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I. ASSIGNMENTS OF ERROR

A. First, the trial court erred in granting the Defendant used car dealer (Dave Barcelon's Truck Town; hereafter "Truck Town")'s RCW 7.04A.060 (CR 12/56) motion to compel private arbitration of the plaintiff's RCW 46.70 and RCW 19.86 statutory consumer claims, by improperly finding at the outset that a binding contractual agreement with a private arbitration clause had ever actually formed in the first place, based merely on Truck Town's EXPRESSLY CONTINGENT ACCEPTANCE under the generally permitted and much lower UCC standards for contract formation, despite the fact that Truck Town had failed to comply with the applicable acceptance deadline and much higher statutory Dealer Practices Act requirements imposed at RCW 46.70.180(4) requiring the car dealer to UNCONDITIONALLY accept the Plaintiff consumer's vehicle purchase offer containing said arbitration provision, within four business days, and in any event before the Plaintiff revoked his offer to purchase entirely.

B. Second, assuming a valid contract with a private arbitration clause which silently required the customer, and the customer only, to use arbitration and also required to the customer pay for justice by the hour on any claim against the dealer and moreover to also possibly pay the dealer's legal fees, had ever been timely accepted and formed, the trial court nevertheless erred in finding that the particular arbitration clause at issue had in fact, expressly and clearly covered the statutory Consumer Protection claims (under RCW 46.70 and RCW 19.86) in a manner legally sufficient to meet the required standards for obtaining the customer's knowing, intelligent, and voluntary waiver of the Plaintiff consumer's right to a jury trial in a public forum with the added benefits and protections for both the individual consumer and the public at large, of one-way, consumer-only fee shifting and injunctive reliefs available on those statutory consumer protection claims under RCW 46.70 and RCW 19.86.

C. Third, assuming a valid vehicle purchase contract with a private arbitration clause was silently formed by the car dealer after the passing of the mandatory 4-day, RCW 46.70.180(4) anti-bushing deadline for Truck Town's statutorily required unconditional acceptance and also after the plaintiff customer's purchase offer had already been revoked by the consumer and even if the clause did not specifically cover statutory Consumer Protection claims including RCW 46.70 and RCW 19.86 as needed to properly obtain a knowing, voluntary, and intelligent waiver of the Plaintiff's jury trial rights thereon, then the Court erred by failing to find that the private arbitration provision was overridden by our legislature's exercise of its State police powers to statutorily provide public access to justice, to create and maintain a body of law to promote and foster important public policies such as fair and honest trade and competition, to adequately protect the investments of consumers and the ability to secure

adequate family transportation, and to promote uniform interpretation and application of the consumer laws by judges elected and accountable to the public thereon in public forums as spelled out in Wineland v. Marketex, 28 Wash. App. 830 (1981), which applies to this purely INTRA-state consumer transaction with its express state law invoking terms; whereas all INTER-state Commerce based, Federal Supremacy Clause founded cases like Garmo v. Dean Witter, 101 Wn.2d 585, 681 P.2d 253 (1984), in otherwise properly accepted and binding contractual agreements containing express invocations of both Federal law and the Federal Arbitration Act, explicitly covering statutory consumer claims in private forums, does not apply.

D. Fourth, the trial court thereafter failed to find that the one-sided private arbitration clause in this case, assuming it was ever initially binding at all for forcing private arbitration and waiving a public jury trial on the statutory

consumer claims at issue, was thereafter nevertheless unconscionable and otherwise void against public policy.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Defendant Truck Town never submitted any evidence to show that Truck Town's express, written financing contingency and their reservation of the right to determine the plaintiff customer's "credit worthiness", (which Truck Town placed on any ultimate future acceptance that might have been given by Truck Town to the Plaintiff's vehicle purchase order which Truck Town drafted with its own merger and integration clause), had: (1) ever been subsequently and timely satisfied or waived in order to provide the Plaintiff customer with the statutorily mandated timely and UNCONDITIONAL ACCEPTANCE AND any showing that (2) Truck Town had ever informed the plaintiff of the same, all as statutorily required by law to happen by the end of the fourth business day pursuant to RCW

46.70.180(4) and definitely before the Plaintiff customer's purchase offer was also withdrawn by Plaintiff Wegeleben prior to any such possible unconditional and final acceptance and potential notification thereof.

B. Contract formation requires offer, acceptance, and consideration. Christiano v. Spokane County Health Dist., 93 Wash. App. 90, 969 P.2d 1078, reconsideration denied (Div. III, 1999). However, under our Washington State statutes, AUTOMOBILE purchase contracts require more than what might otherwise suffice under general contract law or the UCC for other goods. In such transactions, our State law requires that car dealers in Washington State must finally and unconditionally accept offers to create any binding deal AND that the same final and unconditional acceptance must be provided to the customer before the 4 (four) day deadline to do so expires. RCW 46.70.180(4).

The same principle was brought home in Otis Housing Association v. Ha, 140 Wash. App. 470, 475 (2007) (where party seeking to enforce contractual arbitration clause in a real estate lease option to purchase agreement failed to timely exercise the option to purchase before the deadline to make the purchase lapsed, both the option to purchase AND THE ARBITRATION CLAUSE therein, "no longer had any force or effect; thus, it [the arbitration clause] was void.").

At best, Truck Town had only started up a "conditional contract", which is a contract whose very existence and performance depend entirely upon the satisfaction of a specified contingency. In fact, the parties in this case had a unilateral contract because neither party was bound until the dealer unconditionally accepted the purchase offer by actually satisfying or waiving the financing contingency and also informing the customer when it had done so, rather than merely providing the

indefinite promise to do so at some unspecified future date if ever. As such, Plaintiff Wegeleben's purchase order, during the brief time it was open for acceptance, was a unilateral contractual offer awaiting UNCONDITIONAL ACCEPTANCE within a reasonable time.

The offer of such a unilateral contract is an offer to enter into a contract upon the doing of the bargained for act by the offeree, and performance by the other party constitutes acceptance of the offer and the contract then becomes executory, but until the required acceptance by completion of that performance, the offer may be revoked by communication of such revocation to the offeree or by acts inconsistent with the offer, knowledge of which has been conveyed to the offeree. Knight v. Seattle First National Bank, 22 Wash. App. 493, 589 P.2d 1279 (1979).

An offer, unless sooner withdrawn, stands during the time it was limited to, or if there is no express time limitation placed on the offer by the offeror, then it stands open for a reasonable period of time, and until the end of that time the offer is regarded as being constantly repeated; but after the expiration of such time **there is no offer and nothing to withdraw and nothing which the offeree can do to revive the offer or to produce an extension of time for acceptance.** Wax v. Northwest Seed Co., 189 Wash. 212, 64 P.2d 513 (1937).

As to "reasonable time" for acceptance, our legislature, in order to protect consumer purchasers, has placed a mandatory time limit on what constitutes that reasonable time for acceptance by car dealers in car sales transactions to just four days. RCW 46.70.180(4). While the Plaintiff's vehicle purchase order did not expressly place a time limit on how long the Plaintiff's offer to purchase upon satisfaction of

the contingency would last, our State legislature did so.

The statute requires car dealers as a matter of law to unconditionally provide prompt and unconditional acceptance or rejection of a customer's purchase offer within 4 days. RCW 46.70.180(4)(a)(i,ii). The car dealer must timely do one or the other and notify the customer of the same and cannot leave the customer in limbo with the dealer's spot-delivered car. RCW 46.70.180(4).

If the dealer fails or refuses to unconditionally accept the deal, then they must timely offer, within the same 4 (four) day deadline, to return the customer's money and property prior to ANY further negotiations or any new proposals.

Without the timely acceptance, the customer is free to leave and walk away from their original

purchase order without any obligation to the dealer whatsoever. This must happen if the customer's purchase offer as written was not timely and unconditionally accepted via satisfaction of any and all contingencies placed thereon AND for which the customer must have been notified of the same all within 4 business days as required by law for car dealers for any valid acceptance to occur to bind the customer. RCW 46.70.180(4).

In this case, it is undisputed that the defendant dealer failed to comply with the law and on top of that, the Plaintiff customer revoked his unaccepted offer before any belated acceptance could have been given thereafter anyhow. CP-81-87.

Defendant Truck Town left Plaintiff Wegeleben's sworn declaration (at CP-81-87), regarding these undisputed facts on both the Defendant dealer's failure to timely comply with RCW 46.70.180(4) AND the dealer's failure to comply

with the revocation of his purchaser offer, UNCONTESTED. This is despite the fact that the Plaintiff had challenged the defendant to come up with any such evidence not only for the dealer's motion but ever since last July of 2007 and before the Plaintiff filed the lawsuit to affordably bring this dealer to justice. CP-65.

Worse yet for Truck Town, and for purposes of Truck Town's superior court motion to force private arbitration, that motion was akin to a dismissal or summary judgment motion against the Plaintiff's superior court action. As such, Plaintiff Wegeleben was also entitled to all inferences to be construed in his favor. CR 12/CR 56; McKee v. American Home Products Corp., 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (Moving party must establish the absence of any genuine issue of material fact upon which reasonable minds could disagree).

A reasonable inference regarding the lack of

any defense declarations was that the Plaintiff's allegations were factually irrefutable and uncontested. Certainly, the dealer's chosen silence on facts was also attributable to the fact that the none of the defendant's employees wanted to implicate themselves with any involvement in the CRIMINAL ACT of the bushing violation at issue which the dealer does not want to be brought in front of a jury of consumers for.

Many people forget that such illegal bushing and stalling in violation of RCW 46.70.180 as here, is so harmful and or ripe for further abuses on customers and contrary to free and active trade and commerce that it is not only illegal and a direct civil violation of the Dealer Practices Act at RCW 46.70.180(4), not to mention a per se unfair and deceptive business practice in violation of the Consumer Protection Act at RCW 19.86.020 pursuant to RCW 46.70.310, but it is also A CRIMINAL MISDEMEANOR ACT pursuant to RCW 46.70.170. This

explains why a dealer would now want to keep such allegations as private as possible and why any dealer employees and the dealership might choose to remain silent, lest the Plaintiff forward the matter to the prosecutor's office as well.

Instead of refuting the Plaintiff's uncontested facts regarding the lack of timely and unconditional acceptance as well as Plaintiff's revocation of the offer, Defendant Truck Town presented purely parol and directly conflicting oral arguments merely from their legal counsel at (RP-13, lines 5-15). This attempted to somehow allege a contradictory parol "acceptance" in spite of the express language of the own dealer drafted purchase order AND without any supporting affidavits from any witnesses to attack the effect of their own express contingency language therein. This was done in violation of the Parol Evidence Rule, and without pleading or alleging or showing any fraud, accident or mistake for any such Partial

Integration Defense¹ thereto. Plaintiff objected to such oral argument regarding this sudden alleged notification of ACCEPTANCE at RP-13, lines 17-23.

1

The Defendant's attempt to orally argue that the contingency had been eliminated at the time the purchase order was signed, is not only absent from the factual record in any affidavit before the court, but it is also in direct contravention of the express contingency stated in the dealer drafted purchase order and thus barred by the Parol Evidence Rule; Furthermore, it also barred by the Defendant dealer's own merger/integration language provided to the Plaintiff purchaser as part of the Plaintiff's financing application, attached hereto from Truck Town's sworn discovery answers as **Appendix A**. That clause expressly states: **ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON STATE LAW.** Additionally, RCW 46.70.180(4) requires actual notification be given to the customer of the acceptance/satisfaction of the contingency which refutes Defense counsel's argument that the unconditional acceptance was somehow "automatic". The failure or lack of an express rejection of the offer does not inversely create an acceptance either. Troyer v. Fox, 162 Wash. 537, 298 P. 733 (1931).

III. STATEMENT OF THE CASE

A. OVERVIEW OF BACKGROUND FACTS

As indicated in Plaintiff Wegeleben's uncontested sworn declaration at CP-81-87: On or about June 22nd, 2007, Plaintiff Kenneth W. Wegeleben signed a contingent Vehicle Purchase Order, drafted by the dealer, with an express financing contingency placed on any acceptance by the dealer at (CP-13, section entitled "FINANCING CONDITION"). The financing contingency clause in the vehicle purchase order stated in relevant part:

FINANCING CONDITION - IF A RETAIL INSTALLMENT CONTRACT . . . IS SIGNED IN CONJUNCTION WITH THIS BUYER'S ORDER . . . , THE DEALER WILL HEREAFTER ASSESS THE BUYER'S CREDITWORTHINESS AND IF THE DEALER DOES NOT HEREAFTER APPROVE FINANCING ON ACCOUNT OF THE BUYER'S CREDITWORTHINESS AND SUBSEQUENTLY NOTIFIES BUYER OF SUCH DISAPPROVAL, THIS AGREEMENT IS VOID . . . [and you will have to bring back our vehicle]

(CP-13). As anticipated by RCW 46.70.180(4), the parties did in fact sign a retail installment contract triggering this clause at CP-16-19. The

Plaintiff also signed a financing application (attached hereto as Appendix A) in order to facilitate potential satisfaction of the contingencies placed upon the defendant dealer's willingness to accept the Plaintiff's purchase order.

Plaintiff Wegeleben's uncontradicted declaration established that by Saturday, June 30th, 2007, the Defendant dealer Truck Town "had still not given any unconditional acceptance of the [proposed 6-22-07] deal AND they were now balking at providing the vertical winch that they still owed as part of the deal [per Exhibit C to Plaintiff's complaint]." (CP-20). Thus, all the customer had in writing was a contingent acceptance, and Wegeleben never got any news thereafter from the dealer to timely change that fact as required by law.

Finally, on June 30th, 2007, 8 days after no

further progress on the expressly contingent purchase order had been made by Truck Town, Plaintiff Wegeleben drove the dealer's vehicle back to the dealership, gave their vehicle back to them, and revoked his offer by demanding his money back. Wegeleben also refused the Defendant's illegal demands that he sign a new and different contract². (CP-83, paragraph 5).

2

The dealer cannot try to engage in further negotiations with the customer without first returning the customer's money or property as Plaintiff Wegeleben demanded. That is illegal and yet another violation of RCW 46.70.180(4). Such action unfairly impairs negotiations to the disadvantage of the customer by creating a false sense of obligation while the dealer still holds the customer's money. Instead, the customer should feel free to walk away with their property and money in hand or to choose to continue with the dealer who failed to timely accept the deal. Such a dealer should be bargaining with such an empowered customer earnestly and fairly during this period of unfettered customer freedom in direct and open competition with other dealers who actually can get a deal done on time and perhaps for less without stifling trade and commerce and transportation.

On July 2nd, 2007, Co-Defendant Kitsap Bank, which had been tipped off to the dispute, suddenly sent the Plaintiff a letter indicating for the first time ever from any source a notification that this lender had apparently approved the loan based on the June 22nd vehicle purchase order at some point and was now threatening to treat its knowledge of the Plaintiff's vehicle return as a voluntary repossession if Plaintiff Wegeleben did not stop resisting the dealer's bushing violation. (CP-83, paragraph 7).

When the bank and the dealer still refused to back down from the violation and return the Plaintiff's money, the Plaintiff retained counsel and on August 24th, 2007 filed his statutory consumer protection claims under RCW 46.70 and RCW 19.86 in Kitsap County Superior Court where both defendants are located and could be affordably confronted with a mere \$200 filing fee.

Plaintiff's complaint sought damages and other statutory reliefs for Plaintiff's injuries, jointly and severally, from the defendant dealer Truck Town, from the dealer's surety company Contractor's Bonding and Surety Company, and also from Kitsap Bank, including but not limited to injunctive relief in the public interest as provided for in RCW 46.70.190 and RCW 19.86.090.

Defendant Truck Town and Contractor's Bonding and Insurance Company answered the Plaintiff's lawsuit and filed a Superior Court Counter-claim against the Plaintiff on October 10th, 2007, suing Plaintiff for breach of contract in order force the bushed deal on Wegeleben. (CP-34). Kitsap Bank filed its answer on October 19th, 2007. (CP-21-26).

Defendant Truck Town then sought to block the entire superior court action by filing their motion to compel private arbitration for all of the claims and all of the parties. (CP-36-42). Contractors

Bonding and Insurance Company and Kitsap Bank did not contest Truck Town's motion against the consumer suing them. The trial court heard oral arguments of Truck Town and Plaintiff Wegeleben on November 16th, 2007 (RP-1-22).

On November 30th, 2007 the Court gave its oral ruling (RP-23-32) and then entered a written order compelling arbitration (CP-110-112). On December 17th, 2007, Plaintiff Wegeleben filed his Notice of Appeal. (CP-113-118).

IV. ARGUMENT

A. THE STANDARD OF REVIEW

1. The appellate court reviews questions of arbitrability, De Novo. Mendez v. Palm Harbor Homes, Inc., 111 Wash. App. 446, 453, 45 P.3d 594 (2002). CR 12 or CR 56 motions are also reviewed De Novo. Davis v. Baugh Industrial Contractors, 159 Wn.2d 413 (2007) (citing to Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).

The attempt to stop the superior court action and to force and start a private arbitration, was in effect a motion to dismiss the superior court action on the pleadings under CR 12. Pursuant to CR 12(c), "[i]f on a motion for judgment on the pleadings, matters outside the pleadings [such as sworn statements from the parties or any witnesses] are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56."

Accordingly, Defendant's RCW 7.04A.060 Motion to compel arbitration was effectively converted into a CR 56 motion governed by the same De Novo standard of review once Plaintiff Wegeleben filed sworn declarations in response thereto with the trial court.

For that review, "[t]he [ADMISSIBLE] facts and all reasonable inferences are considered in the light most favorable to the nonmoving party [not

the moving party].” Gaines v. Northern Pacific R. Co., 62 Wn.2d 45, 380 P.2d 863 (1963). Thus, Plaintiff Wegeleben was entitled to all of the most favorable inferences if he needed them for the uncontested facts at hand.

B. THE ANALYTICAL FRAMEWORK

1. The Uniform Commercial Code on the sale of goods is just a general, gap filler where an agreement or specific statute on point does not already govern. See generally RCW 62A.1-102 and Washington Comments thereto.

As such, it was improper for the trial court to reason (at RP-25) and to order (at CP-110-112) that a statutorily non-compliant, but UCC contingent acceptance that might be generally accepted in sales of other goods in another type of transaction at large, had somehow led to a binding automobile sales contract without the timely and unconditional acceptance specifically required by

law by our legislature for such **AUTO** sales transactions specifically.

RCW 46.70.180(4) governs here, not the UCC, and the statute specifically requires car dealers to either unconditionally accept or reject vehicle purchase orders and to inform consumers of the same within 4 business days. The failure to do so is a per se unfair and deceptive business practice in violation of both RCW 46.70.180(4) and also in violation of the Consumer Protection Act at RCW 19.86, pursuant to RCW 46.70.310.

The key test for illegal bushing under RCW 46.70.180(4) is whether the customer was timely informed that the dealer had decided to give unconditional acceptance or the customer was informed that he was free to take his money back and leave without any obligation by the statutory deadline. If the dealer cannot show one or the other, then the law was violated and the Plaintiff

consumer can sue the dealer in Superior Court as expressly provided in RCW 46.70.190 and RCW 19.86.090. The dealer is not rewarded with an enforceable contract and a means of blocking a public trial for doing so.

The Defendant car dealer is not allowed to hold the customer and the customer's deposit money or trade-in vehicle in limbo by withholding unconditional acceptance through the passage of the statutory deadline for acceptance and also through the consumer's ultimate revocation of their original offer. Furthermore, the dealer after having done so, cannot then suddenly claim that a valid contract with a binding arbitration clause had ever formed. The dealer cannot have it both ways. Truck Town is illegally attempting to have its cake and eat it too.

Truck Town maintained the contingency and only claimed to have an enforceable deal only to block

the customer's ability to back out of the purchase order via ready access to an affordable public forum to cost effectively and thoroughly challenge the dealer's illegal practices and also prevent the same from happening again. Only then did the defendant dealer try to claim a contract had formed in order to shoestring its alleged right to yank the Plaintiff's case against the dealer's actions from being heard in public by the court at all.

Any allegation of lack of jurisdiction or improper venue, because of an allegedly binding arbitration agreement or otherwise, is a CR 12(b)(1-3) or a CR 12(b)(6) motion. As both CR 12(b) and CR 12(c) both state, if "matters outside of the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, . . .".

Thus, Defendant Truck Town's RCW 7.04A.060

motion was a CR 12/CR 56 motion with the burdens and showings required on the moving party for the same. Defendant's RCW 7.04A.060 motion asked the Court to "decide whether an agreement to arbitrate exists [i.e. - had a binding contract with Wegeleben ever been timely formed in compliance with RCW 46.70.180(4) or ever formed before Plaintiff Wegeleben withdrew his offer if at all] or a controversy is subject to an agreement to arbitrate." RCW 7.04A.060.

Thereafter, RCW 7.04A.070 states in relevant part that "**[i]f the court finds there is no enforceable agreement, it may not order the parties to arbitrate.**" RCW 7.04A.070. Without the required timely and unconditional acceptance, Plaintiff properly revoked his offer and no contractual obligations ever formed or remained.

Defendant's motion took on the burden to establish as a matter of law that no reasonable

minds could disagree that the dealer had in fact provided the unconditional and timely acceptance required by RCW 46.70.180(4) in order to form a valid and binding contract between the dealer and the Plaintiff consumer and that all the terms in that contract were now fully enforceable. Such terms included, most importantly, the arbitration clause contained within the purchase order.

Of course, the validity of any contract formation itself was the first legal hurdle for Truck Town's CR 12/56 motion, since the validity and enforceability of the very contract containing the arbitration clause therein still had to be established. Then also the clause itself had to be defended from Plaintiff's additional challenges thereafter well.

The financing contingency is at best a qualified acceptance which does not comply with RCW 46.70.180(4) unless and until fully and timely

satisfied and effective only upon timely notification thereof all of which must be given within 4 days and otherwise before the customer revokes the offer. In any event, such a conditional acceptance is actually a counter-offer and therefore a rejection of the original offer. Banks v. Crescent Lumber & Shingle Co., 61 Wn.2d 528, 379 P.2d 203 (1963); Excelsior Knitting Mills v. Bush, 38 Wn.2d 876, 233 P.2d 847 (1951) (the same applies to sales of goods under the UCC).

Had Truck Town decided to comply with the anti-bushing statute at RCW 46.70.180(4) and timely provided their unconditional acceptance, a binding contract would have formed, then and only then giving rise to their argument that their arbitration clause (at CP-46, first paragraph) might apply and then, if a binding contract formed to give it any potential life, it might also thereafter withstand the rest of the Plaintiff's challenges thereto.

Note how Defendant Truck Town should have learned that their inaction and procedures in this case would only have a small chance of passing muster on the first hurdle back a few years ago under the old version of RCW 46.70.180(4) that was in place back when the Plouse v. Bud Clary of Yakima, Inc., 128 Wn. App. 644 (2005), review denied, 157 Wn.2d 1015 (2006), decision was still good law. Unfortunately for Truck Town, they need to remember that the statute was quickly amended to make clear what Plaintiff Plouse had already argued in vain to the Courts (that contingent acceptance is not valid acceptance). No longer.

In response to the miscarriage of justice imposed upon the clearly bushed customer in that case by the blatantly contingent acceptance employed by the dealer to indefinitely bush the customer, the legislature promptly amended RCW 46.70,180(4). This was to make it absolutely clear that a dealer's mere signature on a purchase order

containing an express financing contingency is not enough to timely complete acceptance in compliance with the anti-bushing statute (RCW 46.70.180(4)). Timely and UNCONDITIONAL acceptance or refund is MANDATORY to prevent bushing, as if a statutory amendment was really needed to figure that out.

Moreover, a car dealer's conditional acceptance pending satisfaction of a financing contingency, is still merely an agreement to make an agreement if and when the contingency is satisfied. The contingent promise of a future acceptance for an agreement upon satisfaction of an express contingency is nothing more than mere negotiation and not a binding contract until that final and unconditional acceptance is timely given to the offer and assuming the offer is still open. Merritt-Chapman & Scott Corp. V. Gunderson Bros. Engineering Corp., 305 F.2d 659, certiorari denied 83 S.Ct. 307, 371 U.S. 935, 9 L.Ed.2d 271, rehearing denied 83 S.Ct. 540, 371 U.S. 965, 9

L.Ed.2d 512 (1962); Excelsior Knitting Mills v. Bush, 38 Wn.2d 876, 233 P.2d 847 (1951) (the same principal applies to the sale of goods under the UCC).

Moreover, the defendant Truck Town's use of the same on preprinted purchase orders of its so-called reservation of the right and complete discretion to not go forward with the proposed sales if the dealer did not somehow "approve" of Plaintiff's "creditworthiness" was illusory. This is because it was and still is completely untied to any objective factor such as a specified credit score or other factor (besides a subsequent notification of unconditional acceptance of the customer's credit application by a third-party financing institution) that the Plaintiff customer could hold the dealer accountable to.

An "illusory promise" is one that is so indefinite that it cannot be enforced, or by its

terms makes performance optional or entirely discretionary on the part of the promissor. Lane v. Wahl, 101 Wash. App. 878, 6 P.3d 621 (Div. III, 2000). Generally, an agreement that reserves the right for one party to cancel at his or her pleasure cannot create a contract. Id. Again, if there is no contract, then the dealer has no contractual right to arbitration.

Plaintiff's statutory consumer claims under RCW 46.70 and RCW 19.86 did not allege or depend on the formation of any contract whatsoever, but were completely independent and could be brought against the dealer even if no contract ever formed. Consumer protection claims do not require the formation of a contract; but only that the consumer was caused to act or refrain from acting in any way. Robinson v. Avis Rent A Car Systems, 106 Wash. App. 104, 113, 22 P.3d 818 (2001) (further citations omitted).

where the validly formed and contract containing the arbitration agreement involves inter-state commerce AND also expressly invokes the Federal Arbitration Act favoring arbitration, then the State's Consumer Protect interest in using readily accessible and affordable public forums to achieve its purposes must yield to the Supremacy Clause of the Federal Constitution, thus overruling Wineland, supra., to the extent it was inconsistent).

The Garmo decision was based on the fact that Section 2 of the Federal Arbitration Act, applicable to transactions involving interstate commerce, was found to be "a congressional declaration of a liberal federal policy favoring arbitration agreements, **notwithstanding any state substantive or procedural policies to the contrary.**" However, this reasoning is only applicable where such a Federal Policy actually pre-empts the State's policies. Pre-emption only occurs in areas where the Federal interests over-

ride State interest, otherwise States fully retain their sovereignty to exercise their police powers as they see fit. One such area where State agreed to Federal Supremacy is for commerce among the States. Garmo, supra. at 588-589 (citing to Southland v. Keating, 104 S. Ct. 852, 858 (1984)).

However, even the United States Supreme Court in Southland, supra at 858 readily acknowledged that the Federal Arbitration Act mandating enforcement of arbitration clauses in an enforceable contract providing for the submission of all claims to arbitration notwithstanding State policies or is still subject to two key limitations as follows:

First, the arbitration provisions must be part of a contract evidencing a transaction involving [INTER-STATE] commerce. Second, such clauses are revocable on such grounds as exist at law or in equity for the revocation of any contract.

Garmo, supra. at 589 (citing to Southland, supra. at 858; further citations omitted).

Accordingly, since Truck Town did not challenge the facts in Plaintiff Wegeleben's declaration at CP-81-87, which supported Plaintiff Wegeleben's claims in Plaintiff's Memorandum of Law (at CP-61, lines 15-25) that the transaction was solely a matter of INTRA-state commerce, those being the only facts, they are analogous to unchallenged findings of fact which are verities on appeal. State v. Ross, 141 Wn.2d 304, 309 (2000). In any event, under CR 56(c), this Court will infer, as the Plaintiff did, that Defendant Truck had and has no evidence to the contrary.

As such, Truck Town cannot distinguish Wineland, supra., and cannot invoke Garmo, supra., either given the failure to get around the first exception set forth above which would have required Truck Town to obtain a finding of fact in their favor that the transaction at issue involved interstate commerce. However, Truck Town, does not even have the luxury of getting to that first

exception because they cannot even survive the second exception. Namely, they didn't even form a binding contract to ever be able to invoke such a clause therein anyhow.

Defendant Truck Town missed this opportunity when Truck Town failed to rebut the Plaintiff's facts when the trial Court held its RCW 7.04A.060 hearing to "decide whether an agreement to arbitrate exists [i.e. - whether Truck Town had a binding contract with Wegeleben that was ever timely formed by the deadline set forth in RCW 46.70.180(4) or ever formed before Plaintiff Wegeleben withdrew his offer to purchase] or a controversy is subject to an agreement to arbitrate." RCW 7.04A.060. That was fatal for Truck Town since RCW 7.04A.070 states in relevant part that "**[i]f the court finds there is no enforceable agreement, it may not order the parties to arbitrate.**" RCW 7.04A.070. The Court's conclusion that a contract had formed under the

more flexible provisions of the UCC was an error of law.

Instead, the Uniform Commercial Code for the Sale of Goods as adopted by Washington State at RCW 62A.2, **YIELDS** to the specific and higher requirements for vehicle sales contracts set forth in RCW 46.70.180. RCW 62A.2-206, entitled "Offer and acceptance in formation of contract", provides in relevant part that"

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium **reasonable in the circumstances;**

. . .

(2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance **within a reasonable time** may treat the offer as having lapsed before acceptance.

RCW 62A.2-206 (emphasis added).

"Reasonable under the circumstances" and

"within a reasonable time" would necessarily invoke the statutory deadline under RCW 46.70.180(4) in effect at the time, given the parties' agreement that Washington State law applied. RCW 62A.2-204 states in relevant part that "what is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action."

The nature of this particular sale of goods, was that it was for the proposed sale of an **AUTOMOBILE** and thus specifically governed by RCW 46.70. Moreover, Truck Town's conditional acceptance/financing contingency was actually viewed by the UCC as a counter-offer, not an acceptance, pursuant to RCW 62A.2-207(1). This is because Plaintiff Wegeleben is not a merchant in the trade as pointed out by RCW 62A.2-207(2), even if RCW 46.70 did not exist to set a time limit on the unconditional acceptance required specially for car dealers to form a contract under the UCC or otherwise. Even under the UCC, there was no valid

and binding acceptance and thus no contract either.

Thus, while the trial court erroneously felt that the UCC controlled, the fact of the matter is that the UCC deferred to the Auto Dealer Practices Act at RCW 46.70.180(4) because any time for unconditional acceptance beyond four (4) days was manifestly unreasonable as a matter of law.

In Wineland, the parties agreed that the Federal Arbitration Act applied to their transaction. Not so, for the Wegeleben transaction, which expressly invoked Washington State law instead (at CP-15, paragraph 10; CP-46, line 2). Moreover, the attempted transaction in Wegeleben was a purely intra-state transaction, not inter-state. The Wineland Court found that Washington State Consumer Protection Act claims, falling under Washington State's RCW 19.86 are patterned directly after the anti-trust law of the Federal Trade Commission Act at 15 U.S.C.A. Section

45 which likewise prohibits all unfair and deceptive trade practices. Supra. at 834-5.

Furthermore, just like anti-trust claims, Consumer Protection Act claims are not subject to arbitration because the public interest factors for such claims for judges hearing such claims in public forums are just too strong. Wineland, Supra. at 835 (expressly relying at 883-835 on the reasoning of American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821, 3 A.L.R. Fed. 901 (2d Cir. 1968) (claims based on antitrust laws are not arbitrable) which was followed by A&E Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 716 (9th Cir. 1968) (Whereas the public interests in such anti-trust matters is so strong, for "[s]uch issues the parties cannot, by stipulation or otherwise, exclude [the same] from the area of judicial scrutiny and determination.") (further citations omitted)).

Note how for Plaintiff Wegeleben's RCW 46.70/RCW 19.86 claims, the Washington State legislature drafted RCW 46.70 such that any violation of RCW 46.70 also constituted a simultaneous and per se violation of the Consumer Protection Act, pursuant to RCW 46.70.310 which states "Any violation of this chapter is deemed to affect the public interest and constitutes a violation of chapter 19.86 RCW." Moreover, our State Legislature declared at RCW 46.70.005 that:

The legislature finds and declares that the distribution and sale of vehicles in the state of Washington vitally affects the general economy of the state and the public interest and the public welfare, and that in order to promote the public interest and the public welfare, and in the exercise of its police power, it is necessary to regulate [car dealers] . . . in order to prevent frauds, impositions, and other abuses upon its citizens and to protect and preserve the investments and properties of the citizens of this state.

RCW 46.70.005.

Note that the Washington legislature passed the Unfair Business Practices-Consumer Protection

Act (CPA) at RCW 19.86 in 1961. RCW 19.86.020 is identical to Section 5(a) of the Federal Trade Commission Act. In 1971, the Washington legislature added a private right of action to encourage active private enforcement by public interest attorneys and consumers for the recovery of actual damages, as well as treble damages of up to \$10,000.00 and attorney fees and costs under RCW 19.86.090. The CPA specifically directs Washington courts to use the precedent developed by federal courts as a guideline in interpreting the CPA. RCW 19.86.920.

However, there will be no precedents if merchants governed by consumer protection and antitrust laws can discourage consumer enforcement in readily accessible public forums and instead quietly shield themselves from the courts and other regulating administrative agencies. This is all the more troubling when it is done with one-sided private arbitration clauses in contracts of

adhesion that the dealer themselves and or their assigns leaves themselves free to sidestep and bring their own claims to court if they, and they alone want to. Imagine the tragedy on the body of law for bushing cases, if the tidal waives of forced arbitration clauses on the vulnerable public meant that it had left off at Plouse, supra.

Furthermore, courts "**NARROWLY** construe waivers of the jury right". Wilson v. Horsley, 137 Wn.2d 500, 511, 974 P.2d 316 (1999) (emphasis added). **Any waiver of the right to jury trial "must be voluntary, knowing, and intelligent."** City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (emphasis added).

Additionally, the contract at issue solely embodied the sale of a vehicle, not the defendant dealer's separate statutory obligations unknown at the time to the Plaintiff signing the conditional contract for claims that hadn't even arisen yet.

The sales agreement itself covered no other relationship between the parties and had no "arising out of this agreement" clause that would apply to claims other than claims on the contract itself that were legal and equitable. Accordingly, the clause at issue does not clearly waive a jury trial right to cover the plaintiff's statutory consumer protection claims similar to the situation and holding in Nelson v. Westport Shipyard, Inc., 140 Wash. App. 102, 118 (2007).

Moreover, the jury trial waiver was pretty sneaky in that it nonchalantly did a lot more than just switch who would wear the robe. Rather, the defendant never mentioned that Plaintiff was being switched from a free trial to a pay by the hour trial, and being switched from the right to have one-way fee shifting to reciprocal fee shifting, as well as giving up the right to seek critical injunctive relief that an arbitrator could not award or enforce any more than any other private

citizen.

These would have been minimum disclosures needed to obtain a knowing and voluntary waiver with a full appreciation and understanding of the consequences of consenting to the same before basically giving up the most reasonable access to justice available and unwittingly getting bound by what is actually a civil disabling dispute clause. See also Plaintiff's Memorandum of Law in opposition to Arbitration at CP-62, 68-80; and the illustrative example of the right way to do arbitration agreements for transactions with binding contracts that actually falling under the category of INTER-STATE commerce as shown and distinguished at CP-88-92.

Additionally, there was no consideration to support the jury trial waiver and/or the release of all the rights that was otherwise available, but for enforcement of the arbitration clause. The

waiver was a release and any release is itself a contract and its construction is governed by contract principles. Vanderpool v. Grange Ins. Assoc., 110 Wn.2d 483, 756 P.2d 111 (1988). See also Trompeter v. United Ins. Co., 51 Wn.2d 133, 316 P.2d 455 (1957) (The payment of a liquidated amount admittedly owed already under the terms of an insurance contract does not, of itself, constitute sufficient consideration for the release of an unliquidated claim under the same policy.).

The question of adequate consideration is a question of law and may be properly determined by a court on summary judgement. Keeter v. John Griffith, Inc., 40 Wn.2d 128, 241 P.2d 213 (1952). Since the arbitration clause at issue was thrown into this car sale after the Plaintiff Wegeleben had already agreed on what he was buying and the price of the same, it was NOT supported by any consideration at all, let alone any sufficient consideration. Therefore it is not valid or

binding for lack of consideration.

V. ATTORNEY'S FEES AND COSTS

Plaintiff Wegeleben requests recovery for his reasonable attorney's fees and costs against the Defendants pursuant to RCW 46.70.190 and RCW 19.86.090, for properly standing up for his rights to pursue his claims as pleaded and in the venue pleaded, all of which were incurred below and on appeal defending that right for himself and in the public interest, to be awarded at conclusion of this case, if not now to replenish resources needed to complete the Plaintiff's case.

VI. CONCLUSION

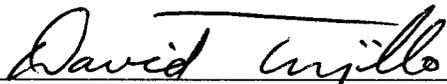
For the reasons stated above, Plaintiff Wegeleben requests that this court to make the de novo ruling to reverse the trial court's order compelling arbitration due to the lack of any binding contract at all, as similarly reasoned in the case of Otis Housing Association v. Ha, supra.,

by holding for all to see that if the contract doesn't form or expires, then there is no enforceable arbitration clause either.

Additionally and if it is necessary to even get to the secondary issues, this court should also find that the one-sided arbitration clause on this purely INTRA-STATE transaction, was unconscionable and would have yielded to the State of Washington's public policies favoring public forums for the statutory consumer protection claim involved in this case as set forth in Wineland v. Marketex, supra.

Respectfully submitted this 14th day of April, 2008.

Attorney for Plaintiff Wegeleben:



DAVID B. TRUJILLO, WSBA #25580

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

KENNETH W. WEGELEBEN, a single person,

Plaintiff,

vs.

DAVE BARCELON'S TRUCK TOWN, LTD.; CONTRACTOR'S BONDING AND INSURANCE COMPANY; and KITSAP BANK,

Defendants.

No. 07-2-02095-2

PLAINTIFF'S FIRST SET FO INTERROGATORIES AND REQUESTS FOR PRODUCTION TO DEFENDANT DAVE BARCELON'S TRUCK TOWN, LTD. **AND ANSWERS THERETO**

TO: DEFENDANT DAVE BARCELON'S TRUCK TOWN, LTD., by and through its attorney of record, BRIAN M. KING:

In accordance with Rules 33 and 34 of the Washington Civil Rules for Superior Court, the Plaintiff Kenneth Wegeleben, by and through his attorney of record, David B. Trujillo, requests Defendant Dave Barcelon's Truck Town, Ltd. to answer and respond to

PLAINTIFF'S FIRST SET FO INTERROGATORIES AND REQUESTS FOR PRODUCTION TO DEFENDANT DAVE BARCELON'S TRUCK TOWN, LTD. **AND ANSWERS THERETO**

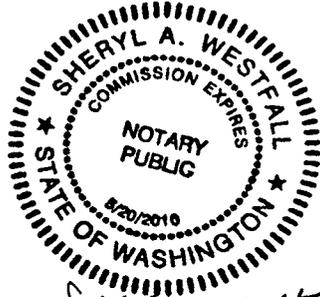
Page 1 of 48

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
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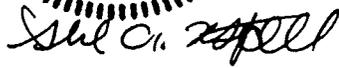
1 production.

2 DATED this 4th day of December, 2007 at Bremerton (City),
3 WA (State).



4 SIGNED:

5 
6 David Gasvoda
7 TITLE G.M.

8 

9 CERTIFICATE

10 As attorney for Defendant Truck Town and Contractor's Bonding and Insurance
11 Company, I certify that I have read the answers and responses to the interrogatories and
12 requests for production, and to the best of my knowledge, information, and belief, these
13 answers are supported by the facts within the possession and control of my clients and
14 my law firm, after reviewing all of those facts and after consulting with the relevant
15 persons having knowledge of those facts, these responses are true, accurate, complete,
16 and were formed after a reasonable and diligent inquiry and review of our records and
17 with the persons having relevant knowledge, and all responses or objections are made in
18 good faith consistent with the Superior Court Civil Rules and are warranted by existing
19 law or a good faith argument for the extension, modification, or reversal of existing law;
20 are not interposed for any improper purpose such as to harass, to unnecessary delay, or to
21 needlessly increase the cost of litigation; and are not unreasonable, unduly burdensome,
22

23
24 **PLAINTIFF'S SECOND SET OF INTERROGATORIES**
25 **AND REQUESTS FOR PRODUCTION TO**
26 **DEFENDANT DAVE BARCELON'S TRUCK TOWN,**
LTD. AND ANSWERS THERETO
Page 10 of 11

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Appendix A pg 2 of 6

1 into the facts within our possession or control and after consulting with all persons having
2 knowledge of the facts supporting our answers to these interrogatories and requests for
3 production.

4 DATED this 30 day of November, 2007 at Tacoma, WA.



SIGNED:

David Gasvoda

TITLE

11 CERTIFICATE

12 As attorney for Defendant Truck Town and Contractor's Bonding and Insurance
13 Company, I certify that I have read the answers and responses to the interrogatories and
14 requests for production, and to the best of my knowledge, information, and belief, these
15 answers are supported by the facts within the possession and control of my clients and
16 my law firm, after reviewing all of those facts and after consulting with the relevant
17 persons having knowledge of those facts, these responses are true, accurate, complete,
18 and were formed after a reasonable and diligent inquiry and review of our records and
19 with the persons having relevant knowledge, and all responses or objections are made in
20 good faith consistent with the Superior Court Civil Rules and are warranted by existing
21 law or a good faith argument for the extension, modification, or reversal of existing law;
22 are not interposed for any improper purpose such as to harass, to unnecessary delay, or to
23

24 PLAINTIFF'S FIRST SET FO INTERROGATORIES
25 AND REQUESTS FOR PRODUCTION TO
26 DEFENDANT DAVE BARCELON'S TRUCK TOWN,
LTD. AND ANSWERS THERETO

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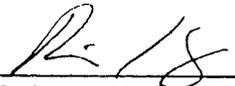
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1 needlessly increase the cost of litigation; and are not unreasonable, unduly burdensome,
2 or expensive, given the needs of the case, the discovery already had in the case, the
3 amount in controversy, and the importance of the issues at stake in the litigation.

4 DATED this 30 day of November, 2007.

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6 
7 BRIAN M. KING, WSBA #29197
8 Attorney for Defendants
9 Truck Town and CBIC

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PLAINTIFF'S FIRST SET FO INTERROGATORIES
AND REQUESTS FOR PRODUCTION TO
DEFENDANT DAVE BARCELON'S TRUCK TOWN,
LTD. *AND ANSWERS THERETO*
Page 48 of 48

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TYPE OF CREDIT REQUESTED	FOR CREDITOR USE
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<p>Important: Check the appropriate box below and complete the applicable sections.</p> <p> <input type="checkbox"/> Individual <input type="checkbox"/> Joint with Spouse <input type="checkbox"/> Joint with Someone Else </p> <p> 1) Are you relying on community property as a basis for repayment of the credit requested (In Washington, wages are considered community property) <input type="checkbox"/> Yes <input type="checkbox"/> No 2) Are you relying on your spouses income as a basis for repayment of this obligation. <input type="checkbox"/> Yes <input type="checkbox"/> No 3) Are you relying on the receipt of alimony, child support, or maintenance as a basis for repayment..... <input type="checkbox"/> Yes <input type="checkbox"/> No </p>	<p>Date Received _____</p> <p>Account# _____</p> <p>Approved By _____</p> <p>Declined By _____</p>
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Important Information: Federal Law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. When you apply for an account, we will ask you for your name, street address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.

APPLICANT INFORMATION

First Name <i>Kenneth</i>	Middle	Last <i>Wegeleben</i>	Date of Birth <i>11-27-51</i>	Social Security Number <i>[REDACTED]</i>
Current Street Address (No PO Boxes) <i>5608 Richey Rd.</i>			City <i>Yakima</i>	State <i>WA</i>
Mailing Address (if different)			Zip <i>98908</i>	How Long <i>48</i>
Prior Address (if less that 2 years at above)			How Long	Home Phone
Employer			Work Phone	
Position/Occupation			How Long	Gross Income
Previous Employer			How Long	Position
Other Income: You need not disclose income from Alimony, Child Support, or Maintenance Payments if you do not rely on this income for credit worthiness.			Other Income/Frequency	
Nearest Relative (Not living with you)			Address	Relationship
				Phone

CO-APPLICANT INFORMATION

First Name	Middle	Last	Date of Birth	Social Security Number
Current Street Address (No PO Boxes)			City	State
Employer			Work phone	Drivers License State Expiration Date
Position/Occupation			How Long	Gross Income
Nearest Relative (Not living with you)			Address	Relationship
				Phone

YOUR CREDIT PROFILE

YOUR ASSETS	CURRENT VALUE	YOUR DEBTS/ CREDIT REFERENCES	BALANCE OWING	MONTHLY PAYMENTS
CASH IN BANKS	\$	MORTGAGE LOAN/RENT PAYMENT	\$	\$
PRIMARY RESIDENCE		SECOND MORTGAGE LOAN		
Date of Purchase Cost \$		LOANS ON OTHER REAL ESTATE		
OTHER REAL ESTATE OWNED		BANK LOANS (LIST SEPARATELY)		
AUTO YEAR/MAKE/MODEL				
AUTO YEAR/MAKE/MODEL		CREDIT CARDS (LIST SEPARATELY)		
BOAT YEAR/LENGTH/MAKE				
OTHER ASSETS (DESCRIBE)				

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		ALIMONY/CHILD SUPPORT		
TOTAL ASSETS	\$		TOTAL	\$
				\$

ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON STATE LAW. I (We) have answered all of the questions on this application fully and truthfully. All information given is of this date unless otherwise noted. You are authorized to check my (our) credit and employment history and to answer questions about your credit experience with me (us). I (We) fully understand that it is a federal crime punishable by fine, imprisonment, or both to knowingly make any false statements concerning anything on this application.

Applicant's Signature: <i>D Kenneth W. Wajulike</i>	Date: 6-22-07
Spouse's Signature (if applying with spouse):	Date:

KB2547

Rev. 02/05

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FILED
COURT OF APPEALS
DIVISION II

08 APR 17 PM 1:36

STATE OF WASHINGTON

BY _____
DEPUTY

STATE OF WASHINGTON COURT OF APPEALS
DIVISION II

KENNETH W. WEGELEBEN, a single)
person)

Plaintiff,)

vs.)

DAVE BARCELON'S TRUCK TOWN,)
LTD.; CONTRACTOR'S BONDING AND)
INSURANCE COMPANY; and KITSAP)
BANK,)

Defendants.)

APPEAL NO. 37124-3-II

CERTIFICATE OF SERVICE

CERTIFICATE

A. I, DAVID B. TRUJILLO, certify that on April 14th, 2008 as set forth below, I sent by regular United States Mail, postage prepaid, a copy of: (1) the Plaintiff Wegeleben's Appellate Brief with Appendix A attached thereto, and (2) a copy of this Certificate of Service for the same, all to:

1. the attorney of record for the Defendant Dave Barcelon's Truck Town, Ltd. and the Defendant Contractor's Bonding and Insurance Company, Mr. Brian M. King, at Davies Pearson, P.C., 920 Fawcett, P.O. Box 1657, Tacoma, WA 98401; and to:

