

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

Court of Appeals No. 37153-7-II
from
Jefferson County No. 07-2-00250-1

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

Donald R. Earl (appellant)

v.

Menu Foods Income Fund et al and The Kroger Company (respondents)

BRIEF OF APPELLANT (corrected)

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1. INTRODUCTION

1. The Plaintiff, Donald R. Earl, filed suit in Jefferson County Superior Court for product liability claims against Menu Foods Income Fund, et al (hereinafter referred to as "Menu Foods") and The Kroger Company (hereinafter referred to as "Kroger") for the poisoning death of his pet cat, which resulted from the pet's consumption of adulterated pet food products manufactured or sold by the Defendants.

2. A series of untenable decisions in the case have placed the case in a state of such disarray it is no longer possible to proceed without Appellate Court intervention. The initiating event in the flawed decision sequence was an untenable construction of *WWP v. Graybar Electric Co.*, 112 Wn.2d 847, 774 P.2d 1199. In that case, the court ruled the Washington Product Liability Act (WPLA) preempts common law "*remedies*". In the case before this court, the trial court has adopted a theory the WPLA bars any product liability "*claim*" which may be perceived as being expressed in terms of the common law. This theory is in direct contravention of the plain language of the statute, which specifically "*includes*" common law claims as causes of action under the WPLA.

3. In *Parkins v. Van Doren Sales*, 45 Wn. App. 19, 724 P.2d 389, the court ruled:

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"The product liability act, RCW 7.72, applies since Ms. Parkins was injured on September 1, 1983. A threshold issue is what effect do the act's provisions have on Ms. Parkins' action brought under the common law theories of negligence and strict liability.... Ms. Parkins is a claimant entitled to bring a products liability action for purposes of the act".

4. In *WWP v. Graybar Electric Co.*, 112 Wn.2d 847, 774 P.2d

1199, the court ruled:

"Having determined that WWP's [common law] claims are governed by the WPLA, we must next determine whether the damages WWP seeks are the sort for which the WPLA affords a remedy."

5. In *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, the court

ruled:

"Central to the appellants' position in this appeal is the question of whether the provisions of the 1981 tort reform act (hereinafter Act) apply to this case. The Act, by its terms, applies to all claims arising on or after July 26, 1981."

6. In, *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, P.2d

1054, the court ruled:

"In a product liability claim, liability can be predicated on negligence or even on strict liability."

And:

"A claim previously based on negligence is within the definition of a product liability claim."

7. The plain language of the WPLA, and all related precedent, shows the only factor which distinguishes a common law product liability claim from a statutory product liability claim is when the cause of action

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arose.

8. In the case before this court, the trial court has created a Catch 22 situation where the Plaintiff's product liability claims were first determined to be common law claims, to be dismissed with prejudice, while at the same time allowing those claims to be more definitely stated as being statutory in an amended complaint, then ordered a second amended complaint be filed, barring all previous product liability claims. The absurd consequences doctrine applies. Adopting the trial court's reasoning, no plaintiff suffering product liability damages would be able to prosecute a product liability action in Washington State.

9. The Appellant seeks review for abuse of discretion. A trial court abuses its discretion "when no reasonable person would take the view adopted by the trial court.", State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

2. ASSIGNMENTS OF ERROR

10. **Assignment of Error 1:** The trial court erred in entering the order of October 12, 2007 dismissing Earl's product liability claims with prejudice on the basis common law theories are barred under the Washington Product Liability Act (WPLA).

11. **Issues Pertaining to Assignments of Error 1:** Are claims of

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negligence, breach of express warranty, breach of implied warranty; failure to discharge a duty to warn, defect in manufacture, and negligent misrepresentation, causes of action upon which relief may be granted under the provisions of the WPLA?

12. Assignment of Error 2: The trial court erred in entering the order of November 9, 2007 (CP 113), which barred Earl from asserting any claim not covered by the WPLA in any future amended complaint, on the basis complete recovery may be available under the WPLA.

13. Issues Pertaining to Assignments of Error 2: Does the theoretical potential for complete recovery under one legal theory bar a claimant from asserting viable causes of action under alternate legal or equitable grounds?

14. Assignment of Error 3: The trial court erred in entering the orders of December 21, 2007 dismissing Earl's motion for sanctions (CP 218 & CP 221).

15. Issues Pertaining to Assignments of Error 3: The basis for the decision was the opposing parties motions, which were the subject of the motion for sanctions, were granted. If it is shown on appeal that motions subject to a motion for sanctions were granted in error, and were in violation of Rule 11, is the prevailing party reasonably entitled to

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sanctions on remand?

16. Assignment of Error 4: The trial court erred in entering the order of December 21, 2007 dismissing Earl's breach of express warranty claim against Menu Foods (CP 218).

17. Issues Pertaining Assignments of Error 4: Earl claims Menu Foods breached express warranties stated on its products. Menu Foods argued certain parts of the complaint were inconsistent with the claim (RP 12-21-07, page 12). Under the provisions of CR 8(e)(2), is a CR 12 (b)(6) motion sustainable when it is based solely on perceived inconsistencies in the complaint?

18. Assignment of Error 5: The trial court erred in entering the order of December 21, 2007 dismissing Earl's implied warranty claim against Menu Foods (CP 218).

19. Issues Pertaining to Assignments of Error 5: Does the WPLA create a free standing breach of implied warranty cause of action in relation to consumer goods purchased for private use?

20. Assignment of Error 6: The trial court erred in entering the order of December 21, 2007 granting the Defendants' motions for more definite statements.

21. Issues Pertaining to Assignments of Error 6: Under the

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provisions of CR 12(g) does the trial court have discretion to entertain a CR 12(e) motion, on previously existing issues, which were not addressed in a defendant's previous Rule 12 motions?

22. Assignment of Error 7: The trial court erred in entering the order of December 21, 2007 barring the Plaintiff's previously pled product liability claims from inclusion in an amended complaint (CP 222).

23. Assignment of Error 8: The trial court erred in refusing to consider the trial court's own orders, made in open court, when provided verbatim transcripts of the proceedings at the hearing of December 21, 2007 (RP 12/21/07, page 20).

24. Issues Pertaining to Assignments of Error 7 and 8: The Defendants filed motions based on an interpretation of a signed order, which was in conflict with the trial court's oral rulings (CP 56). The trial court was provided a verbatim record of the proceedings in order to demonstrate the actual rulings made in open court (10-12-07 RP, page 24). Is a trial court's refusal to consider its rulings, as shown by the record, manifestly unreasonable and an abuse of discretion?

25. Assignment of Error 9: The trial court erred in its interpretation of precedent relevant to the Washington Product Liability Act.

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26. Issues Pertaining to Assignments of Error 9: In 1981 the Washington Product Liability Act created a statutory cause of action for all product liability claims previously recognized under the common law. Is a trial court's interpretation that product liability claims should be viewed as being common law in nature, and thus barred by the WPLA, contrary to law?

3. STATEMENT OF THE CASE

27. Earl filed a complaint on July 13, 2007 alleging 6 product liability claims, counts 2-7 (CP 12-19), a claim of fraud, count 1 (CP 10-13), and a claim of unjust enrichment, count 8 (CP 19) against Menu Foods and Kroger. Subsequent to a motion for default, Kroger filed an answer dated August 22, 2007.

28. On CR 12(b)(6) motion by Menu Foods (CP 22-55) , a hearing was held on October 12, 2007. On the record, the trial court dismissed Earl's counts 1 and 8 (RP 10/12/07, page 24), and ordered Earl would be allowed to re-plead counts 2 through 7 in an amended complaint within 10 days, advising Earl sanctions would be imposed if Earl sought to re-plead a fraud claim (RP 10/12/07, page 23)).

29. At this point, both Defendants had used or abandoned the pre-answer motions available under Civil Rule 12.

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30. Earl filed an amended complaint on October 16, 2007 (CP 59-71), in compliance with the trial court's oral instructions.

31. Earl, having acquired new evidence, timely filed a motion for reconsideration of the fraud claim (CP 105-109), requesting the judgment be amended to dismissal without prejudice in order to allow Earl to review the new evidence in light of other evidence in Earl's possession. The motion was denied on the basis Earl's product liability claims were allowed claims and provided potential for complete relief (CP 113).

32. On October 30, 2007, with the Defendants in default, Earl filed a motion for default judgment (CP 110), which was noted for hearing on November 9, 2007. On November 7, 2007, Menu Foods and Kroger filed requests to continue the hearing to November 16, 2007, which the trial court granted over Earl's objections, assuring Earl an answer could be expected by that time (RP 11/09/07, page 6).

33. On November 15, 2007, Earl was served with new Civil Rule 12 motions by Menu Foods and Kroger for more definite statements. Menu Foods also revived a CR 12(b)(6) motion to dismiss Earl's express and implied warranty claims (CP 115 & CP 119).

34. In reply, Earl filed a motion to strike and for sanctions (CP 145) in part based the provisions of Rule 12, which prohibit raising new motions

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under the rule after an answer has been filed, or when not addressed in a previous motion. Due to irregularities in the court's schedule (between November 9, 2007 and December 21, 2007, the assigned judge was not available to hear civil motions), these matters were not heard until December 21, 2007.

35. The Defendants filed responses to Earl's motion (CP 192 & CP 207) and Earl filed a supplemental brief in reply (CP 211).

36. As the Defendants' motions relied on a hastily modified order prepared by Menu Foods (CP 56), Earl provided transcripts of the October 12, 2007 and November 9, 2007 hearings (CP 192). The trial court ruled it was not bound by the oral record and that the October 12, 2007 order should be interpreted as having dismissed all Earl's claims against the Defendants (RP 12/21/07, page 20).

37. The trial court dismissed Earl's motion to strike and for sanctions (CP 218, CP 221 and RP 12/21/07, page 19). The trial court granted Menu Foods' motion to dismiss express and implied warranty claims. Earl was instructed to file a second amended complaint, with claims for relief in separate sections for each defendant. The original complaint and the first amended complaint assert all claims against both defendants equally (CP 10-21 & CP 69-72).

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38. Without allowing Earl to view orders presented by the Defendants, the trial court then signed the orders (RP 12/21/07, page 19). The Kroger drafted order (CP 222) includes a statement Earl would not be allowed to re-plead any claims in the original complaint - effectively discontinuing the action. The potential to file a second amended complaint becomes moot with no remaining claims to plead.

4. ARGUMENT

39. **Argument Pertaining to Assignments of Error 1:** The trial court adopted an interpretation of "Washington Water Power Co. v. Graybar Electric Co., 112 Wn.2d 847, 774 P.2d 1199", proposed by Menu Foods, which is not based on fact or law. RCW 7.72 (WPLA), specifically includes common law *claims* as causes of action under the act. The trial court mistakenly interpreted language related to the WPLA's preemptive effect on common law *remedies* (in that case the issue was "economic loss, which is a remedy barred under the act), as extending to claims allowed under the WPLA. No reasonable reading of the WPLA or related precedent supports the interpretation adopted by the trial court. In fact, it was not until the hearing of December 21, 2007 (RP, page 20) that the trial court gave any indication it would interpret its order as dismissing Earl's product liability claims as stated in the original complaint as counts 2

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3 through 7 (CP 13-19).

4 **40. Argument Pertaining to Assignments of Error 2:** The trial
5 court's dismissal of Earl's fraud claim was apparently based on Menu
6 Foods' contention it lacked the requisite particularity required under CR 9.
7 Earl originally requested permission to re-plead the claim (RP 10/12/07,
8 page 17). Upon acquisition of new evidence, Earl timely filed a motion to
9 reconsider the judgment (CP 105-109), asking it be amended to without
10 prejudice. Generally, these are requests litigants may expect to be liberally
11 granted. Additionally, under CR 8(e)(2), a party is specifically permitted to
12 plead all claims available to him.

13 **41. Issues Pertaining to Assignments of Error 3:** Earl incurred
14 considerable time and expense in responding to the Defendants' motions,
15 which were not based on fact and law, were interposed for the purpose of
16 delay, and were in clear violation of CR 11, as well as being barred under
17 the provisions of CR 12(g).

18 42. CR 12 (g), reads as follows:

19 "A party who makes a motion under this rule may join with it any other
20 motions herein provided for and then available to him. If a party makes a
21 motion under this rule but omits therefrom any defense or objection then
22 available to him which this rule permits to be raised by motion, he shall not
23 thereafter make a motion based on the defense or objection so omitted,
24 ***except a motion as provided in subsection (h)(2) hereof*** on any of the
25 grounds there stated." (emphasis added)

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43. CR 12 (h)(2) reads as follows:

"A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under rule 7(a), or *by motion for judgment on the pleadings*, or at the trial on the merits." (emphasis added)

44. Having previously filed CR 12(b)(6) motions, or otherwise responding to Earl's Complaint, under the provisions of Rule 12, the only remaining motion permitted under the rule is one for judgment on the pleadings.

45. On sanctions, the trial court stated (RP 12/21/07, page 20):

"But, um, the motion was properly before the Court and it was properly brought. And, in fact, I granted it. So, I'll deny your motions for sanctions."

46. The Defendants' CR 12(b)(6) and CR 12(e) motions (CP 115 & CP 119) were not properly before the trial court under the provisions of CR 12(g). Menu Foods omitted objections to express and implied warranty claims from its previous CR 12(b)(6) motion and is barred under the provisions of Rule 12 from subsequent CR 12(b)(6) motions. Likewise, neither Defendant raised objections as to the need for more definite statements, other than clarification of the statutory nature of the action, which Earl addressed in the amended complaint (CP 65-68).

47. **Argument Pertaining to Assignments of Error 4:** In

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addition to the procedurally improper nature of the Defendants' motions, Earl properly claims express and implied warranty causes of action against Menu Foods. Earl's Amended Complaint quotes the express warranty in paragraphs 32 and 33 (CP 65) . Earl asserts the statutory basis of express warranty claims under RCW 7.72.030(2)(b) in paragraph 37 (CP 66).

Breach of express warranty by the Defendants is claimed in paragraphs 53 and 54, and is cited as a statutory cause of action in paragraph 56 (CP70).

Paragraph 53 of the Plaintiff's Amended Complaint reads, "The Defendants expressly warranted that the pet food was safe, healthy, balanced and nutritious for consumption by companion pets." . In its motion, Menu Foods (the manufacturer) falsely stated this claim was not present in the complaint (CP 127, line 16). Nowhere in the motion does Menu Foods deny warranting the pet food, nor has Menu Foods produced documentation or evidence to that effect. In *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 961, 577 P.2d 580 (1978), the court ruled:

"To prevail on a CR 12(b)(6) motion, a defendant has the burden of establishing beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief."

48. The plain language of the WPLA holds the manufacturer liable for breach of express warranty. RCW 7.72.030 (2)(b) reads:

"A product does not conform to the express warranty of the manufacturer

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if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue."

49. The court writes in *Dobias v. Western Farmers Association*, 6 Wn. App. 194:

"Thus, between the retailer and the manufacturer, commercial expediency requires the manufacturer, whose duty is to market merchantable products, to exercise the necessary precautions so that the product, if properly used, will be safe. A retailer, with no duty to test the product, can only rely on statements made by the manufacturer."

50. In *Martin v. Patent Scaffolding*, 37 Wn. App. 37, 678 P.2d 362, the court wrote:

"While the amended complaint contains an allegation of breach of warranty by the manufacturer, the complaint states a product liability claim and alleges that the scaffolding was unsafe for use. The essence of the claim is product liability. It remains a product liability claim even though it contains allegations of breach of warranty. The essence of the case controls, not particular words in the pleadings."

And:

"the term "warranty", if still used in a product liability case, is a very different thing from the warranty usually found in the direct sale of goods and is not subject to the contract rules which apply to such sales."

And:

"The statute [RCW 62A.2-725(1)] speaks of breach of a sales contract, not breach of warranty. It would require a tortured interpretation of the statute to apply it to a product liability case because a warranty had been made or implied."

51. In *WWP v. Graybar Electric Co.*, 112 Wn.2d 847, 774 P.2d

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1199, the court ruled:

"A product liability claim may be maintained against a manufacturer or other product seller notwithstanding an absence of contractual privity."

52. Argument Pertaining to Assignments of Error 5: Menu

Foods and the trial court placed undue reliance on vertical privity precedent set in cases such as *Tex Enters., Inc. v. Brockway Standard, Inc.* 149 Wn.2d 204. The WPLA creates a free standing implied warranty cause of action under RCW 7.72.030 (2)(c) for goods purchased for use by private consumers. Vertical privity applies to sophisticated commercial buyers and sellers, not to private users of consumer goods. RCW 62A.2-316 (4) provides:

"Notwithstanding the provisions of subsections (2) and (3) of this section and the provisions of RCW 62A.2-719, as now or hereafter amended, in any case where goods are purchased primarily for personal, family or household use and not for commercial or business use, disclaimers of the warranty of merchantability or fitness for particular purpose shall not be effective to limit the liability of merchant sellers except insofar as the disclaimer sets forth with particularity the qualities and characteristics which are not being warranted."

53. The WPLA under RCW 7.72.030 (2) provides:

"A product manufacturer is subject to strict liability to a claimant if the claimant's harm was proximately caused by the fact the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW" (emphasis added).

54. That these are three separate, free standing causes of action, is

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reiterated in the following subsections, a, b and c:

" (a) A product is not reasonably safe in construction if, when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.

(b) A product does not conform to the express warranty of the manufacturer if it is made part of the basis of the bargain and relates to a material fact or facts concerning the product and the express warranty proved to be untrue.

(c) Whether or not a product conforms to an implied warranty created under Title 62A RCW shall be determined under that title."

55. In *State v. Zornes*, 78 Wn.2d 9, the court ruled:

"Members of the legislature are presumed to know the meaning of the words they write into their enactments."

56. The clear intent of our lawmakers is users of consumer goods reasonably rely on the skill and expertise of manufacturers to provide products fit for their intended use, unless such implied warranty is explicitly disclaimed. Menu Foods does not disclaim implied warranty of the products it manufactures. With or without privity, or an express warranty claim, an implied warranty claim is intended by the legislature to be an allowed cause of action against a manufacturer under the WPLA for users of consumer goods.

57. Argument Pertaining to Assignments of Error 6: Earl's Amended Complaint was drafted in response to Menu Foods request for

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more definite statements as to the statutory nature of the product liability claims. In Menu Foods' motion (CP 124, line 9), Menu Foods states: "For example, portions of the Amended Complaint make it appear that Plaintiff may be attempting to recover under every conceivable theory available under the Act.". While oddly phrased, the statement shows Menu Foods understood the nature of the claims made in the Amended Complaint perfectly well.

58. In *Christensen v. Swedish Hosp.*, 59 Wn. 2d 545 548, 368 P.2d 897 (1962), the court ruled: "A complaint must apprise the defendant of the nature of the plaintiff's claims and the legal grounds upon which the claims rest."

59. In *Lightner v. Balow*, 59 Wn. 2d 856, 370 P.2d 98, the court ruled: "under our liberal rules of procedure, pleadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted".

60. At the December 21, 2007 hearing, the trial court ruled in regard to filing a new amended complaint: "you'll have a cause of action section against Menu Foods, a cause of action section against Kroger. Those won't be over three pages, each. You can't go over three pages.". (RP 12/21/07 page 16, line 19)

61. To illustrate the issue, in paragraph 47 of the amended

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complaint (CP 69) it begins, "The Defendants, Menu Foods and Kroger, failed to warn...". The argument raised by the Defendants, and adopted by the trial court, is it is impossible for the Defendants to understand to whom the claim is addressed when stated against both Defendants equally, and that only by the use of separate sections for each Defendant will it be possible for the necessary enlightenment to occur. No reasonable person would fail to understand the nature of the claims or to which party they are addressed, in this format. Creating a separate section to repeat claims redundantly is unnecessary and not a reasonable basis for granting a motion for a more definite statement. In its ruling, creating a separate claims section for each defendant is the sole basis of ordering the filing of a second amended complaint (RP 12-21-07, page 16).

62. The trial court's order to amend the amended complaint to create a separate section to assert claims against each defendant individually was in response to an existing issue, in that the original complaint used the same format, which neither defendant objected to previously. In addition to the apparent understanding of the claims and legal basis of those claims, CR 12(g) barred the Defendants from raising subsequent CR 12(e) motions. It should not be allowed as a dilatory tactic in subsequent proceedings.

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63. Argument Pertaining to Assignments of Error 7 and 8: At the October 12, 2007 hearing (RP 10/12/07, page 24), the trial court ruled: "I did dismiss Count 1 and Count 8. The rest of them I think can be -- and, you know, when you read -- like I say, when you read Count 4, Count 5, he does everything but -- but list the statute.... I'm going to give you the opportunity to change it"

64. At that hearing, Menu Foods stated (RP 10-12-07, page 24): "Given what you've just talked about, I think our form of order works having added this language at the end: "Plaintiff shall have ten days to file an amended complaint for statutory product liability.""

65. The Defendants' motions (CP 115 & CP 121, line 17) heard on December 21, 2007 are in part based on the assumption language in the order prepared and presented by Menu Foods may be interpreted as dismissing all Earl's claims. In response, Earl obtained and provided a transcript of the October 12, 2007 hearing to show that interpretation was incorrect.

66. At the December 21, 2007 hearing (RP 12/21/07, page 20), the trial court ruled: "It doesn't, it doesn't behoove you to give me the whole record of everything that was said. That written motion is what controls the written order, as does this written order."

67. In essence, the trial court's view is that even when presented with the verbatim record of proceedings, it is beyond honoring the letter

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and intent of its rulings made orally on the record. If an alternate interpretation may be drawn from orders prepared by opposing parties, that, in the trial court's view, is what controls.

68. The order (CP 222) entered on December 21, 2007, presented by Kroger, and signed by the trial court, states:

"IT IS FURTHER ORDERED that plaintiff shall file a new complaint within twenty (20) days that specifically and clearly identifies the legal theories under which his Washington Product Liability Act (WPLA) claims are based, and which does not include any claims that were previously dismissed with prejudice by this Court's order dated October 12, 2007. (emphasis added)

69. This is the basis for the Plaintiff's filing an appeal versus a motion for discretionary review. Whether viewed as statutory or common law, the product liability claims the Plaintiff asserts against the Defendants are the same. As the trial court has adopted the position all claims were dismissed with prejudice on October 12, 2007, the possibility of filing a second amended complaint becomes moot.

70. Argument Pertaining to Assignments of Error 9: As discussed in the introduction, the trial court has placed an interpretation on the Washington Product Liability Act that is opposite of the plain language of the WPLA and all relevant precedent. The WPLA created an umbrella that includes all product liability claims; broadly and all inclusively. While certain remedies are barred, all previously recognized product liability

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causes of action are specifically preserved. Causes of action previously recognized under the common law are essentially identical to those recognized under the WPLA: unreasonably dangerous, defective in design, defective in construction, breach of express warranty, breach of implied warranty, failure to warn, etc.. Under the WPLA, any of those claims automatically puts a defendant on notice it is being sued either subject to common law remedies if the cause of action arose prior to July 26, 1981, or subject to statutory remedies under the WPLA if the cause of action arose after July 26, 1981.

71. The Plaintiff's original complaint (CP 3) provides the dates the causes of action arose. The dates clearly show the claims are governed by the WPLA, and have been for over a quarter century. The Plaintiff's original complaint specifically references the WPLA in paragraph 34(CP 8).

72. In *Christensen v. Swedish Hosp.*, 59 Wn. 2d 545 548, 368 P.2d 897 (1962), the court ruled:
"A complaint must apprise the defendant of the nature of the plaintiff's claims and the legal grounds upon which the claims rest."

73. In *Lightner v. Balow*, 59 Wn. 2d 856, 370 P.2d 98, the court ruled:
"under our liberal rules of procedure, pleadings are primarily intended to give notice to the court and the opponent of the general nature of the claim

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asserted".

74. As Earl stated on oral argument (RP 10/12/07, page 18):

"I don't believe anybody reading my complaint would fail to understand that this is a product liability action. You know, the manufacturer is accountable, that the seller is accountable."

75. At the October 12, 2007 hearing (RP 10/12/07, page 13) the trial court states:

"Well, the Washington Water Power case says, ""A claim previously based on negligence is within the definition of a product liability claim." That's within the definition of 7.72.010, sub 4. But they go on. It says, "Since this present cause of action is predicated upon a failure to warn by a product manufacturer, any negligence cause of action therefore is preempted by the Washington State Product Liability Act. Therefore, this product liability claim cannot be maintained on a common law negligence theory." I think that's the clearest statement of what Menu Foods is arguing here."

76. The citation quoted by the trial court above is from "Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, P.2d 1054", not WWP v. Graybar Electric. In "Physicians", a doctor claimed he suffered emotional harm as a result of a patient's harm caused by negligent failure to warn. He claimed a cause of action for pain and suffering under both the WPLA and a free standing common law negligence claim. The court ruled the doctor did not have standing to bring a claim under the WPLA, and, since the negligence claim was automatically governed by the WPLA, the same lack of standing applied. Hence the quote, "Therefore, this product liability claim cannot be maintained on a common law negligence theory.". The

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reference was to that case only, not a general application to all cases.

77. In *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, P.2d

1054, the court ruled:

"In a product liability claim, liability can be predicated on negligence or even on strict liability."

And:

"A claim previously based on negligence is within the definition of a product liability claim."

78. The WPLA at RCW 7.72.010 (4), defines product liability

claims as:

""Product liability claim" ***includes*** any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. ***It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory*** except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW." (emphasis added)

79. In *State v. Zornes*, 78 Wn.2d 9, the court ruled:

"Members of the legislature are presumed to know the meaning of the words they write into their enactments."

80. It should not have been necessary for Earl to amend the original complaint , as under both the plain language of the statute and related

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precedent, the claims were properly pled, allowed causes of action, which adequately informed the Defendants of the nature of the action.

5. CONCLUSION

81. As described above, a series of untenable and manifestly unreasonable decisions, opinions and orders have been entered in this case, under decidedly irregular circumstances. At numerous points, sanctions should have been imposed to curb egregious conduct on the part of counsel for the Defendants. As a result of this series of untenable decisions and failures to curb egregious conduct, it is no longer possible for the Plaintiff to prosecute the case absent appellate intervention.

82. Some of the erroneous decisions could have been absorbed if subsequent erroneous decisions hadn't contributed to an accelerated disintegration of the case. It is somewhat difficult to pinpoint where in the sequence reversals would serve to put the case back on track. The orders of December 21, 2007 should be reversed. The motions filed by Menu Foods and Kroger are without merit, not based on fact and law, and were submitted in complete disregard for the provisions of CR 11, in addition to being specifically prohibited under the provisions of CR 12(g). Earl properly should be reimbursed for out of pocket expenses and for the time and delays incurred in defending against these frivolous motions. In the

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absence of sanctions, it unreasonable to believe egregious conduct on the part of the Defendants' counsel will cease.

83. As a first Amended Complaint has been filed and served, it seems pointless to take the case back to the original complaint, even though an amended complaint should never have been necessary had rule and law been applied as it should have been. At the same time, Earl should not be barred from raising viable causes of action outside the scope of the WPLA. If facts are uncovered in ongoing research, which support alternate or additional claims, the Plaintiff should be allowed the opportunity to pled those claims. For these reasons, the trial court's opinion and order denying reconsideration, which prohibits Earl from re-pleading a claim for fraud, or causes of action outside the WPLA, should be reversed.

84. If the above defects are cured, the remaining issue is the fact the Defendants remain in a state of default. Earl is entitled to an answer from the Defendants without further delay. Earl's previously filed Motion for Default Judgment should be returned to a pending status, to be heard at the trial court's earliest convenience, in order to compel a prompt answer to the amended complaint by the Defendants.

85. WHEREFORE, Earl respectfully prays the Appellate Court:

- a) Reverse the trial court's dismissal with prejudice of counts 1

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through 8 in the Plaintiff's original complaint.

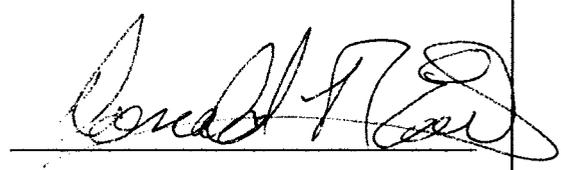
b) Reverse the trial court's orders granting of the Defendant's motions for more definite statements, and Menu Foods' motion to dismiss express and implied warranty claims against Menu Foods.

c) Reverse the trial court's dismissal of Earl's motion for sanctions and remand to the trial court to impose appropriate sanctions which fully compensate Earl for time and actual costs.

d) Remand to the trial court Earl's previously filed motion for default judgment, in order to compel answers to Earl's amended complaint, to be heard without further delay.

e) Award Earl costs on appeal.

Dated: February 11, 2008.
Respectfully submitted by:



Donald R. Earl (pro se)
3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604

FILED
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DIVISION II

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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY jm
DEPUTY

Donald R. Earl) CASE # 37153-7-II
(Plaintiff/Appellant))
)
) CERTIFICATE OF MAILING:
v.)
)
Menu Foods Income Fund, et al) APPELLANT'S EMERGENCY
The Kroger Company) MOTION TO STAY SUPERIOR
(Defendants/Respondents)) COURT PROCEEDINGS, and
) APPELLANT'S BRIEF (corrected)

CERTIFICATE OF MAILING

I certify that on the 11th day of February, 2008, I placed by Express, Certified mail, return receipt requested, copies of "APPELLANT'S EMERGENCY MOTION TO STAY PROCEEDINGS SUBJECT TO THIS COURT'S FEBRUARY 7, 2008 ORDER, IN SUPERIOR COURT, PENDING THE OUTCOME OF RELEVANT LITIGATION PENDING IN FEDERAL DISTRICT COURT", and, APPELLANT'S BRIEF (corrected) addressed to:

The Kroger Company Defendant's attorney of record, Charles Willmes, at:

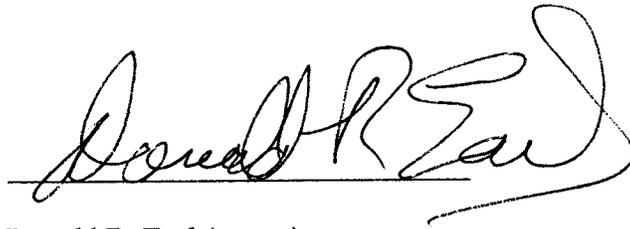
Merrick, Hofstedt & Lindsey
3101 Western Ave. #200
Seattle, WA 98121

And to: The Menu Foods Income Fund Defendant's attorney of record, Stelman Keehnel,
at:

DLA Piper
701 Fifth Avenue #7000
Seattle, WA 98104-7044

A copy of the related receipts to be attached to Court copies.

Dated February 11, 2008:

A handwritten signature in black ink, appearing to read "Donald R. Earl", written over a horizontal line. The signature is stylized and cursive.

Donald R. Earl (pro se)
3090 Discovery Road
Port Townsend, WA 98368
(360) 379-6604



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