

No. 34961-2-II

COURT OF APPEALS  
DIVISION II OF THE STATE OF WASHINGTON

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TACOMA FIXTURE CO., INC.,

Respondent/Cross Appellant,

v.

RUDD COMPANY, INC.,

Petitioner.

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REPLY BRIEF OF CROSS APPELLANT  
TACOMA FIXTURE COMPANY

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**I. RUDD WAIVED ITS AFFIRMATIVE DEFENSE OF IMPROPER VENUE.**

Rudd asks this Court to affirm the trial court's ruling that Rudd did not waive its affirmative defense of improper venue. In support of its argument, Rudd asserts that it did not file any motions under CR 12 prior to filing its motion for summary judgment and motion to dismiss for improper venue ("Rudd's Motions). Rudd's Response, at 29. However, Rudd's argument misses the point. The issue is not whether Rudd filed another CR 12 motion before filing its motion for summary judgment. Rather, the focus should be on the fact that Rudd filed its summary judgment motion before it filed its motion to dismiss for improper venue.

Rudd also asserts that because Rudd's Motions were noted for oral argument on the same day, they should be treated as a single motion. *Id.* Rudd fails to cite any authority in support of this contention. TFC believes that it is the filing date of the particular motion that governs the analysis, and not the date of oral argument.

It is TFC's position that CR 12(g) required Rudd to have filed its motion to dismiss for improper venue either before or at the same time as Rudd filed its motion for summary judgment. It is clear from the

record that Rudd actually filed its motion for summary judgment about two weeks before it filed its motion to dismiss for improper venue. CP 164-188; CP 189-200. TFC contends that the procedural facts of this case require a finding that Rudd waived its affirmative defense of improper venue by seeking affirmative relief from the court in its motion for summary judgment before it filed its motion to dismiss for improper venue.

CR 12(h)(1)(A) provides that a defense of improper venue is waived “if omitted from a motion in the circumstances described in section (g). . . .” CR 12(h)(1). CR 12(g) provides that:

If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h)(2) hereof on any of the grounds there stated.

CR 12(g) (emphasis added).

It is clear that a portion of Rudd’s motion for summary judgment was essentially a CR 12(b)(6) motion for “failure to state a claim upon which relief can be granted.” As noted by author Karl Tegland in *Rules Practice - Washington Practice Series*, typical examples of failure to state a claim defenses are “cases in which the plaintiff’s claim is clearly

barred by the statute of limitations, or the plaintiff is asserting a cause of action that is not recognized in the state, or the defendant has some other iron-clad defense as a matter of law.” 3A K. Tegland, *Rules Practice - Washington Practice Series*, at 264 (5th ed. 2006) (citing, Wright and Miller, *Federal Practice and Procedure: Civil*, § 1357) (emphasis added).

In its motion for summary judgment, Rudd sought, among other things, to dismiss all of TFC’s claims for breach of express or implied warranties, arguing that the warranty disclaimers contained on the back of Rudd’s invoices precluded TFC’s claims in their entirety. CP 165, 184-186. Rudd’s attempt to have TFC’s warranty claims dismissed based on the warranty disclaimer provision on the back of the invoices was essentially a CR 12(b)(6) motion (i.e., failure to state a claim). As such, Rudd was required to file its motion to dismiss for improper venue before its motion for summary judgment. Alternatively, Rudd could have combined the relief requested in its motion to dismiss for improper venue into its summary judgment motion.

Because Rudd did not actually file its motion to dismiss for improper venue until two weeks after it filed its motion for summary judgment, Rudd’s defense of improper venue was waived pursuant to CR

12(g). Further, the fact that Rudd noted both motions for oral argument on the same day cannot resurrect the waiver that occurred immediately upon the filing of its motion for summary judgment.

In its Response, Rudd also asserts that TFC misfiled the original action under the “standard” case track assignment when it should have been filed under the “complex” case track assignment in accordance with Pierce County Local Rule 1(h). As a result, Rudd argues that it was forced to file a motion for continuance of the trial date. Rudd’s Response, at 28-29. It is interesting to note that Rudd never raised its “mistracked” argument until September 22, 2005, when it filed its Motion for Trial Continuance, which was nearly nine months after TFC commenced its legal action and about three months before the original trial date. CP 18-26.

Moreover, TFC believes that its breach of express and implied warranty claims actually do not fit squarely within any of the track assignments (i.e., expedited, standard, complex) described in PCLR 1(h) and there certainly were no sinister motives involved in initially designating the “standard” case assignment track.

PCLR 1(h)(2) provides that cases that should be assigned to the “expedited” case track assignment include “actions on contract . . . and

warranty (with no personal injury involved). . .” This would seem to fit our case, except for the limitation on the number of witnesses, since TFC’s claims were based on express and implied warranties under the U.C.C.

PCLR 1(h)(3) provides that cases that should be assigned to the “standard” case track assignment include “construction claims involving questions of workmanship.” TFC was in the business of constructing cabinets. Further, one could certainly anticipate that questions of workmanship could arise in connection with this case (and, in fact, such issues were raised by Rudd).

Finally, PCLR 1(h)(4) provides that cases that should be assigned to the “complex” case track assignment include “product liability and class action claims.” TFC believes the phrase “product liability claims” is generally understood to mean a tort claim arising out of the use of a manufacturer’s product. While TFC’s claims may include allegations of defective products, this is not a traditional “products liability” tort case.

Since TFC’s claims were more closely aligned with the description of the types of claims described in the expedited and standard track, TFC elected the standard case track assignment as being the best fit at the time.

Although TFC does not believe that the Court will need to reach the issue on TFC's cross appeal relating to Rudd's venue defense, if the Court does consider this issue, TFC believes that the Court should reverse the trial court's decision on this issue. A dismissal of TFC's lawsuit, as opposed to a transfer of venue to King County Superior Court, would have a detrimental impact on TFC's claims as a significant portion of its claims may be barred by the applicable UCC statute of limitations. Under the facts of this case, it would be unfair and unjust to dismiss this case for improper venue. At a minimum, venue should be transferred to King County Superior Court, a remedy previously offered to the trial court by Rudd in its motion to dismiss for improper venue. CP 189-200.

**II. RUDD'S REQUEST FOR ATTORNEY FEES SHOULD BE DENIED AS RUDD FAILED TO COMPLY WITH RAP 18.1.**

Rudd's request for attorney fees should be denied as Rudd failed to comply with RAP 18.1. RAP 18.1(b) specifically provides as follows: "The party must devote a section of its opening brief to the request for the fees or expenses. . . ." RAP 18.1(b) (emphasis added). Rudd's opening brief did not include a request for attorney fees. Rather, Rudd included its request for attorney fees for the first time in its Reply

Brief. RAP 10.3(c) provides that: "A reply brief should be limited to a response to the issues in the brief to which the reply brief is directed." RAP 10.3(c). Because Rudd failed to comply with both RAP 18.1(b) and RAP 10.3(c), the Court should deny Rudd's request for attorney fees.

Under similar circumstances, the courts in the following cases refused to grant an attorney fees request that was not made in compliance with RAP 18.1(b): *Industrial Coatings Co. v. Fidelity and Deposit Co.*, 117 Wn.2d 511, 520, 817 P.2d 393 (1991) (fee request denied because it was raised for the first time in the reply brief); *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990) (denied fee request made for first time in reply brief and stated: "This court does not consider issues raised for first time in a reply brief."); and *In re Marriage of Mull*, 61 Wn. App. 715, 723-24, 812 P.2d 125 (1991) (fee request denied because it was raised for the first time in the reply brief).

Rudd relies on *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 757 P.2d 1378 (1988) to argue that an appellate court may waive strict compliance with the requirements of RAP 18.1 and that Rudd's attorney fee request should be granted even though it admittedly failed to comply with the requirements of RAP 18.1(b). However, *Donovick*

involved a situation where a party failed to file an affidavit in support of an attorney fee request 7 days prior to oral argument as required under RAP 18.1(c). Although it is not clear from the opinion, presumably the request for an award of attorney fees was properly included in the party's opening brief. Further, the Court's opinion notes that the opposing party did not challenge the amount of the fee request nor the request to waive strict compliance with RAP 18.1(c) in light of the "extenuating circumstances" set forth in the affidavit. *Id.* at 418.

Therefore, it appears that in *Donovick* there were extenuating circumstances that prevented the timely filing of the affidavit supporting the fee request. In our case, Rudd does not provide any explanation of why it failed to comply with RAP 18.1(b). As such, this Court should not presume that there are any similar "extenuating circumstances" present in this case to excuse Rudd's compliance with RAP 18.1(b).

Rudd also relies upon *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995) to argue that this Court has discretionary authority to award attorney fees even though Rudd failed to comply with RAP 18.1(b). However, the Court's decision in *Boyd* does not support Rudd's position under the facts of our case.

As an initial matter, it should be noted that the *Boyd* Court references the court rulings made in *In re Marriage of Sacco* and *In re Marriage of Mull* and states that the facts in those cases are distinguishable from the facts in *Boyd*. *Boyd*, at 264-65. The *Boyd* Court states that in *Sacco* and *Mull*, the appellate courts refused to address an attorney fees issue that was not discussed in the opening brief. *Id.*

In comparison, in *Boyd* the Court of Appeals actually decided the attorney fees issue despite the party's failure to address the issue in his opening brief. The *Boyd* Court then ruled that RAP 12.1(b) suggests that an appellate court has the discretion to decide issues regardless of which, if any, brief addressed it. In this case, the *Boyd* Court found that the Court of Appeals exercised its discretion to decide the attorney fee issue and the Court decided that it was not going to disturb the appellate court's decision. *Id.* Further, it is clear from the opinion that the issue of attorney fees is something that had been an important issue in the prior legal proceedings, beginning with the arbitrator's award of attorney fees.

Since the facts in our case are the same as the facts involved in *Sacco* and *Mull*, the Court should follow the precedent established in

those cases. TFC requests that the Court deny Rudd's attorney fee request as it failed to comply with RAP 18.1(b).

RESPECTFULLY SUBMITTED this 16th day of May, 2007.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of May, 2007, I caused to be served true and correct copies of the foregoing Reply Brief of Tacoma Fixture Co., Inc. on the court and counsel as follows:

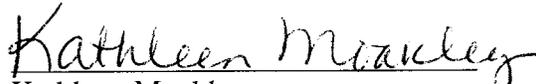
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 16th day of May, 2007.

  
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