

No. 34961-2-II

07/12/16 PM 3:11
STATE OF WASHINGTON
BY *JW*
CITY

COURT OF APPEALS,
DIVISION II OF THE STATE OF WASHINGTON

TACOMA FIXTURE CO., INC.,

Respondent/Cross-Petitioner,

v.

RUDD COMPANY, INC.,

Petitioner/Cross-Respondent.

RESPONSE TO TACOMA FIXTURE'S APPELLATE BRIEF AND
REPLY BRIEF OF RUDD COMPANY, INC.

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CORPORATE DISCLOSURE

Rudd Company, Inc., is a closely-held Washington Corporation.

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I. INTRODUCTION

In a curious attempt to avoid the proverbial “elephant in the room,” Tacoma Fixture Co., Inc. (“TFC”), largely ignores the two Washington Supreme Court cases relied upon by Rudd, *Puget Sound Financial, LLC v. Unisearch, Inc.*, 146 Wn.2d 428, 47 P.3d 940 (2002), and *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 998 P.2d 305 (2000). The *Puget Sound Financial* case, in particular, is factually similar to the present case, and TFC fails to provide this Court with any sound basis to reject its holding and reach a different result here.

Instead of analyzing and attempting to distinguish the *Puget Sound Financial* and *Mortenson* cases, TFC resorts to rather shrill mischaracterizations regarding this case and Rudd’s arguments on the present appeal. For example, this case has nothing to do with the old common law “last shot” rule; Rudd did not mail its invoices to TFC “after the oral contracts [had] been fully performed;” the two Washington Supreme Court cases relied upon by Rudd do not “repeal the applicable UCC statutes” at issue in this case; and Rudd does not argue that *Hartwig Farms* and its progeny are not good law on the facts of those cases. Those simply are not the issues before this Court on the present appeal, and this

Court should not be distracted by TFC's series of red herrings.

On Rudd's appeal, the ultimate issue is whether a three year course of dealing between Rudd and TFC establishes that the terms and conditions in the Rudd invoices are part of the parties' contracts for the sale of goods. This Court's answer in the affirmative is compelled by application of the holding and analysis of *Puget Sound Financial* to the following facts, none of which TFC disputes: (1) the parties entered into 775 separate contracts; (2) the invoices provided by Rudd to TFC are the only writings establishing the terms of the contracts between the parties; (3) the TFC shop manager, Mike Stanley, reviewed every invoice containing Rudd's terms and conditions before approving payment; (4) after having an opportunity to review the terms and conditions in the invoices, TFC – typically through Mr. Stanley – then entered into additional contracts with Rudd on behalf of TFC; (5) TFC never objected to Rudd's terms and conditions prior to the present litigation; and (6) each invoice sent to TFC in confirmation of an order contained exactly the same terms and conditions as were in the invoice(s) TFC received prior to placing that order. Under these *undisputed* facts, this case is analytically indistinguishable from *Puget Sound Financial*, and the analysis and

holding of that controlling authority are dispositive of the issue here.

Accordingly, the trial court erred in finding that the terms and conditions in the Rudd invoices were not part of the contracts between the parties, and should be reversed on that issue.

On TFC's cross-appeal of the trial court's ruling that Rudd did not waive its affirmative defense of improper venue, TFC fails to show that Rudd engaged in conduct so inconsistent with its assertion that venue for this case is improper in Pierce County as to constitute a waiver of the defense. The trial court's ruling that Rudd did not waive its affirmative defense of improper venue is correct and should be affirmed.

II. ARGUMENT

While the parties disagree as to whether the contracts at issue were oral or written, it is significant that Rudd and TFC agree that the invoices at issue refer to *775 separate contacts* for the sale of goods. *See, e.g.*, TFC brief at 16 (“the parties admittedly entered into a series of oral contracts”); *see also, id.* at 32. However, despite the numerous contracts entered into over the parties' three year course of dealing, TFC asks this Court to analyze the parties' course of dealing as if each subsequent contract was entered into with no memory of or reference to the prior contracts or

communications between the parties, *i.e.*, that there was no course of dealing. Of course, merchants do not operate that way, and neither does the UCC.

A. **TFC Fails to Distinguish this Case from the Controlling Authority of *Puget Sound Financial*, Which Compels Reversal of the Trial Court’s Ruling that the Terms and Conditions in the Rudd Invoices are not Part of the Contracts.**

TFC’s only attempt to distinguish *Puget Sound Financial* from the present case is by maintaining that this is a UCC sale of goods case, while *Puget Sound Financial* concerned a services contract. TFC brief at 36. This is a distinction without a difference, as the analysis applied in *Puget Sound Financial* is overwhelmingly a UCC analysis. Further, the Court’s citations to the RESTATEMENT (SECOND) OF CONTRACTS are essentially identical to the comparable UCC provisions, particularly with regard to course of dealing.

1. **The parties’ prior course of dealing establishes the terms of the parties’ contracts.**

TFC’s brief completely ignores the parties’ course of dealing, which is at the heart of the parties’ dispute on the present appeal. As defined in the UCC, “course of dealing” is an interpretive tool for the Court.

RCW62A.1-205. Course of Dealing and Usage of Trade.

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

Thus, under RCW 62A.1-205, a course of dealing is comprised of the conduct of the parties *prior* to the particular transaction at issue. Here, that course of dealing consists of TFC's continuing to place additional orders for the purchase of goods from Rudd *after* receiving invoices from Rudd containing clear and explicit terms and conditions required by Rudd in any contract for the sale of raw materials or goods, TFC placing those subsequent orders without any objection to the terms and conditions demanded by Rudd, then TFC reviewing and paying the invoices, which contained the identical terms and conditions, on those subsequent orders. This is the course of dealing underlying each of the contracts entered into between Rudd and TFC, at least after the very first order, which was repeated 774 times. *See* CP 111-112, CP 114-115, CP 138-139.

Significantly the UCC provision regarding course of dealing is *identical* to the language in Section 223 of the RESTATEMENT (SECOND) OF

CONTRACTS, which states:

(1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

RESTATEMENT (SECOND) OF CONTRACTS § 223(1) (1981), *quoted in Puget Sound Financial*, 146 Wn.2d at 436; *compare with* RCW 62A.2-205(1).

So, contrary to TFC's position, the course of dealing analysis is the same, whether the case is a UCC case or not.

TFC does not dispute that the bulk of the orders to Rudd were placed by TFC's shop manager, Mike Stanley, who reviewed each invoice and approved it prior to forwarding it to TFC's accounting department for payment. *CP 299-300*. There is no evidence in the record that TFC ever objected to any of the invoice terms, including the choice of venue, exclusion of warranties, and limitation of remedies provisions. Thus, after having an opportunity to review the contract terms demanded by Rudd, Mr. Stanley placed subsequent orders with Rudd, which were accepted and filled by Rudd, creating new contracts. For each subsequent order, Rudd sent an invoice to TFC containing the exact same contract language provided by Rudd in the prior invoice(s). *See CP 111-112, CP 114-115,*

CP 138-139, CP 299-300.

The conduct of the parties described above is precisely the same as that in *Puget Sound Financial*, which TFC utterly fails to distinguish.

Unisearch sent Factors 48 invoices, and at least as many search reports, with identical disclaimers on each respective form. The parties present no evidence regarding whether the invoices were ever discussed, but Factors did in fact receive the invoices and search reports. (Citation omitted). Therefore, we conclude that the general commercial setting establishes a prior course of dealing.

Puget Sound Financial v. Unisearch, 146 Wn.2d 428, 444, 47 P.3d 940 (2002), citing *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d at 217, 223, 797 P.2d 477 (1990). Significantly, *American Nursery* is a UCC case, although *Puget Sound Financial* is not. Thus, applying *Puget Sound Financial*, which relied upon *American Nursery*, to the facts of this case compels this Court to reach the same result.

Alternatively, if this Court accepts TFC's argument that only strictly "UCC" cases should be relied upon as authority, this Court can apply *American Nursery*, rather than *Puget Sound Financial*, to the facts of this case and reach precisely the same result as the Court in *Puget Sound Financial*. Regardless of whether this Court applies *Puget Sound*

Financial or the UCC cases that Court relied upon, the result follows like night after day.

In any event, the analysis and holding in *Puget Sound Financial* is hardly unique. Other courts have reached the same result when applying the UCC to similar facts. See e.g. *Waukesha Foundry, Inc. v. Indus. Engineering, Inc.*, 91 F.3d 1002 (7th Cir. 1996) (undisputed facts “lead to the ineluctable conclusion that Industrial consented to the terms and conditions contained in the more than four hundred packing slips and invoices it received from Waukesha from 1989 to 1993.”); *Monarch Nutritional Labs., Inc. v. Max. Human Performance, Inc.*, 2005 WL 1683734 (D.Utah 2005) (Under the UCC, at least 24 invoices with terms and conditions mailed after shipping goods established course of dealing and terms and conditions, not objected to, were part of the parties’ contracts); *Capital Converting Equip. v. LEP Transport, Inc.*, 750 F.Supp. 862 (N.D.Ill. 1990), *aff’d*, 965 F.2d 391 (7th Cir. 1992); *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F.Supp. 164, 184-86 (D.Conn. 1984); *Intrastate Piping & Controls, Inc. v. Robert-James Sales, Inc.*, 315 Ill.App.3d 248, 733 N.E.2d 718, 722-26 (2000); *Sternheim v. Silver Bell of Roslyn, Inc.*, 321 N.Y.S.2d 965, 968-69, 66 Misc.2d 726, 9

UCC Rep. Serv. 465 (1971).

2. There is no “Battle of the Forms” under RCW 62A.2-207.

The parties agree that a new contract was formed each time Rudd received an order from TFC and, in response, Rudd shipped the ordered raw materials to TFC. *See* TFC brief at 14.¹ However, TFC maintains that this Court must ignore the parties’ course of dealing and engage in a “battle of the forms” analysis under RCW 62A.2-207. TFC brief at 23-33. The argument is without merit.

RCW 62A.2-207 provides as follows:

RCW 62A.2-207. Additional terms in acceptance or confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

¹ TFC’s assertion that each contract was fully performed “long before” TFC’s receipt of an invoice from Rudd is incorrect. *See* TFC brief at 1. It is elementary contract law that each contract was fully performed only upon TFC’s acceptance of and payment for the goods it ordered from Rudd. TFC has not proffered any evidence that payment was ever made prior to its receipt of the invoice for each order; and the testimony of Mike Stanley that he reviewed each invoice for accuracy of product received, then forwarded the invoice to TFC accounting for payment, supports the conclusion that payment was never made prior to receipt of the invoice.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Title.

TFC maintains that the terms and conditions in the Rudd invoices are proposed terms which “materially alter” the agreement under UCC 2-207(2)(b). TFC brief at 29-33. This is incorrect.

- a. **The Rudd terms and conditions provided before each order are identical to the terms and conditions on the confirming invoice.**

In essence, under TFC’s unique version of contract formation, each contract begins with an order, whether via telephone or facsimile, from

TFC to Rudd; the UCC provides the other “gap fillers” for the contract;² and the contract is completed by Rudd’s shipment of the raw materials ordered by TFC even though TFC hasn’t paid for them. Once the goods are shipped, Rudd sends an invoice with the, now, disputed terms and conditions. Thus, because the terms and conditions contained in the invoice are different than the UCC gap fillers, they drop out through application of UCC 2-207(2)(b) as “material alterations” to the contract. See TFC brief at 31-32. However, this hypothetical falls apart with TFC’s very next order, not to mention the parties’ subsequent three year course of dealing involving 775 contracts.

As is apparent on its face, RCW 62A.2-207 concerns “additional” or “different” terms in an acceptance or confirmation. Accordingly, Rudd will assume only for the sake of argument that TFC may be correct that UCC 2-207 would apply in the way it suggests with regard to the *first* contract and confirming invoice – if this Court decides that (1) there was an oral contract, (2) UCC gap fillers supplied terms not included in the

² TFC does not explicitly refer to UCC gap fillers, but if the terms and conditions in the invoices do not apply, then the standard UCC provisions “fill the gap” and supply the omitted terms of the contracts. Whether the gap fillers were, in fact, material to TFC prior to the present litigation is questionable, as the assumption that gap fillers are material to an otherwise silent buyer has been rejected. See, e.g., *JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 57 (1st Cir. 1999)(“the buyer’s silence may simply reflect that it considers a damages-limitation clause ‘immaterial’ to contract formation”).

initial oral contract, and (3) a confirming invoice was sent that conflicted with the UCC gap fillers. However, the first contract in 2000 is *not* at issue in this case, as TFC does not allege any issues with the Rudd products arising from the first goods shipped by Rudd, or any Rudd products, until at least mid-2002. *See* CP 296. Any claims based upon the first contract are well beyond the statute of limitations in any event. Rather, the significance of the first invoice supplied by Rudd is that it provides an explicit statement by Rudd of the terms and conditions it requires in its sales contracts, all of which were provided in advance of TFC's next purchase order. *See, e.g.*, CP 111- CP 112, CP 114-115, CP 138-139.³

In this case, the facts of record establish that, for every contract after the first, TFC had a copy of a prior invoice containing all of the terms and conditions demanded by Rudd. *See id.* TFC ordered new raw materials from Rudd after an opportunity to review, but without objection to, Rudd's terms and conditions. Rudd shipped the materials and TFC subsequently received an invoice for that order with precisely the same terms and conditions as in the previous invoice. *See id.*

³ Conversely, TFC cannot direct this Court to any evidence in the record that TFC *ever* attempted to limit Rudd's acceptance to the terms of TFC's purchase orders.

Under these undisputed facts, for every transaction after the first contract, TFC had the terms and conditions demanded by Rudd in advance of placing an order with Rudd; TFC orally or via facsimile placed an order for raw materials without any objection to Rudd's terms and conditions; Rudd filled the order and sent a confirming invoice containing exactly the same terms and conditions as on the previous invoice to TFC; and TFC accepted the goods and reviewed the invoice prior to payment. *See* CP 111- CP 112, CP 114-115, CP 138-139, CP 299-300. Accordingly, the 2-207 analysis demanded by TFC does *not* apply because there are no "terms additional to or different from those offered or agreed upon" – they are identical to the terms previously offered by Rudd, no other terms were proposed by either party, and no objections were made to those proposed. *See* RCW 62A.2-207(1).

Here, there is no "battle of the forms," no analysis of 2-207(2) is required, and, if done, would be superfluous, as the "material alteration" claimed by TFC simply does not exist. Instead, the contract includes the terms and conditions proposed by Rudd from its inception. *See e.g., Smith v. Skone & Connors Produce, Inc.*, 107 Wn.App. 199, 26 P.3d 981 (2001), *citing* RCW 62A.2-201(2); *see also* RCW 62A.2-201(3). Hence, there is

no “last shot” issue. The only terms and conditions are the same terms and conditions Rudd provided to TFC prior to TFC entering into additional contracts.

b. **The analysis and holding of *Hartwig Farms* does not apply to this case.**

Because there is no “battle of the forms,” whether the *Hartwig Farms* case is still good law is not at issue in this case. *E.g., Hartwig Farms, Inc. v. Pacific Gamble Robinson Co.*, 28 Wn.App. 539, 625 P.2d 171 (1981). As discussed in Rudd’s opening brief, in *Hartwig Farms*, unlike the present case, a telephone order was followed by a **“confirmation of sale signed by the broker”** that did not contain exclusion of warranty language. *Hartwig Farms*, 28 Wn. App. at 541 (Emphasis added). The seller then sent an invoice to the buyer that contained exclusionary language. *Id.* The exclusionary language was found by the trial court to be inconspicuous as it was in the smallest type used on the entire invoice. *Hartwig Farms*, 28 Wn. App. at 545 (Emphasis added). **Because there was a conflict between two writings**, one of which contained exclusionary language and one of which did not, the Court employed the “battle of the forms” analysis under RCW 62A.2-207. This case is easily distinguished from *Hartwig Farms*, and whether

Hartwig Farms is “still good law” is not at issue here,⁴ nor is whether “a new analysis is now required in all sales of goods cases.” TFC brief at 11-12. Rudd notes that the courts in *Puget Sound Financial* and *Berry v. Spooner Farms*, 2006 WL 1009299, 59 UCC Rep.Serv.2d 443 (2006), did not conduct a UCC 2-207 analysis for the simple reason that in those cases, like here, it did not apply.

B. Limitations of Liability and Warranty Disclaimers in Rudd’s Invoices are Valid and Enforceable Terms of the Contracts Between the Parties

Rudd’s opening brief thoroughly analyzed the law of warranty disclaimers and limitations of liability. *See* Rudd brief at 26-42. In response, TFC presents an internally inconsistent argument that, although *Puget Sound Financial* applied a UCC analysis to the unconscionability issue in that case, this Court should ignore it because that case concerned a services contract. *See* TFC brief at 36. TFC fails to explain how applying the same UCC analysis to a sales of goods case would lead to a different result. The obvious reason for this omission is that it would not. Applying the same analysis to similar facts leads to a similar result.

⁴ While not at issue on this appeal, it is certainly arguable that the court in *Hartwig Farms* should have applied RCW 62A.2-208 and/or 2-209, rather than 2-207, because the second form sent by the seller was not an “acceptance” or “confirmation” under 2-207(1), but an attempt to modify the existing signed agreement. *See* 28 Wn.App. at 541.

Indeed, that is the fundamental basis for *stare decisis*.

Nevertheless, TFC asserts three bases for finding the limitations of remedies and warranty exclusions either unconscionable or unenforceable. First, TFC asserts that the exclusions are unconscionable because the “*Berg* rule” applies to this case, requiring that the provisions be “explicitly negotiated between buyer and seller.” TFC brief at 37-39. Second, TFC asserts that the remedy limitations are unenforceable because they “fail their essential purpose.” *Id.* at 33-35. Finally, TFC asserts that Rudd made express warranties, which cannot be disclaimed. *Id.* at 33. None of the three provides any comfort as each is incorrect.

1. The “*Berg* rule” does not apply to this case.

Rudd thoroughly briefed the issue of conscionability in its opening brief. *See* Rudd brief at 28-36. In response, TFC continues to insist that this case requires application of the “*Berg* rule,” which states that an exclusionary clause in a *consumer contract* must be “explicitly negotiated between buyer and seller,” and that the remedies being excluded be “set forth with particularity.” TFC brief at 37, *quoting Am. Nursery Prods, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 223, 797 P.2d 477 (1990) (*citing Berg v. Stromme*, 79 Wn.2d 184, 196, 484 P.2d 380 (1971)).

However, as the Supreme Court stated in *American Nursery*,

only those commercial transactions with sufficient indicia of unfair surprise in the negotiations should be subject to the *Berg* rule.

Consistent with this position, we have refused to apply the *Berg* requirements to negotiations between competent persons dealing at arm's length, with no claim of an adhesion contract, when the contract contains a specific disclaimer and when the contract language is clear.

American Nursery, 115 Wn.2d at 224, citing *Frickel v. Sunnyside Enters., Inc.*, 106 Wn.2d 714, 721, 725 P.2d 422 (1986).

There is absolutely no indicia of unfair surprise justifying the application of the “*Berg* rule” in this case. *E.g.*, *American Nursery*, 115 Wn.2d at 224-26; *Frickel v. Sunnyside Enters., Inc.*, 106 Wn.2d at 721. Indeed, how could there be when the identical terms and conditions were received 775 times? Similar to *American Nursery*, the contracts in this case were comprised only of the terms on the front and back of each invoice, the disclaimer of “any liability for incidental or consequential damages” was clearly stated in bold print, and TFC’s shop manager, Mike Stanley, had an opportunity to read the contracts prior to placing a subsequent order 774 times, as well as an opportunity to obtain advice

concerning their provisions before placing a subsequent order. *See* CP 111- CP 112, CP 114-115, CP 138-139, CP 299-300. Therefore, there was no “unfair surprise” and whether the exclusions and limitations were explicitly negotiated is simply one of several factors in the conscionability analysis; it is not dispositive of the issue. *See Puget Sound Financial*, 146 Wn.2d at 439, *citing Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 262-63, 544 P.2d 20 (1975).

Under the proper conscionability analysis – as presented in Rudd’s opening brief – the remedy limitations and warranty exclusions in Rudd’s invoices are conscionable.

2. The remedy limitations do not “fail their essential purpose.”

TFC argues that the limited remedies provided in the Rudd invoices “fail their essential purpose” under RCW 62A.2-719(2) and the holding in *Cox v. Lewiston Grain Growers*, 86 Wn. App. 357, 936 P.2d 1191 (1997). *See* TFC brief at 33-35. TFC’s reliance on *Cox* is misplaced, and a proper analysis and application of 2-719(2) to the facts in this case does not support a conclusion that the limited remedies provided by Rudd “failed of their essential purpose.” TFC’s argument on this issue is really a conscionability argument presented in the guise of a UCC 2-

719(2) analysis, which is entirely different.

RCW 62A.2-719(2) provides:

Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Title.

As stated in the leading treatise on the Uniform Commercial Code:

Comment 1 explains that this subsection applies to “an apparently fair and reasonable clause,” which “because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain ***.” Note that both the statutory language and the comment refer to “*its* [i.e., the limited or exclusive remedy’s] essential purpose ***.” (emphasis added). That is, 2-719(2) should be triggered when the remedy fails of *its* essential purpose, not the essential purpose of the Code, contract law, or equity. And to use the words of Professor Honnold, this provision “is not concerned with arrangements which were oppressive at their inception, but rather with the application of an agreement to novel circumstances not contemplated by the parties.”

JAMES J. WHITE AND ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 12-10, p. 442 (4th ed. 1995) (hereinafter “WHITE & SUMMERS”)(underlining added; all other emphasis in original). Thus, the analysis under 2-719(2) begins with a provision that is otherwise

conscionable, but which may fail of its essential purpose due to unanticipated circumstances. *See id.*

Cases in which limitations of remedies have been held to have failed their essential purpose are typically those in which the seller failed to deliver on a limited repair remedy. *See, e.g., Lidstrand v. Silvercrest Indus.*, 28 Wn. App. 359, 623 P.2d 710 (1981) (failure to effect repair provided in limited remedy caused remedy to fail its essential purpose); *RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985) (same); *Fiorito Bros., Inc. v. Fruehauf Corp.*, 747 F.2d 1309 (9th Cir. 1984) (manufacturer's limited "repair or replace" remedy failed its essential purpose when manufacturer arbitrarily refused to make necessary repairs); *Philippine Nat. Oil Co. v. Garrett Corp.*, 724 F.2d 803 (9th Cir. 1984) (A repair or replace remedy fails of its essential purpose only if repeated repair attempts are unsuccessful within a reasonable time); *see also* WHITE & SUMMERS, § 12-10, p. 442 ("The most frequent application of 2-719(2) occurs when under a limited 'repair and replacement' remedy, the seller is unwilling or unable to repair the defective goods within a reasonable period of time."). Under these circumstances, the remedy clearly fails of its essential purpose, as it is rendered effectively illusory.

Under the “repair or replacement” scenario, “[o]rdinarily, the buyer must provide the seller a reasonable opportunity to carry out the exclusive or limited remedy before the buyer can successfully argue failure of essential purpose.” WHITE & SUMMERS § 12-10, p. 442. In the present case, TFC cites to no evidence that it ever established that Rudd’s products were defective, nor that it requested a refund or replacement under the limited remedies provided by Rudd. Thus, the limited remedies provided by Rudd have not failed of their essential purpose. They simply have not been invoked.

TFC goes to great lengths to argue that this case is subject to the holding in *Cox v. Lewiston Grain Growers*, 86 Wn. App. 357, 936 P.2d 1191 (1997). TFC brief at 33-35. In its opening brief, Rudd distinguished *Cox* on its facts, and so limits its analysis here to responding to this particular issue raised by TFC.

First, the court in *Cox* already had held that the limitations at issue were unconscionable before reaching the “essential purpose” issue. Having done so, the court never had to reach the issue of whether the limited remedies failed their essential purpose; that analysis is necessary *only* if there is a preliminary finding that the provisions as issue are

conscionable. *See Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 226, 797 P.2d 477 (1990) (“Since we find the clause conscionable, the question then becomes whether the clause is enforceable”). The discussion in *Cox*, then, is mere *obiter dicta* without any precedential effect in this Court. *See Plankel v. Plankel*, 68 Wn. App. 89, 92, 841 P.2d 1309 (1992) (rationale that is not necessary to an appellate decision is non-binding dicta).

Second, the *Cox* analysis should be rejected on its merits because, in concluding that the limitations “failed their essential purpose,” the court in *Cox* did not engage in a proper analysis of the law, instead making several rather broad conclusory pronouncements, such as that, “[w]hen a limitation of remedy clause deprives a party of the substantive value of its bargain, it is ineffectual” and that, “[a] limitation of remedies fails its essential purpose when the defect is latent and non-discoverable upon reasonable inspection.” *Cox*, 86 Wn. App. at 370, citing *Marr Enterprises, Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951, 955 (9th Cir. 1977). However, in *Marr*, the Ninth Circuit held that the limitation at issue did *not* fail its essential purpose. *Marr*, 556 F.2d at 955.

With regard to latent defects, the *Marr* court cited to one case for

the proposition that a remedy *may* fail of its essential purpose when the defects are latent and not discoverable by reasonable inspection. *Id.*, citing *Neville Chem. Co. v. Union Carbide Corp.*, 294 F.Supp. 649 (D.C. Pa. 1968) (finding a failure of essential purpose in fifteen-day rejection period applied to latent defects); *but see* WHITE & SUMMERS § 12-10, p. 445 (reasoning that the court’s finding of failure of essential purpose in *Neville Chemical* was a “misapplication of 2-719(2)”).

As the analysis in WHITE & SUMMERS makes clear, the issue of whether the limited remedies fail of their essential purpose is not an issue of conscionability, but of frustration due to “novel circumstances.” WHITE & SUMMERS § 12-10, p. 442. As discussed in Rudd’s opening brief, the *Cox* court’s reasoning regarding latent defects concerns conscionability, regarding which the *Cox* holding conflicts with the holding in *M.A. Mortenson*. Since the holding of *M.A. Mortenson* is controlling authority, the analysis and holding in *Cox* must be rejected by this Court. As the Washington Supreme Court stated in *M.A. Mortenson*:

Comment 3 to [U.C.C.] § 2-719 generally approves consequential damage exclusions as “merely an allocation of unknown or undeterminable risks.” *Thus, the presence of latent defects in the goods cannot render these clauses unconscionable.* The need for

certainty in risk-allocation is especially compelling where, as here, the goods are experimental and their performance by nature less predictable.

M.A. Mortenson, 140 Wn.2d at 587, quoting *Tacoma Boatbuilding Co. v. Delta Fishing Co.*, 28 U.C.C. Rep. Serv. 26, 35 (W.D. Wash. 1980) (emphasis added). This reasoning applies with equal logic to the facts of the present case. As explained, *supra*, the analysis under UCC 2-719(2) is entirely different.

In this case, there are no “novel circumstances” which cause the limited remedies to fail their essential purpose. Rudd sold several base products to TFC, which TFC then combined at its production plant and applied to its cabinets using its own equipment. At his deposition, Steven Ryan⁵ explained the process by which TFC applied Rudd products to its cabinets and doors. *CP 404 - CP 408*. Mr. Ryan explained that for each Rudd product involved in the claims being made by TFC, it was TFC employees who would mix the Rudd products at TFC’s facilities, wait a specified period of time, and then apply the Rudd products to the cabinet or door. *CP 405*. Thus, TFC admits that Rudd was not involved in any

⁵ The owner and president of TFC and its CR 30(b)(6) designee for its corporate deposition.

way with the actual mixing or application of the products. Rudd had no control over whether the TFC employees mixed the raw materials in the proper proportions, waited a sufficient time to allow the materials to blend properly before application, allowed the mixture to sufficiently dry after application before sanding and applying a top coat, how thick each coat was applied, or on what type of wood product the mixture was applied. All of those decisions and procedures were controlled by TFC.

Under this set of facts, the limitations of remedies and warranty disclaimers Rudd insisted upon in its invoices were an entirely proper “allocation of unknown or undeterminable risks” associated with Rudd providing raw materials to TFC for final mixing and application to TFC’s cabinets, a production process which deprived Rudd of any means of controlling the quality of the final product mixed and applied by TFC. *See, e.g., Tacoma Boatbuilding Co. v. Delta Fishing Co.*, 28 U.C.C. Rep. Serv. 26, 35 (W.D. Wash 1980), *quoted in M.A. Mortenson*, 140 Wn.2d at 587. As WHITE & SUMMERS states: “[w]e believe that business people should be permitted to agree on any remedy they want and, having done so, that their allocation of loss should not be upset by a court.” There has been no showing by TFC that the facts and circumstances in which TFC’s

products, on which the Rudd products were applied, were later found defective was a “novel circumstance” not contemplated by the parties.

In short, TFC invites this Court to simply ignore the sound reasoning and controlling precedent of *M.A. Mortenson*, as well as the persuasive authority of WHITE & SUMMERS and other courts, which this Court should not do. Contrary to TFC’s assertions, the limited remedies provided by Rudd are conscionable and have not failed of their essential purpose.

3. Express warranties are not properly before this Court.

Finally, allegations of express warranties are not properly before this Court on any appeal, but are an issue to be decided by the trial court on remand. Significantly, there is no competent evidence in the record of any “express warranty” being made by Rudd. TFC relies on a declaration of its own president, Steven Ryan, that a Rudd employee made certain express warranties concerning the Rudd products. *See* TFC brief at 33, *citing* CP 293-94. These allegations by Mr. Ryan are self-serving and inadmissible hearsay. Mr. Ryan failed even to identify when the alleged statements were made or to whom they were allegedly made. *See* CP 293-

94.⁶ Therefore, they are not admissible evidence on this issue, and this Court should disregard them.

Finally, even if true and otherwise admissible, the described “statements,” such as a representation to the effect that “Rudd’s products are as good or better than Lilly’s,” would not be express warranties, but mere sales puffery, opinions, or commendations concerning Rudd’s products generally, rather than “affirmations of fact about the goods.” *Baughn v. Honda Motor Company, Ltd.*, 107 Wn.2d 127, 152, 727 P.2d 655 (1986). TFC is simply dangling another red herring, which is irrelevant to the present appeal. Therefore, this Court should disregard TFC’s reference to any express warranties allegedly made by Rudd.

C. The Trial Court Properly Ruled that Rudd Did Not Waive Its Affirmative Defense of Improper Venue in Pierce County

On its cross-appeal, TFC candidly admits that Rudd properly asserted its affirmative defense of improper venue in Pierce County in its answer to the complaint, and TFC therefore does not attempt to argue that Rudd was dilatory in asserting it. *See* TFC brief at 43. Instead, TFC relies on various assertions concerning Rudd’s conduct prior to filing its motion

⁶ Also notable by its absence from the record is any supporting testimony from the alleged declarant himself, Matt Stelzner, whose deposition was taken by TFC.

to dismiss or change venue that allegedly waived the defense. *See id.* at 47-48. These arguments were unpersuasive to the trial court – who is intimately familiar with Pierce County Local Rules. Furthermore the applicable case law supports the trial court’s ruling that Rudd did not waive its affirmative defense of improper venue. The trial court should be affirmed on this issue.

Even assuming, *arguendo*, the facts alleged by TFC, activities such as filing a jury demand, agreeing to a date for a mandatory settlement conference, and participating in a settlement conference are matters governed by the case schedule and the deadlines in the Civil and Local Rules [all of which Rudd was required to comply with] regardless of its denial of venue. There is simply no authority for the proposition that such compulsory conduct by Rudd, or any defendant, waives a properly asserted defense of improper venue.

The *only* act identified by TFC that was arguably voluntarily undertaken by Rudd was the filing of a motion to reassign the case to a complex track, rather than the standard track under which the Complaint was originally misfiled by TFC. This motion necessarily included a request for a continuance of the trial date, as PCLR 1(h)(4) states that a

complex case shall have a trial date in 78 weeks, whereas standard cases have a trial in 52 weeks pursuant to PCLR 1(h)(3). Correction of the improper case designation, by itself, is patently insufficient to support a finding of waiver, and TFC fails to cite any case supporting such a result. Had TFC properly complied with Local Rules, the motion never would have been necessary.

Moreover, Rudd did not file any motions under CR 12 prior to the motions for summary judgment and to dismiss for improper venue, both of which were noted for the same day. While those motions were not served on TFC at the same time, the notice provisions of the applicable rules are different. CR 56 requires 28 calendar days notice, while a CR 12 motion only requires six court days notice. Rudd met these notice requirements. The motions were set to be considered on the same date and time for the convenience of the trial court and the parties. Therefore, they were joined as allowed under CR 12(g). TFC did not, and has not, provided any evidence that Rudd's conduct with respect to the alleged waiver of the affirmative defense of improper venue is of the type contained in CR 12(h); therefore, Rudd submits, their waiver argument should be rejected in this Court just as it was in the trial court.

TFC places great weight on the *King* decision for the proposition that a party can waive an affirmative defense by its conduct. *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002). True enough, but the facts in *King* are distinguishable from this case. In *King*, the court found that the defendant had provided evasive answers to the plaintiff's interrogatories about its intention of asserting the defense, engaged in four years of litigation before asserting it, failed to raise it during depositions, and waited to assert it in a dispositive motion after the statute of limitations had run, thus foreclosing the plaintiff's option to refile. *See id.*

By contrast, Rudd was not served with any discovery requests regarding its affirmative defense of improper venue, it asserted the defense from the beginning of the case, filed its motion several months before trial and within the deadlines established in the case scheduling order, warned TFC at the outset of the case that it would challenge venue, and allowed for the alternative relief of transferring the action to the proper county rather than dismissal (if the trial court were so inclined) so that TFC's claims would not be foreclosed by the statute of limitations.

When this is contrasted with the other holdings of the appellate courts, it becomes clear that Rudd has not waived its affirmative defense

of improper venue by its conduct. In *French v. Gabriel*, 57 Wn. App. 217, 788 P.2d 569 (1990), *affirmed* 116 Wn.2d 584, 588, 806 P.2d 1234 (1991), the court unequivocally stated that a party who raises the defense of insufficient service of process in his answer does not waive the defense by engaging in discovery. The Supreme Court also has stated that ‘engaging in discovery’ is not always tantamount to conduct inconsistent with a later assertion of an affirmative defense. *Lybbert v. Grant County*, 141 Wn.2d 29, 41, 1 P.3d 1124 (2000). Finally, in *Voicelink*, the court held the defendant does not waive the right to move for a change of venue by engaging in pretrial discovery. *Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 616-17, 937 P.2d 1158 (1997).

The *Voicelink* Court further held that even though Datapulse filed motions to strike depositions that did not mention the venue issue, those motions were not the specified motions under CR 12 and “thus the consolidation requirement of CR 12(g) was inapplicable to the motion to strike.” *Id.* at 626. A CR 12(b)(3) motion may be brought at any time, even as late as trial, as long as the moving party asserted the defense in compliance with CR 12. *Id.* at 622 and 624, fn 8, *citing French v. Gabriel*, 116 Wn.2d 584, 806 P. 2d 1234 (1991).

Rudd asserted the affirmative defense of improper venue in compliance with CR 12 both by including it in its Answer and by asserting it in its only CR 12 motion, which was joined with its CR 56 motion to be heard at the same time. Prior to the motions at issue on the present appeal, Rudd had not previously filed a CR 12 or CR 56 motion, nor had it propounded evasive discovery responses concerning the venue or invoice issues. Accordingly, Rudd did not waive this affirmative defense.

TFC also attempts to argue that Rudd waived its affirmative defenses by other filings with the trial court. *See* TFC brief at 47-48. Significantly, TFC provides no authority for the proposition that filing a jury demand, agreeing to a date for a settlement conference as required by the Case Scheduling Order of the Court, filing a Motion to correct TFC's improper track assignment of the case, or requesting that certain case schedule deadlines be adjusted to follow the guidelines established by the Local Rules constitutes a waiver of an affirmative defense.

Considered in its logical extreme, TFC's position is that a party must ignore all requirements of the court where the case is filed until the party files its CR12 motion on an affirmative defense. Not only is there no authority for such a proposition, it is contrary to both the decisions of the

appellate courts and CR 12's provisions regarding what constitutes a waiver of the affirmative defense of improper venue. This is especially true when trying to harmonize TFC's proposition with the holding in *Voicelink* that if properly asserted, a defendant can assert the defense up until the first day of trial.

On its cross-appeal, TFC offers no authority for holding that the trial court erred in finding that Rudd had not waived its affirmative defense that venue in Pierce County is improper under the facts and circumstances of this case. Accordingly, the trial court's ruling that Rudd did not waive its affirmative defense of improper venue should be affirmed.

III. REQUEST FOR AN AWARD OF FEES UNDER RAP 18.1

RAP 18.1(a) and (b) provide that if a party has a right to recover reasonable attorney fees or expenses on review before the Court of Appeals or Supreme Court, the party must request an award of fees in its Brief. Rudd requests that it be awarded its reasonable attorney fees on appeal if it prevails. Rudd is entitled to an award of fees under the Attorney's Fees provision of Item 10 of the terms and conditions on the back of each invoice, which states:

If any party resorts to judicial enforcement of any provision of this agreement, including arbitration, the prevailing party shall be entitled to recover from the non-prevailing party or parties reasonable attorney fees and costs incurred prior to litigation, at both the trial and appellate levels, and subsequent to judgment in obtaining any execution or enforcement.

CP 111- CP 112, CP 114-115, CP 138-139. This is a fair and equitable provision which confers the same contract right to attorney fees to any party, whether Rudd or TFC, and contract is a recognized basis for such an award. *See Alejandre v. Bull*, No. 76274-1 ¶¶ 35-37, __ Wn.2d __, 153 P.3d 864 (2007). Consequently, if this Court determines that the terms and conditions in the Rudd invoices are part of the parties' contracts, Rudd is entitled to its attorney's fees under the contract as the prevailing party upon this appeal.

Rudd is cognizant of the fact that this fee request was not included in its opening appellate brief in strict compliance with RAP 18.1(b). However, where – as here – Rudd's reply brief also includes its response to TFC's cross-appeal, the purpose – if not the letter – of the rule is satisfied, as TFC will have a full, fair, and complete opportunity to

respond to Rudd's fee request in its reply brief on its cross-appeal. *E.g.*, *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 757 P.2d 1378 (1988) (request for fees may be granted despite failure of strict compliance when the purpose of RAP 18.1(c) has been satisfied).

Even if the specific issue of attorney fees were never raised in the parties' briefs, this Court still would have discretion to award attorney fees. *See, e.g., Boyd v. Davis*, 127 Wn.2d 256, 264-65, 897 P.2d 1239 (1995) (“[RAP 12.1(b)] suggests that it is within the discretion of the appellate court to decide an issue regardless of which, if any, brief addresses it.”). Here, Rudd's right to attorney fees is based on attorney's fee provision in the invoices, which Rudd contends comprise the contracts of the parties, and whether the invoices comprise the contracts is the ultimate issue on the present appeal. Thus, Rudd's right to attorney fees is an issue that was implicitly, albeit not explicitly, raised its opening appellate brief. Therefore, Rudd respectfully requests that this Court grant its present, explicit, request for its attorney fees on appeal based upon the attorney's fee provision in the invoices at issue.

IV. CONCLUSION

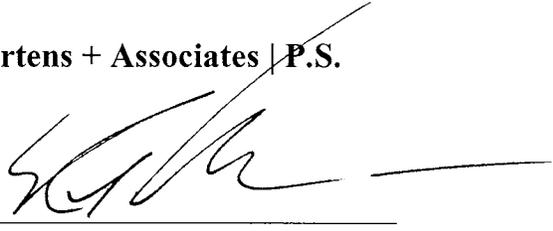
In its opening brief, TFC fails to distinguish the controlling

authority of *Puget Sound Financial* and *M.A. Mortenson* from the facts of this case. Those cases are binding precedent and their holdings are dispositive authority which compel this Court to hold that the venue provision, exclusion of warranty provisions, and limitation of remedies provisions of the 775 invoices provided by Rudd to TFC over a three year course of dealing are valid and enforceable terms and conditions of the parties' contracts. The trial court should be reversed on these issues.

Conversely, the trial court's ruling that Rudd did not waive its affirmative defense of improper venue in Pierce County should be affirmed because TFC has failed to show this Court that Rudd committed any act or series of acts sufficient to constitute a waiver of the defense.

RESPECTFULLY SUBMITTED this 16th day of April, 2007.

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By 

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STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2007, I caused to be served true and correct copies of the foregoing Response to Tacoma Fixture's Appellate Brief and Reply Brief of Rudd Company, Inc. on the court and counsel as follows:

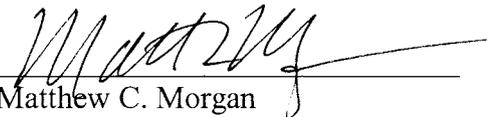
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 16th day of April, 2007.



Matthew C. Morgan
Paralegal for Martens + Associates | P.S.