

Court of Appeals Case No. 47034-9-II

SUPREME COURT OF THE STATE OF WASHINGTON

Donald R. Earl (Appellant)

v.

XYZPrinting, Inc. (Respondent)

APPELLANT'S PETITION FOR REVIEW

Donald R. Earl (pro se)
3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604
Email: don.earl@olypen.com

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DIVISION II
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1 **A. IDENTITY OF PETITIONER**

2 The Appellant, Donald R. Earl, asks this court to accept review of
3 the decision designated in Part B of this motion.

4 **B. DECISION**

5 On June 6, 2016, Division II of the Washington Court of Appeals
6 filed an unpublished opinion in this lawsuit. The Court of Appeals refused
7 to review issues related to void judgments raised in the trial court related
8 to the fact that no judge was present in the courtroom during summary
9 judgment proceedings, in violation of RCW 2.28.030(2). The Court of
10 Appeals refused to conduct de novo review of the trial court's summary
11 judgment decisions. The Court of Appeals ruled that in spite of a motion
12 to compel discovery being pending at the time summary judgment was
13 entered, the Appellant had no right to conduct discovery prior to entry of
14 summary judgment against him. The Appellant subsequently filed a
15 Motion for Reconsideration, which the Court of Appeals denied, without
16 comment, on July 28, 2016. A copy of the decisions (and the trial court's
17 unsigned memorandum opinion) is in the Appendix, pages 1 - 22.
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19

20 **C. ISSUES PRESENTED FOR REVIEW**

21 **Issue 1:** A visiting judge was scheduled to hear pending summary
22 judgment and other motions in Jefferson County Superior Court. On the
23 day and time of the hearing, no judge was present in the courtroom. A
24

1 voice alleged to be that of Clallam County Superior Court Judge
2 Christopher Melly could be heard over the court's speaker system. RCW
3 2.28.030(2) bars any judge from acting "*When he or she was not present*
4 *and sitting as a member of the court at the hearing of a matter submitted*
5 *for its decision.*" RCW 2.08.150 requires visiting judges to appear "*at the*
6 *seat of judicial business of such county, in such quarters as shall be*
7 *provided for such session by the board of county commissioners*". Are the
8 decisions entered by Judge Melly void because Judge Melly did not have
9 jurisdiction to act in the case without being present and sitting at the
10 hearing where the matters were presented and was Mr. Earl's right of
11 access to the courts, due process and equal protection of the laws under
12 Art. I, Sec. 3 & 10 and the Fourteenth Amendment violated thereby?
13

14 **Issue 2:** Mr. Earl moved for reconsideration in the trial court,
15 raising the issue the trial court's judgment was void because no judge was
16 present at the summary judgment hearing. Mr. Earl raised the issue on
17 appeal. The Court of Appeals refused to consider the void judgment issue,
18 erroneously stating Mr. Earl failed to raise the issue in the trial court. Did
19 the Court of Appeals refusal to rule on the void judgment issue constitute
20 legal error and did the decision violate Mr. Earl's right of access to the
21 courts and due process under Art. I, Sec 3 & 10 and the Fourteenth
22 Amendment?
23

1 **Issue 3:** On appeal, Mr. Earl provided the Court of Appeals with
2 all documents and evidence submitted for the trial court's consideration on
3 summary judgment motions. The Court of Appeals refused to conduct de
4 novo review, as required under well settled Washington law. In refusing to
5 review summary judgment, did the Court of Appeals commit legal error
6 and violate Mr. Earl's right to due process and access to the courts under
7 Art. I, Sec 3 & 10 and the Fourteenth Amendment?
8

9 **Issue 4:** On August 1, 2014, Mr. Earl served interrogatories and
10 requests for production on the Defendant, XYZPrinting, Inc. On
11 September 15, 2014, while the parties were making arrangements to meet
12 and confer, XYZPrinting, Inc. filed a motion for summary judgment. Mr.
13 Earl filed a cross motion for summary judgment and a motion to compel
14 production of discovery. The trial court refused to consider the then
15 pending motion to produce discovery and entered summary judgment
16 against Mr. Earl without allowing Mr. Earl to conduct discovery prior to
17 entry of the decision, on the grounds Mr. Earl had waived his right to
18 conduct discovery by filing a cross motion for summary judgment. The
19 Court of Appeals affirmed the trial court's decision. Did courts below err
20 in refusing to allow Mr. Earl to conduct discovery prior to entry of
21 summary judgment and did the error violate Mr. Earl's right to due
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1 process and access to the courts under Art. I, Sec 3 & 10 and the
2 Fourteenth Amendment??

3 **D. STATEMENT OF THE CASE**

4 On June 20, 2014, the Plaintiff/Appellant, Donald R. Earl, filed a
5 lawsuit against XYZPrinting, Inc. in Jefferson County Superior Court,
6 alleging four causes of action based on violations of Federal warranty
7 laws, unfair business practices under the Washington Consumer Protection
8 Act, and fraud. (Appendix p. 23-30)

9
10 A change of judge was requested and various motions were
11 scheduled to be heard by a visiting judge from Clallam County, including
12 motions for summary judgment filed by both parties. (Plaintiff's summary
13 judgment motion – Appendix p. 43-60) (Plaintiff's motion to produce
14 discovery – Appendix p. 31-42)

15 A hearing was held on November 10, 2014, in the Jefferson
16 County Superior Court courtroom. No judge was present at the hearing. A
17 male voice, alleged to be that of Clallam County Superior Court Judge,
18 Christopher Melly, could be heard intermittently during the hearing over
19 the Court's speaker system. The voice tended to fade in and out, break off
20 and start up again, at irregular intervals, making it difficult and sometimes
21 impossible to understand what was being said. The Verbatim Report of
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1 Proceedings identifies 17 places in the transcript where Judge Melly's
2 voice is inaudible.

3 Without making any findings of fact or conclusions of law, Judge
4 Melly dismissed Mr. Earl's lawsuit, granting summary judgment in favor
5 of XYXPrinting, Inc.

6 Judge Melly then proposed a settlement and threatened Mr. Earl
7 with costs and sanctions if he did not accept Judge Melly's proposal. No
8 findings of fact or conclusions of law supporting an award of costs or
9 sanctions have been made at any point in the case. In fact, nowhere in the
10 record are allegations of sanctionable conduct made against Mr. Earl.

11 Mr. Earl rejected the Court's proposed settlement in open court
12 and timely filed a motion for reconsideration. Among the reasons
13 submitted as a basis for reconsideration was the argument, fully supported
14 by authority, that the judgment was void because Judge Melly lacked
15 jurisdiction of the case and parties because he was not present in the
16 courtroom where the hearing was held.

17 An unsigned memorandum opinion denying the motion for
18 reconsideration was entered on December 24, 2014, from which Mr. Earl
19 timely filed an appeal (Appendix p. 19-22)

20 On January 16, 2015, XYZPrinting, Inc. filed a motion requesting
21 costs and fees in the amount of 25,433.60.

1 On February 6, 2016, Kitsap County Visiting Superior Court,
2 Judge, Sally Olsen granted the motion in the amount requested. As noted
3 above, at no time in this case have any findings of fact or conclusions of
4 law been made to support an award of costs and fees. Mr. Earl timely
5 appealed the decision.

6 On July 6, 2016 Division II of the Washington State Court of
7 Appeals entered an unpublished opinion remanding the case to the trial
8 court for further consideration of the award of costs. (Appendix 1-17)

9 In order to facilitate de novo review of summary judgment, all
10 documents and evidence submitted to the trial court was provided to the
11 Court of Appeals. Contrary to settled law at the Washington Supreme
12 Court level, the Court of Appeals refused to conduct de novo review of the
13 summary judgment decisions, upholding summary judgment dismissal
14 without making any findings of fact or conclusions of law. (Appendix p.
15 6-7) As noted above, Mr. Earl's lawsuit has been dismissed with
16 prejudice, without any judge, in any Washington court, having offered any
17 legal or factual basis to support the decision.

18 Contrary to settled law at the Washington Supreme Court level, the
19 Court of Appeals also refused to review the void judgment issue
20 (Appendix p. 6). In the unpublished opinion, the Court of Appeals claimed
21 Mr. Earl failed to raise the issue in the trial court. Mr. Earl timely filed a
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24

1 motion for reconsideration on the issue, with citations to the record
2 demonstrating the trial court was fully briefed on the issue and took
3 judicial notice of the issue (Appendix 19). The Court of Appeals denied
4 the motion, without explanation, on July 28, 2016.

5 **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

6 **Issue 1: Are the decisions entered by Judge Melly void because**
7 **Judge Melly did not have jurisdiction to act in the case without being**
8 **present and sitting at the hearing where the matters were presented**
9 **and was Mr. Earl's right of access to the courts, due process and**
10 **equal protection of the laws under Art. I, Sec. 3 & 10 and the**
11 **Fourteenth Amendment violated thereby?**

12 In *Whatcom County v. Bellingham*, 128 Wn.2d 537 (1996), (citing
13 *Stone v. Chelan County Sheriff's Dep't*, 110 Wn. 2d 806, 810, 756 P.2d
14 736 (1988)), this Court provided the following rule of statutory
15 construction: "*Statutes must be interpreted and construed so that all the*
16 *language used is given effect, with no portion rendered meaningless or*
17 *superfluous.*" We review questions of law de novo. *State v. Robinson*, 153
18 Wn.2d 689, 693, 107 P.3d 90 (2005).

19 Under Washington law, at RCW 2.08.150 a visiting judge is
20 empowered to act only when at *the seat of judicial business of such*
21 *county, in such quarters as shall be provided for such session by the board*
22 *of county commissioners.* (Appendix p. 61)

1 Under the plain language of Washington law, the Clallam County
2 visiting judge had no legal authority to take any action in this matter
3 without being physically present in the Jefferson County courtroom where
4 the hearing took place.

5 Mr. Earl has been unable to identify a single Washington case
6 where our courts have ever found it necessary to consider the propriety of
7 a judge appearing in court by phone on a matter to be heard in open court.
8 In *Arnold v. Laird*, 94 Wn.2d 867 (1980), citing prior law, this Court ruled
9 in pertinent part as follows:
10

11 *“The trial can be but in one place at a time, and that place is*
12 *where the judge presides and the evidence is produced... a*
13 *properly constituted court, [is] where all proper and necessary*
14 *persons are in attendance”* (Brackets added)

15 Washington law addresses the issue further at RCW 2.28.030(2).
16 Washington judges are barred from taking any action in a case when *not*
17 ***present and sitting*** as a member of the court ***at the hearing*** of a matter
18 *submitted for its decision.* (Appendix p. 62)

19 Citing well settled law in *Dike v. Dike*, 75 Wn.2d 1 (1968), this
20 court stated, *“A judgment, decree or order entered by a court which lacks*
21 *jurisdiction of the parties or of the subject matter, or which lacks the*
22 *inherent power to make or enter the particular order involved, is void.”*

1 Under the plain, unambiguous language of Washington law, the
2 Clallam County visiting judge lacked inherent power to take any action in
3 this case without being physically present in the courtroom where the
4 hearing was held. All decisions that lie from that hearing are void.

5 Furthermore, any other litigant appearing at a hearing on summary
6 judgment would have had access to the court's projection equipment to aid
7 the visual inspection of evidence exhibits presented for a judge's
8 consideration. Any other litigant would have had the ability to gauge a
9 judge's level of attentiveness and reactions to the arguments and evidence
10 offered for the court's consideration in order to help guide them in the
11 manner of their presentations. Any other litigant appearing in open court
12 has the benefit of a judge being present to maintain order and observe any
13 potential misconduct occurring in the courtroom to ensure litigants are
14 fairly heard without distractions. All of these considerations are elements
15 of a litigant's right of access to the courts and were denied to Mr. Earl due
16 to the absence of a judge being physically present at the hearing.
17

18
19 In *Carter v. Univ. of Wash.*, 85 Wn.2d 391 (1975), this Court
20 recognized a right of access to the courts as follows: "*Because of our*
21 *conviction that judicial trepidation in the face of social need should not*
22 *prevail, we forthrightly predicate a general right of access to the courts*
23 *upon the Washington Constitution.*"
24

1 Citing the U.S. Supreme Court as authority in *Putman v.*
2 *Wenatchee Valley Med. Ctr.*, PS, 166 Wn. 2d 974 (2009), this Court ruled
3 in relevant part as follows: "*The very essence of civil liberty certainly*
4 *consists in the right of every individual to claim the protection of the laws,*
5 *whenever he receives an injury. One of the first duties of government is to*
6 *afford that protection.*" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163,
7 2 L. Ed. 60 (1803).

8 *The people have a right of access to courts; indeed, it is "the*
9 *bedrock foundation upon which rest all the people's rights and*
10 *obligations."* *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780,
11 819 P.2d 370 (1991)

13 The circumstances surrounding this case, and the nature of the
14 decisions entered, should shock the conscience of any right thinking
15 person. Rule, law, precedent and ordinary procedures were not simply
16 abused, they were utterly abandoned to a degree that is without precedent.
17 Review of Issue 1 should be accepted pursuant to RAP 13.5(b)(3) because
18 the Court of Appeals has so far departed from the accepted and usual
19 course of judicial proceedings and so far sanctioned such a departure by
20 the trial court, as to call for the exercise of revisory jurisdiction by the
21 Supreme Court.
22

1 **Issue 2: Did the Court of Appeals refusal to rule on the void**
2 **judgment issue constitute legal error and did the decision violate Mr.**
3 **Earl's right of access to the courts and due process under Art. I, Sec 3**
4 **& 10 and the Fourteenth Amendment?**

5 It is well settled law in Washington State that a void judgment may
6 be challenged at any time and is appealable. Case law on the question is
7 over a hundred years deep as shown below:

8 *"It has been repeatedly held by this court that an appeal lies from*
9 *a void judgment, and it follows that an order setting aside a*
10 *judgment in form on the ground that it is in fact invalid, is also*
11 *appealable." Fox v. Nachtsheim, 3 Wash. 684 (1882)*

12 *"A judgment, decree or order entered by a court which lacks*
13 *jurisdiction of the parties or of the subject matter, or which lacks*
14 *the inherent power to make or enter the particular order involved,*
15 *is void... a void order, judgment, or decree is a nullity and may be*
16 *attacked collaterally" Dike v. Dike, 75 Wn.2d 1 (1968)*

17 *"a void judgment can be attacked at any time" Hazel v. Van Beek,*
18 *135 Wn.2d 45 (1998)*

19 *"a court may vacate a void judgment at any time. A judgment is*
20 *void if entered by a court without jurisdiction." Roberts v.*
21 *Johnson, 137 Wn.2d 84 (1999)*

22 Under settled Washington law, Mr. Earl's right of access to the
23 courts includes a right to appeal void judgments and to challenge a void
24 judgment at any time. Even if Mr. Earl had failed to raise the issue in the
25 trial court, which he did not, the Court of Appeals' refusal to consider the
26 issue when properly raised on appeal violated Mr. Earl's right to due
process and access to the courts.

1 Review of Issue 2 should be accepted pursuant to RAP 13.5(b)(3)
2 because the Court of Appeals has so far departed from the accepted and
3 usual course of judicial proceedings, as to call for the exercise of revisory
4 jurisdiction by the Supreme Court.

5 **Issue 3: In refusing to review summary judgment, did the**
6 **Court of Appeals commit legal error and violate Mr. Earl's right to**
7 **due process and access to the courts under Art. I, Sec 3 & 10 and the**
8 **Fourteenth Amendment?**

9 Mr. Earl raises this issue in order to preserve it, recognizing the
10 issue may be moot in the event the Court finds the judgment entered in the
11 case is void.

12 Citing settled law in *Folsom v. Burger King*, 135 Wn.2d 658
13 (1998) this Court ruled in relevant part as follows:

14 *"An appellate court would not be properly accomplishing its*
15 *charge if the appellate court did not examine all the evidence*
16 *presented to the trial court, including evidence that had been*
17 *redacted. The de novo standard of review is used by an appellate*
18 *court when reviewing **all trial court rulings made in conjunction***
19 *with a summary judgment motion. This standard of review is*
20 *consistent with the requirement that evidence and inferences are*
21 *viewed in favor of the nonmoving party, Lamon, 91 Wn.2d at 349*
22 *(citing Morris, 83 Wn.2d at 494-95), and the standard of review is*
23 *consistent with the requirement that the appellate court conduct*
24 *the same inquiry as the trial court. Mountain Park Homeowners*
25 *Ass'n, 125 Wn.2d at 341." (Emphasis added)*

26 Additional authority regarding the requirement for de novo review
is found in the following cases: *Stokes v. Polley*, 145 Wn.2d 341 (2001)
("Summary judgment orders are reviewed de novo."), *Cowiche Canyon*

1 *Conservancy v. Bosley*, 118 Wn. 2d 801 (1992), (“In reviewing a grant of
2 summary judgment, the appellate court engages in the same inquiry as the
3 trial court.”), *Rivett v. City of Tacoma*, 123 Wn.2d 573 (1994) (“This case
4 is an appeal from an order on summary judgment. In reviewing such an
5 order, this court engages in the same inquiry as the trial court. Since the
6 relevant facts are undisputed and the trial court's decision involved only
7 questions of law, our review is de novo.”), *Washington Fed'n of State*
8 *Employees v. Office of Financial Mgt.*, 121 Wash. 2d 152, 157, 849 P.2d
9 1201 (1993) (On review, the appellate court "will consider only evidence
10 and issues called to the attention of the trial court." "The purpose of this
11 limitation is to effectuate the rule that the appellate court engages in the
12 same inquiry as the trial court."), and, *Hodge v. Raab*, 151 Wash. 2d 351
13 (2004) (“On appeal from summary judgment, we engage in the same
14 inquiry as the trial court.”)
15

16 To date, Mr. Earl’s lawsuit has been dismissed without explanation
17 and the Court of Appeals has refused to conduct the de novo review the
18 law requires. Mr. Earl has been denied his right to trial, his right to due
19 process and access to the courts. CR 56(h) does not appear to require a
20 trial court to make any findings of fact or conclusions of law to support
21 any decisions made on summary judgment. A litigant cannot assign error
22 to the specific nature of a trial court’s decision, when the trial court has
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1 the trial court. The Court of Appeals did not consider ANY of the
2 evidence presented to the trial court!

3 Review of Issue 3 should be accepted pursuant to RAP 13.5(b)(3)
4 because the Court of Appeals has so far departed from the accepted and
5 usual course of judicial proceedings, as to call for the exercise of revisory
6 jurisdiction by the Supreme Court.

7 **Issue 4: Did trial court err in refusing to allow Mr. Earl to**
8 **conduct discovery prior to entry of summary judgment and did the**
9 **error violate Mr. Earl's right to due process and access to the courts**
10 **under Art. I, Sec 3 & 10 and the Fourteenth Amendment?**

11 As with Issue 3, Issue 4 may be moot in the event this Court finds
12 the decisions in this matter are void.

13 Citing settled law with approval in *Wash. State Physicians Ins.*
14 *Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299 (1993) this court stated as
15 follows:

16 *"The Supreme Court has noted that the aim of the liberal federal*
17 *discovery rules is to "make a trial less a game of blindman's b[l]uff*
18 *and more a fair contest with the basic issues and facts disclosed to*
19 *the fullest practicable extent." The availability of liberal discovery*
20 *means that civil trials no longer need be carried on in the dark.*
21 *The way is now clear . . . for the parties to obtain the fullest*
22 *possible knowledge of the issues and facts before trial."*

23 This Court also recognized discovery as a right of access to the
24 courts in *John Doe v. Blood Center*, 117 Wn.2d 772, P.2d 370(1991),
25 ruling in relevant part as follows:
26

1 *“The court rules recognize and implement the right of access. The*
2 *discovery rules, specifically CR 26 and its companion rules, CR*
3 *27-37, grant a broad right of discovery which is subject to the*
4 *relatively narrow restrictions of CR 26(c). This broad right of*
5 *discovery is necessary to ensure access to the party seeking the*
6 *discovery. It is common legal knowledge that extensive discovery is*
7 *necessary to effectively pursue either a plaintiff's claim or a*
8 *defendant's defense. Thus, the right of access as previously*
9 *discussed is a general principle, implicated whenever a party seeks*
10 *discovery. It justifies the limited nature of the exceptions to broad*
11 *discovery found in CR 26(c). Plaintiff, as the party seeking*
12 *discovery, therefore has a significant interest in receiving it.”*

13 The view of the courts below in concluding Mr. Earl had waived
14 his right to conduct discovery prior to entry of summary judgment against
15 him -- because he filed a cross motion for summary judgment -- is both
16 inconsistent with the record and unsupported by any authority.

17 In his cross motion for summary judgment, Mr. Earl stated as
18 follows: *“the Plaintiff will pursue summary judgment on Claim 3 at this*
19 *time and pursue further discovery if Court deems it necessary [to] obtain*
20 *additional evidence to substantiate the claim, which the Defendant is*
21 *currently withholding.”* (Appendix p. 56) It is undisputed and indisputable
22 that Mr. Earl invested the time and effort necessary to prepare, file and
23 serve a motion to produce discovery, and, that the motion was pending
24 consideration at the summary judgment hearing.

25 The circumstances necessary to constitute implied waiver is well
26 settled law. In *Reynolds v. Travelers' Ins. Co.*, 176 Wash. 36 (1934) this

1 Court ruled in pertinent part, “*An implied waiver may arise where one*
2 *party has pursued such a course of conduct as to evidence an intention to*
3 *waive a right, or where his conduct is inconsistent with any other intention*
4 *than to waive it.*”

5 Mr. Earl had been active pursuing discovery for a full month and a
6 half prior to XYZPrinting, Inc.’s filing for summary judgment. Mr. Earl
7 prepared, filed and served his motion to produce discovery and noted it for
8 hearing at the earliest opportunity a hearing date was available, which was
9 the same day the summary judgment motions were to be heard. Mr. Earl
10 expressly preserved his right to pursue discovery in his cross motion for
11 summary judgment. Mr. Earl sought to argue his motion to produce
12 discovery at the hearing and was denied the opportunity to do so. There is
13 absolutely no aspect of Mr. Earl’s conduct that could plausibly be
14 construed as an intent to waive his right to discovery prior to summary
15 judgment being entered against him. On the contrary, Mr. Earl’s actions
16 were those of any prudent litigant diligently acting to preserve the right. In
17 refusing to permit discovery prior to entry of summary judgment, the trial
18 court violated Mr. Earl’s right to due process and access to the courts.
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21 Review of Issue 4 should be accepted pursuant to RAP 13.5(b)(3)
22 because the Court of Appeals has so far departed from the accepted and
23 usual course of judicial proceedings and so far sanctioned such a departure
24

1 by the trial court, as to call for the exercise of revisory jurisdiction by the
2 Supreme Court.

3 **F. CONCLUSION**

4 This Court should accept review for the reasons indicated in Part E
5 and vacate all orders entered in the trial court, or in the alternate, conduct
6 de novo review of Mr. Earl's motion for summary judgment and enter
7 judgment in Mr. Earl's favor. This Court should also allow Mr. Earl costs
8 and fees on appeal.
9

10
11 Dated: August 19, 2016
12 Respectfully submitted by:



13 Donald R. Earl (pro se)
14 3090 Discovery Road
15 Port Townsend, WA 98368
16 (360) 379-6604
17 don.earl@olypen.com
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CERTIFICATE OF SERVICE

I, Donald R. Earl, in compliance with RAP 5.4(b), hereby certify that on the 19th day of August, 2016, I sent a copy of "*Appellant's Motion for Discretionary Review*" by First Class US Mail, addressed to XYZPrinting, Inc.'s counsel of record, Virginia Nicholson, at the following address:

Schwabe, Williamson & Wyatt
1420 5th Ave., Ste. 3400
Seattle, WA 98101-4010

Dated: August 19, 2016
Respectfully submitted by:



Donald R. Earl (pro se)
3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604
don.earl@olympen.com

July 6, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DONALD R. EARL,

Appellant,

v.

XYZPRINTING, INC.

Respondent.

No. 47034-9-II

UNPUBLISHED OPINION

WORSWICK, J. — Donald Earl, a self-represented litigant, appeals three adverse rulings in his lawsuit against XYZPrinting for an allegedly defective printer: the superior court's order granting summary judgment in favor of XYZPrinting Inc., the superior court's unsigned memorandum opinion denying Earl's motion for reconsideration of the summary judgment order, and the superior court's order imposing fees and costs against Earl as CR 11 sanctions. Earl argues that the superior court erred by (1) delaying Earl's hearing, (2) conducting a hearing telephonically, (3) denying his cross motion for summary judgment, (4) failing to comply with the notice requirement in CR 54(f)(2), (5) denying his motion for reconsideration, (6) granting sanctions against him, (7) awarding XYZPrinting fees and costs in violation of CR 54(d)'s 10-day time limit, (8) failing to sanction XYZ's opposing counsel, (9) denying his motion to compel discovery, and (10) denying his conditional motion to change venue. Most of Earl's arguments either fail or were inadequately preserved for appeal. However, the superior court failed to support the CR 11 sanctions against Earl with sufficient findings of fact and conclusions of law. Consequently we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

Earl purchased a 3-D printer manufactured by XYZPrinting Inc. from an online reseller for \$600.33 and received the printer on May 20, 2014. Ten days later, Earl was dissatisfied with the functionality of the printer and contacted XYZPrinting. That same day, Earl began threatening litigation, stating in his second email to XYZPrinting:

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.

Clerk's Papers (CP) at 126. Despite efforts by XYZPrinting to meet Earl's needs, Earl filed a complaint against XYZPrinting in Jefferson County Superior Court on June 20, 2014, one month after receiving the printer.

Jefferson County, where Earl resides, has one superior court judge. Earl filed an affidavit of prejudice against this judge, which required visiting judges to hear this case.

XYZPrinting moved for summary judgment dismissal of Earl's claims on September 15, 2014. Earl filed a cross motion for summary judgment on September 18, a motion for sanctions against XYZPrinting's counsel on October 8, and a motion to compel discovery on October 10.

The motions were scheduled to be heard in Jefferson County by Judge Melly, a visiting judge from Clallam County on October 17, 2014. On October 15, the superior court notified the parties that the hearing could not occur in Jefferson County as scheduled, but offered to give the matter a special setting in Clallam County on October 17. Earl declined the offer and requested that the hearing be continued to a later date in Jefferson County. The next day, the Jefferson County Superior Court's administrator confirmed a special setting for the matter on November 10. The confirmation letter stated in part, "Parties will be in the Jefferson County Superior Court

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and the Clallam County Visiting Judge will either be here in person or will appear telephonically.” CP at 309. On November 7, the parties received confirmation that Judge Melly intended to conduct the hearing telephonically. On November 10, the parties attended the hearing in person and Judge Melly appeared telephonically. At no point did Earl object or otherwise raise any issue regarding the judge’s telephonic appearance.

On November 10, after hearing argument from both XYZPrinting and Earl, the superior court granted XYZPrinting’s motion for summary judgment, denied Earl’s cross motion for summary judgment, denied Earl’s motion for CR 11 sanctions against XYZPrinting’s counsel, and awarded attorney fees and costs to XYZPrinting as CR 11 sanctions against Earl. The superior court then stayed the attorney fees and costs pending Earl’s acceptance of the refund of the purchase price of his printer and dismissal of his lawsuit with prejudice.

Earl moved for reconsideration and to vacate the summary judgment order. The superior court denied his motion for reconsideration in a memorandum opinion filed on December 24. On December 29, Earl filed a notice of appeal with this court seeking review of the superior court’s order granting XYZPrinting’s summary judgment motion and the court’s memorandum opinion denying reconsideration.

On January 16, 2015, XYZPrinting filed its motion to set fees and costs as awarded by the superior court’s order granting summary judgment. On January 30, Earl filed a conditional motion for change of venue, and a CR 60 and RCW 4.72 motion to vacate summary judgment. On February 6, a different visiting judge, Judge Olsen, set the fees and costs, specifically finding that Earl filed his litigation in bad faith without factual or legal bases and failed to conduct a reasonable inquiry into the factual and legal basis of his pleadings.

On February 25, Earl filed an amended notice of appeal seeking direct review by our Supreme Court of the order granting XYZPrinting's motion for summary judgment, the memorandum opinion denying reconsideration, and the order setting the amount of fees and costs. The Supreme Court transferred the matter to us on November 4, 2015.

ANALYSIS

I. JEFFERSON COUNTY'S ADMINISTRATIVE PRACTICES REGARDING AFFIDAVIT OF PREJUDICE

Earl argues that his constitutional rights were violated by the superior court's delay in hearing Earl's motions after he filed an affidavit of prejudice. We disagree.

As a threshold matter, Earl raises the issue of Jefferson County's administrative practices for the first time on appeal. An appellate court generally will not consider a claimed error that was not raised in the trial court. RAP 2.5(a). However, under RAP 2.5(a)(3), a party may raise for the first time on appeal a manifest error affecting a constitutional right. Before addressing the merits of such a claim, a reviewing court must determine whether there is a constitutional issue at all. *In re Detention of Strauss*, 106 Wn. App. 1, 11, 20 P.3d 1022 (2001). Although Earl contends that Jefferson County's administrative practices, "[o]n its face" violate the article I, section 10 right to justice without unnecessary delay and the right of access to the courts, this bald assertion is insufficient to demonstrate a constitutional issue.

Earl's right under article I, section 10 is a right to justice without *unnecessary* delay. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 362, 16 P.3d 45 (2000). Here, the delay was necessary pursuant to Earl's statutory right to one change of judge without inquiry. RCW

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4.12.040¹ gives every party the right to a change of judge if the requirements of RCW 4.12.050² are satisfied. *Marine Power & Equipment Co., Inc. v. Dep't of Transportation*, 102 Wn.2d 457, 459, 687 P.2d 202 (1984). Washington courts have acknowledged the reality that a litigant's statutory right to one change of judge without inquiry may implicate the orderly administration of justice. 102 Wn.2d at 463. Washington courts consistently accord great weight to the party's right to a change of judge. 102 Wn.2d at 463. We hold that the modest delay between Earl's affidavit of prejudice and the motions hearing does not qualify as an error of constitutional magnitude, and therefore, Earl fails to satisfy the manifest constitutional error exception in RAP

¹ RCW 4.12.040(1) provides:

No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court. In all judicial districts where there is only one judge, a certified copy of the motion and affidavit filed in the cause shall be transmitted by the clerk of the superior court to the clerk of the superior court designated by the chief justice of the supreme court. Upon receipt the clerk of said superior court shall transmit the forwarded affidavit to the presiding judge who shall direct a visiting judge *to hear and try such action as soon as convenient and practical.*

(Emphasis added.)

² RCW 4.12.050(1) provides, in pertinent part:

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge . . . and in any event, 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.

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2.5(a)(3). As Earl's claim of error is unpreserved and does not meet RAP 2.5(a)(3), we do not address it further.

II. RCW 2.28.030

Earl next argues that by conducting the motions hearing telephonically, the superior court judge violated RCW 2.28.030 and consequently violated Earl's constitutional rights. We hold that Earl also failed to preserve this issue for appeal.

Earl concedes that he was notified nearly a month before the hearing that it was possible the visiting judge would appear telephonically. Furthermore, three days prior to the hearing Earl received confirmation that the judge would appear telephonically. Earl made no objection, at any point, to the hearing arrangements. Because he did not object, Earl failed to preserve this issue, and we do not address it.

III. EARL'S CROSS MOTION FOR SUMMARY JUDGMENT

Earl next argues that the superior court erred by denying his cross motion for summary judgment. We disagree.

Earl provides no argument or authority to support this assignment of error. Earl simply lists the documents relied on by the trial court in denying his motion and encourages us to conduct a de novo review of the listed filings. Earl does not articulate what his underlying claims are, does not point to any particular evidence supporting those claims, and provides no argument as to why denial of his summary judgment motion was inappropriate. The entirety of his argument on the issue is as follows:

De novo review of the above listed filings will demonstrate Mr. Earl's motion for summary [sic] is exhaustively supported by fact and law throughout, that the Defendant failed to demonstrate any nonfrivolous legal theory in opposition to the motion and, that the facts in this case supporting summary judgment in Mr. Earl's favor are undisputed.

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Br. of Appellant 46. In his reply brief, Earl defends his lack of argument, contending that he has fulfilled his duty on appeal by simply designating the documents considered by the superior court.

Although we review the grant or denial of a motion for summary judgment de novo, appellants are nonetheless bound by the Rules of Appellate Procedure. *City of Puyallup v. Hogan*, 168 Wn. App. 406, 416, 277 P.3d 49 (2012). RAP 10.3(a)(6) requires an appellant to make reasoned arguments supported by citations to the record and legal authority. The purpose of this rule is to enable the court and opposing counsel to efficiently and expeditiously review the accuracy of the factual statements made in the briefs and the relevant legal authority. *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999). Even when appealing a summary judgment where our review is de novo, a party is required to support his assignments of error with legal arguments. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn. 2d 619, 624, 818 P.2d 1056 (1991). We do not address appellant's claim because it is inadequately supported by authority or argument.

IV. CR 54(f)(2) NOTICE

Earl also argues that the order granting XYZPrinting's motion for summary judgment is void because the superior court failed to comply with the notice requirements of CR 54(f)(2). Because Earl fails to show the alleged lack of notice of summary judgment caused him any prejudice, his claim fails.

"Failure to comply with the notice requirement in CR 54(f)(2) generally renders the trial court's entry of judgment void." *Burton v. Ascol*, 105 Wn.2d 344, 352, 715 P.2d 110 (1986). "A judgment entered without the notice required by CR 54(f)(2) is not invalid, however, where the

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complaining party shows no resulting prejudice.” 105 Wn.2d at 352. No prejudice exists when the complaining party is able to appeal the judgment and argue the issues it wished to raise. 105 Wn.2d at 352-53. Here, Earl filed a motion for reconsideration and appealed. On appeal, he makes no argument that he was prejudiced. Therefore, the order is not void for lack of notice.

V. RULING ON MOTION FOR RECONSIDERATION

Earl next argues that the superior court violated his constitutional right to have his case decided within ninety days because the court entered a memorandum opinion on reconsideration as opposed to a signed order. We disagree.

Earl argues that the opinion issued by the superior court on December 24, 2014, is void because it was not a signed, formal order. Earl contends this violated article IV, section 20 of the Washington Constitution, which requires: “Every cause submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof.”

Here, the superior court judge clearly rendered his decision on Earl’s motion for reconsideration. The memorandum opinion clearly addressed each of Earl’s issues noted for reconsideration and concluded: “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 at 333. The clarity of the superior court’s decision denying Earl’s motion for reconsideration is underscored by Earl’s prompt appeal of the memorandum opinion. The superior court judge’s decision on the merits of Earl’s motion was unequivocal and Earl treated it as such. Therefore, we reject Earl’s claim.

VI. SANCTIONS AGAINST EARL

Earl challenges the superior court's imposition of CR 11 sanctions against him. Because the superior court failed to enter proper findings of fact and conclusions of law supporting the award of sanctions, the court erred by imposing sanctions against Earl.³

We review an award of sanctions under CR 11 for abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). CR 11 allows a trial court to sanction parties and attorneys for baseless filings and filings made for an improper purpose. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883, 912 P.2d 1052 (1996). If a party violates CR 11, the court may impose appropriate sanctions ordering that party to pay reasonable expenses incurred by the other party, including reasonable attorney fees. CR 11. A trial court must exercise its discretion on articulable grounds, making an adequate record so the appellate court can review a fee award. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 415, 157 P.3d 431 (2007).

“[I]n imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order.” *Biggs*, 124 Wn.2d at 201. This requires specific findings that “either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose.” 124 Wn.2d at 201 (emphasis omitted). Otherwise, we must remand for the trial court to “make explicit findings as to which filings violated CR 11, if any, as well as how such pleadings constituted a violation.” 124 Wn.2d at 202. A successor judge does not possess the authority to

³ Earl also argues that (1) XYZPrinting failed to provide timely notice that it would seek CR 11 sanctions, (2) the trial court erred by awarding XYZPrinting fees and costs in violation of CR 54(d)'s 10-day time limit, and (3) the trial court failed to comply with the notice requirements of CR 54(f). Because we reverse the trial court's award of fees and costs on other grounds we do not address these additional arguments.

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do acts which require finding facts. *State v. Ward*, 182 Wn. App. 574, 584, 330 P.3d 203, *review denied*, 339 P.3d 634 (2014).

Here, the superior court awarded attorney fees and costs to XYZPrinting as CR 11 sanctions against Earl. However, the superior court did not enter findings specifically identifying any sanctionable actions, and the court failed to otherwise explain its reasons for imposing sanctions.

XYZPrinting argues that the court's written order setting costs and fees provides an adequate record for review. We disagree. The order setting costs and fees was not signed by Judge Melly who presided over the summary judgment hearing and granted the CR 11 sanctions, but was instead signed by Judge Olsen, who presided over a hearing setting the amount of fees and costs. The order contained findings of fact developed at a hearing over which she did not preside. Judge Olsen did not have authority to enter findings of fact, thus her findings cannot support CR 11 sanctions.

XYZPrinting also contends that Judge Melly's oral ruling clarified the court's reasons for imposing sanctions against Earl. Earl argues that the superior court's oral ruling was nothing more than an attempt "to force Earl to accept a settlement . . . under pain of retaliation."⁴ Br. of Appellant at 44. Although a trial court's oral decision may provide an adequate record for review, we hold that Judge Melly's oral ruling was insufficient to support its imposition of CR 11 sanctions. *See Just Dirt*, 138 Wn. App. at 416.

⁴ Because we reverse the imposition of CR 11 sanctions, we do not reach the issue of whether the court's improper actions violated Earl's constitutional rights of access to the courts, equal protection of the laws, and due process.

On the issue of XYZPrinting's request for costs and fees as CR 11 sanctions against Earl, the superior court told Earl:

I will award costs and fees under CR 11, Mr. Earl. However, I will stay those if you accept the defense proposal for a nonsuit in exchange for a total refund of your purchase price. To the extent that you deny that then I will sign an order authorizing sanctions against you on CR 11 because 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 opportunity to file a lawsuit and you were working towards that at the very beginning. That, that's the way it appears to the Court. That's why I'm ordering the fees and, and the sanctions against you. However, I am going to hold that in abeyance if you accept their offer for settlement and for nonsuit in exchange for a six hundred refund payment to you. It's your choice. That's reasonable folks.

Verbatim Report of Proceedings (VRP) (Nov. 10, 2014) at 24. The superior court's comments are not adequate for us to review this issue. While the superior court stated its belief that Earl's lawsuit was brought in bad faith, it appears from these statements that the court's primary reason for imposing CR 11 sanctions against Earl was to convince him to settle the case. Indeed, the court stayed the imposition of sanctions, encouraging Earl to "take that refund and run with it . . . and bring this thing to a . . . peaceful conclusion." VRP (Nov. 10, 2014) at 23. If the superior court was using the threat of sanctions to encourage settlement, this was improper. Additionally, the court's oral ruling failed to make proper, specific findings as to why sanctions were appropriate.

Because the superior court failed to make an adequate record for us to review the award of costs and fees as sanctions, we reverse the CR 11 sanctions against Earl and remand for the superior court to properly consider whether Earl violated CR11 and, if so, to enter written findings of fact and conclusions of law supporting the imposition of sanctions.

VII. CR 54(d)

Earl argues that the trial court erred by awarding XYZPrinting fees and costs in violation of CR 54(d)'s 10-day time limit. Because XYZPrinting complied with the plain language of CR 54(d), we disagree.

“Interpretation of a court rule is a question of law, subject to de novo review.” *Mitchell v. Wash. Inst. of Pub. Policy*, 153 Wn. App. 803, 821, 225 P.3d 280 (2009) (quoting *Gourley v. Gourley*, 158 Wn.2d 460, 466, 145 P.3d 1185 (2006)). “Court rules are interpreted in the same manner as statutes. If the rule’s meaning is plain on its face, we must give effect to that meaning as an expression of the drafter’s intent.” *Jafar v. Webb*, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013). Where a court rule is ambiguous, we look to the drafter’s intent by “reading the rule as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent embodied in the rule.” 177 Wn.2d at 526-27 (quoting *State v. Chhom*, 162 Wn.2d 451, 458, 173 P.3d 234 (2007)).

Washington’s CR 54(d) states, in relevant part:

Costs, Disbursements, Attorneys’ Fees, and Expenses.

....

(2) *Attorneys’ Fees and Expenses*. Claims for attorneys’ fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

CR 54(d)(2) clearly requires claims for attorney fees and expenses be filed no later than 10 days after entry of judgment. Here, XYZPrinting expressly moved the court for costs and fees when it filed its motion for summary judgment on September 15, 2014. Nothing in the text of CR 54, nor related rules, suggests that the substance of XYZPrinting’s motion, or the manner

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in which it was submitted, fails to comply with the requirements set forth in CR 54(d)(2). See *North Coast Elec. Co. v. Signal Elec., Inc.*, No. 47618-5-II, 2016 WL 2343172, at *3 (Wash. Ct. App. Apr. 26, 2016).

When the trial court granted XYZPrinting's motion for summary judgment, it explicitly granted XYZPrinting attorney fees and costs, but stayed the award pending Earl's acceptance of a settlement. When Earl refused to accept the settlement offer, XYZPrinting brought its motion to set the amount of fees and costs. XYZPrinting's motion to set the amount of fees and costs pursuant to the order granting summary judgment was not a CR 54(d)(2) motion, as Earl describes it, rather it was simply a request that the court calculate the amount of fees and costs already authorized.

We hold that XYZPrinting's inclusion of its request for attorney fees in its motion for summary judgment complied with the plain language of CR 54(d)(2) because it claimed attorney fees and expenses, was made by motion, and that motion was filed not later than 10 days after judgment was entered. CR 54(d)(2). Therefore, Earl's argument on this ground fails.

VIII. FAILURE TO SANCTION OPPOSING COUNSEL

Earl also argues that the superior court violated his due process rights by failing to sanction opposing counsel. We disagree.

Despite Earl's attempt to cast this argument in a constitutional light, we review the superior court's decision not to impose CR 11 sanctions for an abuse of discretion. *Biggs*, 124 Wn.2d at 197. The trial court abuses its discretion when its decision is based on untenable grounds or reasons. *Clarke v. Office of the Attorney General*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006). A trial court abuses its discretion when it relies on unsupported facts, adopts a view

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that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

Most of Earl's argument on this issue consists of his simply naming documents contained within the record wherein he lists examples of alleged misconduct by opposing counsel. Merely listing documents in the record is insufficient to carry Earl's burden on appeal, and we do not address those insufficiently argued claims. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Of his claims which may be sufficiently argued, Earl lists some specific examples of opposing counsel's alleged misconduct, but of these examples, none had yet occurred at the time the superior court ruled on Earl's motions for sanctions. Earl contends that opposing counsel "perpetuate[s] fraud" on the court by referring to the memorandum opinion on reconsideration entered by the superior court as "signed" in her motions and at the hearing on Earl's CR 60 motion to vacate on February 6, 2015. Br. of Appellant at 34. Earl also contends that opposing counsel's statement to the superior court at the reconsideration hearing—pointing out Earl's litigious history—warranted sanctions. Not only are the statements Earl criticizes not misconduct, these statements were made well after the superior court denied Earl's motion for sanctions on November 10, 2014. It would be illogical to hold that the superior court abused its discretion by failing to impose sanctions for behavior that had yet to occur.

Earl claims that opposing counsel's "reprehensible conduct, and the extreme prejudice Mr. Earl has suffered as a result, clearly warrants harsh sanctions The trial court's failure to curb misconduct of this magnitude amounts to little more than a frontal assault on Mr. Earl's right to due process and access to the courts." Br. of Appellant at 39. But neither the record nor

Earl's argument supports such a bold allegation. We find no abuse of superior court discretion in denying Earl's request for sanctions under CR 11.

IX. MOTION TO COMPEL DISCOVERY

Earl next argues that the superior court violated his due process rights by denying Earl's motion to compel discovery.⁵ We disagree.

The decision to grant or deny a motion to compel discovery is within the discretion of the trial court, and we will not reverse the decision absent an abuse of discretion. *Clarke*, 133 Wn. App. at 777. The trial court abuses its discretion when its decision is based on untenable grounds or reasons. 133 Wn. App. at 777.

Earl filed his motion to compel discovery on October 10, 2014. However, prior to his motion to compel discovery, Earl had filed a cross motion for summary judgment on September 18, 2014. In his motion for summary judgment, Earl stated:

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*, in spite of the fact that Plaintiff would have preferred to do so after the production of information currently being withheld by the Defendant.

⁵ Earl does not explain how a denial of his motion to compel discovery violated his due process rights.

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CP at 87-88 (emphasis added). The superior court validly relied on Earl's statement in concluding that the evidentiary posture of the case was sufficient for the court to consider the motions for summary judgment.⁶

On appeal, Earl fails to explain why, contrary to his assertion in his cross motion for summary judgment, further discovery was necessary or would have helped him to defeat summary judgment. Moreover, he offers no argument that the denial of his motion was an abuse of discretion. His argument fails.

X. CONDITIONAL CHANGE OF VENUE

Earl also argues that the superior court erred by denying his conditional motion for change of venue. We disagree.

Earl's conditional motion for change of venue asked the superior court to prematurely rule that in the event his appeal was remanded for further proceedings that those further proceedings be conducted in King County. The superior court did not abuse its discretion by not addressing this motion because the superior court has no duty to address premature motions.

ATTORNEY FEES

Finally, Earl requests costs and fees pursuant to RAP 14.2, RAP 18.1, and RCW 4.84. Because Earl is not a substantially prevailing party, we reject his request.

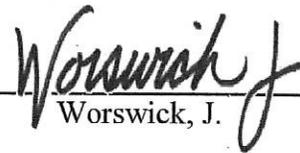
XYZPrinting also requests attorney fees and costs pursuant to RAP 18.1 and RAP 18.9 on the basis that Earl's appeal is frivolous. Because we reverse the superior court's imposition of CR 11 sanctions against Earl, we hold that Earl's appeal was not frivolous and therefore deny XYZPrinting's request for attorney fees and costs.

⁶ As of September 10, 2014, XYZPrinting had sent responses to Earl's first interrogatories and requests for production. The parties conducted a discovery conference on September 16, 2014.

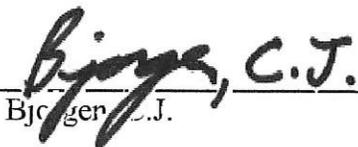
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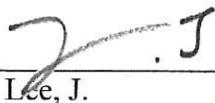
In conclusion, of the three orders Earl appeals, we affirm the order granting XYZPrinting's motion for summary judgment, and the decision denying Earl's motion for reconsideration of the summary judgment order. However, because the superior court failed to properly specify any findings or conclusions supporting its imposition of CR 11 sanctions against Earl, we reverse the order imposing sanctions, and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Worswick, J.

We concur:


Bjorge, C.J.


Lee, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DONALD R. EARL,

Appellant,

v.

XYZ PRINTING, INC.,

Respondent.

No. 47034-9-II

ORDER DENYING MOTION FOR RECONSIDERATION

FILED
COURT OF APPEALS
DIVISION II
2016 JUL 28 PM 2:37
STATE OF WASHINGTON
DEPUTY

APPELLANT moves for reconsideration of the Court's opinion filed July 6, 2016 in the above-referenced matter. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Worswick, Lee

DATED this 28th day of July, 2016.

FOR THE COURT:

Bjorgen, C.J.
CHIEF JUDGE

Virginia Nicholson
Schwabe Williamson & Wyatt PC
1420 5th Ave Ste 3400
Seattle, WA 98101-4010
vnicolson@schwabe.com

Troy Donald Greenfield
Schwabe, Williamson & Wyatt
1420 5th Ave Ste 3400
Seattle, WA 98101-2339
tgreenfield@schwabe.com

Donald R. Earl
3090 Discovery Road
Port Townsend, WA 98368
don.earl@olypen.com

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2
3 **SUPERIOR COURT OF WASHINGTON**
4 **COUNTY OF JEFFERSON**

5 DONALD R. EARL,)

6 Plaintiff,)

7 vs.)

8 XYZ Printing, Inc.,)

9 Defendant.)

NO. 14-2-00123-1

MEMORANDUM OPINION
ON RECONSIDERATION

10
11 A Clallam County Superior Court judge was requested to sit as a visiting judge
12 in Jefferson County for the instant matter. RCW 2.08.150. A telephone hearing was
13 arranged by the Jefferson County Superior Court Clerk. Such telephonic hearings are
14 common. Cr 7(b)(5). Nothing about the instant case required that all participants be in
15 the same room.
16

17 The Court does not recall the specific discussion regarding Exhibit G. Suffice it
18 to say that the Court reviewed virtually all written submissions of the parties prior to
19 oral argument.

20 The Plaintiff is correct that the purpose of summary judgment is to avoid useless
21 trials where there is no issue of material fact. The Plaintiff submitted evidence in
22 support of his Motion for Summary Judgment that the original printer, returned to the
23 manufacturer, was cleaned, recalibrated and operational. Declaration of Donald R. Earl
24 in support of Plaintiff's Cross Motion for Summary Judgment, Exhibit F (message 23).
25 This was uncontroverted. He further indicated that the replacement printer "is printing
26 the same way as the one I returned," which served as the basis for the Court's comment
27

1
2
3 regarding "operator error". *Id* at message 20. The Plaintiff's argument that the Court
4 should not have considered the evidence which he presented for the Court to consider is
5 without merit.

6 The basis of the Plaintiff's claim that the printer had previously been used was
7 the filament located in the printer nozzles. *Id* at 2-3. The Defendant presented evidence
8 that each printer was put through a quality control testing procedure which involved
9 loading the machine with filament. Declaration of Yao Tsung Chang in support of
10 Defendant's XYZ Printing, Inc.'s Motion for Summary Judgment at 2 and Exhibit A.
11 These statements are not contradictory and the Court did not engage in weighing
12 evidence.
13

14 Regarding the issue of discovery, the Court stated that the Plaintiff advised that
15 the evidentiary posture of the case was sufficient for the Court to consider motions.
16 Plaintiff's Cross Motion for Summary Judgment at 2 ("... Plaintiff believes that the
17 case is sufficiently well developed to warrant filing this Motion for Summary Judgment
18 ...").
19

20 The Court opined that, based upon both the speed of the filing of the complaint
21 (several weeks after receipt of the printer) and the tenor of the emails sent by the
22 Plaintiff to the Defendant, it appeared to the Court that the Plaintiff was gearing up for
23 litigation against the Defendant.
24

25 The Plaintiff ordered the printer on May 14, 2014, and received it on May 20,
26 2014. In his second email, the Plaintiff states:
27
28

1
2
3 "As an aside, you REALLY should familiarize yourself
4 with U.S. warranty laws. Your 'warranty' is in violation
5 of so many laws, you would lose any class action lawsuit
6 filed against you about ten minutes after it was filed. Or
7 perhaps more accurately, you would lose on summary
8 judgment after spending half a million dollars on attorney
9 fees." Declaration of Donald R. Earl in support of
10 Plaintiff's Cross Motion for Summary Judgment, Exhibit
11 F, second message.

12
13 On June 1, 2014, the Plaintiff demands a refund in full "if you do not want to be
14 facing a lawsuit." *Id.* at Exhibit F, seventh message.

15 In the 22nd message on June 17, 2014, the Plaintiff states: "I will file a lawsuit
16 against you" if arrangements haven't been made to pick up the printer and provide a
17 refund. *Id.*

18 That same day, the Plaintiff advises that if the Defendant has not made
19 arrangements to pick up the printer and issue a refund, he would prepare a complaint
20 alleging breach of warranty and unfair trade practices. *Id.*, Exhibit F, message 24.
21 Finally, he charges the Defendant with "stone walling" and indicates he will prepare a
22 complaint. *Id.*, Exhibit F, message 26.

23 In the span of less than three weeks, the Plaintiff threatened, directly or
24 implicitly, a multitude of times. The Court's comment was well-founded.

25 The Plaintiff's printers had filament in the nozzles because the Defendant
26 engaged in quality control testing. The original printer was returned by the Plaintiff and
27 cleaned and recalibrated by the Defendant and functioned properly. This was
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uncontroverted. There are no material issues of fact. Summary judgment in favor of the Defendant was properly granted.

Plaintiff's Motion for Reconsideration is denied.

DATED this 24th day of December, 2014.

(Filed without signature at the direction of Judge Melly) - LF

CHRISTOPHER MELLY
JUDGE

JM

FILED

2014 JUN 20 PM 3: 51
IN SUPERIOR COURT
JEFFERSON COUNTY CLERK

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

Donald R. Earl (Plaintiff))	Case No. 14-2-00123-1
)	
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v.)	
)	
)	
XYZPrinting, Inc. (Defendant))	PLAINTIFF'S COMPLAINT AND DEMAND FOR JURY TRIAL

1. INTRODUCTION

1. The Plaintiff, Donald R. Earl, files this Complaint against the Defendant, XYZPrinting, Inc., demands trial by jury, and allege as follows:

2. PARTIES

2. The Plaintiff, Donald R. Earl, is natural person and a U.S. citizen, over the age of 18, residing in Jefferson County, in the State of Washington.

3. The Defendant, XYZPrinting, Inc., is 3D printer supplier and/or manufacturer, with its principal U.S. headquarters located at 9877 Waples St., San Diego, CA 92121.

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3. JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to RCW 4.12.025(1)(a & c) and RCW 2.08.010, as XYZPrinting, Inc. conducts business in Washington state, conducted business directly with the Plaintiff at his place of residence at the time the cause of action arose and the amount in controversy is over \$300. Additionally, this Court has jurisdiction pursuant to 15 USC § 2310(d)(1)(A) and RCW 19.86.160.

5. Venue is proper in this Court and judicial district pursuant to RCW 4.12.010(2), RCW 4.12.020(1) and RCW 4.12.020(2)

4. FACTS GIVING RISE TO THE CLAIMS

6. After reviewing advertisements for the Di Vinci 1.0 3D printer on the Studica website (Exhibit A), the Plaintiff purchased the 3D printer and related plastic filament at a total cost of \$600.33 on May 14, 2014. The 3D printer is warranted by XYZPrinting, Inc. and is so advertised on the Studica website, which states, "*Your Investment is Protected: This 3d printer is backed by a free 1 year extended warranty*" (Exhibit A).

7. The Plaintiff received the printer on or about May 20, 2014. On unpacking and setting up the printer, the Plaintiff noticed the printer appeared to be used, as the printer nozzle contained yellow filament, where the printer comes stock with an unopened package of white filament. On installing the white filament, the printer nozzle extruded yellow plastic until the white filament eventually cleared out the yellow residue.

8. The printer is advertised as being pre-calibrated, however, it required adjustments as the initial calibration test failed.

9. The Plaintiff then printed a test sample of a cup shaped object which is a computer file installed on the printer for testing purposes. At that point in time, the printer appeared to

1 be functioning correctly. Over the following several days, the Plaintiff sought to print a
2 number of objects and found the printer to be defective. The calibration function ceased to
3 work. The printer would not print in solid mode. Objects printed with the machine had paper
4 thin shells that would crumble and/or break apart when subjected to light fingertip pressure.
5 The top surfaces of objects printed were often so thin, and the voids below the surface so
6 large, the objects had holes in them.
7

8 10. The printer is equipped with a variety of print quality options, such as layer
9 thickness, wall thickness, speed of operation, and the density of plastic filling of the object's
10 interior. After finding the quality of printed objects unacceptable when selecting the lower
11 quality options, the Plaintiff set up every subsequent print job at the highest quality settings.
12 When the printer repeatedly failed to print any object at other than the lowest quality, the
13 Plaintiff contacted XYZPrinting, Inc. for warranty service on or around May 29, 2014.
14

15 11. In response to the Plaintiff's request for warranty service, XYZPrinting, Inc. sent a
16 series of nonresponsive answers to the Plaintiff's repeated requests. XYZPrinting, Inc.
17 eventually agreed to replace the defective printer on June 3, 2014. The Plaintiff returned the
18 defective printer and received the replacement on June 13, 2014. As with the first printer, the
19 replacement printer appeared to be a used machine, as the printer nozzle contained plastic
20 residue from prior use. The Plaintiff installed a new filament cartridge in the printer
21 containing black filament. The nozzle extruded white filament until it was eventually cleared
22 by the black colored filament.
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25 12. The replacement printer began malfunctioning out of the box, exhibiting the same
26 type of defects as the original printer. The Plaintiff again contacted XYZPrinting, Inc. to
27 request warranty service. In a series of exchanges, XYZPrinting, Inc. repeatedly gave the
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1 Plaintiff nonresponsive answers, effectively refusing to honor the written warranty. The
2 Plaintiff provided XYZPrinting, Inc. with a series of increasingly stronger warnings and
3 notices -- including hyperlinks and citations to Federal law -- informing XYZPrinting, Inc., in
4 no uncertain terms, that a lawsuit would follow if XYZPrinting, Inc. continued to be
5 recalcitrant in honoring its warranty. XYZPrinting, Inc. refused to acknowledge these
6 warnings and notices, provided nonresponsive answers to the Plaintiff's repeated requests for
7 a remedy under the written warranty and engaged in a general pattern of stonewalling. This
8 lawsuit follows.

9
10 5. CLAIMS ON WHICH RELIEF MAY BE GRANTED

11 **CLAIM 1: 15 USC, Chapter 50 Statutory Warranty Claims**

12
13 13. Paragraphs 6 through 12 are incorporated by reference as if fully stated herein.

14 14. The XYZPrinting, Inc. warranty (Exhibit B) is expressed in terms constituting a
15 full warranty. As such, XYZPrinting, Inc. is bound by the "Minimum Standards for
16 Warranties" under 15 USC § 2304, pursuant to 15 USC § 2304(e).

17
18 15. The Plaintiff gave XYZPrinting, Inc. an opportunity to repair the defective printer
19 and subsequently agreed to accept a replacement printer. At no time did XYZPrinting, Inc.
20 indicate it had the knowledge, skill or expertise to provide the Plaintiff with a functional
21 printer, as the problems appear to be related to defective software. When the replacement
22 printer exhibited the same defects as the original printer, the Plaintiff requested a refund, in
23 writing, which XYZPrinting, Inc. failed to provide, in violation of 15 USC § 2304(a)(4). After
24 repeated requests and notices, XYZPrinting, Inc. has failed to provide any remedy to the
25 Plaintiff, in violation of 15 USC § 2304(d), which entitles the Plaintiff *to recover reasonable*
26 *incidental expenses which are so incurred in any action against the warrantor.*
27
28

1 16. XYZPrinting, Inc. is in violation of 15 USC § 2302(a) as its warranty is deceptive
2 and the Plaintiff has incurred damages as a result of XYZPrinting, Inc.'s breach of warranty.

3 17. Pursuant to 15 USC § 2310(d)(2), the Plaintiff claims relief in the amount of
4 \$600.33 in pecuniary damages, plus costs, expenses, reasonable attorney fees and, such
5 further and other relief as is allowed by law.

6 **CLAIM 2: Common Law Fraud**

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8 18. Paragraphs 6 through 17 and paragraphs 22 through 28 are incorporated by
9 reference as if fully stated herein.

10 19. Customer reviews published on Amazon.com (Exhibit C) show the printer sold by
11 XYZPrinting, Inc. has been plagued with numerous defects that have resulted in customers
12 returning the defective printers to XYZPrinting, Inc.. XYZPrinting, Inc. knows or reasonably
13 should know the printers are defective. XYZPrinting, Inc. repackages the returned, defective
14 printers, and resells them as new, without disclosing the fact the printers are not new, but are
15 in fact used printers returned to XYZPrinting, Inc. as defective. XYZPrinting, Inc. makes
16 numerous *material representations* about its printers, including, but not limited to, that they
17 are of good quality, that they are compatible with computer operating systems such as that
18 used by the Plaintiff, the printers are implicitly represented as being new machines, and that a
19 consumer's investment in the printers is safe because of the warranty. These representations
20 are *false* as demonstrated by the factual allegations in this Complaint. XYZPrinting, Inc. *knew*
21 *or reasonably should have known* the representations are false. XYZPrinting, Inc. knew or
22 reasonably should have known its software/firmware programs were defective and would not
23 function properly. XYZPrinting, Inc. knew or reasonably should have known the product
24 defects would generate a large number of requests for warranty service, if a warranty were
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1 offered. XYZPrinting, Inc. knew or reasonably should have known that customers would
2 expect a refund when XYZPrinting, Inc. proved unable to cure the defects and that refunding
3 the purchase price of the defective printers would be costly if the warranty were honored in
4 good faith. Possessed of this knowledge, XYZPrinting, Inc. nevertheless offered customers
5 the warranty as an incentive to purchase its defective printer, knowing it had no intent of
6 fulfilling its legal obligations under relevant warranty laws. XYZPrinting, Inc. made these
7 representations with the *intent* the Plaintiff would *rely* on the representations in making the
8 decision to purchase a XYZPrinting, Inc. 3D printer. The Plaintiff *did not know the*
9 *representations were false*, nor could the Plaintiff have so known. As a matter of law, the
10 Plaintiff had a *right to rely* on the representations and promises which were made by
11 XYZPrinting, Inc.. The Plaintiff *did rely* on promises and representations made by
12 XYZPrinting, Inc. and *consequently suffered damages*, which were proximately caused by the
13 fraudulent representations made by XYZPrinting, Inc..
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16 20. The Plaintiff claims relief in the amount of \$600.33 in pecuniary damages, plus
17 costs, expenses, reasonable attorney fees and such other and further relief as is allowed by
18 law.
19

20 **CLAIM 3: RCW 19.86 claim for unfair business practices**

21 21. Paragraphs 6 through 20 are incorporated by reference as if fully stated herein.

22 22. The practice by XYZPrinting, Inc. of reselling refurbished, used, returned as
23 defective printers as new, without disclosing the true condition of the printers, is an unfair
24 business practice, as is the practice of selling merchandise known to be defective. Pursuant to
25 RCW 19.86.093(3)(a, b & c), this practice has injured other persons, had the capacity to injure
26 other persons and has the capacity to injure other persons.
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1 23. Additionally, pursuant to RCW 19.86.093(2), the practice of selling used printers
2 as new is a per se violation of 15 USC 45, which contains a specific legislative declaration of
3 public interest impact. In an advisory letter published by the Federal Trade Commission on
4 December 20, 2006, the Federal Trade Commission stated in relevant part as follows:

5 "15 U.S.C. tj 45. The Commission has explored the concept of
6 deception under Section 5 in two relevant policy statements.

7 Our analysis begins with the Commission's 1969 Enforcement Policy
8 on Merchandise Which Has Been Subjected to Previous Use on Trial Basis and
9 Subsequently Resold as New. 34 Fed. Reg. 176-77. The 1969 Enforcement
10 Policy concerned the then-prevalent business practice of selling, as new,
11 products that previously had been used on a trial basis by prospective
12 purchasers. *Id.* at 176. In that policy statement, the Commission set out the
13 broad principle that deception lies where a marketer "[fails] to disclose
14 material facts relevant to a purchaser's decision to buy or not to buy." *Id.*
15 Because consumers have a preference for new or unused products, the
16 Commission found that prior use was material to the purchase decision. *Id.* The
17 Commission, therefore, concluded that the failure to disclose prior use was
18 unlawful even where returned merchandise had been refurbished to "good as
19 new" condition. *Id.* at 177. The

20 Commission noted, however, that this policy applied only to products
21 that in fact had been "used," as distinguished from products that had "merely
22 been inspected but not used." *Id.*

23 The Commission provided more specific guidance in its Policy
24 Statement on Deception, appended to *Clifdale Assocs., Inc.*, 103 F.T.C. 110,
25 174 (1984). The Commission stated that it will find deception where a
26 representation, omission or practice is likely to materially mislead a consumer
27 acting reasonably under the circumstances. *Id.* at 176. Materiality is a core
28 element of deception. A misrepresentation or omission is material if it is
"likely to affect a consumer's choice of or conduct regarding the product," and
therefore, injures the consumer who may have otherwise made a different
choice. *Id.* at 182-83."

29 24. The Plaintiff has suffered harm as a result of unfair and deceptive practices in
30 commerce by XYZPrinting, Inc.

31 25. The Plaintiff claims relief in the amount of \$600.33 in pecuniary damages, to be
32 tripled pursuant to RCW 19.86.090 to \$1800.99, plus costs, expenses, and reasonable attorney
33 fees. The Plaintiff additionally seeks injunctive relief barring XYZPrinting, Inc. from
34

1 engaging in the unfair business practice of selling refurbished, used merchandise without
2 disclosing the fact the products being sold are not new and, such other and further relief as is
3 allowed by law.

4 **CLAIM 4: RCW 19.86 claim for violation of 15 USC, Chapter 50**

5 26. Paragraphs 6 through 25 are incorporated by reference as if fully stated herein.

6
7 27. XYZPrinting, Inc.'s warranty does not comply with Federal law at 15 USC §
8 2303(a), as it does not conspicuously disclose whether it is a "full" or "limited" warranty.
9 XYZPrinting, Inc. violated 15 USC § 2304(a) as it refused to provide the Plaintiff with any
10 remedy on receipt of the Plaintiff's notice the replacement printer was defective. 15 USC
11 §2302(a) expresses a legislative intent of a public interest in preventing deceptive warranty
12 practices in commerce. Additionally, XYZPrinting, Inc.'s unfair and deceptive warranty
13 violations in commerce have harmed others, have had the capacity to harm others and have
14 the capacity to harm others in the future. The Plaintiff has suffered harm as a result of
15 XYZPrinting, Inc.'s unfair and deceptive practices in commerce.
16

17
18 28. The Plaintiff claims relief in the amount of \$600.33 in pecuniary damages, to be
19 tripled pursuant to RCW 19.86.090 to \$1800.99, plus costs, expenses, and reasonable attorney
20 fees. The Plaintiff additionally seeks injunctive relief barring XYZPrinting, Inc. from
21 engaging in violations of 15 USC, Chapter 50 and, such other and further relief as is allowed
22 by law.

23
24 Respectfully submitted on June 20, 2014 by:



25
26 Donald R. Earl (pro se)
27 3090 Discovery Road
28 Port Townsend, WA 98368
(360) 379-6604

SM

FILED

2014 OCT 10 AM 11:20

IN SUPERIOR COURT OF THE STATE OF WASHINGTON
JEFFERSON COUNTY

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

Donald R. Earl
(Plaintiff)

) Case No. 14-2-00123-1

) **Judge: Clallam County Visiting Judge**

v.

) PLAINTIFF'S CR 37 MOTION TO COMPEL
) PRODUCTION OF DISCOVERY AND FOR CR 26
) SANCTIONS AGAINST ATTORNEY VIRGINIA R.
) NICHOLSON

XYZPrinting, Inc.
(Defendant)

) **For hearing on: October 17, 2014 @ 2:30 PM**

1. INTRODUCTION

The Plaintiff, Donald R. Earl, respectfully submits this "Plaintiff's CR 37 Motion to Compel Production of Discovery and for CR 26 Sanctions Against Attorney Virginia R. Nicholson" and prays for the relief sought in Part 2.

2. RELIEF SOUGHT

1. Enter an order to compel the Defendant to fully and completely answer the Plaintiff's Interrogatories 1, 2, 4-19, 22 & 23.

2. Enter an order to compel the Defendant to produce discovery in response to the Plaintiff's Requests for Production 1, 2, 4, 5, and 6A (mislabeled 6 in the original).

1 3. Enter an order imposing sanctions against opposing counsel, Virginia R. Nicholson,
2 for discovery violations.

3 4. To the extent any of the Plaintiff's claims cannot be decided in favor of the Plaintiff
4 on Summary Judgment, due to the Defendant's refusal to produce relevant discovery,
5 continue the pending Rule 56 motions until discovery has been completed, or in the alternate,
6 as part of a sanction order, find that an adverse inference should be made in the Plaintiff's
7 favor on any questions of fact related to the evidence being withheld by the Defendant.
8

9 **3. FACTS AND BACKGROUND**

10 The Declaration of Donald R. Earl in Opposition to Defendant's Motion for Summary
11 Judgment, and, in Support of Plaintiff's Sanction Motions is incorporated by reference as if
12 fully stated herein (Second Earl Declaration).
13

14 The following are the Plaintiff's Interrogatories and Requests for Production and, the
15 Defendant's Answers, which are in dispute:

16 **INTERROGATORY NUMBER 1:** Please describe in detail each and every fact and
17 the evidence supporting such facts, which XYZ intends to claim or introduce in
18 support of each defense asserted by XYZ in answer to the Plaintiff's Complaint.

19 **ANSWER:** Defendant objects to this request as overly-broad, in that it demands an
20 exhaustive list of every fact and the evidence to support it. Discovery has just begun
21 and all facts are not known at this time. Defendant objects to this request to the extent
22 that it is premature. Furthermore, Defendant objects to this request as not calculated to
23 lead to the discovery of admissible evidence. Defendant further objects to this request
24 as vague and overly- burdensome in that the affirmative defenses are clearly laid out
25 in the answer and speak for themselves. Defendant will supplement this answer if
26 necessary.

27 **REQUEST FOR PRODUCTION NUMBER 1:** Please provide true and correct
28 copies of all documents described in response to Interrogatory Number 1.

ANSWER: Defendant has no documents responsive to this request. Defendant will
supplement this answer if necessary.

INTERROGATORY NUMBER 2: Please provide a description of all requests for
warranty repairs and complaints related to XYZ printers, including, but not limited to
the "Di Vinci" model, which were received by XYZ within the two years prior to the
filing of this action. This information is being requested in support of the Plaintiff's

1 Washington Consumer Protection Act claims (See: Magana v. Hyundai Motor Am.
2 167 Wn.2d 570 (2009), and, Gammon v. Clark Equipment 38 Wn.App. 274 (1984),
3 affirmed in Gammon v. Clark Equipment 104 Wn.2d 613 (2005)).

4 **ANSWER:** Defendant objects to this request as overly-broad, unduly burdensome,
5 and unlimited in scope. Defendant objects to this request as not calculated to lead to
6 the discovery of admissible evidence in this litigation.

7 **REQUEST FOR PRODUCTION NUMBER 2:** Please provide true and correct
8 copies of all documents related to Interrogatory Number 2, including, but not limited
9 to, all electronic and written communications to or from XYZ, documents related to
10 repair work done by XYZ and documents related to any corrective actions, or lack
11 thereof, made by XYZ in response to complaints and requests for warranty repairs.

12 **ANSWER:** Defendant objects to this request as overly-broad, unduly burdensome,
13 and unlimited in scope. Defendant objects to this request as not calculated to lead to
14 the discovery of admissible evidence in this litigation. Defendant further objects to this
15 request to the extent it seeks to obtain proprietary and confidential business
16 information. Without waiving the foregoing objection, Defendant will provide
17 documents related to Plaintiff's request for warranty repairs.

18 **INTERROGATORY NUMBER 4:** Please list by serial number and date returned,
19 every printer returned to XYZ within the two years prior to the commencement of this
20 lawsuit, along with the reasons for the return if known.

21 **ANSWER:** Defendant objects to this request as overly-broad, unduly burdensome,
22 and unlimited in scope. Defendant objects to this request as not calculated to lead to
23 the discovery of admissible evidence in this litigation. Defendant further objects to this
24 request to the extent it seeks to obtain proprietary and confidential business
25 information.

26 **REQUEST FOR PRODUCTION NUMBER 4:** Please produce true and correct
27 copies of all documents related to the returns of printers listed in Interrogatory
28 Number 4.

ANSWER: Defendant objects to this request as overly-broad, unduly burdensome,
and unlimited in scope. Defendant objects to this request as not calculated to lead to
the discovery of admissible evidence in this litigation.

INTERROGATORY NUMBER 5: Please describe in detail how XYZ processes
returned printers, including, but not limited to inspections conducted on returned
printers, repairs/refurbishments performed on returned printers, tests and/or
inspections performed on returned printers, repackaging of returned printers and any
and all other steps, policies, practices and procedures XYZ performs or uses in
preparing returned printers for resale, including under what conditions XYZ sells
refurbished printers as new.

ANSWER: Defendant objects to this request as overly-broad, unduly burdensome,
and unlimited in time and scope. Defendant objects to this request as not calculated to
lead to the discovery of admissible evidence in this litigation. Defendant further
objects to this request to the extent it seeks to obtain proprietary and confidential
business information. Without waiver of the foregoing objections, Defendant does not

1 sell refurbished printers as new. Pursuant to its limited warranty, when providing any
2 warranty service, Defendant reserves the right to repair the Product with materials and
3 parts selected by Defendant or to replace the Product with another product of the same
4 kind at the option of Defendant. Any replacement product may be new, refurbished, or
used, provided that the replacement Product has functionality at least equal to that of
the Product being replaced. Defendant will supplement this answer if necessary.

5 **REQUEST FOR PRODUCTION NUMBER 5:** Please produce true and correct
6 copies of all documents related to Interrogatory Number 5.

7 **ANSWER:** Defendant objects to this request as overly-broad, unduly burdensome,
8 and unlimited in time and scope. Defendant objects to this request as not calculated to
lead to the discovery of admissible evidence in this litigation. Defendant will
supplement this answer if necessary.

9 **INTERROGATORY NUMBER 6:** Please describe in detail the corporate structure
10 of XYZ, including: the names and addresses of its officers and directors; the names
11 and addresses of all persons or entities holding more than a 5% ownership interest in
12 XYZ; the markets, by country, in which XYZ conducts business; the number of
13 printers sold during the two year period prior to the commencement of this lawsuit in
each of the markets in which XYZ operates or conducts business; the number of
persons employed by XYZ and; the number of years XYZ has been in business.

14 **ANSWER:** Defendant objects to this request as consisting of numerous subparts such
15 that it contains multiple interrogatories contrary to the rules of discovery. Defendant
16 objects to this request as not calculated to lead to the discovery of admissible evidence
17 in this litigation. Defendant further objects to this request to the extent it seeks
18 information, the disclosure of which could constitute an unwarranted invasion of the
19 affected persons' rights of privacy and/or confidentiality. Defendant further objects to
20 this request to the extent it seeks to obtain proprietary and confidential business
information. Without waiver of the foregoing objections, XYZprinting, Inc. is owned
by Kinpo Electronics Inc. and Cal-Comp Electronics (Thailand) Public Co. Ltd.
XYZprinting has been in business since 2013. XYZprinting is dedicated to bringing
cost-effective 3D printing to consumers and businesses around the world. Currently,
XYZprinting has offices in China, Japan, the United States and Europe.

21 **INTERROGATORY NUMBER 7:** Does XYZ own, operate, control or publish the
22 website located on the Internet at www.xyzprinting.com and/or website addresses
23 redirected from that website address?

24 **ANSWER:** Defendant objects to this request as not calculated to lead to the discovery
of admissible evidence in this litigation.

25 **INTERROGATORY NUMBER 8:** If the answer to Interrogatory 7 is yes, is the
26 website in any way programmed to redirect visitors to the website to a page which
27 states in part: "Sorry, your browser does not support some of the features of our
website, please download the latest version of your browser to get the most complete
browsing experience."?

28 **ANSWER:** Defendant objects to this request as not calculated to lead to the discovery
of admissible evidence in this litigation.

1 **INTERROGATORY NUMBER 9:** If the answers to Interrogatories 7 and 8 are yes,
2 please describe in detail the "features" not supported by browsers other than those
3 listed on the page described in Interrogatory 8, complete with references to the related
4 source code that is alleged to be unsupported by other browsers.

5 **ANSWER:** Defendant objects to this request as not calculated to lead to the discovery
6 of admissible evidence in this litigation.

7 **INTERROGATORY NUMBER 10:** If the answers to Interrogatories 7 and 8 are
8 yes, please describe in detail how the website is programmed to redirect visitors to the
9 page described in Interrogatory 8, including, but not limited to, which pages on the
10 website will trigger the redirect, which browsers will trigger the redirect and, any and
11 all other circumstances or conditions that will cause visitors to the website to be
12 redirected to the page described in Interrogatory 8 rather than to the portions and
13 pages of the website the visitor intended to view.

14 **ANSWER:** Defendant objects to this request as not calculated to lead to the discovery
15 of admissible evidence in this litigation.

16 **INTERROGATORY NUMBER 11:** If the answer to Interrogatory 7 is yes, describe
17 in specific detail the steps a visitor to the website would have to follow from the home
18 page to locate XYZ's warranty.

19 **ANSWER:** Defendant objects to this request as not calculated to lead to the discovery
20 of admissible evidence in this litigation. Without waiver of the foregoing objections,
21 Defendant's warranty is found here:
22 http://support.xyzprinting.com/us_en/support/warranty. From the home page, select
23 Support and then Product Warranty.

24 **INTERROGATORY NUMBER 12:** If the answer to Interrogatory 7 is yes, describe
25 in detail what information a visitor to the website will find by clicking on the link
26 titled "Product Warranty" when visiting the web page located at:
27 <http://support.xyzprinting.com/us/Support>.

28 **ANSWER:** Defendant objects to this request as not calculated to lead to the discovery
of admissible evidence in this litigation. Defendant's warranty is found here:
http://support.xyzprinting.com/us_en/support/warranty. Without waiver of the
foregoing objections, a printed copy of this website page is included in Defendant's
response.

**REQUEST FOR PRODUCTION NUMBER [misabeled in the original, refer to
as 6A] 6:** Please produce true and correct copies of all documents in the possession of
XYZ, or available to XYZ through its website hosting service or any other source,
which are related to its website statistics covering the period within two years prior to
the commencement of this lawsuit, including, but not limited to statistics related to:
pages visited; the number of unique visitors to the website; the number of visits to
various pages on the website; the browsers used by visitors to the website, and; any
and all other data related to traffic to the website described in Interrogatory Number 7.

ANSWER: Defendant objects to this request as not calculated to lead to the discovery
of admissible evidence in this litigation,

1 **INTERROGATORY NUMBER 13:** Please list the name, address and phone number
2 of each and every person XYZ intends to call as a witness at trial and the nature of the
3 testimony XYZ anticipates procuring from each witness named.

4 **ANSWER:** Defendant objects to this request as premature and beyond what is
5 required by the rules of civil procedure. Defendant will disclose witnesses in
6 accordance with the case schedule in this matter.

7 **INTERROGATORY NUMBER 14:** Identify each person you or your attorneys
8 expect to testify at trial as an expert witness and for each such witness, state: (a) The
9 subject matter on which the expert is expected to testify; (b) The substance of the facts
10 and opinions to which the expert will testify; and (c) A summary of the grounds for
11 each such opinion.

12 **ANSWER:** Defendant objects to this request as premature and beyond what is
13 required by the rules of civil procedure. Defendant will disclose expert witnesses in
14 accordance with the case schedule in this matter.

15 **INTERROGATORY NUMBER 15:** Please describe in detail any and all products
16 and services XYZ provides directly and/or indirectly to residents and businesses
17 located in Washington State, including but not limited to warranty services, products
18 marketed directly to consumers on its website and, products and services marketed or
19 provided to Washington retailers on an ongoing basis.

20 **ANSWER:** Defendant objects to this request as overly-broad, unduly burdensome,
21 and unlimited in time and scope. Defendant objects to this request as not calculated to
22 lead to the discovery of admissible evidence in this litigation. Without wavier of the
23 foregoing objections, in the United States, Defendant sells its printers via online
24 resellers, including Amazon, MicroCenter, Studica, and Newegg.

25 **INTERROGATORY NUMBER 16:** Please list by name, address and phone number
26 all parties not joined in this lawsuit which XYZ claims or believes are indispensable to
27 this litigation.

28 **ANSWER:** Defendant objects to this request as premature and beyond what is
required by the rules of civil procedure.

INTERROGATORY NUMBER 17: Please list by name, address and phone number
all parties responsible for any and all intervening and/or superseding acts which XYZ
claims caused the Plaintiff's damages and briefly describe the acts of each person
listed.

ANSWER: Defendant objects to this request as not calculated to lead to the discovery
of admissible evidence in this litigation.

INTERROGATORY NUMBER 18: Please list by title, name, address, phone
number and document/information, the person or persons providing
information/documents responsive to these interrogatories and requests for production.

ANSWER: Defendant objects to this request to the extent it calls for information
protected by attorney-client privilege and/or attorney work product.

1 **INTERROGATORY NUMBER 19:** Please list by title, name, address and phone
2 number any and all persons having knowledge of any facts relevant to this lawsuit or
3 who are in possession of any evidence relevant to this lawsuit.

4 **ANSWER:** Defendant further objects to this request to the extent it seeks information,
5 the disclosure of which could constitute an unwarranted invasion of the affected
6 persons' rights of privacy and/or confidentiality. Without waiving the forgoing
7 objection, Defendant answers as follows: XYZprinting Customer Care employees
8 Roxanne, Kristel, and Charles. Any and all contact with XYZprinting Customer Care
9 employees must be made via counsel for XYZprinting.

10 **INTERROGATORY NUMBER 22:** Does your answer to plaintiff's complaint set
11 forth any affirmative defenses? If so, please state the facts upon which each
12 affirmative defense is based.

13 **ANSWER:** Defendant objects to this request as entirely duplicative of Interrogatory
14 Number 1. Please see Response to Interrogatory Number 1.

15 **INTERROGATORY NUMBER 23:** Do you deny liability? If so, please state the
16 facts supporting that denial.

17 **ANSWER:** Defendant objects to this request as vague. Defendant objects to this
18 request to the extent that it is premature. Discovery has just begun and not all facts are
19 known at this time. Defendant further objects to this request as vague and overly
20 burdensome in that the affirmative defenses are clearly laid out in the answer and
21 speak for themselves. Defendant will supplement this answer if necessary.

22 4. LEGAL AUTHORITY AND ARGUMENT

23 CR 37(a) reads in relevant part as follows:

24 “(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to
25 other parties and all persons affected thereby, and upon a showing of compliance with
26 rule 26(i), may apply to the court in the county where the deposition was taken, or in
27 the county where the action is pending, for an order compelling discovery as follows:

28 (2) Motion. If a deponent fails to answer a question propounded or submitted
under rules 30 or 31, or a corporation or other entity fails to make a designation under
rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under rule
33, or if a party, in response to a request for inspection submitted under rule 34, fails
to respond that inspection will be permitted as requested or fails to permit inspection
as requested, any party may move for an order compelling an answer or a designation,
or an order compelling inspection in accordance with the request. When taking a
deposition on oral examination, the proponent of the question may complete or
adjourn the examination before he applies for an order.

(3) Evasive or Incomplete Answer. For purposes of this section an evasive or
incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after
opportunity for hearing, require party or deponent whose conduct necessitated the
motion or the party or attorney advising such conduct or both of them to pay to the
moving party the reasonable expenses incurred in obtaining the order, including

1 attorney fees, unless the court finds that the opposition to the motion was substantially
2 or that other circumstances make an award of expenses unjust.”

3 CR 26(g) provides as follows:

4 “Every request for discovery or response or objection thereto made by a party
5 represented by an attorney shall be signed by at least one attorney of record in his
6 individual name, whose address shall be stated. A party who is not represented by an
7 attorney shall sign the request, response, or objection and state his address. The
8 signature of the attorney or party constitutes certification that he has read the request,
9 response, or objection, and that to the best of his knowledge, information, and belief
10 formed after a reasonable inquiry it is:

11 (1) consistent with these rules and warranted by existing law or a good
12 faith argument for the extension, modification, or reversal of existing law;

13 (2) not interposed for any improper purpose, such as to harass or to cause
14 unnecessary delay or needless increase in the cost of litigation; and

15 (3) not unreasonable or unduly burdensome or expensive, given the needs
16 of the case, the discovery already had in the case, the amount in controversy, and the
17 importance of the issues at stake in the litigation. If a request, response, or objection is
18 not signed, it shall be stricken unless it is signed promptly after the omission is called
19 to the attention of the party making the request, response, or objection and a party
20 shall not be obligated to take any action with respect to it until it is signed.

21 If a certification is made in violation of the rule, the court, upon motion or upon
22 its own initiative, shall impose upon the person who made the certification, the party
23 on whose behalf the request, response, or objection is made, or both, an appropriate
24 sanction, which may include an order to pay the amount of the reasonable expenses
25 incurred because of the violation, including a reasonable attorney fee.”

26 In *John Doe v. Blood Center*, 117 Wn.2d 772, P.2d 370 (1991) the court ruled in
27 pertinent part as follows: “*Plaintiff has a right of access to the courts. In this civil case that*
28 *right of access includes the right of discovery authorized by the civil rules, subject to the*
limitations contained therein.”

In *Gammon v. Clark Equipment*, 38 Wn. App. 274 (1984), the court cited U.S.
Supreme Court decisions with approval as follows:

“The Supreme Court has noted that the aim of the liberal federal discovery rules is to
“make a trial less a game of blindman's buff and more a fair contest with the basic
issues and facts disclosed to the fullest practicable extent.” The availability of liberal
discovery means that civil trials no longer need be carried on in the dark. The way is
now clear... for the parties to obtain the fullest possible knowledge of the issues and
facts before trial.” (Internal citations omitted)

1 The Plaintiff exercised care and restraint in the course of tailoring discovery requests
2 to the most basic and relevant needs of the case, limiting the scope of discovery to that which
3 Washington precedent has ruled is discoverable. In fact, many of the Plaintiff's
4 Interrogatories were copied verbatim from Washington pattern interrogatories. The nature of
5 the Plaintiff's discovery requests generally falls into three categories. 1. The Plaintiff seeks to
6 obtain sufficient information on the names and whereabouts of potential witnesses, in order to
7 issue subpoenas to compel attendance at depositions. 2. The Plaintiff seeks to obtain
8 information on how the Defendant's website is programmed, which is related to the Plaintiff's
9 Magnusson Moss Warranty Act claim and the Act's mandate that warrantors must make the
10 terms of warranties "readily available" to consumers. 3. The Plaintiff seeks to obtain
11 information on consumer complaints and product returns, which are relevant to the Plaintiff's
12 Washington Consumer Protection Act claims.

13
14 It is well settled law in Washington State that consumer complaints are discoverable.
15
16 In *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570 (2009), the court described proceedings in
17 the trial court related to production of consumer complaints as follows:
18

19 "In request for production 20 Magana requested Hyundai produce "copies of any and
20 all documents including but not limited to complaints, answers, police reports,
21 photographs, depositions or other documents relating to *complaints*, notices, claims,
22 lawsuits or incidents of alleged seat back failure on Hyundai products for the years
23 1980 to present."... On November 18, 2005 the trial court ordered Hyundai to produce
24 "Police Reports, legal claims, *Consumer Complaints* and Expert Reports or
25 Depositions and Exhibits and photographs thereto with respect to all consumer
26 complaints and lawsuits involving allegations of seat back failure on all Hyundai
27 vehicles with single recliner mechanisms regardless of incident date and regardless of
28 model year."... Broad discovery is permitted under CR 26. "It is not ground for
objection that the information sought will be inadmissible at the trial if the information
sought appears reasonably calculated to lead to the discovery of admissible evidence."
CR 26(b)(1). If a party objects to an interrogatory or a request for production, then the
party must seek a protective order under CR 26(c). CR 37(d). *If the party does not
seek a protective order, then the party must respond to the discovery request. The
party cannot simply ignore or fail to respond to the request. "[A]n evasive or
misleading answer is to be treated as a failure to answer.*" CR 37(d). Hyundai never

1 sought a protective order under CR 26(c) but simply objected to Magana's discovery
2 requests, asserting the requests were overbroad and not reasonably calculated to lead
3 to the discovery of admissible evidence.” (Emphasis added)

4 The *Magana* court upheld the trial court’s sanction award as follows:

5 “*Trial courts need not tolerate deliberate and willful discovery abuse.* Given the
6 unique facts and circumstances of this case, we hold that the trial court appropriately
7 diagnosed Hyundai's willful efforts to frustrate and undermine truthful pretrial
8 discovery efforts by striking its pleadings and rendering an \$8,000,000 default
9 judgment plus reasonable attorney fees. This result appropriately compensates the
10 other party, punishes Hyundai, *and hopefully educates and deters others so inclined.*”
11 (Emphasis added)

12 In *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508 (2001), the Court of Appeals
13 reversed the trial court’s entry of summary judgment because the trial court failed to order the
14 defendant to produce evidence of customer complaints.

15 In *Johnson v. Mermis*, 91 Wn. App. 127 (1998), the court ruled in pertinent part as
16 follows:

17 “*The trial court was correct to find that the interrogatories and requests for*
18 *production of documents were improperly answered and contained boilerplate*
19 *objections without specificity. The rules are clear that a party must fully answer all*
20 *interrogatories and all requests for production, unless a specific and clear objection*
21 *is made. If a party disagrees with the scope of production, or wishes not to respond, it*
22 *must move for a protective order and cannot withhold discoverable materials. A*
23 *party's failure to comply with deposition or document production rules may not be*
24 *excused on grounds that the discovery sought is objectionable.” (Emphasis added,*
25 *internal quote marks omitted)*

26 On the face of the Plaintiff’s Interrogatories and Requests for Production, and the
27 Defendant’s Answers, the Defendant’s conduct in this matter is entirely inexcusable. In the
28 brief time Ms. Nicholson has been representing the Defendant, Ms. Nicholson appears intent
on setting some kind of record for committing the most rule violations in the shortest amount
of time. Among other considerations, the Plaintiff went to considerable trouble to provide Ms.
Nicholson with relevant authorities prior to the parties’ Rule 26 conference. (See: Second Earl

1 Declaration) Ms. Nicholson's resistance to producing lawful discovery cannot be construed as
2 other than willful.

3 RPC 3.4(d) provides in relevant part as follows: "A lawyer shall not... fail to make
4 reasonably diligent effort to comply with a legally proper discovery request by an opposing
5 party".

6
7 The Plaintiff objected to the fact the Answers were not signed by the person/s
8 making them. Ms. Nicholson refused to comply with the plain language of CR 33(a), which
9 provides in pertinent part, "*Each interrogatory shall be answered separately and fully in*
10 *writing under oath, unless it is objected to, in which event the reasons for objection shall be*
11 *stated in lieu of an answer. The answers are to be signed by the person making them, and the*
12 *objections signed by the attorney making them.*"

13
14 Ms. Nicholson insisted the Defendant was under no obligation to answer discovery
15 requests in the absence of a scheduling order. CR 33(a) governs the timing of serving
16 interrogatories as follows: "Interrogatories may, *without leave of court*, be served upon the
17 plaintiff after the summons and a copy of the complaint are served upon the defendant, or the
18 complaint is filed, whichever shall first occur, *and upon any other party with or after service*
19 *of the summons and complaint upon that party.*" (Emphasis added) The rule requires
20 answers to be served within 30 days. Ms. Nicholson's excuse is particularly frivolous in light
21 of the fact that while Federal trial courts typically issue scheduling orders, Washington State
22 courts do not.

23
24
25 Ms. Nicholson also insisted that having filed the Defendant's Rule 56 Motion the
26 day before the Rule 26(i) conference, the Defendant was under no obligation to produce
27 discovery before a ruling was made on the motion. CR 56(f) provides as follows: "Should it
28 appear from the affidavits of a party opposing the motion that he cannot, for reasons stated,

1 present by affidavit facts essential to justify his opposition, the court may refuse the
2 application for judgment or may order a continuance to permit affidavits to be obtained or
3 depositions to be taken or discovery to be had or may make such other order as is just.”

4 When a motion for summary judgment is pending, all refusing to produce discovery
5 accomplishes is to delay a decision on the motion until such time as the nonmoving party has
6 had an opportunity to obtain the discovery needed to effectively oppose the motion.
7

8 Even if a final judgment is entered on summary judgment, while a final decision
9 may end the need to conduct further discovery, it does not end the need to impose sanctions
10 for blatant misconduct and rule violations.
11

12 Ms. Nicholson’s refusal to comply with the Plaintiff’s lawful discovery requests has
13 not only required the Plaintiff to invest considerable time on otherwise unnecessary litigation
14 -- approximately ten hours extra work as of this writing – the Plaintiff has also suffered
15 substantial prejudice as a result of not having all of the evidence the Plaintiff anticipated
16 needing to support and/or oppose summary judgment. Ms. Nicholson’s scofflaw approach to
17 litigation needs to be curbed through the imposition of appropriate sanctions.
18

19 5. CONCLUSION

20 For the above reasons, the Plaintiff, Donald R. Earl, respectfully prays the Court grant
21 the relief sought in Part 2 and such alternate or further relief as the Court may deem fair and
22 just in the exercise of its sound discretion.
23

24 Respectfully submitted on October 10, 2014 by:



25
26 Donald R. Earl (pro se)
27 3090 Discovery Road
28 Port Townsend, WA 98368
(360) 379-6604

FILED

2014 SEP 18 PM 4:00

IN SUPERIOR COURT
JEFFERSON COUNTY WASHINGTON

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

Donald R. Earl
(Plaintiff)

) Case No. 14-2-00123-1

) Judge: Clallam County Visiting Judge

v.

) PLAINTIFF'S CROSS MOTION FOR
) SUMMARY JUDGMENT

XYZPrinting, Inc.
(Defendant)

) For hearing on:
) October 17, 2014 @ 2:30PM

1. INTRODUCTION

The Plaintiff, Donald R. Earl, hereby respectfully submits this *Plaintiff's Cross Motion for Summary Judgment* and requests the relief sought in Part 2.

2. RELIEF SOUGHT

Enter an order granting the Plaintiff's Motion for Summary Judgment, which provides the Plaintiff relief in the amount of \$600.33 in pecuniary damages, to be tripled pursuant to RCW 19.86.090 to \$1800.99, plus costs, expenses, reasonable attorney fees and injunctive relief barring XYZPrinting, Inc. from engaging in further violations of the Washington Consumer Protection Act.

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3. FACTS AND BACKGROUND

The Plaintiff filed a lawsuit against the Defendant, XYZPrinting, Inc. on June 20, 2014 alleging four causes of action, a Federal warranty claim under 15 USC 50, a claim for common law fraud, and two claims under the Washington Consumer Protection Act. A bench copy of the text of the Plaintiff's Complaint will be provided with the accompanying documents.

Process was served on the Defendant's California agent of record on June 27, 2014 and proof of service was filed in this Court on August 1, 2014. The Defendant filed and served its Answer on August 26, 2014. The Plaintiff filed and served the affidavit required under RCW 4.28.185(4) on September 2, 2014.

The Plaintiff served Interrogatories and Requests for Production on the Defendant on August 1, 2014 and the Defendant served its Answers, which the Plaintiff believes are incomplete, on June 10, 2014. A meet and confer conference was conducted by the parties on September 16, 2014, which resulted in an impasse on resolving discovery related disputes.

On September 15, 2014, the Defendant filed and served a motion for summary judgment, which the Plaintiff believes is frivolous and filed in violation of CR 11.

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, in spite of the fact the Plaintiff would have

1 preferred to do so after the production of information currently being withheld by the
2 Defendant.

3 The facts and evidence contained in the "*Declaration of Donald R. Earl in Support of*
4 *Plaintiff's Cross Motion for Summary Judgment*" are incorporated by reference as if fully
5 stated herein.
6

7 4. LEGAL AUTHORITY AND ARGUMENT

8 CR 56(a) provides as follows:

9 "A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a
10 declaratory judgment may, after the expiration of the period within which the
11 defendant is required to appear, or after service of a motion for summary judgment by
12 the adverse party, move with or without supporting affidavits for a summary judgment
13 in his favor upon all or any part thereof."

14 In *Sea-Pac Co. v. United Food & Comm'l Workers Local Union 44*, 103 Wn.2d 800,
15 802, 699 P.2d 217 (1985) the court ruled that a motion for summary judgment should be
16 granted if there is no genuine issue of material fact or if reasonable minds could reach only
17 one conclusion on that issue based upon the evidence construed in the light most favorable to
18 the nonmoving party.

19 *a) Summary Judgment should be granted on the Plaintiff's Claim 1 Magnusson Moss*
20 *Warranty Act cause of action.*

21 The legal authority creating a private right of action by consumers harmed by
22 deceptive warranty practices under the Magnusson Moss Warranty Act is found at 15 USC §
23 2310(d), which provides in relevant part as follows:

24 "Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and
25 expenses; cognizable claims

26 (1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged
27 by the failure of a supplier, warrantor, or service contractor to comply with any
28 obligation under this chapter, or under a written warranty, implied warranty, or
service contract, may bring suit for damages and other legal and equitable relief—

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3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604

1 (A) in any court of competent jurisdiction in any State or the District of Columbia”
2 (emphasis added)

3 15 USC § 2310(f) creates legal liability on the part of the warrantor as follows:

4 “(f) Warrantors subject to enforcement of remedies

5 For purposes of this section, only the warrantor actually making a written affirmation
6 of fact, promise, or undertaking shall be deemed to have created a written warranty,
7 and any rights arising thereunder may be enforced under this section only against such
8 warrantor and no other person.”

9 The Parties do not dispute the Defendant warrants the Plaintiff’s printer in writing and
10 is the warrantor actually making the written affirmations.

11 15 USC § 2302(a) provides in relevant part as follows:

12 “In order to improve the adequacy of information available to consumers, prevent
13 deception, and improve competition in the marketing of consumer products, any
14 warrantor warranting a consumer product to a consumer by means of a written
15 warranty shall, to the extent required by rules of the Commission, fully and
16 conspicuously disclose in simple and readily understood language the terms and
17 conditions of such warranty.” (emphasis added)

18 16 CFR § 701.3 provides in part as follows:

19 “Written warranty terms.

20 (a) Any warrantor warranting to a consumer by means of a written warranty a
21 consumer product actually costing the consumer more than \$15.00 shall clearly and
22 conspicuously disclose in a single document in simple and readily understood
23 language, the following items of information:” (emphasis added)

24 16 CFR § 700.3 provides in pertinent part as follows:

25 “Written warranty.

26 (a) The Act imposes specific duties and liabilities on suppliers who offer written
27 warranties on consumer products...

28 (c) The Magnuson-Moss Warranty Act generally applies to written warranties
covering consumer products...” (emphasis added)

The term “written warranty is defined at 15 USC § 2301(6) § as follows:

“(A) any written affirmation of fact or written promise made in connection with the
sale of a consumer product by a supplier to a buyer which relates to the nature of the

1 material or workmanship and affirms or promises that such material or workmanship
2 is defect free or will meet a specified level of performance over a specified period of
time, or

3 (B) any undertaking in writing in connection with the sale by a supplier of a consumer
4 product to refund, repair, replace, or take other remedial action with respect to such
product in the event that such product fails to meet the specifications set forth in the
undertaking,"

5 The Defendant warrants its printers in relevant part as follows (see: Earl Declaration,
6

7 Exhibit E):

8 "This product is guaranteed for one year from the purchase date against any
9 breakdown within the scope of proper and reasonable usage of this product as defined
10 by XYZprinting. Presentation of this warranty card with the product will ensure free
service and repair of *inherent faults in the product* within the warranty period."
(emphasis added)

11 Exhibit G of the Earl Declaration, which is a photo showing the inability of the
12 Defendant's printer to print solid objects, and related testimony regarding the software defect,
13 which is the apparent cause of the printer being incapable of printing solid models -- a
14 fundamental, essential feature of all 3D printers -- demonstrates the printer is indeed
15 defective. The larger problem appears to be the Defendant presently has no idea of how to
16 cure this defect. As this defect is inherent in all of the Defendant's products because the
17 Defendant's software is the only type supported by its printers, and no course of repairs or
18 replacements could possibly cure the defect until such time as the Defendant is able to debug
19 its software, the ONLY effective remedy the Defendant has available to offer is a refund of
20 the purchase price of the printer.
21

22 In order to avert the liability inherent in the Defendant's universally defective software
23 programs, the Defendant has engaged in a pattern of unlawful, deceptive warranty practices.
24 16 CFR § 702.3(b)(1) defines a warrantor's duty to provide the terms of warranties to
25 consumers as follows:
26
27
28

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3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604

1 "Duties of the warrantor.

2 (1) A warrantor who gives a written warranty warranting to a consumer a consumer
3 product actually costing the consumer more than \$15.00 shall:

4 (i) Provide sellers with warranty materials necessary for such sellers to comply with
5 the requirements set forth in paragraph (a) of this section, by the use of one or more by
6 the following means:

7 (A) *Providing a copy of the written warranty with every warranted consumer
8 product; and/or*

9 (B) *Providing a tag, sign, sticker, label, decal or other attachment to the product,
10 which contains the full text of the written warranty; and/or*

11 (C) *Printing on or otherwise attaching the text of the written warranty to the
12 package, carton, or other container if that package, carton or other container is
13 normally used for display purposes. If the warrantor elects this option a copy of the
14 written warranty must also accompany the warranted product; and/or*

15 (D) *Providing a notice, sign, or poster disclosing the text of a consumer product
16 warranty. If the warrantor elects this option, a copy of the written warranty must
17 also accompany each warranted product." (emphasis added)*

18 Each of the requirements of A, B, C and D above, make inclusion of the full terms of
19 the warranty with the product a duty the warrantor must perform.

20 This requirement is reiterated at 16 CFR § 700.11(b) as follows: "'Written warranty"
21 and "service contract" are defined in sections 101(6) and 101(8) of the Act, respectively. A
22 written warranty must be "part of the basis of the bargain." *This means that it must be
23 conveyed at the time of sale of the consumer product...*" (emphasis added)

24 The Defendant does not and cannot dispute the fact the only warranty provided to the
25 Plaintiff at the time of sale, and included with the printer, is the document attached to the
26 Plaintiff's Complaint at Exhibit B and to the Earl Declaration at Exhibit E. The Defendant
27 offers no evidence, authority or argument in support of a position the Defendant's warranty
28 practices are other than deceptive under the provisions of 16 CFR § 702.3(b)(1).

Under the plain language of the law and related rules, the Plaintiff had, and continues
to have, a legal right to rely on the terms of the Product Warranty *shipped with the printer.*

The "warranty" the Defendant has since sought to rely on is inadmissible as evidence as there

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3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604

1 is no foundation to support a contention the Defendant complied with the legal requirements
2 necessary to give the document any enforceable legal effect. Unless that document ships with
3 the product, which it does not, it is not a warranty and has no legally recognizable existence.

4 The Defendant contends the retailer, Studica, is the entity from whom the Plaintiff
5 must obtain relief for the Defendant's breach of warranty, deceptive warranty practices and
6 defective products. Studica's return policy, as cited in the Earl Declaration and attached
7 thereto as Exhibits A and B, expressly denies any obligation to perform warranty services or
8 provide refunds on defective products. Contrary to the Defendant's contentions, the Plaintiff
9 could neither obtain a refund from Studica, nor was Studica under any legal obligation to
10 provide such relief. Under the plain language of 16 CFR § 700.4, the Defendant's argument
11 that Studica is under an obligation to provide a refund to the Plaintiff fails on its face. The rule
12 provides in pertinent part as follows:
13
14

15 "Parties "actually making" a written warranty.

16 "Section 110(f) of the Act provides that *only the supplier "actually making" a*
17 *written warranty is liable* for purposes of FTC and *private enforcement of the Act*. A
18 supplier who does no more than distribute or sell a consumer product covered by a
19 written warranty offered by another person or business and which identifies that
20 person or business as the warrantor is not liable for failure of the written warranty to
21 comply with the Act or rules thereunder..." (emphasis added)

22 The legerdemain in which the Defendant engages, in blocking a significant cross
23 section of consumers from accessing its support page or viewing the document alleged to be a
24 warranty, is particularly reprehensible. As described in more detail in the Earl Declaration and
25 the related Exhibit D, the Defendant has programmed its website to block consumer access to
26 its support page and warranty information. There is no plausible explanation for such
27 programming that does not involve a willful intent to deceive consumers and to avoid the
28 liability inherent in its warranty of universally defective products. As the Earl Declaration

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(360) 379-6604

1 demonstrates, the support page is displayed properly in the seconds before it is redirected to
2 the error page. In the absence of the redirect command programmed into the website's source
3 code, the site would be readily viewable using any browser version produced in the past
4 decade.

5 16 CFR §702.3(a) provides as follows:

6
7 "Except as provided in paragraphs (c) through (d) of this section, the seller of a
8 consumer product with a written warranty *shall make a text of the warranty readily*
9 *available for examination by the prospective buyer* by:

- 10 (1) Displaying it in close proximity to the warranted product, or
11 (2) Furnishing it upon request prior to sale and placing signs reasonably calculated to
12 elicit the prospective buyer's attention in prominent locations in the store or
13 department advising such prospective buyers of the availability of warranties upon
14 request." (emphasis added)

15 The deceptive website programming tactic used by the Defendant prevents the text of
16 the warranty from being *readily available* for examination by prospective buyers and is
17 therefore unlawful and a violation of the Act. Furthermore, the warranty that actually ships
18 with the printer is not made available for pre-purchase examination at all.

19 15 USC § 2303(a) provides as follows:

20 "(a) Full (statement of duration) or limited warranty

21 Any warrantor warranting a consumer product by means of a written warranty shall
22 clearly and conspicuously designate such warranty in the following manner, unless
23 exempted from doing so by the Commission pursuant to subsection (c) of this section:

24 (1) If the written warranty meets the Federal minimum standards for warranty set forth
25 in section 2304 of this title, *then it shall be conspicuously designated a "full*
26 *(statement of duration) warranty"*.

27 (2) If the written warranty does not meet the Federal minimum standards for warranty
28 set forth in section 2304 of this title, *then it shall be conspicuously designated a*
"limited warranty"." (emphasis added)

Exhibit E of the Earl Declaration shows the Defendant's warranty practices are
deceptive as the Defendant fails to conspicuously designate the warranty it ships with its
printer as "full" or "limited".

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3090 Discovery Road
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(360) 379-6604

1 In sum, the Defendant's warranty practices are unlawful because:

2 a) The Defendant does not provide the warranty in a single document as is required
3 under 16 CFR § 701.3.

4 b) The Defendant does not include the full terms of its warranty with the product as is
5 required under 16 CFR § 702.3(b)(1).

6 c) The Defendant does not make the text of the warranty readily available to
7 prospective buyers as required under 16 CFR §702.3(a).

8 d) The Defendant does not conspicuously designate the warranty shipped with its
9 products as "full" or "limited" as required under 15 USC § 2303(a).

10 e) The Defendant does not provide the warranty in the form of a single document as
11 required under 16 CFR § 701.3.

12 f) The Defendant breached its warranty in refusing to provide the Plaintiff with any
13 effective remedy on the defective printer.

14 For any, some, or all of these reasons, the Court should grant the Plaintiff's Motion for
15 Summary Judgment on the Plaintiff's Claim 1.

16 *b) Summary Judgment should be granted on the Plaintiff's Claim 2 Common Law Fraud*
17 *cause of action.*

18 The Plaintiff's Common Law Fraud claim reads as follows:

19 "18. Paragraphs 6 through 17 and paragraphs 22 through 28 are incorporated
20 by reference as if fully stated herein.

21 19. Customer reviews published on Amazon.com (Exhibit C) show the printer
22 sold by XYZPrinting, Inc. has been plagued with numerous defects that have resulted
23 in customers returning the defective printers to XYZPrinting, Inc. XYZPrinting, Inc.
24 knows or reasonably should know the printers are defective. XYZPrinting, Inc.
25 repackages the returned, defective printers, and resells them as new, without
26 disclosing the fact the printers are not new, but are in fact used printers returned to
27 XYZPrinting, Inc. as defective. XYZPrinting, Inc. makes numerous *material*
28 *representations* about its printers, including, but not limited to, that they are of good
quality, that they are compatible with computer operating systems such as that used by

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3090 Discovery Road
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(360) 379-6604

1 the Plaintiff, the printers are implicitly represented as being new machines, and that a
2 consumer's investment in the printers is safe because of the warranty. These
3 representations are *false* as demonstrated by the factual allegations in this Complaint.
4 XYZPrinting, Inc. *knew or reasonably should have known* the representations are
5 false. XYZPrinting, Inc. knew or reasonably should have known its software/firmware
6 programs were defective and would not function properly. XYZPrinting, Inc. knew or
7 reasonably should have known the product defects would generate a large number of
8 requests for warranty service, if a warranty were offered. XYZPrinting, Inc. knew or
9 reasonably should have known that customers would expect a refund when
10 XYZPrinting, Inc. proved unable to cure the defects and that refunding the purchase
11 price of the defective printers would be costly if the warranty were honored in good
12 faith. Possessed of this knowledge, XYZPrinting, Inc. nevertheless offered customers
13 the warranty as an incentive to purchase its defective printer, knowing it had no intent
14 of fulfilling its legal obligations under relevant warranty laws. XYZPrinting, Inc.
15 made these representations with the *intent* the Plaintiff would *rely* on the
16 representations in making the decision to purchase a XYZPrinting, Inc. 3D printer.
17 The Plaintiff *did not know the representations were false*, nor could the Plaintiff have
18 so known. As a matter of law, the Plaintiff had a *right to rely* on the representations
19 and promises which were made by XYZPrinting, Inc.. The Plaintiff *did rely* on
20 promises and representations made by XYZPrinting, Inc. and *consequently suffered*
21 *damages*, which were proximately caused by the fraudulent representations made by
22 XYZPrinting, Inc."

23 The Plaintiff's Common Law Fraud claim is properly pled, and is abundantly
24 supported by facts sufficient to support the claim.

25 In *Haberman v. WPPSS*, 109 Wn..2d 107 (1987), the court ruled in pertinent part as
26 follows:

27 "The complaining party must plead both the elements and circumstances of fraudulent
28 conduct. Applying CR 9(b) in light of CR 8(a), which requires a short and plain
statement of the claim showing that the pleader is entitled to relief, a complaint must
allege specific fraudulent acts, *but need not plead evidentiary matters*... A complaint
adequately alleges fraud if it informs the defendant of who did what, and describes the
fraudulent conduct and mechanisms." (emphasis added, internal quote marks and
citations omitted)

29 The *Haberman* court went on to rule that if the "*complaint gave respondents sufficient*
30 *notice of the allegations to allow them to prepare their answer and defense, we conclude that*
31 *intervenors' complaint satisfies the CR 9(b) particularity requirement as to their fraud*
32 *claims.*"

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3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604

1 The elements of fraud include: (1) representation of an existing fact; (2) materiality; (3)
2 falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be
3 acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the
4 truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the
5 plaintiff. *Stiley v. Block*, 130 Wn. 2d 486 (1996).
6

7 The Defendant does not dispute that all nine elements of fraud are present in the
8 Plaintiff's Complaint. As demonstrated by substantial evidence and as is undisputed by the
9 Defendant, the Defendant represents its printer is covered by a warranty. This representation
10 was a material element in the Plaintiff's decision to purchase the printer. The record and
11 evidence show the Defendant knows its software is defective and that it never had any
12 intention of providing any buyer with the only effective remedy available to cure the defect,
13 which is to refund the purchase price of the printer. As evidenced by the Defendant's own
14 filings in this matter, and as incredible as it might appear to an impartial observer, the
15 Defendant asserts its warranty is not enforceable by those to whom it is made and
16 demonstrates the Defendant never had any intention of honoring the warranty beyond using it
17 as a mechanism for disposing of its apparently large inventory of used, returned, defective
18 printers. Section a) above demonstrates the level of deception the Defendant engaged in
19 regarding its warranty. The Defendant did not merely violate the law, the Defendant
20 abandoned the law altogether. The promises of a warranty and other advertised
21 representations demonstrated in the Earl Declaration at Exhibits E and H show the Defendant
22 expected the Plaintiff to act on its representations. As the Earl Declaration shows, the Plaintiff
23 was unaware any other form of warranty even existed prior to the commencement of this
24 action and had no knowledge the Defendant was selling the Plaintiff a used printer or
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28

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1 providing used printers as warranty replacements. Exhibit A of the Nicholson Declaration
2 states in part: "*Any [warranty] replacement product may be... used*". The Plaintiff did rely
3 on the Defendant's representations and, as shown in Section a) above, has a protected legal
4 right to rely on representations made in regard to consumer product warranties. The Plaintiff
5 suffered damages in excess of \$600 as a result of the Defendant's fraud.
6

7 While the technical requirements of establishing a common law fraud cause of action
8 are frequently difficult to overcome, in the instant case, the Defendant's actions are so blatant
9 that once all the pieces fit into place, the Defendant's fraud is readily apparent to any
10 objective observer viewing the Defendant's actions in retrospect.
11

12 For these reasons, the Court should grant the Plaintiff's motion for summary judgment
13 on the Plaintiff's Common Law Fraud Claim 2.

14 *c) Summary Judgment should be granted on the Plaintiff's Claim 3 RCW 19.86 unfair
15 business practice cause of action.*

16 In 2009, the Washington Legislature amended the Washington Consumer Protection
17 Act at RCW 19.86.093 to specify by law the elements of a CPA claim, which was previously
18 governed only by the common law. This amendment to the Act reads as follows:
19

20 "Civil action — Unfair or deceptive act or practice — Claim elements.

21 In a private action in which an unfair or deceptive act or practice is alleged under
22 RCW 19.86.020, a claimant may establish that the act or practice is injurious to the
23 public interest because it: (1) Violates a statute that incorporates this chapter; (2)
24 Violates a statute that contains a specific legislative declaration of public interest
25 impact; or (3)(a) Injured other persons; (b) had the capacity to injure other persons; or
26 (c) has the capacity to injure other persons."

27 The Plaintiff's Claim 3 reads as follows:

28 "21. Paragraphs 6 through 20 are incorporated by reference as if fully stated
herein.

22. The practice by XYZPrinting, Inc. of reselling refurbished, used, returned
as defective printers as new, without disclosing the true condition of the printers, is an

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(360) 379-6604

1 unfair business practice, as is the practice of selling merchandise known to be
2 defective. Pursuant to RCW 19.86.093(3)(a, b & c), this practice has injured other
3 persons, had the capacity to injure other persons and has the capacity to injure other
4 persons.

5 23. Additionally, pursuant to RCW 19.86.093(2), the practice of selling used
6 printers as new is a per se violation of 15 USC 45, which contains a specific legislative
7 declaration of public interest impact. In an advisory letter published by the Federal Trade
8 Commission on December 20, 2006, the Federal Trade Commission stated in relevant
9 part as follows:

10 "15 U.S.C. tj 45. The Commission has explored the concept of
11 deception under Section 5 in two relevant policy statements.

12 Our analysis begins with the Commission's 1969 Enforcement Policy
13 on Merchandise Which Has Been Subjected to Previous Use on Trial
14 Basis and Subsequently Resold as New. 34 Fed. Reg. 176-77. The 1969
15 Enforcement Policy concerned the then-prevalent business practice of
16 selling, as new, products that previously had been used on a trial basis
17 by prospective purchasers. *Id.* at 176. In that policy statement, the
18 Commission set out the broad principle that deception lies where a
19 marketer "[fails] to disclose material facts relevant to a purchaser's
20 decision to buy or not to buy." *Id.* Because consumers have a
21 preference for new or unused products, the Commission found that
22 prior use was material to the purchase decision. *Id.* The Commission,
23 therefore, concluded that the failure to disclose prior use was unlawful
24 even where returned merchandise had been refurbished to "good as
25 new" condition. *Id.* at 177. The

26 Commission noted, however, that this policy applied only to
27 products that in fact had been "used," as distinguished from products
28 that had "merely been inspected but not used." *Id.*

The Commission provided more specific guidance in its Policy
Statement on Deception, appended to *Clifdale Assocs., Inc.*, 103
F.T.C. 110, 174 (1984). The Commission stated that it will find
deception where a representation, omission or practice is likely to
materially mislead a consumer acting reasonably under the
circumstances. *Id.* at 176. Materiality is a core element of deception. A
misrepresentation or omission is material if it is "likely to affect a
consumer's choice of or conduct regarding the product," and therefore,
injures the consumer who may have otherwise made a different choice.
Id. at 182-83."

24. The Plaintiff has suffered harm as a result of unfair and deceptive practices
in commerce by XYZPrinting, Inc."

It is the Plaintiff's Claim 3 on which the Plaintiff anticipated obtaining discovery prior
to moving for summary judgment. However, in light of the fact the Nicholson Declaration at
Exhibit A admits to providing consumers with used printers under at least some circumstances

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1 and, the fact the Plaintiff is in possession of evidence showing the Defendant's software is
2 universally defective, the Plaintiff will pursue summary judgment on Claim 3 at this time and
3 pursue further discovery if Court deems it necessary obtain additional evidence to substantiate
4 the claim, which the Defendant is currently withholding.

5 In regard to the Defendant selling used printers, it should be noted that when given the
6 opportunity to deny the Defendant sells used printers as new in the Chang Declaration, Mr.
7 Chang declined to do so, instead provided an evasive explanation for how it was "not
8 uncommon" for some (evidently not all) printers to show signs of prior use as a result of
9 "testing".
10

11 The Federal Trade Commission ruling that selling used products as new is a per se
12 unfair business practice under consumer protection act statutes, when not fully disclosed prior
13 to purchase, should apply equally to the practice of providing used printers to consumers as
14 warranty replacements when not fully disclosed prior to sale. As described in detail in Section
15 a) above, the Defendant goes to considerable lengths to prevent consumers from learning of
16 the existence of what amounts to a secret warranty. The so called warranty is buried in a less
17 than intuitive location on the Defendant's website. Specifically, it is located at the bottom of a
18 section labeled "Product Documents" rather than in the section labeled "Product Warranty".
19 The Defendant does not provide a copy of this so called warranty with the product, as it is
20 required by law to do. The kind of full and open disclosure necessary to inform a reasonable
21 person of the undisputed fact that warranty replacement printers may have been subject to
22 hard, prior use is entirely absent. Even if the original printer was in some or all cases a new
23 machine, any warranty replacement subsequently received by the consumer is potentially a
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1 defective machine that has bounced back and forth between many unhappy consumers and the
2 Defendant for years.

3 The second prong of the Plaintiff's Claim 3 is that it is an unfair business practice to
4 offer universally defective printers in commerce because the practice has harmed others, had
5 the capacity to harm others or may harm others. Those consumers not needing the strength of
6 a solidly infilled model might not immediately notice the defect and the defect might not be
7 immediately apparent to others. However, for all consumers in need of a fully functional
8 printer able to print solid models, such as the Plaintiff, it is a defect which renders the printer
9 useless for its intended purpose. The resulting harm is self evident. As all of the Defendant's
10 printers suffer from the same defect, a substantial number of consumers will be injured by the
11 Defendant's practice of selling printers which may be otherwise sound were it not for the fact
12 the software used to control them is fatally flawed.

13
14
15 The Earl Declaration, Exhibit I also shows numerous consumers have been injured
16 by the Defendant's unfair business practices. This evidence is admissible under a variety of
17 provisions of the rules of evidence, including ER 406 which provides as follows:
18

19 "Evidence of the habit of a person or of the routine practice of an organization,
20 whether corroborated or not and regardless of the presence of eyewitnesses, is relevant
21 to prove that the conduct of the person or organization on a particular occasion was in
22 conformity with the habit or routine practice."

23 The Plaintiff also relies on exemptions to the hearsay rule under ER
24 803(a)(1,17&21), which read in relevant part as follows:

25 "The following are not excluded by the hearsay rule, even though the declarant is
26 available as a witness:

27 (1) Present Sense Impression. A statement describing or explaining an event or
28 condition made while the declarant was perceiving the event or condition, or
immediately thereafter...

1 (17) Market Reports, Commercial Publications. Market quotations, tabulations, lists,
2 directories, or other published compilations, generally used and relied upon by the
3 public or by persons in particular occupations...

4 (21) Reputation as to Character. Reputation of a person's character among his
5 associates or in the community."

6 All three of these provisions are applicable. 1. The reviews published on
7 Amazon.com constitute "present sense impressions". 2. It is a common practice among online
8 retailers to publish independent reviews submitted by consumers, with the intent these
9 reviews collectively constitute "*published compilations, generally used and relied upon by the*
10 *public*". 3. These reviews are evidence of the Defendant's character in the community.

11 There are currently over 200 such reviews published on Amazon.com regarding the
12 same printer purchased by the Plaintiff. A significant percentage of these reviews recount
13 experiences similar to those experienced by the Plaintiff, including allegations that the
14 printers received by consumers were used machines and not new, that the Defendant failed to
15 provide remedies under its warranty and that the printers were defective out of the box.

16 For the above reasons, the Court should grant the Plaintiff's Motion for Summary
17 Judgment on the Plaintiff's Claim 3, provide appropriate injunctive relief to stop the
18 Defendant from engaging in unfair business practices and such further relief as is available to
19 the Plaintiff under the Washington Consumer Protection Act.

20 ***d) Summary Judgment should be granted on the Plaintiff's Claim 4 RCW 19.86 unfair***
21 ***business practice for violation of 15 USC, Chapter 50 cause of action.***

22 The Plaintiff's Claim 4 reads as follows:

23 "26. Paragraphs 6 through 25 are incorporated by reference as if fully stated
24 herein.

25 27. XYZPrinting, Inc.'s warranty does not comply with Federal law at 15 USC
26 § 2303(a), as it does not conspicuously disclose whether it is a "full" or "limited"
27 warranty. XYZPrinting, Inc. violated 15 USC § 2304(a) as it refused to provide the
28 Plaintiff with any remedy on receipt of the Plaintiff's notice the replacement printer
was defective. 15 USC §2302(a) expresses a legislative intent of a public interest in

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3090 Discovery Road
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(360) 379-6604

1 preventing deceptive warranty practices in commerce. Additionally, XYZPrinting,
2 Inc.'s unfair and deceptive warranty violations in commerce have harmed others, have
3 had the capacity to harm others and have the capacity to harm others in the future. The
4 Plaintiff has suffered harm as a result of XYZPrinting, Inc.'s unfair and deceptive
5 practices in commerce."

6 15 USC § 2310(b) provides as follows: "*It shall be a violation of section 45(a)(1) of*
7 *this title for any person to fail to comply with any requirement imposed on such person by*
8 *this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or*
9 *a rule thereunder).*"

10 15 USC § 45(a)(1) provides as follows: "*Unfair methods of competition in or*
11 *affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are*
12 *hereby declared unlawful.*"

13 The language contained in Washington's RCW 19.86.020 is nearly identical to its
14 Federal counterpart at 15 USC § 45(a)(1) and reads as follows: "*Unfair methods of*
15 *competition and unfair or deceptive acts or practices in the conduct of any trade or*
16 *commerce are hereby declared unlawful.*"

17 RCW 19.86.093(2) provides as follows: "*In a private action in which an unfair or*
18 *deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the*
19 *act or practice is injurious to the public interest because it: (2) Violates a statute that*
20 *contains a specific legislative declaration of public interest impact*". (emphasis added)
21

22 As the Magnusson Moss Warranty Act contains *a specific legislative declaration of*
23 *public interest impact*, under the plain language of Washington law, violations of the Act
24 constitute a per se violation of RCW 19.86.
25

26 The Plaintiff's Claim 4 is pled in the alternate under RCW 19.86.093(3)(a,b & c)
27 which provides as follows: "*In a private action in which an unfair or deceptive act or practice*
28

1 is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious
2 to the public interest because it: (3)(a) Injured other persons; (b) had the capacity to injure
3 other persons; or (c) has the capacity to injure other persons.”

4 Under any of these provisions, the numerous violations of the Magnusson Moss
5 Warranty Act demonstrated in Section a) above, incorporated by reference in this Section,
6 constitutes a violation of RCW 19.86.020 and creates a private right of action under the
7 provisions of RCW 19.86.090, which reads in pertinent part as follows:
8

9 “Any person who is injured in his or her business or property by a violation of RCW
10 19.86.020,.. may bring a civil action in superior court to enjoin further violations, to
11 recover the actual damages sustained by him or her, or both, together with the costs of
12 the suit, including a reasonable attorney's fee. In addition, the court may, in its
13 discretion, increase the award of damages up to an amount not to exceed three times
14 the actual damages sustained: PROVIDED, That such increased damage award for
15 violation of RCW 19.86.020 may not exceed twenty-five thousand dollars.”

16 For the above reasons, the Court should grant the Plaintiff's Motion for Summary
17 Judgment on the Plaintiff's Claim 4, provide appropriate injunctive relief to stop the
18 Defendant from engaging in unfair business practices and, such further relief as is available to
19 the Plaintiff under the Washington Consumer Protection Act.

20 5. CONCLUSION

21 For the above reasons, the Plaintiff, Donald R. Earl, respectfully requests the Court
22 grant the Plaintiff's Motion for Summary Judgment on Plaintiff's claims 1-4, award triple
23 damages, order appropriate injunctive relief, plus costs as allowed by law.

24 Dated: September 18, 2014
25 Respectfully submitted by:



26 Donald R. Earl (pro se)
27 3090 Discovery Road
28 Port Townsend, WA 98368
(360) 379-6604

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3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604

RCW 2.08.150

Visiting judge at request of judge or judges.

Whenever a like request shall be addressed by the judge, or by a majority of the judges (if there be more than one) of the superior court of any county to the superior judge of any other county, he or she is hereby empowered, if he or she deem it consistent with the state of judicial business in the county or counties whereof he or she is a superior judge (and in such case it shall be his or her duty to comply with such request), to hold a session of the superior court of the county the judge or judges whereof shall have made such request, at the seat of judicial business of such county, in such quarters as shall be provided for such session by the board of county commissioners, and during such period as shall have been specified in the request, or such shorter period as he or she may deem necessary by the state of judicial business in the county or counties whereof he or she is a superior judge.

[2011 c 336 § 16; 1893 c 43 § 2; RRS § 28. Prior: 1890 p 343 § 10.]

RCW 2.28.030

Judicial officer defined—When disqualified.

A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he or she is a member in any of the following cases:

- (1) In an action, suit, or proceeding to which he or she is a party, or in which he or she is directly interested.
- (2) When he or she was not present and sitting as a member of the court at the hearing of a matter submitted for its decision.
- (3) When he or she is related to either party by consanguinity or affinity within the third degree. The degree shall be ascertained and computed by ascending from the judge to the common ancestor and descending to the party, counting a degree for each person in both lines, including the judge and party and excluding the common ancestor.
- (4) When he or she has been attorney in the action, suit, or proceeding in question for either party; but this section does not apply to an application to change the place of trial, or the regulation of the order of business in court.

In the cases specified in subsections (3) and (4) of this section, the disqualification may be waived by the parties, and except in the supreme court and the court of appeals shall be deemed to be waived unless an application for a change of the place of trial be made as provided by law.

[2011 c 336 § 39; 1971 c 81 § 11; 1895 c 39 § 1; 1891 c 54 § 3; RRS § 54.]