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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

CHERI ROLLINS,

Appellant,

vs.

BOMBARDIER RECREATIONAL PRODUCTS, a Canadian corporation,

Respondent.

APPELLANT'S REPLY BRIEF

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1. Settlement agreement.

2. Judgment.

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1. OVERVIEW

BRP cites not a single case holding anything but a Statute or Regulation gives rise to a conflict of law preempting State law. BRP relies on reversed authority and misstates case law relying on syntax artifacts where opinions use "action" and "standard" as pronouns referring to standards or actions codified in an actual Regulation already cited in the cases.

BRP fails to disclose it obtained an Order on an old agreement, no longer in effect. BRP misstates the relief it sought, was granted, and also ignores its arguments of an "alternate ground" for dismissal require the agreement be in effect and enforced. BRP cannot have it both ways: it cannot move for and obtain an order invalidating the agreement then make arguments that can have merit only if the agreement is enforced.

2. FACTS

Appellant originally conceded the facts of loss are not material other than for context. Cheri will not respond to BRP's counter facts. BRP errs appellant did not cite the record. The facts cited are from Cheri's expert; his declaration is cited at the end of each fact paragraph.

Regarding the letter exemption, BRP describes the supposedly 'thoughtful' process the USCG went through writing it. If the letter may give rise to preemption that is no less true if poorly thought. Conversely, if insufficient it cannot preempt all 50 States' Rights because the single person writing it thought really hard first.

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3. ARGUMENT

A. BRP Has Not Demonstrated Preemption

i. BRP Has Abandoned Field Preemption

BRP's response is one paragraph at p. 39 citing a definition of field preemption. BRP ignores Sprietsma v. Mercury Marine, 537 US 51 (2002) and Becker v. US Marine, 88 Wn.App. 103 (1997) holding the FBSA does not occupy the field. That is fatal given the cases and arguments BRP relies on.

ii. BRP's Response Requires Finding "Action" Short Of Regulation Creates Preemption

a. OVERVIEW

State liability for no powered ventilation contradicts neither a Statute or Regulation passed in accord with the APA. BRP cites none. BRP's argument is mere "action" by an agency preempt States Rights. That fails for two reasons: (1) The citations relied on used "action" and "standards" as pronouns for specific Regulations cited elsewhere in the opinions. (2) To the extent BRP found a case implying action is sufficient, BRP ignores it has been reversed.

Cheri provided substantial authority only Regulation, passed under the APA, published in the CFR gives rise to preemption. BRP all but ignored those cases. Cheri need not repeat herself here.

b. NOT ONE OF BRP'S CASES HOLDS ACTION WITHOUT REGULATION CREATES PREEMPTION

BRP at p.10 asserts City of New York v. FCC, 486 US 57 (1988) held mere "action by federal agencies...is afforded the same preemptive power over conflicting state laws or regulations." It did not hold that.

The case was clear what BRP calls "standards" and "actions" were codified Regulations. 486 US at 59. ("The Federal Communications Commission has adopted regulations that establish technical standards...") 486 US at 61. ("The commission promulgated regulations that would establish technical standards..."). Every "action" or "standard" was codified as a Regulation. Preemption arose out of those Regulations; not standards or actions standing alone.

New York also demonstrates the import of the FBSA not occupying the field. The case explained "Congress authorized the Commission to regulate all aspects of interstate communication by wire or radio..." Id. at 60. Implementing that, the FCC passed a Regulation stating "its intent to exercise exclusive authority in this area and to preempt state and local regulation." Id. at 65. The combination of Congresses' stated intention the FCC regulate all aspects of broadcast standards and the agency's passage of Regulations doing so, led the Court to conclude the "field" of Regulation was occupied so an absence of Regulation might express an intention there be no regulation. Id. at 60. (The FCC became convinced the need for "uniformity in cable television technical standards... would require it to preempt the field of signal quality regulation..." (underlined added). That is unlike the FBSA.

Cited with no dispute, Congress did not intend or empower DOT via the FBSA to regulate all aspects of boating equipment. Sprietsma, 537 US at 57 and 68. That is clear by Congress's limiting Regulation to 10 areas and using the word "may," DOT may – but need not – regulate anything. Id. and 46 USC 4302. Further, unlike New York the USCG did not pass a Regulation

indicating an intention to be the sole authority. It could not if it wanted; Congress did not delegate that power. Sprietsma held the FBSA does not occupy the field but only when the field is occupied may a lack of regulation be considered an intent there be none.

At p. 13 BRP asserts Cheri's argument preemption only arises from laws or Regulations "is directly refuted by Congress's intent as manifested through the plain language of the FBSA." BRP cites no Statute or authority. It cites "House Notes" saying "in lieu of establishing specific statutory safety requirements, subsection (a) provides flexible regulatory authority to establish uniform standards." BRP relies on similar Notes throughout its brief. They do not obviate the requirement of a Regulation for four independent reasons.

First, New York shows this is an artifact of syntax. Although "standard" may be said, what is required is a standard expressed by Regulation. New York, 486 US at 60 and APA. A Note cannot override the Supremacy Clause and the APA.

Second, BRP confuses an agency's ability to police conduct, with its ability to preempt all 50 States' laws. An Agency may establish rules called standards. But, it was not BRP's task to prove a rule or standard existed. It was to prove preemption laid. BRP ignored the greater concept: Federalism versus States' rights. Only a conflict of law gives rise to preemption. BRP's ignores the warning of Fellner v. Tri-Union Seafoods, LLC, 539 F.3d 237 (3rd Cir. 2008) cited in the opening brief:

> [L]est the analysis become unmoored, that it is federal *law* which preempts contrary state law; nothing short of federal law can have that effect. The Supreme Court's longstanding interpretation of the Supremacy Clause, and indeed the

Supremacy Clause itself, mandate this principle.

Id. at 243.

Third, citation to a Note is meaningless as the FBSA's language requires no interpretation: only state laws not "identical to a Regulation prescribed under section 4302" are preempted. 46 USC 4306. A letter is not a Regulation; Congress said only conflicts with Regulations are preempted. It is an established rule a "Court will not allow an isolated a statement in (a) House Report to undermine the legislative intent unambiguously expressed by the statute's plain language." Perez-Olano v. Gonzales, 248 FRD 248, 265 (Cal. 2008) (citing Exxon Mobil v. Allapattah Services, 454 US 546, 577 (2005) (rejecting attempts to "amend a statute through a committee report.")

Fourth, on the merits BRP stretches the Note beyond all bounds. Saying the USCG could pass "standards" "in lieu of... specific statutory safety requirements" only explained the USCG need not micro-design every boat. For example, it need not pass Regulations for "specific requirements" of blowers saying how much air they must move. It could establish by Regulation a "standard" blowers are required, leaving it to manufacturers to determine the correct one given the boat produced.

Related to this, at p. 19 BRP cites Gracia v. Volvo, 112 F.3d 291 (7th Cir. 1997) arguing Gracia found NHTSA's "decision to issue an exemption... constituted an authoritative federal determination with as much preemptive force as a decision to regulate." (p. 19). BRP wants this Court to conclude the act of any mere "exemption" creates preemption. BRP misstates authority; Gracia did not hold that.

Gracia explained NHTSA issued no mere exemption; it passed a Regulation at 49 CFR 571.212(3) stating plaintiff's truck need not comply with a windshield Regulation. That had the effect in lay terms of exempting the manufacturer from the Regulation but preemption was found because of the conflict of law created by the Regulation; not because of an agency (in BRP's words) "action" to issue an exemption. Id. at 296.

At p. 31 BRP asserts because exemptions are a part of the FBSA, an exemption under it is "part and parcel of the FBSA" so any action taken under it has the force of law. That argument relies on a block quote of Fellner. In isolation at p. 32 of BRP's brief, the quote interesting. But, Fellner cited Colacicco v. Apotex, Inc., 531 F.3d 253, 271 (3rd Cir. 2008) as authority for the quote BRP relies on: **Colacicco was explicitly reversed and vacated,** 556 US 1101 (2009), with an instruction for proceedings "in light of" Wyeth v. Levine, 555 US 555 (2009). BRP ignores the quote it relies on has been reversed and cites not one case post Wyeth for the proposition.

Wyeth rejects BRP's contention actions or orders short of Regulation have preemptive effect; it repudiates all of BRP's arguments. Wyeth involved the FDA and liability under state law; plaintiff alleged a drug did not have sufficient label warnings. Id. at 560. The manufacturer sought dismissal arguing its label's content was Ordered by the FDA therefore State liability requiring additional warning was preempted.

The manufacturer showed it submitted its label to the FDA in accord with Regulatory requirements. Id. at 561. As BRP argues it worked with and followed the direction of the USCG over a period of years, in Wyeth the

manufacturer showed that over "17 years" it followed the FDA's Orders (actual Orders, contrasted with the mere letter BRP asked for) over the content of its label. As time passed, the FDA Ordered the manufacturer "to retain verbiage in the current label." Id. Later, the FDA by its Regulatory process "instructed (the defendant manufacturer's) printed label must be identical to the approved package insert." Id. at 562. That was the label plaintiff sued over. Id.

Wyeth framed the issue essentially identically to that here:

> The question presented by the petition is whether... (Federal agency) judgments... preempt state law product liability premised on the theory that different... judgments (than that made by the Federal agency) were necessary to make (the product) reasonably safe for use.

Id. at 563. The Court concluded there was no preemption.

As BRP does, the manufacturer argued "it would have been impossible to comply with the state-law duty to modify" the item (there a label, here a blower) "without violating federal law" (there the FDA's Order on the label content and here BRP's letter on blowers) Id. Also as BRP does, the manufacturer argued state liability "creates an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. There, the judgment of the FDA on the label labels and here the judgment of the USCG on boating.

Wyeth affirmed the presumption of no preemption absent "the clear and manifest purpose of Congress" to do so. Id. at 565. That is required because "respect for the State as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly preempt state law causes of action." Id.

The Court acknowledged the longstanding, sweeping authority of the FDA granted by Congress since in 1906 to "regulate... drugs and drug labeling." Id. at 566-567. But, Congress held manufacturers responsible for the safe content of labels and to change them if reasonable as time passed. Id. at 568. Thus, as only one basis for denying preemption (there were two) Wyeth held the manufacturer could not assert preemption merely because the FDA Ordered the label read a certain way. Id. at 570.

First, the Supreme Court scoffed at the notion, argued repeatedly by BRP, a Federal Agency would take action against a manufacturer for making its product safer:

> ...The very idea that the FDA would bring enforcement action against a manufacturer for strengthening a warning pursuant to the... regulation is difficult to accept.

Id. The Court noted the manufacturer, like BRP, identified no case where that happened. Id.

The Court addressed BRP's argument a Federal Agency requiring something for safety means all state law that may make a product more safe is preempted is "premised on a more fundamental misunderstanding" that following a Federal Regulation (not present here) means something is safe. That is particularly true where, as in the FBSA, Congress stated the FBSA's intention was only to provide "minimum" safety standards, Sprietsma, 537 US at 57, and under the FBSA the manufacturer bears ultimate responsibility for the safety of its product. See 42 USC 4311(g).

Also like BRP, in Wyeth the manufacturer argued the FDA's federal Regulatory scheme created a safety ceiling and state liability contrary to those

requirements interfered with Congresses' intention to entrust the Agency "to make... decisions that strike a balance between competing objectives." Id. at 573. Rejecting that, Wyeth recognized (as under the FBSA with boats) "Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs..." Id. That illustrated Congress's belief "that widely available state rights of action provided appropriate relief for injured consumers." Id. It also constituted recognition "that state law remedies further consumer protection by motivating manufacturers to produce safe and effective" products. Id.

The second reason Wyeth rejected preemption explicitly repudiates BRP's argument action short of Regulation may give rise to preemption. As BRP argues at p. 31, the manufacturer in Wyeth tried to ride the coattails of Regulations, arguing because FDA Orders on label content are done under a process set up by law, the Orders themselves are equivalent to law giving rise to preemption. The manufacturer pointed to the Regulation's "preamble" stating "FDA approval of labeling preempts conflicting or contrary State law" and any state action "threatened FDA's statutorily prescribed role as the expert federal agency responsible for evaluating and regulating" in that area. Id. at 575.

First, the Court rejected the notion an agency's Order is, or has the force of law, simply because it is issued under a process set up by law. Id. **Second**, although the FDA passed its Regulations with proper notice (under the APA), the preamble relied on was made "without offering states or other interested parties notice or opportunity for comment." Id. at 577. It did not

meet the APA; it was not a proper Regulation itself. Given that, the Agency's unilateral statement was "inherently suspect in light of this procedural failure." Id. The Court also found the statement at odds with the language of Congress indicating a decision "not to preempt common-law tort suits," exactly as the FBSA's Savings Clause states.

If in Wyeth an Agency pronouncement directly on point, dressed up as a Regulation, published in the CFR, cannot give rise to preemption for failing to comply with the APA, it is exceedingly without merit for BRP to argue its letter that cannot even claim that pretense does.

Wyeth discusses Geier v. American Honda Motor Corp., 529 US 861 (2000); BRP claims Cheri wrongly cited it. Wyeth's reading of Geier follows Cheri's, not BRP's. Wyeth held it was DOT's "formal rulemaking," adopting airbag Regulations preserving choice that created preemption in Geier. Wyeth, 555 US at 580. Regulation was required.

Finally on Wyeth, punctuating the rejection of BRP's argument that anything less than an actual Regulation suffices:

> [W]e have no occasion in this case to consider the pre-emptive effect of a specific agency regulation bearing the force of law. And the FDA's newfound opinion, expressed in its 2006 preamble, that state law "frustrate[s] the agency's implementation of its statutory mandate," 71 Fed.Reg. 3934, does not merit deference for the reasons we have explained.

Id. at 580. None of the FDA's "actions" were sufficient. With no "specific agency Regulation bearing the force of law" "to consider," preemption does not even get out of the gate. Id.

Cheri need not address BRP's other authority; she did that in her opening brief. Not only is any implication action short of Regulation gives rise to preemption rejected by Wyeth, BRP's cases do not hold that. As one example, BRP's citation to Chicago & North Western Transp. v. Kalo, 450 US 311 (1981) bears mentioning again as BRP relies on it so heavily.

BRP asserts at p. 34 Chicago found preemption merely because of an Agency's "finding" that "was not codified as a regulation and was not published in the Federal register as appellant claims must occur for preemption to lie." However, Chicago did not find preemption because of an Agency's finding; it was because the state law relied on by plaintiff regarding the closure of a railroad line conflicted "the Interstate Commerce Act (which) is among the most pervasive and comprehensive of federal regulatory schemes." Id. at 318. Asserting its authority over Railroads, Congress passed the Interstate Commerce Act (a Statute), id. at 320, that conferred (unlike the USCG under the FBSA) "exclusive and plenary" power to the Interstate Commerce Commission to decide when and how rail lines should be closed, enacting a Statute that once the Agency made its decision "under the statute, it is not a matter for judicial redicision." Id. at 321. In Chicago state liability for closing a rail line conflicted with both the Interstate Commerce Act and Congressional "intent to limit judicial interference with the agency's work." The Court also noted that Act "spells out with considerable precision the remedies available" before the Agency when a person is "injured" by a Commission decision and that the Act provided "no provision... for a civil damages action." Id. at 321-322. That is unlike the FBSA and Wyeth that found no administrative Agency

remedy along with a preservation (through the FBSA Savings Clause) of civil tort remedies evidences an intention to not preempt state tort law.

BRP's attempt to distinguish Wabash Valley Power v. REA, 903 F.2d 445 (7th Cir. 1990) fails for the same flaw: BRP ignores the holding and fly specks sentences.

Related, BRP argues at p. 36 an Agency's decision "not to take any regulatory action whatsoever" constitutes preemption. BRP attempts to distinguish Spritesma asserting propeller guards were "not regulated at all therefore, there was no conflict." BRP asserts that is unlike this case where, according to BRP "the Coast Guard has extensively regulated the area of ventilation on boats and PWC's establishing – through exemption - that PWC's must be designed without a powered ventilation system." That argument fails for two independent reasons.

First, the factual premise is false. BRP misrepresents that propeller guards were never on the USCG's radar and that was why failure to regulate could not be seen to preemption State regulation. Spritesma was clear the USCG did consider whether to require them but passed no Regulation either way. This is where BRP's failure to prevail on field preemption becomes fatal.

Spritesma found the decision to pass no Regulation on guards could not be viewed as a decision there shall be no State law because the FBSA does not occupy the field of regulation. Spritesma, supra. at 68. Only when the full field is occupied may the decision not to Regulate be considered a finding there shall be no law (State or Federal). Id.and New York. Because the FBSA does not occupy the field, State liability arising out of an area of no Regulation implies

no conflict. Spritesma. Folsom v. Kawaski Motors, 509 F.Supp. 1364, 1373 (GA 2007) reached the same result finding preemption for liability regarding PWC throttles could not be implied by USCG's decision not to regulate them.

Second, BRP's assertion is false the USCG has "extensively regulated" "through exemption – that PWCs must be designed without a powered ventilation system." Cheri defies BRP to identify the Regulation. There is none. Not even its letter says that. The FBSA empowers the USCG to pass Regulations both requiring and prohibiting equipment. Its failure to pass a Regulation prohibiting PWC blowers cannot be ignored.

Related, BRP argues at p. 16 it could not use powered ventilation in the face of its letter without prior USCG approval. It does that to bolster its argument it could not comply with state liability for not having a blower and its USCG letter *supposedly* not allowing one. **First,** the letter simply does not say what BRP says. CP 300-301. Nothing in it prohibits BRP using powered ventilation or that BRP must have leave of the USCG to do so thereafter. **Second,** the Supreme Court in Wyeth rejected as a matter of law the notion a manufacturer would be held to administratively answer for making its product more safe. Wyeth, supra. at 570. **Third,** as in Wyeth with the FDA, under the FBSA the ultimate responsibility for designing a safe product is BRP's so even if it had to ask for permission to use a blower that was its duty; liability for not asking is not preempted. Finally **fourth,** BRP's sole support for this factual contention is not from the FBSA, Regulation, much less its letter. BRP cites at CP 1748 the Federal Register where the USCG provided a layperson cheat sheet of "descriptions" of the FBSA "to assist interested persons with providing

helpful comments..." on Regulations the USCG was considering but never passed.[1] As inadequate as the agency statement relied on by the manufacturer in Wyeth was that did not support preemption because it was not APA vetted it was at least in a Regulation, BRP's citation is even weaker.

At p. 37 BRP tries to sidestep the requirement of Regulation by asserting through an aside the Regulation here was "through the exemption." But, as discussed elsewhere that letter is not a Regulation.

At p. 38 BRP makes a statement Cheri does not disagree with; BRP cites Spreitsma referring to its discussion of the FBSA's Saving's Clause indicating "state common law" claims are preempted where they "directly conflict with a Federal Regulation..." State liability here conflicts with no "Federal Regulation." The "Federal Regulation" requires blowers. Liability at best only conflicts BRP's letter; but even that is no conflict because the letter does not prohibit the use of blowers.

Between pp. 28-30 BRP makes an argument – not found in any case law – that because its letter is "formatted in the style of an Order" it should be given preemptive effect. That requires no response. If a Federal employee or agency can preempt 50 States' Rights by "formatting," attaching a fancy "heading," and assigning "an official number," there is no such thing as States' Rights. Either the USCG complied with the Supremacy Clause and the APA or not. If it did, it matters not if the text was neatly formatted. Conversely, that

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1 This was highlighted in the opening brief. This Federal Register demonstrates the USCG considered passing regulations that might have created a preemptive effect to exemptions such as BRP. It never passed those regulations. What more need be said that BRP's letter does not give rise to preemption when the USCG started the process to pass Regulations to do so, but decided not to.

the letter was on letterhead and purportedly given a lot of thought is of no weight.

iii. BRP's Reliance On WACs Is Misplaced

Between pages 41-45 BRP asserts summary judgment should be affirmed because its design "complies" with the USCG "standard" and "identical Washington State law." **First**, that is an argument on the merits; that compliance with law is a defense to an unsafe design claim. BRP did not make an argument on the merits, it moved based on preemption. **Second**, it requires finding BRP's letter is a law. It is not. **Third**, the FBSA, Savings Clause, and Sprietsma are clear compliance with the FBSA is no defense to liability. Nor is there an exclusive remedy under the FBSA, unlike the Interstate Commerce Act discussed in Chicago.

Moving past that, BRP's argument is incomprehensible. WAC 352-60-050 referencing the FBSA adds nothing to BRP's preemption argument. BRP asserts the WAC contains a "catch-all" "that a vessel may have any type of ventilation system allowable by the Coast Guard." (p. 42). That is not what it says.

The WAC BRP cites only says craft must "be open to the atmosphere, or be ventilated by a natural ventilation system and a mechanical exhaust blower system as required by the federal boat safety act of 1971, as amended, and applicable federal regulations." The PWC is not "open to the atmosphere" and does not have a "mechanical exhaust blower system." The FBSA requires powered ventilation; by BRP's logic so does the WAC. BRP's letter does not

"amend" the "federal regulation."[2]

Between pp. 43-44 BRP argues "Washington's statutory scheme for recreational vessels defers to the Coast Guard federal scheme." Again, BRP cites the WACs and RCWs but ignores each time the language it cites says only Washington will defer to "United States Coast Guard Regulations." RCW 79A.05.310. BRP's letter is not a "Regulation." Without authority BRP asserts at p. 44 the WACs and RCWs "create a statutory scheme that requires absolute deference and strict consistency between state boating safety requirements and Coast Guard regulations, standards, and precedents." There is nothing in any WAC or RCW requiring "absolute deference and strict consistency" with the USCG. But even if true, BRP again ignores where some deference is given it is only as to "United States Coast Guard Regulations." See RCW 79A.05.310.

To the extent BRP relies on one line from RCW 79A.05.310 to the "Parks and Recreation Commission," arguing its Exemption letter "at the very least constitutes a standard or precedent," that is seen for the overreaching it is. **First,** that statute is not a boating regulation. It is a generic charging statute that the agency consider and pass Regulations – it is not a Regulation itself. The Regulation passed, cited but exaggerated by BRP, is WAC 352-60-050; it indicates an intention to have rules consistent with Federal "Regulations." BRP cites no authority indicating Washington has passed a law bending to the will of every letter written by every Federal Bureaucrat. **Second**, given the case law above not even the US government would read BRP's letter as a legal "standard." It is odd to assert Washington should give the letter more weight.

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[2] Cheri does not rely on, and has never alleged, a violation of the WAC or FBSA as a basis of liability. She pled the Products Liability Act only.

Third, BRP cites no authority the Legislature telling the Commission to adopt recreational rules consistent with USCG Regulations displaces the whole of the Products Liability Scheme in this State. Not only does BRP cite no authority, it defies statutory construction that a more specific statute controls over a general one. Waste Mgt.of Seattle v. Utilities and Transp. Comm., 123 Wn.2d 621, 630 (1994). Here, Washington's Products Liability Act is a detailed statutory scheme to protect Washington citizens against defective products. It is a specific statute applicable to this situation and BRP's manufacture of PWCs as compared to a general charging statute to the Department of Parks and Recreation. **Fourth,** to the extent it has any application it creates no more a defense than the FBSA itself. Cited above, the FBSA rejects compliance constitutes a defense. It is odd to assert the WAC follows the FBSA but provides manufacturers even more immunity.

B. The Order Regarding Settlement Does Not Provide "An Alternate Ground" To Affirm Dismissal

i. FACTS

Immediately BRP starts by misrepresenting the agreement as an "assignment" of Cheri's "personal injury claim." Its argument requires that falsity because only an assignment of a claim allows argument this is an 'impermissible indemnification action.'[3]

The agreement was clear; it did not assign the claim. In exchange for the Long's payment, Cheri assigned future proceeds but not her claims. CP 2567. The agreement in essence established a loan receipt agreement.

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[3] At p. 5 BRP purports to set forth the terms of the agreement; it does so with a colon, then hard indents and single spaces to create the appearance what is typed is actually from the agreement. It is not.

Second, the "agreement" BRP filed a motion and the Court ruled on ***is not even Cheri's and her parents' agreement.*** Although it was believed BRP's motion was without merit, if for no reason other than to deny BRP any argument, Cheri worked on a new agreement removing each provision BRP complained was not appropriate. VRP, 12/20/13, p. 12. BRP objected to the Court even knowing that. Id. at p. 18. The Court indicated it would not consider it. Id. The Court made its oral rulings but entered no Order.[4] Cheri continued to finalize new language; because she was represented by different counsel there was a lag exchanging signatures. The Longs' payment constituted their ratification. (Appendix). The new agreement struck all provisions the Court orally said were (albeit in error) inappropriate. It affirms a loan-receipt agreement, Cheri assigned no claims (*nor did the original*). She conceded no control regarding litigation decisions. It assigned limited proceeds; the balance went her. Given the $7 million dollar judgment entered,[5] the assignment was minimal. (Appendix). It is a plain vanilla loan-receipt agreement.

When BRP later presented its Order, the Court indicated its understanding the Order entered was not on the parties' actual agreement and he was only entering an Order on the prior agreement. VRP 01.10.14, p. 12-13. An order on what the Court knew was not the final agreement was entered.

BRP misrepresents both the Trial Court's oral comments and the content of the written Order.

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[4] BRP asserts the Court did not enter an Order because the undersigned unreasonably would not agree to its content. Does BRP expect this Court to believe the Trial Court refused to sign a proper order because the undersigned threw a fit. The Court did not sign it, because its content did not reflect the ruling.

[5] Judgment was entered against BRP's codefendants for $7,040,758.

First, the Court said it did not consider or determine the factual import of ruling the agreement was invalid. VRP 12/20/13, p. 23 ("I'm not going to resolve that.") The Court recognized if invalid, many factual issues needed to be determined but the court said they were "moot" by the dismissal on preemption and did not reach or rule on them. Id. at CP 2794.

Second, the Trial Court found no conflict requiring disqualification. VRP 12/20/13, p. 31. It never even identified what the conflict was other than broadly saying it was a conflict to represent "both Cheri Rollins and the Longs." As a general statement that may be true but there was no finding on it.[6] Counsel asked the Court to clarify in the Order what the conflict was and why; it would not. VRP 01/10/14, p. 5.

At times the Trial Court indicated it hoped the Appellate Court would provide some "guidance." But, (1) nothing in the record demonstrates any possible guidance affirms dismissal and (2) as Cheri protested below, while the Court's aspiration may have been laudable it cannot say issues are mooted, decline to resolve facts necessary to grant relief because it has found them moot, enter a partial Order outlining additional issues it needs to decide on an agreement it acknowledged was no long in effect, and pass it off to the Court of

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[6] BRP implies conflict over counsel representing Cheri and her parents at the same time Cheri was suing her parents. That never happened. Concurrent with the settlement Cheri dismissed her claims against her parents. Only then did the undersigned firm represent her. To the extent there could be an appearance of conflict in successive representation, that was disclosed, Cheri had her independent counsel evaluate, and was waived. That disclosure and waiver is provided in the Appendix redacted if only to show the level of fact finding necessary to even consider a conflict issue, never run to ground by the Trial Court. (Appendix). At best for BRP, even if there is a conflict (real or appearance) it (1) provides no basis for dismissing Cheri's claim and (2) only demonstrates more fact finding must be done as the Trial Court anticipated. In reviewing it, it appears Mrs. Long did not sign. That was an oversight; she agreed. That is being addressed now.

Appeals for the factual resolution. That runs directly against RAP 9.11.[7]

At p. 8-9 BRP cites the Trial Court's colloquy on its impressions of the agreement while ignoring the Order. Colloquy is not the Order. Ferree v. Doric, 62 Wn.2d 561, 566-567 (1963) ("a trial judge's oral decision is no more than a verbal expression of his informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated" into the order) BRP's reliance on it when there is a written Order is not well taken.

ii. ARGUMENT

The question of why Cheri did not appeal the Order finding the agreement BRP moved on invalid or the findings based on it has a simple answer: that is not her agreement. She already negotiated a new agreement addressing all the Court's concerns and was exchanging signatures.

There was no need to appeal an Order invalidating an agreement everyone, the Court included, knew was no longer in effect. BRP knows that. And because BRP knows that, it (1) objected at the time to her even making that offer of proof and (2) is why it tries to blame the undersigned here for the delay in an Order being entered.[8] BRP succeeded asking the Trial Court to enter an Order on an agreement it knew was not the effective agreement but errs expecting three Justices ignore that.

Problematically, the entirety of BRP's argument runs up against RAP

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7 This was discussed at length in VRP 12/20/13. Cheri pointed out given the Court said it had not considered much less resolved all the facts, it could not pass it along to the Court of Appeals by the expedient of signing an incomplete, moot Order.

8 Even if she entered a second agreement much later that matters not. The Court found the agreement invalid; it did not prohibit her from amending it to address its concerns or find it would be impossible to do so. Parties may freely contract.

9.11. The Trial Court explicitly indicated it did not even try to consider facts much less determine them on the import of its Order invalidating the no longer in effect agreement. This Court cannot do so. This provides no "alternate basis" to affirm dismissal particularly as not even the Trial Court granted that relief. Here, this Court should reverse summary judgment based on preemption and remand for further proceedings. If BRP wants to press again on an agreement that is not Cheri's it may move to do so and the Trial Court must rule.

Moving past that, on the "merits" of BRP's argument the agreement Order provides an alternate basis for dismissal, by BRP errs.

The gist of BRP's argument is the settlement agreement assigned Cheri's cause of action to the Longs and therefore the Trial Court found this an indemnification action by the Longs, against BRP, for its liability to Cheri. That argument suffers multiple defects.

First, BRP cannot have it both ways. It cannot ask the Court to rule the agreement invalid and therefore void, have the Court so Order, and then argue the agreement if enforced divested Cheri of her claim creating an improper indemnification claim. Based on BRP's motion, there is no settlement agreement. Even the Trial Court acknowledged the dilemma BRP created for itself. VRP 12/20/13, p. 9. That is what BRP asked for and what the Trial Court Ordered: "The Court has determined there are grounds to invalidate" the settlement agreement. CP 2792. To reach the result it now wants, BRP needed to move to enforce the agreement and argue its effect leads to the consequences BRP complains of. BRP cannot divorce itself from the relief it sought and was granted: the agreement was invalidated, the ills BRP complain of supposedly

requiring dismissal no longer exist.

Second, BRP is seeking relief here it did not seek, nor was ordered, in the Trial Court. It may be a party can argue an alternate basis to sustain a Trial Court order. However, that does not include making argument and seeking relief never sought below. See RAP 2.5(a). BRP did not ask, and the Trial court did not dismiss, based on the agreement allegedly being improper. To reach that, this Court would have to engage in fact finding the Trial Court explicitly said it did not engage in. That is (1) contrary to RAP 9.11(b) requiring the appellate court to "direct the trial court to take additional evidence and find the facts based on that evidence," and (2) antithetical to the role of the Court of Appeals.

Third, even if this court wanted to play fact finder, BRP asks this court to enforce the agreement (the agreement it has already obtained an order invalidating) to find it assigns Cheri's claim to the Longs. Although BRP argues Cheri may not appeal the Trial Court's finding the agreement (which is not even her agreement) is invalid was error, BRP cannot ask this Court to play fact finder and then ask it to ignore the facts.

If this Court plays fact finder on the import of the agreement, it must actually look at the agreement. The agreement does not assign Cheri's claim. It only assigns an amount of proceeds.[9] BRP cites no authority an assignment of proceeds is illegal or divests her as the party in interest. BRP principal

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[9] Admittedly, instead of a specific dollar amount the assignment identified the amount of the Long's defense costs and the amount paid to Cheri. The agreement could have as easily inserted a number. It could have been any number, arrived at for any reason. Why the number is what it is, is of no import. As described below, loan-receipts are valid without consideration to why the particular amount of loan (the payment) was chosen.

citation this is now an improper indemnification claim is Toste v. Durham & Bates Agencies, 116 Wn.App. 516 (2003) but that provides no support.

Toste involved a multi-party claim. Toste asked a Broker to insure its boat. Id. at 518. The Broker sought coverage from a carrier (MIMI) that "secured insurance coverage from an offshore underwriter." Id. That underwriter refused to pay when the boat sank. Id. Totste sued the Broker in negligence for not properly placing coverage, id., fn. 2, and MIMI for not paying the claim. Id. Those defendants cross-claimed against each other for their liability arising out of the other's fault. Both the Broker and MIMI settled with Toste and Toste dismissed all claims against defendants. Id. Thereafter, the Broker continued against MIMI obtaining a judgment ostensibly as its cross-claim, in the amount it paid Toste, its fees, and other damages. Id. at 519.

Toste found the Broker's claim to be one of indemnification from a joint tortfeasor. Id. But what BRP ignores is in Toste the plaintiff dismissed all his claims against all defendants and was no longer a party. Thus, a claim by one defendant against another was indeed one for indemnification, despite the fact it was dressed up as a cross-claim; what Toste called an "indemnity claim in disguise." Id. That is completely unlike this case where Cheri did not dismiss her claim against BRP, remained a party, and is suing for her own personal injuries. That she agreed to pay the Longs some of those proceeds on the back end no more changes her claim into indemnification than would a stated intent to buy a car with the verdict change the claim into a contract to buy a car: how a plaintiff spends their proceeds does not determine the nature of their claim.

Here, Cheri in exchange for a payment she needed, agreed to pay the Longs a sum out of her proceeds. That is a proper loan-receipt agreement, enforced in Washington and does not transform the claim into one of indemnification, "disguised" as BRP argues or otherwise. US Oil & Refining v. Lee & Eastes Tank Lines, Inc., 104 Wn.App. 823, 832 (2001) rejected that. ("A loan receipt agreement is a proper arrangement" that "advances" an amount "as a loan, repayable only and to the extent" the party "obtains a net recovery from others also liable.") Barton v. DOT, 178 Wn.2d 193(2013) ratified their use in PI cases finding they "further the underlying policies of the tort reform act" because they "encourage out-of-court settlements, help solve the economic needs of an injured person confronted with the delays in the court system, and simplify complex multiparty litigation." Id. at 207.

Fourth, BRP argues the Trial Court's inclusion in its order one sentence that the Longs are the "real party in interest" provides a basis to dismiss. It does not. First, to find the Longs are the real party in interest requires enforcing the settlement agreement that supposedly made them that; again BRP ignores the Order invalidated that agreement. Second, BRP's assertion a finding a claim is not made in the name of the real party in interest compels dismissal is false. On that CR 17 is clear:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.

At very best, and ignoring the fallacies the statement stands on, assuming the Longs are the real party in interest that only means they must amend the

complaint. They were not given that opportunity below. This does not require, much less compel, dismissal.

BRP cites two cases it asserts hold the only remedy is dismissal. BRP asserts Bench v. State Auto & Cas. Underwriters, 67 Wn.2d 999 (1965) holds dismissal is the only possible remedy. Bench did not hold that. Bench involved what plaintiff claimed was an assigned cause of action for the benefit of a trust. Id. Bench is a 3 paragraph opinion saying nothing other than the Trial Court's refusal to consider affidavits at trial was not error and without evidence the suit was brought to benefit a trust, the case must be dismissed. Id.

BRP cites Dennis v. Heggen, 35 Wn.App. 432 (1983). Defendant sought dismissal on the pleadings for plaintiff not being the party in interest. Dismissal was affirmed because plaintiff filed no opposition and no-showed, not because the wrong party named compels dismissal. Id. at 434. Dennis held a claim is "an assignable interest(s)." Id. at 434.

BRP's assertion pleadings filed to approve Cheri's minor son's settlement demonstrate indicate Cheri had no interest in further litigation provides no basis to dismiss. Cheri changed her mind. BRP does not explain how that entitles it to judgment Cheri's claims are preempted. The argument is, as so many in BRP's brief are, frivolous albeit no more frivolous than its constant and repeated misattributions of authority and the record.

DATED this 15th day of April, 2015.

McGAUGHEY BRIDGES DUNLAP, PLLC

By: ______________________

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STATE OF WASHINGTON

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DEPUTY

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

CHERI ROLLINS, an individual, Appellant, vs. BOMBARDIER RECREATIONAL PRODUCTS, INC., a foreign corporation, Respondent.	))))))))))	NO. 45791 - 1 - II **CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on April 28, 2015, I caused the Appellant's Reply Brief to be filed with this Court and a copy to be delivered by legal messenger to attorneys for respondent at:

Thomas R. Merrick, WSBA #10945
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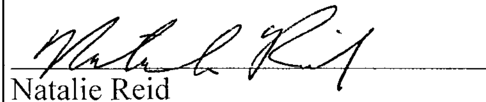
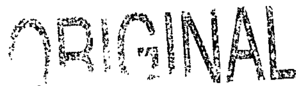
3101 Western Ave, Ste 200
Seattle, WA 98121

Dated this 28th day of April, 2015, at Seattle, Washington.



Natalie Reid



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