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Case No. 93598-0

SUPREME COURT OF THE STATE OF WASHINGTON

Donald R. Earl (Appellant)

v.

XYZPrinting, Inc. (Respondent)

APPELLANT'S REPLY TO PETITION FOR REVIEW ANSWER

Donald R. Earl (pro se)
3090 Discovery Road
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(360) 379-6604
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 ORIGINAL

TABLE OF CONTENTS

A. *IDENTITY OF PETITIONER*..... 1

B. *SUMMARY OF RELEVANT FACTS* 1

C. *REPLY*2

*1. Counsel for XYZPrinting, Inc. misapprehends
the Rules of Appellate Procedure* 2

D. *CONCLUSION*..... 4

CERTIFICATE OF SERVICE..... 5

TABLE OF AUTHORITIES

RAP 13.5(b) 3

1 **A. IDENTITY OF PETITIONER**

2 The Appellant, Donald R. Earl, hereby replies to Respondent,
3 XYZPrinting, Inc.'s Answer, regarding applicable rules of appellate
4 procedure.

5 **B. SUMMARY OF RELEVANT FACTS**

6 Both parties filed motions for summary judgment in the trial court,
7 which were scheduled to be heard by a visiting judge from Clallam
8 County Superior Court.

9 On the day of the hearing, no judge was present in the courtroom.
10 A voice alleged to be that of Clallam County Superior Court Judge Melly
11 could be heard over the court's speaker system. Judge Melly allowed ten
12 minutes for the Defendant, XYZPrinting, Inc. to present its summary
13 judgment motion and allowed Mr. Earl ten minutes to respond. Judge
14 Melly did not allow Mr. Earl time to present argument on his own motion
15 for summary judgment. Without making any findings of fact or
16 conclusions of law, Judge Melly granted summary judgment in favor of
17 XYZPrinting, Inc. and ruled that Mr. Earl would be required to pay costs
18 if Mr. Earl declined to accept a settlement proposed by Judge Melly.

19 Mr. Earl filed a motion for reconsideration of Judge Melly's
20 decision and briefed the court in detail on the grounds supporting a finding
21 that Judge Melly's decision was void because he was not present in the
22 courtroom, as required by law. In an unsigned memorandum opinion,
23 Judge Melly stated he had authority to preside over motion hearings, at his

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1 discretion, by phone, without his being physically present in the
2 courtroom.

3 Kitsap County Superior Court Visiting Judge Olsen, without
4 making any findings of fact or conclusions of law, subsequently ordered
5 Mr. Earl to pay in excess of \$25,000 in sanctions because Mr. Earl
6 declined to settle the case on Judge Melly's settlement proposal terms.

7 On appeal, the Court of Appeals refused to consider the issues
8 related to the void judgment, in conflict with settled law, ruling Mr. Earl
9 should have done more in the trial court to preserve the issue. The Court
10 of Appeals also refused to conduct de novo review of summary judgment.
11 To date, no court has made any findings of fact or conclusions of law to
12 support the decision to enter summary judgment against Mr. Earl.

13 The Court of Appeals entered an interlocutory decision, remanding
14 the case to the trial court for further proceedings on the issue of sanctions.

15 In its Answer, XYZPrinting, Inc. argues Mr. Earl failed to follow
16 the Rules of Appellate Procedure on his petition for review. XYZPrinting,
17 Inc.'s Answer does not cite a single case to support any of its arguments.

18 **C. REPLY**

19
20 **1. Counsel for XYZPrinting, Inc. misapprehends the Rules of
Appellate Procedure.**

21 XYZPrinting, Inc. incorrectly argues Mr. Earl failed to comply
22 with the provisions of RAP 13.4(b)

23 At page 17 of the Court of Appeals' unpublished opinion, the court
24 stated at the second to last paragraph as follows:

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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.*” (Emphasis added)

As the Court of Appeals remanded the case to the trial court for further proceedings, the decision is interlocutory.

Mr. Earl correctly followed the procedures governing discretionary review of an interlocutory decision under RAP 13.5(b). XYZPrinting, Inc.’s argument to the contrary, RAP 13.4(b) is not the applicable rule in this circumstance. Because the decision of the Court of Appeals is interlocutory in nature, RAP 13.5(b) is the applicable standard on which to seek discretionary review by this Court.

RAP 13.5(b) provides as follows:

- “(b) Considerations Governing Acceptance of Review.
Discretionary review of an *interlocutory* decision of the Court of Appeals will be accepted by the Supreme Court only:
- (1) If the Court of Appeals has committed an obvious error which would render further proceedings useless; or
 - (2) If the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
 - (3) If the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.”
- (Emphasis added)

1 XYZPrinting, Inc.'s arguments are without merit, are unsupported
2 by authority, are nonresponsive to the issues and arguments raised in the
3 Appellant's Petition for Discretionary Review and lack any meritorious
4 basis in fact or law.

5 Discretionary review should be granted for the reasons stated in the
6 Appellant's Petition for Discretionary Review, because the Court of
7 Appeals' review of the case constituted an unprecedented departure from
8 the ordinary course of due process in Washington State and, no useful
9 purpose would be served by forcing the parties to incur further time and
10 expense litigating matters in the courts below without first deciding the
11 core issues presented for this Court's consideration.
12

13 **D. CONCLUSION**

14 This Court should accept review for the reasons indicated in Part E
15 of the Appellant's Petition for Discretionary Review and vacate all orders
16 entered in the trial court, or in the alternate, conduct de novo review of
17 Mr. Earl's motion for summary judgment and enter judgment in Mr. Earl's
18 favor. This Court should also allow Mr. Earl costs and fees on appeal.
19

20 Dated: September 27, 2016
21 Respectfully submitted by:

s// Donald R. Earl

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CERTIFICATE OF SERVICE

1
2 I, Donald R. Earl, in compliance with RAP 5.4(b), hereby certify
3 that on the 27th day of September, 2016, pursuant to the parties' mutual
4 agreement to accept service of documents by electronic mail, I sent a copy
5 of "*APPELLANT'S REPLY TO PETITION FOR REVIEW ANSWER*"
6 addressed to XYZPrinting, Inc.'s counsel of record, Virginia Nicholson, at
7 the following email address: vnicholson@schwabe.com

8 Dated: September 27, 2016

9 Respectfully submitted by:

s// Donald R. Earl

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OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, September 27, 2016 8:55 AM
To: 'Don Earl'; 'Williams, Mary A.'
Cc: Greenfield, Troy D.; Nicholson, Virginia R.
Subject: RE: Supreme Court No. 93598-0 --- Reply to Petition for Review Answer

Received 9/27/16.

Supreme Court Clerk's Office

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From: Don Earl [mailto:don.earl@olypen.com]
Sent: Tuesday, September 27, 2016 12:17 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; 'Williams, Mary A.' <MAWilliams@SCHWABE.com>
Cc: Greenfield, Troy D. <TGreenfield@SCHWABE.com>; Nicholson, Virginia R. <VNicholson@SCHWABE.com>
Subject: Re: Supreme Court No. 93598-0 --- Reply to Petition for Review Answer

To the Clerk of the Court and to counsel:

Please see the attached APPELLANT'S REPLY TO PETITION FOR REVIEW ANSWER to be filed on today's date.