RCW 4.12.040-050, once a party complies with the terms of the statute, prejudice is deemed established and the judge is divested of authority to proceed further into the merits of the action.).

As discussed in *Marine Power & Equip. Co. v. State*, 102 Wn.2d 457, 463, 687 P.2d 202 (1984), when an affidavit of prejudice has been filed, timeliness necessarily becomes the secondary concern to the party's right to a change of judge:

> In apparent response to the concern expressed in *Funk* and *Black*, the Legislature amended RCW 4.12.050 to provide, "in counties where there is but one resident Judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial . . ." Laws of 1941, ch. 148, § 2, p. 417. The statute's history reflects an accommodation between two important, and at times competing, interests: a party's right to one change of judge without inquiry and the orderly administration of justice. This history also reflects a decision to accord greater weight to the party's right to a change of judge.

Id.; *see also State ex. rel. Goodman v. Frater*, 172 Wash. 571, 573, 24 P.2d 66 (1933) (holding that the movant was entitled to the benefit of the statute despite its obvious interference with the orderly administration of justice). Here, the court properly recognized and accommodated Mr. Earl's affidavit of prejudice: Judge Harper immediately was divested of authority and a visiting judge was assigned.

Mr. Earl fails to establish that the relatively short delay was of constitutional import for resolution of this civil dispute.

Mr. Earl cites no law to show that error occurred that would entitle him to any relief against XYZprinting.

3. Superior Court judges have both the authority and duty to conduct hearings in the most efficient and expedient manner possible and Mr. Earl waived his objections to Judge Melly's telephonic appearance.

Mr. Earl argues that RCW 2.28.030, which grants authority to judges "present and sitting as a member of the court," requires a judge to

physically sit in the courtroom. This is incorrect. This Court should deny his assignment of error number 3.

Under Washington State Superior Court Rules, a judge has the discretionary authority to conduct telephonic hearings:

> Telephonic argument. Oral argument on civil motions, including family law motions, may be heard by conference telephone call in the discretion of the court. The expense of the call shall be spared equally by the parties unless the court directs otherwise in the ruling or decision on the motion.

CR 7(b)(5). Mr. Earl ignores the Superior Court's authority pursuant to this rule, instead citing RCW 2.28.030. This statute does not support his argument. This Court has already construed the meaning of RCW 2.28.030(2). *See In re Jaime*, 59 Wn.2d 58, 61, 365 P.2d 772 (1961). As reflected in the statutory language, a judge must be present "as a member of the Court," not, as Mr. Earl argues, physically sitting in the courthouse: "The statute means no more than that a judge may not pass upon a matter that was never properly submitted to him." *Id.*

A Superior Court moreover has the discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases. A court must effectively manage its caseload, minimize backlog, and conserve scarce judicial resources. *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995); *Wagner v. McDonald*, 10 Wn. App. 213, 217, 516 P.2d 1051 (1973). The

Superior Court of the state of Washington, in whatever county it is sitting, is expressly authorized to hear and determine this matter pursuant to the power granted by the Washington State Constitution, Art. IV, Section 6.

Jefferson County Superior Court Local Rule 7.11 allows for a visiting judge to preside over hearings where an affidavit of prejudice is filed against the judge. Mr. Earl filed his lawsuit in Jefferson County. He filed an affidavit of prejudice against the Jefferson County judge. The visiting judge—whose appointment Mr. Earl does not challenge—was from Clallam County. CR 7(b)(5) and local rule 7.11 permitted the hearing to be conducted by conference call with the parties in Jefferson County and the judge in Clallam County as all parties agreed when the special setting was offered.

The Civil Rules also support a hearing outside the county if the parties consent, as follows:

> CR 77(j) Trials and Hearings; Orders in Chambers. Except as otherwise authorized by these rules or by statute, all trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the county; but no hearing, other than one ex parte, shall be conducted outside the county in which the cause or proceedings are pending without the consent of all parties affected thereby.

CR 77(j). Even if the hearing were considered to have been held in

Jefferson County because the judge was there, this also was authorized. Rather than require the parties to wait until December for a hearing date, the visiting judge offered a special set to hear the summary judgment and other motions in November. The first offered accommodation, to hold the hearing in Clallam County Superior Court, was rebuffed by Mr. Earl. The visiting judge then offered another date, clearly stating that Judge Melly could appear either in person or telephonically. This offer was made three weeks in advance of the hearing. Mr. Earl consented by failing to reject the offer, and then by appearing and arguing.

Mr. Earl waived any objection. He appeared in the Jefferson County courthouse and participated in the hearing. He made no objection. His current objections only surfaced after his motion practice was unsuccessful. Three days prior to the hearing, the parties were informed that Judge Melly would appear telephonically. Mr. Earl offered no objection and chose to participate from his Jefferson County location with the knowledge that Judge Melly would be in Clallam County. He did not raise a due process concern prior to the hearing. CP 391-461, ¶ 7. During the hearing, he never raised an objection or voiced a single concern regarding the hearing arrangements. CP 391-461, ¶ 7. Judge Melly had copies of all of Mr. Earl's exhibits, and assured Mr. Earl that he had reviewed Mr. Earl's pleadings. VR November 10, 2014, 9:18; CP 491:17-

19.

It was only after receiving unfavorable rulings that Mr. Earl raised issues that he could not hear the proceedings, that he was not sure that it was Judge Melly on the telephone, and that his rights were infringed. CP 303, ¶ 7.

The appeal is meritless. Judge Melly had the authority pursuant to court rule, statute and case law to appear telephonically and properly exercised his discretion to conduct the hearing by conference call to accommodate Mr. Earl's requests. Mr. Earl knew the details for arrangement of the conference call and consented. This Court should reject the assignment of error.

4. The Superior Court's denial of a conditional motion was not an abuse of discretion where it need not spend resources on abstract issues.

Contrary to Mr. Earl's assignment of error 4, the Superior Court did not abuse its discretion when it denied his "conditional" motion to change venue should the case be reversed and remanded as a result of this appeal. In his motion, Mr. Earl requested: "Order a conditional change of venue to King County, Washington, to take effect in the event the case, which is currently on appeal, is remanded to this court for further proceedings." CP 379. No authority demonstrates that denial of this motion seeking relief for future proceedings that may never materialize

was an abuse of discretion.

A Superior Court need not consider motions that are "conditional" or "abstract." *See Norman v. Chelan County Pub. Hosp. Dist. No. 1*, 100 Wn.2d 633, 635, 673 P.2d 189 (1983) (*quoting Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). The Court denial of his motion was reasonable and not an abuse of discretion. This Court should affirm.

5. The Superior Court did not abuse its discretion in finding no basis for a sanction against XYZprinting's counsel.

Mr. Earl argues that his due process rights were violated because the Superior Court did not sanction XYZprinting's counsel, and that evidence of other similar litigation brought by Mr. Earl is improperly before this Court. No authority supports reversal based on these assertions raised in the fifth assignment of error. The Superior Court's denial of a sanction award against XYZprinting's counsel was discretionary. Mr. Earl fails to demonstrate an abuse of discretion.

Mr. Earl did not make a showing of any conduct meriting sanction on the part of XYZprinting's counsel. The record shows that Mr. Earl filed motions for sanctions based on disagreement with opposing counsel's arguments regarding the applicable law or facts in this case. *See, e.g.*, CP 263-65; CP 266-69; CP 358-68. On appeal, Mr. Earl addresses only the Memorandum Opinion on Reconsideration filed in

Jefferson County on December 24, 2014. Mr. Earl took issue with the stamp used by Judge Melly's clerk; during the hearing on the motion to set fees, the judge and opposing counsel referred to the summary judgment order while Mr. Earl referred to the opinion on reconsideration. VR February 26, 2015, 8:5-13. This is insufficient to show reversible error. The Superior Court found no basis for sanctions; Mr. Earl fails to provide any compelling argument to reverse this discretionary ruling.

In his brief, Mr. Earl complains that XYZprinting called his past litigious behavior to the Court's attention. Appellant's Brief at p. 37. This also fails to establish reversible error. Contrary to Mr. Earl's argument, there is nothing improper about highlighting the similarities between Mr. Earl's current lawsuit and his various other lawsuits before this and other courts. *See, e.g.*, CP 392-93, ¶¶ 3-5. The Washington State Supreme Court has deemed his filings frivolous. *Id.* (ruling terminating review, filed 2/10/09, stating: "Mr. Earl's pleadings to this court are legally frivolous. If Mr. Earl continues his campaign of frivolous filing that requires the attention of opposing counsel and this court, the court will impose sanctions."). The Supreme Court has explained: "[E]quity has jurisdiction to enjoin vexatious suits, not brought in good faith and instituted for annoyance or oppression or to cause unnecessary litigation. And this is so whether the litigation complained of is numerous actions

between the same parties or numerous actions brought by many against one." *Burdick v. Burdick*, 148 Wash. 15, 23, 267 P. 767 (1928). *See also Demos v. United States Dist. Court*, 925 F.2d 1160 (9th Cir. 1991) (holding that a well-known prolific litigant had abused the privilege of filing petitions in *forma pauperis*). At the least, the evidence was relevant to whether Mr. Earl was a prolific litigant.

In Washington State and under Ninth Circuit authority, Courts have taken under consideration a vexatious Plaintiff's litigious habits. Mr. Earl offers no grounds for reversal of the discretionary ruling denying sanctions in Mr. Earl's favor.

6. The Superior Court did not abuse its discretion when it imposed sanctions against Mr. Earl, who had notice of intent to seek sanctions.

Mr. Earl assigns error to the sanctions awarded against him for his frivolous filings. He claims that he lacked notice that XYZprinting sought sanctions. The record demonstrates notice. There is no merit to his argument.

XYZprinting clearly and timely made its request for sanctions. The request was included in the following pleadings, all of which were timely served on Mr. Earl:

- CP 61, Motion for Summary Judgment, § E;
- CP 174, Response to Plaintiff's Cross Motion for Summary Judgment, § D;

- CP 477, Response to Plaintiff's Motion to Vacate Summary Judgment, § V;
- CP 253-54, Response to Motion to Compel and for CR 26 Sanctions;
- CP 316, Response to CR 59 Motion for Reconsideration;
- CP 462, Response to Second Cross Motion for CR 11 sanctions, § II;
- CP 387, Reply to Motion to Set Fees and Costs, § III;
- CP 467, Response to Conditional Motion for Change in Venue, § II.

Also contrary to Mr. Earl's contentions, the Superior Court found bad faith to support the sanctions against Mr. Earl for frivolous litigation. CP 482-85 at Findings 7-9 ("Plaintiff Donald Earl filed this litigation in bad faith."; "Plaintiff Donald Earl's pleadings filed in this matter lacked a factual or legal basis."; "Plaintiff Donald Earl failed to conduct a reasonable inquiry into the factual and legal basis of his pleadings."). Mr. Earl failed to assign error to these findings. The Court, therefore, must accept the findings as true. *See Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 110, 267 P.3d 435 (2011) (holding that unchallenged findings of fact are verities on appeal and, in the absence of assignment of error to findings, review is limited to whether unchallenged findings support the conclusions of law).[1]

[1] Even if this Court reviewed the record for substantial evidence to support the finding of bad faith, which it need not do, there is plenty of it, including Mr. Earl's threat to XYZprinting that it would need to spend half a million dollars on attorney fees, made on the day he first requested assistance from XYZprinting Customer Service. CP 126-39. As noted in

The sanction award is properly supported. "CR 11 sanctions are available against a pro se litigant for filing a claim for an improper purpose, or if the claim is not grounded in fact or law and the signing litigant failed to conduct a reasonable inquiry." *In the Matter of Recall of Lindquist*, 172 Wn.2d 120, 136, 258 P.3d 9 (2011).

Here, the trial court stated in its written order that Mr. Earl filed litigation in bad faith, lacking a factual or legal basis for pleadings. CP 482-85 at Findings 7-9. The Court clarified in its oral ruling:

> But it seems to me that from the get go the goal here wasn't so much to get a working product as much as it was trying to set them up for your warranty lawsuit.

VR November 10, 2014, 18:23-26;

> I think that your lawsuit was brought baselessly and in, in bad form, excuse me, bad faith and uh, much, with much too rapidity. Without trying to really resolve the underlying issue I think you sort of jumped at the

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the Memorandum Opinion on Reconsideration, the tenor of all of Mr. Earl's email communications indicate Mr. Earl was gearing up for litigation. CP 491-94; CP 126-39. In the span of less than three weeks, Mr. Earl threatened, directly or implicitly, to sue XYZprinting a multitude of times. *Id.* Mr. Earl rushed to litigate this matter, within one month of receiving his printer. *Id.* Mr. Earl refused to allow XYZprinting to assist him in resolving his printer problems. *Id.* Instead, as threatened, he instituted a hasty lawsuit and drove up XYZprinting's attorneys fees with unnecessary motion practice in pursuit of claims that had no legal or factual basis. Mr. Earl has not overcome these findings or the presumption in favor of the findings, or met his burden to show that the findings are not supported by substantial evidence (had he assigned error to them). *See Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

> opportunity to file a lawsuit and you were working towards that at the very beginning.

VR November 10, 2014, 24:9-15. Based upon the written order, including a finding of bad faith, and its oral ruling, the trial court sufficiently articulated its reasons to support the award of fees. Reversal would require a finding that the Superior Court abused its discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). There is no showing of an abuse of discretion to support the sixth assignment of error.

Moreover, a trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith. *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000). A court's inherent power to sanction is "governed not by rule or statute but by the control necessarily vested in the courts to manage their own affairs so as to achieve the orderly and expeditions disposition of cases." *Id.*, *citing Chambers v. NASCO Inc.*, 501 U.S. 32, 43 (1991). "Sanctions may be appropriate if an act affects the integrity of the court and if left unchecked, would encourage future abuses." *Id.*

Mr. Earl fails to demonstrate that this Court should reverse the sanctions for his frivolous lawsuit against XYZprinting.

7. The Superior Court had the authority to encourage Mr. Earl to settle his litigation and in doing so did not violate Mr. Earl's constitutional rights.

Mr. Earl argues in his seventh assignment of error that the Superior Court erred in offering to delay or stay entry of final judgment and liquidation of the fees and costs awarded against Mr. Earl to allow the parties to conduct settlement negotiations. CP 487-88; VR November 10, 2014, p. 24:3-19. Contrary to Mr. Earl's arguments, a Superior Court does have the authority to encourage settlement. The public policy of this state strongly encourages settlement. *See City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997); *Seafirst Ctr. Ltd. Partnership v. Erickson*, 127 Wn.2d 355, 365, 898 P.2d 299 (1995) (the law "strongly favors" settlement). Thus, Superior Courts do what they can to encourage settlement. *See, e.g., Puget Sound Energy v. Certain Underwriters at Lloyd's*, 134 Wn. App. 228, 250, 138 P.3d 1068, 1079, 2006 Wash. App. LEXIS 1071, 36 (2006) ("Because it is consistent with the public policy in Washington of encouraging settlement, we find that the Superior Court here had the equitable power to issue a contribution bar order.").

There was nothing improper about Judge Melly's attempt to encourage reasonable settlement of this matter. The judge's offer favored no party and simply related to allowing the parties time to converse. Mr.

Earl offers no authority that would support reversal on this ground. This Court should reject his appeal as meritless and unsupported by authority.

8. The Superior Court correctly granted summary judgment to XYZprinting because there were no disputed material facts and all issues could be resolved as a matter of law.

Mr. Earl fails to include any argument explaining his eighth assignment of error that the summary judgment rulings constituted error. Appellate courts ordinarily will not consider assignments of error unsupported by legal argument and authority. *Snyder v. Dep't of Labor & Indus.*, 40 Wn. App. 566, 576, 699 P.2d 256 (1985) (*citing Lutz v. Longview*, 83 Wn.2d 566, 520 P.2d 1374 (1974)). An appellant's brief should present argument in support of the issues presented for review, together with citations to legal authority and relevant record sections. RAP 10.3(a)(5). Mr. Earl needed to identify specific errors and cite to specific sections of the record to support his argument that summary judgment was wrongfully decided. Instead, Mr. Earl simply refers this Court to the trial court briefing. Mr. Earl's argument is not meritorious on its face. Mr. Earl has the burden to demonstrate that the Superior Court's decision was incorrect and has failed to do so. For this reason alone, the Court should deny the appeal.

As a matter of law, Mr. Earl's claims failed. Mr. Earl's claim for

violation of the Moss-Magnusson Warranty Act ("MMWA") failed because such claims stand or fall with warranty claims under state law. See *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008). XYZprinting provided a one-year limited warranty, under which XYZprinting will repair or replace the product in the event of a product defect. Mr. Earl demanded a refund, not repair or replacement. The law did not entitle him to one. And the undisputed facts showed that there was no breach of warranty. Because Mr. Earl failed to state any valid claims under state law for breach of express or implied warranty, his MMWA claim also failed. *See, e.g., In re Sony Grand WEGA KDF-E A10/A20 Series Rear Projection HDTV TV Litig.*, 758 F. Supp. 2d 1077 (S.D. Cal. 2010).

Mr. Earl's fraud claims similarly were meritless as a matter of law. *See, e.g., Trohimovich v. State*, 90 Wn. App. 554, 557-58, 952 P.2d 192 (1998) (finding dismissal on summary judgment appropriate where allegations contained in pleadings and briefs were based merely on personal belief, that the complaint was advanced without factual support, and upholding sanctions against the Plaintiff). Here, Mr. Earl tried to support his fraud claims only on his personal beliefs and inadmissible evidence of negative reviews of the printer anonymously posted on Amazon.com. Not only is such "evidence" unacceptable proof of

allegations, Mr. Earl presented it in a misleading manner: there are significantly more positive reviews regarding the Da Vinci 3D printer on Amazon than there are negative reviews.

Finally, Mr. Earl's claims for a violation of Washington's Consumer Protection Act failed as a matter of law because he lacked proof of the elements of a CPA violation. He based this claim on his mistaken belief that he received a used instead of a new printer from Studica.com, the online retailer who sold him his Da Vinci 3D printer. Mr. Earl failed to identify an unfair or deceptive act or practice on the part of XYZprinting. There was no violation of the MMWA to be the basis of a per se violation of Washington's Consumer Protection Act. Mr. Earl also alleged that a per se violation of 15 USC § 45 of the Federal Trade Commission Act could be a basis for violation of the Consumer Protection Act, but this failed because the Federal Trade Commission Act does not provide a private right of action. *Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981).

All of the claims in Mr. Earl's Complaint failed as a matter of law. The Superior Court correctly granted summary judgment in favor of XYZprinting. Mr. Earl provides no argument or authority supporting reversal.

9. The Superior Court correctly denied Mr. Earl's discovery motion because the ruling on summary judgment resolved all issues between the parties.

Mr. Earl argues for his ninth assignment of error that the Superior Court violated his right to pursue discovery because his motion to compel was not considered after the summary judgment hearing. The Superior Court ruled that the case was done and there was no longer any basis for further discovery. VR November 10, 2014, 21:22-22:21.

Mr. Earl propounded discovery and XYZprinting timely responded. Unsatisfied, Mr. Earl moved to compel discovery to support his theories, including that XYZprinting was hiding its warranty by redirecting consumers using old versions of Internet Explorer. He sought extensive information about XYZprinting's web hosting service, including a demand for source code used in older versions of Internet Explorer. *See generally* CP 1-30, Complaint, *see also* CP 219. Mr. Earl had no objective basis for this request, just his own personal belief that XYZprinting had conspired against him with its hosting service and, apparently, Microsoft.

In his Cross Motion for Summary Judgment, Mr. Earl clearly stated his belief that further discovery was not necessary and the case could be determined as a matter of law, as follows:

> The Plaintiff intended to move for summary judgment on completion of discovery, as the Plaintiff reasonably believes the Defendant is in possession of documents,

> information and witness testimony that would aid the Plaintiff in supporting his case. However, in the course of preparing a response to the Defendant's Motion for Summary Judgment, after reviewing the evidence already in the Plaintiff's possession, and on further study of relevant statutes, rules and precedent, the Plaintiff believes the case is sufficiently well developed to warrant filing this Motion for Summary Judgment. . . .

CP 57-58. Mr. Earl's present argument to the contrary contradicts his position at summary judgment. No basis in fact or law supports it. The Court should uphold the Superior Court's decisions. No abuse of discretion is shown.

10. Entry of the summary judgment order caused no prejudice to Mr. Earl; even if CR 54(f) applied, which it does not, Mr. Earl's argument that the order is void is wrong.

Mr. Earl argues for his tenth assignment of error that under CR 54(f), the summary judgment order "is void" because he did not have five days' notice of presentation of the order. He is incorrect on application of that rule. In fact, entry of the order was permissible under CR 53(f)(2)(c), which provides that five days' notice is not necessary if presentation is made in open court, as follows: "(2) *Notice of presentation.* No order or judgment shall be signed or entered until opposing counsel have been given 5 days' not ice of presentation and served with a copy of the proposed order or judgment unless: . . . (C) *After verdict, etc.* If presentation is made after entry of verdict or findings and

while opposing counsel is in open court."

Here, Judge Melly dictated the terms of the summary judgment order at the summary judgment hearing and asked for presentation of that order. VR November 10, 2014, 24. Mr. Earl was in open court during the entry of the summary judgment verdict of findings. Counsel for XYZprinting provided the order requested to Judge Melly and Judge Melly signed the order on the same day the hearing was held, November 10, 2014. *Id.*; CP 487-88. Mr. Earl's argument that the summary judgment order is void is wrong because he was in open court when the findings were stated to the parties.

Moreover, failure to provide timely notice of presentation in accordance with CR 54(f) does not render findings, conclusions or a judgment "invalid" when there is no prejudice arising from the lack of notice. *Burton v. Ascol*, 105 Wn.2d 344, 352, 715 P.2d 110 (1986). In *Burton*, the Washington Supreme Court found no prejudice when the complaining party was able to raise issues on appeal. *Burton*, 105 Wn.2d at 353. Here, Mr. Earl has had every opportunity to raise his issues on appeal. He fails to assert or demonstrate any prejudice. *Id.* There is no basis, therefore, for reversal.

11. Mr. Earl's motion for reconsideration was denied within 90 days.

In his final assignment of error, Mr. Earl argues that he is entitled to reversal because his motion for reconsideration remains undecided. This argument is meritless. The motion was denied not temporarily, as Mr. Earl argues, but finally and in plain language denying the motion. Further, Mr. Earl does not identify any harm or prejudice that would entitle him to relief.

On December 24, 2014, Judge Melly denied Mr. Earl's November 17, 2014, motion for reconsideration. His order specified: "There are no material issues of fact. Summary Judgment in favor of the Defendant was properly granted. Plaintiff's motion for reconsideration is denied." CP 494. Mr. Earl treated the order as final by appealing it. *See, e.g.*, Plaintiff's First Amended Notice of Appeal to the Supreme Court, appending the Memorandum Opinion on Reconsideration. CP 486-96. The order plainly indicates the judge's intent to adjudicate the motion for reconsideration. Any other interpretation is unsupportable.

The law treats such an order as an adjudication and not as a temporary state of affairs. "A judgment need not be in any particular form, nor is it essential that any particular technical phraseology or any prescribed form of expression be employed by the court; it is sufficient if

it appears to be the act and adjudication of the court which renders it." *State ex rel. Lynch v. Pettijohn*, 34 Wn.2d 437, 445, 209 P.2d 320 (1949) *citing* 30 Am. Jur. 828, Judgments, § 19. In *Lynch*, the Washington Supreme Court determined that where an opinion effectually determined the issues presented to the court, the Superior Court intended the opinion to be final, and the parties had treated the opinion as final, the opinion in question constituted a judgment. *Id.* This authority supports affirmance.

Washington precedent correctly places less significance on the form of the judgment than on its content and the intent of the court, as follows:

> In *1 Freeman on Judgments* (5th ed.) 121, appears this statement with reference to the form and contents of judgments: "If it corresponds with the definition of a judgment as established by the code; if it appears to have been intended by some competent tribunal as the determination of the rights of the parties to an action, and shows in intelligible language the relief granted, -- its claim to confidence will not be lessened by a want of technical form, nor by the absence of language commonly deemed especially appropriate to formal judicial records. Even where a form of judgment is prescribed by statute the failure to follow it exactly does not defeat the judgment, since a substantial compliance with the statute is all that is necessary."
>
> And in *49 C. J. S. 181, Judgments*, § 62, we read:
>
> "A record is sufficient as a judgment provided it appears therefrom that it was intended as such, and corresponds with the statutory definition of a judgment, and provided it appears therefrom that it is a judicial determination or act

> of a designated court of a specified term, and if the time, place, parties, matter in dispute, and the result are clearly stated, or may be certainly ascertained therefrom."

Id. It is not doubtful in this case that Judge Melly declined to reconsider. He did so unequivocally and as an expression of immediate resolution, stating in the present tense: "Plaintiff's motion for reconsideration is denied." CP 494. The parties, particularly Mr. Earl, treated the opinion as final. Similar to the result in *Lynch*, this Court should conclude that the Memorandum Opinion resolved the motion for reconsideration.

Mr. Earl's authorities offer no basis for reversal. See Appellant's Brief, 48-49. He fails to show that the denial of the motion for reconsideration was intended only temporarily or as a preliminary step to a more permanent resolution. To the contrary, the record shows that Judge Melly denied the motion. CP 491-94. This Court should dismiss Mr. Earl's appeal and uphold the Superior Court determinations.

V. REQUEST FOR ATTORNEY FEES

This Court should award XYZprinting attorney fees and costs incurred on appeal pursuant to RAP 18.1 and RAP 18.9 on the basis that the appeal is frivolous. Mr. Earl's extortionist intent to hold the expense and hassle of litigation over XYZprinting's head is evident from the inception of these parties' dealings. On the very first day of their communications over this $600 printer, Mr. Earl threatened that

XYZprinting would lose in litigation in "ten minutes," and then upped the ante by declaring: "Or perhaps more accurately, you would lose on summary judgment after spending half a million dollars on attorney fees." CP 126-39.

Mr. Earl embraced an appeal with no concern for the expense or ramifications of dragging XYZprinting through more litigation over his insubstantial and meritless claims. He made eleven assignments of error, including assignments for errors that are contrary to precedent, for which he waived his objections and for which he has no evidentiary support. He failed to provide the standard of review. In some instances, he failed to provide argument.

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Millers Casualty Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983) (granting fees and costs in an insurers' dispute of liability for payment where no debatable issues were presented and the authorities clearly dictated that the trial court be affirmed.). Here, Mr. Earl was sanctioned for a frivolous lawsuit and brought no debatable issues in his appeal. This Court should award fees and costs to XYZprinting.

VI. CONCLUSION

Mr. Earl did not like the Superior Court rulings, but he has failed to identify or support any reversible errors, despite arguing over eleven separate issues. None of his issues create a debatable issue. This appeal is devoid of merit. XYZprinting respectfully requests that this Court deny Mr. Earl's appeal and hopefully end this litigation. XYZprinting also requests its fees and costs for being required to respond to this frivolous appeal.

Respectfully submitted on this 6th day of May, 2015.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 6th day of May, 2015, I arranged for service *via Email as agreed by the parties, with a courtesy copy sent via U.S. Mail*, of the foregoing RESPONDENT'S BRIEF to the party to this action as follows:

Donald R. Earl
3090 Discovery Road
Port Townsend, WA 98368
Email: don-earl@waypoint.com

Mary A. Williams

PDX\127694\199088\VNI\15728717.3

OFFICE RECEPTIONIST, CLERK

To: Williams, Mary A.
Cc: 'don-earl@waypoint.com'; Nicholson, Virginia R.
Subject: RE: Donald Earl v. XYZprinting, Inc./Supreme Court No. 91348-0

Received 5-6-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Williams, Mary A. [mailto:MAWilliams@SCHWABE.com]
Sent: Wednesday, May 06, 2015 1:59 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'don-earl@waypoint.com'; Nicholson, Virginia R.
Subject: Donald Earl v. XYZprinting, Inc./Supreme Court No. 91348-0

Dear Clerk:

Attached please find Respondent's Brief to be filed with the court.

Thank you,

Mary

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